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If Hip-Hop Were Classified and the Pentagon Papers Had Been Copyrighted: An Analysis of Whether the Fair Use Defense in Copyright Law is Broad Enough to Protect First Amendment Concerns

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IF HIP-HOP WERE CLASSIFIED AND THE PENTAGON PAPERS HAD BEEN COPYRIGHTED: AN ANALYSIS OF WHETHER THE FAIR USE DEFENSE IN COPYRIGHT LAW IS BROAD ENOUGH TO PROTECT FIRST AMENDMENT CONCERNS

Sean Buchanan

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ABSTRACT

This paper will show that copyright law conflicts with the First Amendment in that the fair use doctrine is insufficient to protect the fundamental rights and interests that underlie the First Amendment’s protection of speech. To do this, the paper will examine three primary justifications of the First Amendment: individual liberty, the marketplace of ideas, and political participation. The paper will also analyze multiple situations, in which parties bring copyright suits and the defendants claim fair use, to determine whether the fair use doctrine protects the First Amendment. This paper will show that if one accepts either a marketplace of ideas or a personal expression justification for the First Amendment, copyright law will lead to unacceptable results.

The limited purpose of copyright cannot justify the inroads into the Bill of Rights from copyright law.

I. THEORETICAL JUSTIFICATIONS FOR THE FIRST AMENDMENT

The major theories scholars use to justify the First Amendment, while varying slightly amongst interpretations, are the individual self-expression model, the market place model, and the political speech model.¹ There are some additional models, but they are more reasonably considered models of interpretation rather than policy justifications, such as Scalia's original intent doctrine of interpretation.²

The self-expression model focuses on the individual, and the good that it generates accrues to individuals.³ The truth-seeking marketplace theory is focused on society in general.⁴ It claims that as individuals express ideas, the ideas will compete with each other for adherents, as do products in marketplaces.⁵ The marketplace achieves the good by filtering out the untrue to get to the true ideas.⁶ The third is the most limited, and its good is solely political.⁷ It posits that the First Amendment only operates to protect political speech so that individuals maintain some degree of self-governance.⁸

A. *The Self-Expression Model*

The self-expression model has several key characteristics. The first is that it is centered on the value to the individual and not a social or marketplace value.⁹ It also applies broadly to nonverbal expressive conduct.¹⁰ And while nonverbal expression has not always enjoyed the broadest protection from the courts¹¹, even the most adverse rulings do not disclaim nonverbal expression entirely¹², extending it as far as nude

1. Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

2. See Nancy McCahan, Comment, *Justice Scalia's Constitutional Trinity*, 41 St. Louis L.J. 1435 (1997).

3. Emerson, *supra* note 1 at 879-81.

4. *Id.* at 881-82.

5. *Id.*

6. *Id.*

7. *Id.* at 882-84.

8. *Id.*

9. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

10. *Id.*

11. See *U.S. v. O'Brien*, 391 U.S. 367 (1968).

12. *Id.*

dancing.¹³ Dissents have even gone quite far in claiming that purely nonverbal expressive conduct is deserving of full First Amendment protections.¹⁴

Recognition of the value of self-expression goes at least as far back as ancient Greece.¹⁵ Aristotle, in *Nicomachean Ethics*, attempts to explain the good and moral life.¹⁶ He assigns one of the highest values to what could reasonably be called an applied art of living.¹⁷ Aristotle explicitly places the value of art above that of political governance, even though he gives a high degree of value to politics.¹⁸

Professor Sheldon Nahmod claims that individual self-expression and artistic expression have a strong foundation in philosophy.¹⁹ One of the most important philosophical anchors of individual artistic expression as a First Amendment value that Nahmod cites is the aesthetic theory of Kant.²⁰ Kant argued that creative expression itself was a good.²¹ Nahmod also holds the Greeks responsible for relegating artistic expression to a secondary role behind political expression in First Amendment doctrine and Western Law in general.²² He argues that Plato's hierarchy of the forms placed representational speech and communication above non-representational speech and communication.²³ Plato's theory also valued political speech above other forms of representational communication.²⁴ This marginalization of the merely beautiful in favor of the political survived in Western thought through the Middle Ages, largely due to the Catholic Church and the theology of St. Augustine.²⁵ The importance that political speech held over the aesthetic extended from that point, expanding rapidly during the late Middle Ages and the Renaissance and almost entirely vanquishing non-

13. *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981). "Furthermore, as the state courts in this case [*Schad v. Mt. Ephraim*] recognized, nude dancing is not without its First Amendment protections from official regulation."

14. *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J., dissenting).

15. See ARISTOTLE, *NICOMACHEAN ETHICS* (Terence Irwin trans., Hackett 2d ed. 1999).

16. *Id.*

17. *Id.* at 1801.

18. *Id.*

19. Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 221.

20. *Id.* at 229-30.

21. *Id.*

22. *Id.* at 221.

23. *Id.* at 226-27. This put literal painting and speech above music or abstract artwork.

24. *Id.* at 227.

25. *Id.* at 228.

representational communication within Western thought by the time of the Enlightenment.²⁶

In addition to the importance of being able to experience and create the beautiful, unfettered communication has value to individuals outside of aesthetics. Government censorship of individual speech has had disastrous effects for social and familial life in totalitarian countries.²⁷ Writers from Orwell to Solzhenitsyn²⁸ have decried its effects. Judge Learned Hand comes down squarely for personal expression as an essential element of the good life in his writing on Thomas Jefferson in *Sources of Tolerance*.²⁹

Supreme Court Justice Stephen Breyer advocates a modern strain of this model.³⁰ He lays out his theory of constitutional law in *Active Liberty*.³¹ He claims an absolutist theory of speech would be as ineffective as the absolutist theories of the *Lochner* era, because it would not allow the public to regulate areas of law like warranties and campaign finance.³² For Justice Breyer, the middle ground is individual participation.³³ This may sound more similar to the second model, the marketplace of ideas, but the important distinction is where the good of both theories is focused.³⁴ The individual liberty theory says the good (or right) of the individual participating is important.³⁵ The marketplace theory says the good is that individual participation is most likely to get either good government or truth.³⁶ For Justice Breyer, campaign finance legislation indirectly leads to good government, but does it by way of the individual participation and not the marketplace of ideas.³⁷ Campaign finance does not by itself, make government function well, but by decreasing the influence of major donors, it increases the influence of ordinary people.³⁸ This increased influence, or diffusion of influence,

26. *Id.*

27. VACLAV HAVEL, POLITICS AND CONSCIENCE IN LIVING IN TRUTH 136-57, (Faber and Faber 1986).

28. See ALEKSANDER SOLZHENITSYN, THE GULAG ARCHIPELAGO (Harper & Row 1974).

29. LEARNED HAND, SOURCES OF TOLERANCE IN THE SPIRIT OF LIBERTY 66, 69 (Irving Dilliard ed., Alfred A. Knopf 1953).

30. See STEPHEN BREYER, ACTIVE LIBERTY (Alfred A. Knopf 2005).

31. *Id.*

32. *Id.* at 40-41.

33. *Id.* at 42-43.

34. Emerson, *supra* note 1 at 878-82.

35. *Id.* at 879-81.

36. *Id.* at 881-82.

37. BREYER, *supra* note 30, at 46-47.

38. *Id.* at 47.

leads to increased participation in democracy.³⁹ The broad increase in participation leads to good government.⁴⁰

B. The Marketplace of Ideas Model

The justification that has had the most success in American law is the “marketplace of ideas model.” Since every theorist advances the model with different permutations, it is impossible to pin down just one version of it. However, major pillars and foundations are easy to find. The first is John Stuart Mill’s *On Liberty*.⁴¹ Mill wrote that laws or policies limiting speech were robbery of the worst kind.⁴² The reason the banning or ‘theft’ of disagreeing speech was so bad was because “if the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”⁴³ Mill’s argument was that ideas would compete with each other for adherents, and though not everyone would agree, the continued competition would keep older ideas sharp, yet still allow for new ideas.⁴⁴ *On Liberty* also contains an important counterargument against anyone who advocates censorship.⁴⁵ Any assertion that any one idea is so much better than all the opposing ideas that critical speech should be banned is an absolute claim.⁴⁶ Not only is the advocate of censorship saying, ‘my idea is the best idea I have ever heard,’ but they are saying, ‘my idea is the best idea I will ever hear.’⁴⁷ No one has sufficient knowledge to make such an absolute claim, because to do so would require proving an endless series of negatives.⁴⁸ The advocates of censorship are making the jump from ‘better’ to ‘best possible,’ and ‘best possible’ requires more knowledge of all possible ideas than they could possibly have, hence the endless series of ‘better’ arguments the advocates of censorship would have to prove to justify their assertion that their idea is the best idea possible.⁴⁹ Mill also makes an historical

39. *Id.*

40. *Id.*

41. JOHN STUART MILL, *ON LIBERTY* (Everyman’s Library 2d ed. 1992). For prior history see *supra* notes 10 through 19.

42. *Id.* at 33.

43. *Id.*

44. *Id.* at 34.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

argument that the periods of rapid intellectual development were during breaks in authority over thought and speech.⁵⁰ A fourth argument contained within the small, but incredibly fertile, chapter on freedom of thought in *On Liberty* is that even if one could find an infallible idea, it would become weakened if not challenged and fade to the point of not being knowledge, but just a hollow repetition of what others have said.⁵¹ Modern philosophy has kept many of the central themes of Mill's.⁵² Modern philosophers, such as Jurgen Habermass and Bruno Latour, have kept the marketplace theory of ideas, as illustrated by Mill, or some similar variation of it at the forefront of political philosophy.⁵³

Mill's arguments, while certainly not adopted wholesale by the judiciary, are central to the roots of modern American First Amendment law. The dissents, concurrences, and eventual majority opinions of Justices Holmes and Brandeis, as well as Judge Hand, form the framework of the marketplace theory in American law. In *Masses*, the U.S. Postmaster refused to mail the plaintiff's magazine because it violated a law banning statements that interfered with the military.⁵⁴ Judge Hand's opinion in *Masses* was one of the earliest victories for broad protection of speech.⁵⁵ The decision adopts a modified version of Mill's absolutist argument for the specific portion of the statute that related to false statements.⁵⁶ Judge Hand says that to construe false statements so broadly would outlaw opinion.⁵⁷ He then goes on to make a similar argument about the scope of causation between speech and actions. "Yet to interpret the word 'cause' so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies."⁵⁸ Judge Hand is essentially arguing that the law must be interpreted to avoid constitutional problems and to do that requires interpreting 'cause' narrowly. Otherwise the law's suppression of

50. *Id.* at 63 (referencing Germany during the intellectual development of Goethe and Fichte).

51. *Id.*

52. See BRUNO LATOUR, *POLITICS OF NATURE* (Harvard University Press 2004); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (Cambridge University Press 1996).

53. *Id.* The differences between Mill's classical liberalism and these philosophers, communitarians, and group choice theorists, while important, are all much smaller than their similarities when it comes to just the importance of state limits on speech, since none actually challenge the importance of the flow of ideas.

54. *Masses Pub'g Co. v. Patten*, 244 F. 535, 535 (D.N.Y. 1917), *rev'd*, 246 F. 24.

55. *See id.*

56. *Id.* at 539.

57. *Id.*

58. *Id.*

opinion would be unconstitutional because would interfere with democratic governance. The trial court's broad interpretation of causation would make the law criminalize all but agreement with existing policy. However, the protection afforded by Judge Hand proved short-lived, as the appellate court reversed the decision.⁵⁹

Justice Holmes, in his dissent in *Abrams*, adopted similar arguments.⁶⁰ The first was the strict construction of the statute to exclude opinion.⁶¹ Justice Holmes then goes on to make a very direct case for First Amendment values.⁶²

The ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁶³

And while *Abrams* and similar dissents were not immediately adopted, these dissents ultimately became the winning side of the debate.⁶⁴ The Supreme Court now regularly refers to the marketplace theory of ideas when debating First Amendment issues.⁶⁵

C. *The Political Speech Model*

A third theoretical model of the First Amendment is that it bars government censorship of political speech. Very few adherents of this interpretation say that this is all the First Amendment does, but they usually limit their arguments to avoid complications from commercial speech and obscenity. By itself, the model would hardly be worth discussing because the other two models include it, but even the constitutional theories that disagree with the political speech model and modern constitutional history have given political speech a pride of place. So it is worthy of discussion, not because it is a robust model, but because of its role in almost all other theories.

59. *Masses Publ'g. Co. v. Patten*, 246 F. 24, 24.

60. *Abrams v. U.S.* 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

61. *Id.* at 627.

62. *Id.*

63. *Id.* at 630.

64. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969). This case also contains a comprehensive review of the various Brandeis-Holmes dissents, and their eventual transition to the result in this case.

65. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809 (1975).

Justice Breyer gives the ban of political speech that extraordinary prominence in *Active Liberty*.⁶⁶ The cases that formed the marketplace theory were all cases of speech critical of the government.⁶⁷ Even local zoning laws, which ostensibly have almost nothing to do with speech, are struck down by the courts once the prohibited speech is political, like Summit Republican Party Chairman Alex Arshinkoff's giant "Bush 2004" sign that violated Hudson's zoning regulations.⁶⁸

D. Copyright Law and the Fair Use Defense

Copyright law is an explicit constitutional power of Congress.⁶⁹ "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁷⁰ This clause's style is rare in the Constitution, because it explicitly states the purpose that the legislature should adopt copyright laws to advance. Congress has adopted many statutes that allow "exclusive rights" to people and corporations for everything from chemical compounds and genetics to business methods.⁷¹ Congress also included an explicit defense called fair use for certain categories of infringing materials.⁷²

It is easy to see how the copyright power itself could come into conflict with core First Amendment values. Just imagine if the President were able to copyright his "State of the Union" speech and sue on exclusive use grounds if it were ever quoted disparagingly. A candidate or elected official who copyrighted all her speeches and sued anyone who made negative remarks about those speeches that included critical quotes could stifle a large amount of political debate.⁷³ The search for truth outside the political would also be impeded because all quotes of copyrighted work, positive or critical, could be grounds for a copyright suit. *The New York Review of Books* and the whole book reviewing industry would shut down overnight. Individual freedom of expression would also be affected; parody and reference in artistic works would be seriously limited. If the Bible had been within copyright hundreds of years of literary and artistic expression would have been infringing

66. See *supra* text accompanying notes 29-39.

67. See *supra* text accompanying notes 53-57.

68. See *City of Hudson v. Arshinkoff*, 2005 Ohio 6976 (Ohio Ct. App. 2005).

69. U.S. CONST. art. I, § 8.

70. *Id.*

71. 17 U.S.C. § 101-122.

72. 17 U.S.C. § 107.

73. See *infra* notes 236-37 and accompanying text for the Judge who did just this.

because they have depended on the Bible for their references, allusions, and narratives. Both the musical *Wicked* and the movie *Apocalypse Now* are contemporary works that depend on reference for their power in a way that exclusive use would make impossible.⁷⁴ Fortunately, some of these obvious problems are mitigated by the fair use defense. Many courts even say these problems are completely solved by the fair use defense.⁷⁵

The most important part of copyright law for the purpose of this paper is the fair use exception, because it is one of the two strongest protections for First Amendment values in existing copyright law. The Supreme Court made this importance explicit in *Harper & Row Publishers v. Nation Enters.*, by pointing out that the copyright act took at least some account of the First Amendment, “[i]n view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.”⁷⁶ Fair use, like copyright, has its roots in an explicit statute.⁷⁷ Considering the short length of the statute and its importance to the analysis, it is worth quoting in nearly its entirety.

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

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

74. *Wicked* is based on *The Wizard of Oz* by Frank Baum and *Apocalypse Now* is based loosely on Joseph Conrad’s *Heart of Darkness*.

75. *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977).

76. *Harper & Row Publishers. v. Nation Enter.*, 471 U.S. 539, 560 (1985). Reference to the idea-expression dichotomy omitted.

77. 17 U.S.C. §107.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁷⁸

When Congress enacted the fair use statute, the proponents were primarily concerned with creating a statutory framework for existing law and future decisions,

[t]he bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.⁷⁹

The House Committee was also interested in maintaining fair use for educational purposes.⁸⁰ Members of the committee also expressed concern about how copyright would affect newsgathering.⁸¹

Since the fair use statute is simple, it has been up to the courts to make many major decisions about how to interpret its four factors. The one thing that has never been questioned is that since it is an affirmative defense, the burden of proof rests on the defendant.⁸² The first factor is important, but not controlling. The Supreme Court held, in *Luther Campbell v. Acuff-Rose*, that a profitable parody does not mean it cannot be fair use.⁸³ Rather than laying out bright line rules of interpretation, the Supreme Court pointed out where the appellate court went wrong.⁸⁴ Justices also engaged in substantive discussion, but said, “The task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes calls for case by case analysis.”⁸⁵

In *Campbell*, 2 Live Crew released a song entitled “Pretty Woman” that was a parody of Roy Orbison’s “Oh, Pretty Woman.”⁸⁶ 2 Live Crew initially made an offer to pay a fee for the use of the song as well as give

78. *Id.*

79. 17 U.S.C.S. § 107 HOUSE REP. NO. 94-1476 (1976).

80. *Id.*

81. *Id.*

82. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (U.S. 1994).

83. *Id.* at 583-84.

84. *Id.*

85. *Id.* at 577 (citing *Harper & Row*, 471 U.S. 539, 560).

86. *Id.* at 560.

written credit to the original author.⁸⁷ Acuff-Rose replied that they “cannot permit the use of a parody of ‘Oh, Pretty Woman’.”⁸⁸

The district court ruled for 2 Live Crew saying that a commercial recording was not barred from utilizing the fair use defense, and that the lyrics quickly became different and did more to highlight the difference between the two styles than rely on the similarities.⁸⁹ The district court also found that 2 Live Crew took little more of the song than was required and that it was extremely unlikely the 2 Live Crew recording would affect the commercial viability of the Orbison song.⁹⁰ The Sixth Circuit Court of Appeals reversed, saying that the district court failed to take into account the presumption that “every commercial use is unfair.”⁹¹ The Sixth Circuit also claimed that since the market use factor was the most important factor, a commercial use of the infringing song showed a presumption of market harm for the original copyright.⁹²

The Supreme Court reversed the Sixth Circuit, saying that its argument about presumption was wrong.⁹³ The Supreme Court then analyzed the four factors itself.⁹⁴ For the first factor, the Court relies heavily on two arguments, the first being the language of the fair use statute, as well as the intent of the copyright statute.⁹⁵ The statute says, “such as”⁹⁶ indicating that the list at the beginning of possible uses is merely an example and not comprehensive.⁹⁷ The second question used to determine whom the first factor favors is whether the infringing work is transformative.⁹⁸ This harkens back to the original purpose of copyright, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”⁹⁹ The Court goes on to say that this transformative quality is weighted inversely to the other factors, so the more transformative, the less other factors matter.¹⁰⁰ It is important to note that while the Court applies fair

87. *Id.* at 572.

88. *Id.* at 573.

89. *Id.*

90. *Id.*

91. *Id.* at 573-74.

92. *Id.*

93. *Id.* at 584.

94. *Id.* at 577-94.

95. *Id.* at 578-79.

96. 17 U.S.C. § 107.

97. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

98. *Id.* at 579.

99. *Id.*

100. *Id.*

use to a parody in this case, there is no presumption that parody is transformative or fair use.¹⁰¹

The second factor, the nature of the original work, is almost completely ignored in this case. The Court merely says that certain aspects of a work are more protected because they are at the “core of intended copyright protection.”¹⁰²

The Court’s analysis for the third factor begins by quoting Justice Joseph Story’s interpretation of the factor, “the quantity and value of the materials used.”¹⁰³ Once again, the Court says any analysis on this point will be case-by-case and must go back to the purpose of the use.¹⁰⁴ The Court also says an important question is whether the amount and substantiality of the infringing parts lead to the infringing work becoming a substitute for the original.¹⁰⁵

For the fourth factor, the Supreme Court held that it was not simply a question of whether the original would sell less, but rather it also included whether the conduct in question, if widespread and unrestricted, would result in a substantial impact on the market generally.¹⁰⁶ This interpretation broadened the inquiry to include the potential consequences for other actors in the market, in addition to the copyright holder and the infringer. However, the Court said it was not simply a market consideration alone, because an infringement eligible for fair use could be designed to cripple the market for the original work, like an intensely negative review.¹⁰⁷ It stated, “the rule of the Court is to distinguish between ‘biting criticism [that merely] suppresses demand [and] copyright infringement [, which] usurps it.’”¹⁰⁸ Conversely, an infringement that leads to a massive increase in sales for the original work could not be used as a counterbalancing factor for the defendant in the fair use defense analysis.¹⁰⁹

II. HISTORY OF THE CONFLICT

Now that we have some understanding of fair use and the First Amendment, we can begin analysis of the conflict itself. No court has

101. *Id.* at 581.

102. *Id.* at 586.

103. *Id.* (quoting *Folsom v. Marsh*).

104. *Id.* at 586-87.

105. *Id.* at 587.

106. *Id.* at 590.

107. *Id.* at 591-92.

108. *Id.* at 592. (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

109. *Id.* at 591.

held that the First Amendment, outside of fair use, is a valid defense to a copyright infringement claim.¹¹⁰ By the same token, *Eldred v. Ashcroft*, the most recent Supreme Court decision on fair use and the First Amendment, left open a very narrow door that someday a copyright law could be invalidated by the First Amendment, saying, “the D.C. circuit spoke too broadly when it declared copyrights categorically immune from challenges under the First Amendment.”¹¹¹ Prior to the *Eldred* decision, the courts had generally sided against First Amendment defenses in copyright suits. The courts have often relied on disclaiming that a conflict even exists between First Amendment and copyright.¹¹² The negative treatment First Amendment defenses have received can be seen in *Eldred v. Ashcroft* and *Harper & Row v. Nation*.

One of the Supreme Court’s most important decisions on the conflict is *Harper & Row v. Nation Enter.* In that case, President Ford sold his memoirs to Harper & Row, which then negotiated an agreement for a prepublication excerpt to appear in *Time*.¹¹³ *The Nation* obtained a copy of the manuscript and quickly produced a story excerpting 300 to 400 words about Ford’s pardon of Richard Nixon verbatim from Ford’s memoirs.¹¹⁴ *Time* canceled their prepublication agreement, and Harper & Row sued *The Nation* for copyright infringement.¹¹⁵ *The Nation*’s defense claimed both fair use and First Amendment protections.¹¹⁶ The D.C. Circuit found for Harper & Row, the Second Circuit Court of Appeals reversed and found fair use.¹¹⁷ The Supreme Court then reversed the appellate court, finding no fair use.¹¹⁸

The Supreme Court used multiple arguments in its ruling for Harper & Row.¹¹⁹ One of the central arguments for dismissing *The Nation*’s broadest First Amendment defense was the idea/expression distinction.¹²⁰ The idea/expression distinction is the doctrine that no idea itself may be copyrighted but individual expressions may be.¹²¹ For

110. 18 AM. J. 2d *Copyright and Literary Property* § 238.

111. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2002). For a full discussion of *Eldred*, see *supra* note and accompanying text.

112. Michael Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1287 (2003).

113. *Harper & Row*, 471 U.S. at 542-43.

114. *Id.* at 543-48.

115. *Id.* at 543.

116. *Id.* at 544, 555.

117. *Id.* at 544.

118. *Id.* at 569.

119. *Id.* 546-69.

120. *Id.* at 559-60.

121. *Id.* at 556.

example, one could copyright a specific story about adultery, but not the idea of adultery. This is believed to provide protection to First Amendment values by leaving all ‘ideas’ free of copyright protection and allowing anyone to talk about them as they wish, provided they express them in some non-infringing manner.¹²² The Court does not examine this distinction in depth as it simply states the idea/expression distinction.¹²³ The Court also unintentionally blurs the distinction itself when discussing the newsworthiness of the article by saying that the words themselves may be newsworthy in this case.¹²⁴

Another argument the Court made relied on the incentives for publishing information about public figures and newsworthy events.¹²⁵ It argued that if there were a broader fair use exception for public figures, the information the public most needed to know about public figures would be unlikely to be published in profit-seeking memoirs.¹²⁶ The Court then frets about the possibility of a “parade of horrors,” quoting an ASCAP conference report that argued, “[i]f every volume that was in the public interest could be pirated away by a competing publisher...the public would have nothing worth reading.”¹²⁷

The court also discusses the right not to speak as a fundamental First Amendment value.¹²⁸ The right not to speak is a negative right that the Court uses to defend prepublication silence in copyright cases.¹²⁹ If this were a true right copyright, the First Amendment, and plans of publication together, would become a monopoly mechanism if the author just claimed he never wanted to speak at all.¹³⁰ In addition to that, the Court may be on weak ground with this argument for a right to silence because the precedent they cite is mere dicta. *The Estate of Hemingway v. Random House*, the case the Court cites for the right to

122. *Id.*

123. *Id.* at 559-60..

124. *Id.* at 557. That the Supreme Court confuses this distinction is fairly solid evidence that its value may be overstated.

125. *Id.* at 559.

126. *Id.*

127. *Id.* (citing Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT LAW SYMPOSIUM 43, 78 (1971)). Apparently, in his hysterics, Mr. Sobel forgot the quality of reading material like Shakespeare, Dante, Milton and the Bible that has slipped into the public domain. Though of course none of that is ‘worth reading’ when compared with the literary tour de force that is Ford’s memoirs.

128. *Id.* at 559.

129. *Id.*

130. This argument seems very unpersuasive as it relates to this case, but it represents an interesting First Amendment position worth commenting on, as it becomes important later in the paper when the analysis is switched.

silence, mentioned the possibility of such a right, but actually reached the opposite conclusion in its ultimate holding because the speaker, Ernest Hemingway, lost the case and Random House published the material.¹³¹

The Court also goes through all four factors of the fair use statute as they apply to this case.¹³² The first factor was found to weigh against *The Nation*.¹³³ While the defendant argued that the purpose was news, the Court said *The Nation* misunderstood the first factor.¹³⁴ The question was not the motive, which may have been news, but, rather, whether the infringer stood to gain from copyrighted material without paying for it.¹³⁵ The Court also found the second factor failed to support the defendants.¹³⁶ The Court almost accepted *The Nation*'s argument on the first factor of motive and purpose here, but used it against them.¹³⁷ The Court ruled that the purpose of the infringement was to scoop *Time*.¹³⁸ It is interesting to note that the Court specifically states that quality control was an important part of the plaintiff's problem with being scooped.¹³⁹ This focus on quality control is potentially very damaging to First Amendment values as it could let copyright create a shield for public officials to ensure a positive spin on any published facts about their official actions, like the pardon in this case. This is especially true if quality control is broadly construed, as it was in this case, to include the defensive contextualizing of the questionable actions surrounding the Nixon pardon that Ford included in his memoir. The third factor also favored the plaintiff.¹⁴⁰ The Court ruled that the Watergate portion of the memoir, while only amounting to a few hundred words, was the core of Ford's material.¹⁴¹ The Court's decision is based largely on the fair use statute and has no discussion of underlying First Amendment values the decision would implicate. The only First Amendment values discussed were the negative right of silence, personal economic profit, and quality control incentives that copyright supposedly supports. Essentially, the court relies on the profit

131. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348 (N.Y. 1968).

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

133. *Id.* at 562.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 562.

139. *Id.* at 564.

140. *Id.* at 564-65.

141. *Id.*

motive and the opportunity for self-justification on the part of public officials as sufficient mechanisms to put political news into the public sphere.

There was a significant dissent by Justice Brennan in *Harper & Row*.¹⁴² His dissent argues that not only is the majority's holding opposed to the original purpose of copyright and fair use, but that the material was not infringing at all.¹⁴³ This interpretation is important because it indirectly attacks the idea/expression dichotomy. Justice Brennan does this by saying the facts that underlay the quotations in question are not original and not copyrightable.¹⁴⁴ The quotes are still copyrightable, but since the majority of the *Nation* article is a summary of historical fact, there was no taking.¹⁴⁵ The area outside copyright that allows the free discussion of ideas mandates that expression cannot be read as broadly as the majority does; it has to be a question of substantial copying for the expression to be infringed upon.¹⁴⁶ Justice Brennan is also willing to let some of the consequences of this be borne by the author, saying directly "[c]opyright thus does not protect that which is often of most value in a work of history."¹⁴⁷ There is an implicit balancing here informed by the same concerns that underlay the dissent in *Eldred*, that when the public interest concerns regarding copyright and the First Amendment are weighed against the commercial incentive of the author, sometimes the author will lose.

The difference between the Supreme Court's majority opinion and Justice Brennan's dissent's balancing of the economic incentives shows a sharp contrast on what should be considered an economic incentive and how they should be valued. Under the Court's balancing of the economic incentives, the author or creator never loses on First Amendment grounds unless they are unharmed economically. The majority never seems to consider the possibility that Ford could lose the case despite winning the economic balancing test. The economic incentives are just too central for them to admit that possibility. On the other hand, Ford winning on economic incentives, but still losing the case is a possible outcome for Justice Brennan.¹⁴⁸

142. *Id.* at 579 (Brennan, J., dissenting).

143. *Id.* at 580 (Brennan, J., dissenting).

144. *Id.* (Brennan, J., dissenting).

145. *Id.* (Brennan, J., dissenting).

146. *Id.* at 583-84 (Brennan, J., dissenting).

147. *Id.* at 589 (Brennan, J., dissenting).

148. *Id.* at 592 (Brennan, J., dissenting).

After *Harper & Row*, *Eldred* is the most important case for any discussion of how the Supreme Court is presently resolving the conflict between the First Amendment and copyright law. Congress passed the Copyright Term Extension Act of 1998 (CTEA), extending the length of copyrights to 70 years from the death of their creator.¹⁴⁹ *Eldred* brought suit on behalf of libraries, corporations, and others that made use of materials when they slipped into the public domain.¹⁵⁰ *Eldred* advanced two separate arguments: one was that the 20-year extension on existing copyrights was not valid, and the second was that the act itself should be subject to content neutral scrutiny under the First Amendment.¹⁵¹ The assumption *Eldred* relied on for this argument was that if the law were subjected to content neutral scrutiny, it would fail, and be declared unconstitutional.¹⁵² Very little in the first argument is relevant to the First Amendment, so it does not need to be summarized in much depth, but there are a few points of interest in that discussion. The Court holds that the preamble to the copyright clause is not a limit on Congressional power.¹⁵³ It also holds that how best to achieve the clause's goal is a legislative judgment.¹⁵⁴ This is important because it means that once the court determines a law is enacted on the copyright clause authority, it is subject to a judicial analysis very similar to the least restrictive means test. So as long as the law accomplishes the legislative intent of Congress and is reasonably limited, it will not be held to a higher standard of scrutiny. However if the Court thought that the same law restricted First Amendment rights it would be held to a higher standard of scrutiny. That increased scrutiny would be applied regardless of what enumerated power of Congress the law had been enacted under. The Court also makes use of the idea/expression distinction saying, "[a] reader of an author's writing may make full use of any fact or idea she acquires from her reading."¹⁵⁵

The more important argument for First Amendment purposes is that the CTEA should be treated as a content neutral regulation of speech. First, the Court argues that because the copyright clause and the First Amendment were adopted at roughly the same time, "in the Framers'

149. *Eldred*, 537 U.S. at 193.

150. *Id.*

151. *Id.*

152. *Id.* at 218.

153. *Id.* at 211.

154. *Id.* at 212.

155. *Id.* at 217. But it is not clear this is in agreement with *Harper & Row*, and even if it is narrowly, how does one make use of the fact that the president lied without the expression itself? See *supra* discussion on failing idea expression distinction.

view, copyright's limited monopolies are compatible with free speech principles."¹⁵⁶ The Court then repeats the idea/expression distinction and says that it "strike[s] a definitional balance between the First Amendment and the Copyright Act."¹⁵⁷ The Court also includes a very basic statement that fair use also takes account of First Amendment concerns.¹⁵⁸ Essentially, the Court does not resolve the conflict, as much as it simply says the conflict cannot exist.¹⁵⁹

This decision came with a dissent that provided another perspective on what the law should have been regarding copyright and the First Amendment.¹⁶⁰ While dissents may not prevail at any given time, countless constitutional doctrines have come from dissenting opinions of just a single voice speaking against an otherwise hegemonic jurisprudence to governing law. Justice Stevens' dissent argues that the Court is understating the explicit limitation in the copyright clause.¹⁶¹ The proper reading of the clause requires that copyrights go into the public domain as quickly as possible while still preserving an impulse to create.¹⁶² This means that the goal of the clause is to provide the bare minimum of restriction necessary to provide incentive to copyright owners to keep creating. Even while Congress and the courts could draw that line in a few different places, it will necessarily stop short far short of anything that amounts to an absolute or near absolute monopoly.

Justice Breyer's dissent makes the potential conflict between copyright and the First Amendment explicit.¹⁶³ He argues that, under most circumstances, the First Amendment and the Copyright Clause work hand in hand.¹⁶⁴ In his view, the Copyright Clause is the positive aspect encouraging the flow of expression and the First Amendment is the negative, preventing any blocks to the flow of information.¹⁶⁵ He also argues that concerns about the First Amendment in copyright cases should be analyzed in depth, rather than the cursory review those

156. *Id.* at 219. This seems like a very simple dodge as it has not been advanced that because article 1 through 3 were written at the same time they are simply 'compatible'.

157. *Id.*

158. *Id.* But they fail to actually present an argument for this point and cite to *Harper & Row*, which actually limited the scope of the defense.

159. Michael Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003).

160. *Eldred v. Ashcroft*, 537 U.S. 186, 222-42 (2003) (Stevens, J., dissenting).

161. *Id.* at 223-24 (Stevens, J., dissenting).

162. *Id.* at 224-25 (Stevens, J., dissenting).

163. *Id.* at 244 (Breyer, J., dissenting).

164. *Id.* (Breyer, J., dissenting).

165. *Id.* (Breyer, J., dissenting).

concerns seem to be given in many of the prior decisions.¹⁶⁶ Justice Breyer then posits a three-part test for rational support for copyright cases, saying,

I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective.¹⁶⁷

While this test does not explicitly mention the First Amendment, the First Amendment is implicated by the earlier analysis of Justice Breyer. The First Amendment mandates the limits that are embodied in the test, especially the first and second parts.

As the history of the conflict shows, no court has simply analyzed a copyright law solely on First Amendment grounds. The courts usually do not even get close to analyzing the two in conjunction with each other. According to Professor Michael Birnhack, “[s]omething strange happens to the First Amendment when it meets copyright law: it disappears.”¹⁶⁸ There may be a good unspoken reason for this. If the Courts fully analyzed the clash between copyright law and the First Amendment, it would present a troublesome situation for existing First Amendment doctrine: it would subject copyright to various aspects of First Amendment doctrine that would lead to odd results. Professor Rebecca Tushnet writes supports this point.¹⁶⁹ She analyzes copyright speech claims as compared to speech claims in other areas such as pornography and finds that the courts offer a radically different version of First Amendment analysis for copyright claims, one stripped of almost all the distinctive doctrines of the First Amendment.¹⁷⁰ Obviously, the court could simply exempt copyright from many aspects of existing First Amendment analysis. There is no law that says that all court-developed doctrine would automatically apply in all constitutional cases, but it is worth examining how those specific First Amendment doctrines would change copyright law.

166. *Id.* (Breyer, J., dissenting).

167. *Id.* at 245 (Breyer, J., dissenting).

168. Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-up and breaking-up*, 43 IDEA 233, 233.

169. See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV 1 (2000).

170. *Id.*

The first, and possibly strangest, consequence would be an overbreadth challenge to a copyright law. First Amendment law is unique because a challenge to a law does not have to be as applied. The defendant could be engaging in an act that of itself would be unprotected under the law, but if the law is broad enough to affect protected activity, that individual defendant can still challenge the constitutionality of the law. This would allow even the worst copyright infringers the ability to attack the law and win, if they could show it infringed on a protected activity of a theoretical individual.

An aspect of First Amendment doctrine that may be even more troublesome would be the near *per se* bar on injunctions. If Harper & Row had filed suit earlier, the Court may have been willing to uphold an injunction. Copyright violations are enjoined offenses, but activities protected by the First Amendment, even the worst forms of unprotected libel, are generally not.¹⁷¹ Some even question whether this different standard for injunctions between other forms of unprotected speech, such as libel, and copyrighted material is not already running afoul of the constitutional prohibition on prior restraint.¹⁷² At this time, there has not been a case on it, but *Harper & Row* points out the troubling possibility that a public official could seek continuing injunctions on the facts contained in her memoir under copyright law, as the official sought a friendly publisher.¹⁷³ That could, for all practical purposes, shut down discussion over many facts of great public importance.

The usual counterargument to this is the idea/expression distinction. The Court simply assumes that this distinction protects First Amendment values. Despite the distinction's long-standing pedigree, some have questioned whether it is a coherent and valid concept.¹⁷⁴ Briefly summarized, it is a basic linguistic distinction between the arrangement of the words that the author creates and the ideas they signify or represent.¹⁷⁵ One can copyright a paragraph describing democracy, but one cannot copyright the concept, or more generally, descriptions of democracy. Supporters of the distinction argue that not only does it protect the exchange of ideas by preventing ideas themselves from being copyrighted, but it also contains a built-in exemption to copyright for

171. Volokh and Lemly, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 147 (1998).

172. *Id.* at 147-48.

173. *Harper & Row*, 471 U.S. 539 (1985).

174. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 323 (1989).

175. *Id.*

specific instances where the idea and the expression merge: the merger doctrine.¹⁷⁶ That is when the idea and expression come together as a unity.¹⁷⁷ That would prevent copyrighting expressions where the ideas ‘merged’ with the expression.¹⁷⁸

Harper & Row, if it had been analyzed in more detail, would have shown the problems with such a glib dichotomy. One of the most prominent features of *The Nation* article was the Ford quote admitting that he lied about his knowledge of Nixon’s involvement in the Watergate burglary.¹⁷⁹ What was newsworthy about the story was that the President lied. A newsworthy lie represents a near perfect collapse of the expression/idea distinction. Conceptually, it was the words themselves that were the lie. The words were the expression and the lie the idea. It would have been nearly impossible to communicate the idea that the President lied, without his expression. One could accuse someone of being a liar, or lying, but that cannot communicate the idea with the same factual accuracy that the actual expression that contained the lie does. It was not as if the expression taken in this case was something independent of the lie that could have been expressed by different words and kept the same meaning or newsworthiness. This is different from a merger because the underlying idea behind the speech, which could possibly be saved by the merger doctrine, is irrelevant. Essentially, the idea behind Ford’s words (which was mainly self-justification) was not that important, but words showing he lied were very important.

It should not have been a difficult concept for the Court, because the same collapsing of the distinction exists in perjury cases. The words themselves are the perjury. The Court in a perjury case does not rely on a separate paraphrase that relates the independent significance of the words as lies in a different way. The same applies here. Without the expression, the concept could not have been expressed. Another area where the idea/expression distinction runs into problems is with parodies.¹⁸⁰ Mel Marquis points out that the expression of the song is exactly what is being parodied, not the idea behind it, yet the court has upheld a wide variety of parodies of copyrighted material.¹⁸¹ The Court

176. *Id.* at 395.

177. *Id.* at 382.

178. *Id.* at 382-83.

179. *Harper & Row*, 471 U.S. at 572.

180. Mel Marquis, Comment, *Fair Use of the First Amendment: Parody and Its Protections* 8 SETON HALL CONST. L.J. 123, 123-24 (1987).

181. *Id.*

simply ignores the operation of the distinction with trivial expression, but when the expression strikes at the health of a functioning democracy, such as when the President is lying to the public, it becomes of huge legal importance. In addition to the legal problems the idea/expression distinction faces, many linguists and philosophers of language have largely abandoned it.¹⁸² And even those that would keep some version of it, do not assume its truth as casually and without consideration as the Court often does in major decisions.¹⁸³

That, however, does not mean the values that justify the First Amendment cannot be integrated with copyright law. As mentioned, the *Eldred* and *Harper & Row* dissents make it clear they are attempting that very integration.¹⁸⁴ If Justices Breyer and Brennan can do it, it can be done.¹⁸⁵ The decisions in the cases analyzed above go out of their way to say they are considering First Amendment concerns. But to do so, the Court only relies on the most superficial analysis. The Court never goes past a mention of fair use and the idea/expression dichotomy to actually see whether there is fair use and whether the distinction is sufficient to adequately protect the First Amendment.¹⁸⁶ The best test to see if copyright law really does peacefully coexist with the First Amendment is to apply the underlying values and justifications to actual and hypothetical copyright cases that implicate the First Amendment.

The obvious counterargument to this is that if the doctrines are sufficiently distinct as to not lead to differing results, why even reach the level of theoretical justifications? *Harper & Row* could have sought an injunction against *The Nation*, and, based on the copyright analysis of the Court, they would have deserved one. However, in the Pentagon Papers case¹⁸⁷, when the government sought an injunction their argument was roundly dismissed by the Court, even though the government lawyers in the Pentagon Papers relied on state secrets doctrine, one of the strongest reasons possible, for their request.¹⁸⁸

182. See JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (The Free Press 1995). Unfortunately there is not space here to analyze the philosophical problems with this distinction in depth.

183. Many times, it is just tossed in as a paragraph as if it were completely self-explanatory and always functioning.

184. *Harper & Row*, 471 U.S. at 590 (Brennan, J., dissenting); *Eldred*, 537 U.S. at 224 (Breyer, J., dissenting).

185. The best proof of possibility is actuality.

186. See, e.g., *Harper & Row*, 471 U.S. 539 (1985); *Eldred*, 537 U.S. 186 (2002).

187. *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

188. See note 188, *infra*.

It would appear from these two cases that outcomes differ based on what kind of analysis the Court uses. Had President Ford sought an injunction saying *The Nation* had criticized him, his argument would have been laughed out of court and would never have reached the Supreme Court. And had the Pentagon fought instead on an interest in publishing the Pentagon Papers themselves through an outside corporation like RAND, they would have been entitled to an injunction. If two doctrines really are complementary, they should not lead to radically different results. Because they lead to different results, it is necessary to examine the problem at the theoretical level.

III. WHY WE HAVE THE FIRST AMENDMENT AND THE CONFLICT WITH COPYRIGHT

The first theoretical justification of the First Amendment's protection of speech is the personal liberty and aesthetic freedom model. This justification has the most potential to support both sides of the debate. If we look at *Harper & Row*, we can see these competing concerns. The very first concern for a personal expression justification is the importance of allusions to literary expression. Literature and aesthetics, in general, rest on a foundation of allusion. Countless movies and novels recall Shakespeare.¹⁸⁹ Philosophy cannot exist without its history. Ironically, even the title of Ford's memoirs and the subject of *Harper & Row* are biblical allusions and quotes of Ecclesiastes 3.3.¹⁹⁰

The second obvious concern we see is that of Ford and his publisher. Not only do individuals have the right to speak, but they also have some right to choose when and where to speak.¹⁹¹ One does not need to speculate to assume that where to publish his memoirs was a significant concern to Ford. *Time* magazine, while often critical of government, is by all accounts a mainstream establishment publication. *The Nation*, however, is one of the most progressive or liberal major magazines in circulation. *The Nation* article, included in the *Harper & Row* appendix, savaged Ford; whereas the *Time* article, had it run, would have almost certainly glowingly portrayed Ford. And if not glowing, the worst *Time* would have done is focus on the tough choices and bad situation President Ford was put in by President Nixon's resignation.

189. See, e.g., *10 THINGS I HATE ABOUT YOU* (Touchstone Pictures 1999).

190. Ecclesiastes 3.3.

191. Though of course time and place regulations may have something to say about exactly when and where.

Another critical concern for individual expression is when that expression takes place. That concern about timing was clearly violated in *Harper & Row*. However, other authors, none as famously as Kafka, have fretted and delayed publication, insisting the time was not right.¹⁹² Literary and aesthetic history would be radically different today if Max Brod had rushed one of his 'edited' Kafka novels to publication before Kafka was ready. The same would be true if an unscrupulous publisher had excerpted the drafts that Brod shopped around to try to get a publishing contract for his friend.

Artists also have an interest in how their work is used, and are understandably unhappy when their work is put to opposite or unapproved uses. Tom Waits brought a successful lawsuit against Frito Lay for using the themes intended for an anti advertising song in an advertisement for Doritos.¹⁹³ A weak copyright system would allow other artists' work to be used in the same way. An anti-consumerism song, like Waits' could be parodied into an advertising song just as a religious song could be parodied into an irreligious work and vice versa.

Artists and others involved in expressive pursuits would seem to benefit more from a strong copyright than they are hurt by it. The interest in allusion like Ford's title would be protected by even the weakest fair use. But what of the justifications put forward by Justice Breyer? Beyond the benefits to the professional artists,¹⁹⁴ how does copyright affect the bar for participation?

Fair use has failed to allow broad access to sampling in music, one of the most significant new areas of art. Sampling is taking a short sample from a song or video and re-contextualizing or somehow reusing it. The practice is especially prominent in hip-hop and other kinds of electronic music. The songs appropriated range from James Brown's "Funky Drummer" to the most obscure private pressing rock records. The artists involved also range from the unknown to the Notorious B.I.G., who landed in court for sampling "The Ohio Players."¹⁹⁵ Sampling significantly brings down the cost of album production. Its rise in the 70s and 80s essentially allowed basement producers to invent an entirely new genre of music that reflected new and different concerns. This kind of expression is crucial for First Amendment theory. The new lower cost of music making, thanks to sampling, brought a massive influx in musical participation from people and groups that otherwise

192. REINER STACH, *KAFKA THE DECISIVE YEARS* (Shelly Frisch trans., Harcourt 2005).

193. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096-97 (9th Cir. 1992).

194. Weird Al excepted, of course.

195. *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 476 (6th Cir. 2007).

may not have been heard. This led to many things we regard now as commonplace in music, with albums using these techniques being platinum sellers for the past decade. What is important to note here is that fair use did not protect a single hip-hop pioneer like Biz Markie or many others.¹⁹⁶

The second theoretical justification for the First Amendment is the marketplace of ideas model. This model actually works the best with copyright law, even without fair use, as long as licensing works. If we take the metaphor far too literally, the same marketplace will function in both settings. If a Rolling Stones sample is worth putting in a song, it will make the song good enough to sell enough copies to pay the Rolling Stones for the sample. Though Milton Friedman might like this, it is not how it would work out, often the most innovative works, sell the least. Another significant problem with the marketplace theory is that each sample could be priced higher than the last if it were the one that completed the song; it would be like the value of the baseball card that completed the set to a collector. That would reward holdouts for nothing more than delaying the process. That would create an incentive for everyone who had a sample to license, to license it last, to get the highest price.

Whether or not the metaphors analogize nicely with each other does not answer the real question. The barriers to entry would weight against the alleged infringer the same way as they do in the analysis for individual expression above. A weak copyright system and very broad First Amendment protections would allow people into the discussion for less money. But, at first glance, it does not appear that copyright law has much impact on the second important part of the marketplace theory: the discernment that brings the selection mechanism of competition into play. Historical art markets are not the best model for rational economic competition, so we have to look farther back towards the general theory. At its root, marketplace theory could be phrased as a simple question: to what extent is the law erecting artificial barriers between the competition of ideas? Copyright, with the fair use defense, does place limits on the market for ideas, but those limits are essentially the same as what was already shown above for sampling. So a bottom line conclusion is that a moderate expansion of the fair use defense would be sufficient for the literal marketplace half of the justification of the marketplace theory.

196. *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183-85 (D.N.Y. 1991).

The abbreviated marketplace analysis above focuses merely on half of the marketplace of ideas theory, the literal markets. But it leaves out the political marketplace. And that half of the marketplace theory is where fair use fails to protect First Amendment justifications.

The second half of the political marketplace is best analyzed in conjunction with the third theoretical justification of the First Amendment. That is that the First Amendment defends the free flow of political ideas. If copyright and fair use fail to take account of the political justification for the limited theory that the First Amendment serves mainly to protect political speech, it necessarily would fail to protect political speech in the marketplace theory. Essentially, copyright and fair use either defend the free flow of political ideas or they do not, regardless of whether the justification is analyzed from a political marketplace of ideas model or a broader analysis that includes both the market model and the other ways the First Amendment protects political ideas. The above mere marketplace analysis leads to the conclusion that fair use is not broad enough to meet the demands of the political ideas justification because it cannot even meet the lower general marketplace theory. The perfect example of this failure of fair use to protect political ideas is *Harper & Row*. Upon reading it, one wonders if maybe classifying the Pentagon Papers instead of outsourcing them to the RAND Corporation and copyrighting them was a mistake.¹⁹⁷ In the *Pentagon Papers* case, Daniel Ellsberg, a military analyst, surreptitiously smuggled a classified Defense Department summary of the Vietnam War out of his office, made copies, and leaked the copies to the press.¹⁹⁸ The Supreme Court issued a per curium opinion soundly rejecting an injunction sought by the government.¹⁹⁹ In his concurrence, Justice Douglas goes so far as to say that the “dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”²⁰⁰ One can imagine what the outcome would have been in *Harper & Row* if the majority opinion had contained that sentence.

As was mentioned in the section above about doctrinal issues unique to the First Amendment, there was no injunction in *Harper & Row*.²⁰¹ However, the decision is very clear that the First Amendment, in the majority view, is not implicated. Moreover, if the First

197. See *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

198. *Id.* at 714.

199. *Id.*

200. *New York Times Co.*, 403 U.S. at 723-24 (Douglas, J., concurring).

201. *Harper & Row*, 471 U.S. at 543-47.

Amendment is not implicated, Harper & Row could have received an injunction. The crucial distinction the court made in the Pentagon Papers case was present in *Harper & Row* as well. That was that the defendant was *The Nation*, not the one who stole the text, just as the defendant was The New York Times, and not Daniel Ellsberg.

Another interesting part of *Harper & Row* was the balancing between newsworthiness and motive. The Court in *Harper & Row* held that the President admitting to lying to the American people, about both criminal abuses of power and the largest scandal in modern history, was not newsworthy because the newsworthiness of such an admission was swallowed by the motive to scoop.²⁰² This is about as clear as an indication as possible that the newsworthiness exception contained within fair use is almost meaningless. This is because the motive to scoop is unavoidable in any context where newsworthiness is an issue. Of course, there is a motive to scoop. That is what the media does with the news! Interestingly, the Court in *International News Service v. Associated Press* held that while there was no general property interest in the news itself, a wire service was infringed on when its competition took its whole articles.²⁰³ But that decision involved identical information presented in the same manner, they literally took the entire wire stories word for word.²⁰⁴ In *Harper & Row*, the difference is a glowing presentation of Ford in his own words, and a negative portrayal of Ford that contained some direct quotations. If, in *International News Service*, the competing wire service had merely taken the occasional quote by the public figure and was not simply repackaging the Associated Press stories for wholesale redistribution, the result probably would have been different.

IV. ANOTHER POSSIBLE DIRECTION FOR THE FIRST AMENDMENT AND COPYRIGHT

A few lower courts have shown a willingness to give First Amendment concerns a stronger hearing. The amount of deference and the analysis has varied, but in *Keep Thompson Governor Committee v. Citizens for Gallen*, *National Rifle Association of America v. Handgun Control Federation of Ohio*, and *Hustler Magazine v. Moral Majority*,

202. *See id.*

203. *See Int'l News Serv. v. AP*, 248 U.S. 215 (U.S. 1918) (overruling recognized by *Columbia Broad. Sys., Inc. v. DeCosta*, 377 F.2d 315 (1967)).

204. *Id.* at 231.

the courts have considered the First Amendment relevant to copyright law and in all the cases, the courts found fair use.²⁰⁵

The Circuit Court in *Thompson* got it right.²⁰⁶ In this case, one candidate for governor issued a record that contained a song on the A-side and policy provisions on the B-side.²⁰⁷ The opposing candidate ran a commercial that began with roughly 15 seconds of the other campaign's song at the beginning, followed by criticisms of the other candidate's policies.²⁰⁸ The plaintiff asked for an injunction and the court found against them.²⁰⁹

The court in *Thompson* finds both standing and copyright, but rather than skipping from there to fair use, it makes the First Amendment concerns explicit.²¹⁰ The court states that since this is political discourse, it is a First Amendment issue, and that it must apply fair use with that in mind.²¹¹ The court then finds a conflict between the First Amendment and copyright, so in order for fair use to take account of the First Amendment; this particular use has to be fair use.²¹²

Now this analysis may not seem extremely different from that in *Harper & Row*, but the order of the argument shows a completely different process at work. Both courts start with infringement. Next, the *Harper & Row* court argues that since copyright and the First Amendment are both constitutional and precedent has shown fair use protects the First Amendment, if there is a First Amendment problem, fair use will solve it.²¹³ In *Thompson*, the Court seriously analyzes whether there is a First Amendment problem, before going to fair use.²¹⁴ The finding that there is a First Amendment conflict leads almost inevitably to successful use of the fair use defense. The Court, in *Harper & Row*, weighs the fair use factors independent of the First Amendment concerns.²¹⁵ The Supreme Court seems to have essentially already determined, a priori, that fair use is an adequate stand in for

205. See *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978); *Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n*, 15 F.3d 559 (6th Cir. Ohio 1994); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526 (C.D. Cal. 1985).

206. *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978).

207. *Id.*

208. *Id.* at 959.

209. *Id.* at 961.

210. *Id.* at 959.

211. *Id.* at 959-60.

212. *Id.* at 960.

213. See *Harper & Row*, 471 U.S. at 539.

214. *Thompson*, 457 F. Supp. at 959-60.

215. See *Harper and Row*, 471 U.S. at 539.

actual First Amendment analysis. To try and restate this, in *Harper & Row* the Court is saying if the infringement is not fair use it is not a First Amendment issue. In *Thompson*, the court is saying if it is in conflict with the First Amendment, it has to be fair use.

The Handgun Control Federation (HCF) had reproduced a copy of a list of state legislators in their newsletter that had been prepared by the NRA.²¹⁶ Both sides were trying to rally supporters around a bill banning handguns and other automatic weapons.²¹⁷ It was uncontested that the HCF had simply photocopied the NRA's list and placed it in their newsletter.²¹⁸ The NRA sued for copyright infringement.²¹⁹ The circuit court dismissed the suit, ruling that the NRA could not copyright the list; the appellate court then affirmed based on HCF's fair use of the material.²²⁰

The court ran through the fair use factors with the standard analysis.²²¹ But it also stated that HCF's newsletter implicated their First Amendment rights, and that the newsletter was primarily for them "to comment on public issues and petition the government regarding legislation."²²² Based on that, the court said, "[t]he scope of the fair use doctrine is wider when the use relates to issues of public concern."²²³ Since a broader scope for fair use was necessary because of the First Amendment values, it would follow that the standard scope was not broad enough to protect the First Amendment. Simply running through the four factors would not necessarily protect the full concerns of the First Amendment.

The third case that held that the First Amendment broadened fair use was *Hustler Magazine v. Moral Majority*.²²⁴ Jerry Falwell, Moral Majority, and the *Old Time Gospel Hour* sent out fundraising solicitations that contained a *Hustler* parody of a Campari ad.²²⁵ The parody implied that Falwell lost his virginity to his mother in an outhouse.²²⁶ The fundraising letters were part of a campaign to say that

216. *Nat'l Rifle Ass'n of Am.*, 15 F.3d at 560.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 561.

222. *Id.* at 562.

223. *Id.*

224. *Hustler Magazine, Inc.*, 606 F. Supp. at 1532, 1536.

225. *Id.* at 1529-30.

226. *Id.* at 1529.

Falwell himself was under attack for his views and that he needed money to combat people like Larry Flynt.²²⁷

Hustler then sued Falwell and his related organizations for copyright infringement for their use of the copyrighted *Hustler* ad in their fundraising letters.²²⁸ There was no question of whether *Hustler* had copyrighted the material, so the court proceeded to the defendant's fair use defense.²²⁹ However, before analyzing the four factors, the court stated, "[t]he determination of fair use... involves applying the statutory factors with careful attention to the policies behind the copyright laws as well as First Amendment considerations."²³⁰ This is an explicit statement that fair use cannot be considered in isolation. The court particularly focused on whether infringement, "occurs in the course of a political, social, or moral debate, the public interest in free expression is one factor favoring a finding of fair use."²³¹ The court then uses this factor to find fair use, saying that the copying occurs within precisely the context of public debate that the First Amendment and fair use have to protect.²³²

Unfortunately for the First Amendment, *Harper & Row* is a modern Supreme Court decision with great value as a precedent and *Thompson*, *NRA*, and *Hustler* are just lower court decisions. Taken together however, they show a different route of analysis. It seems that whenever a court does not simply take for granted that the enumerated factors in fair use protect the First Amendment, they end up broadening fair use as they did in the three cases cited above. But that analysis is still strictly a minority position. In addition, if the recent news is any indication, there is no sign society will be moving away from *Harper & Row* towards *Thompson* any time soon. Douglas McCullough, a judge in North Carolina, recently threatened YouTube, demanding that a video of a public campaign speech he gave be removed from the site, claiming copyright.²³³ In the speech, he claimed that the Republican Party would get a better deal in redistricting cases if he and his fellow Republican judges were elected next year.²³⁴ YouTube had no interest in even asserting fair use and simply took the video down. That decision makes

227. *Id.* at 1530.

228. *Id.* at 1529.

229. *Id.* at 1531.

230. *Id.* at 1532.

231. *Id.* at 1536.

232. *Id.*

233. Doug Clark, *Judges should be independent, not partisan*, NEWS RECORD, Oct. 31, 2007, http://blog.news-record.com/staff/offtherecord/archives/2007/10/believe_it_or_n.shtml.

234. *Id.*

business sense for them, since there is little money to be made in being sued to try to protect a third party's video and its attendant speech rights. Therefore, if anything, the power of copyright will only grow in the internet age if sites that were supposed to lower the barrier to participation cave at the slightest allegation of copyright violations.

V. CONCLUSION

Fair use as it has been construed by the courts, is generally insufficient to protect the underlying justifications of the First Amendment. Copyright serves as a barrier to participation under the individual liberty expression theory and in the marketplace of ideas. Thanks to cases like *Harper & Row*, fair use is so limited as to be insufficient to save any of the underlying justifications for the First Amendment by itself.

Despite some cases that come out for strong First Amendment protections, like *Thompson*, *NRA*, and *Hustler* the Supreme Court has typically favored copyright concerns over First Amendment concerns with decisions like *Harper & Row*. The high barriers courts have placed on participation in sampling cases and the emerging YouTube cases suggest that this trend will only worsen. The hope here is that *Thompson*, *NRA*, and *Hustler* point out a meaningful possibility of analysis that could protect the First Amendment. Essentially, these cases use the First Amendment analysis with fair use concurrently, almost as if the First Amendment is the fifth factor. Of course, critics would say that it would weaken copyright protections, but that alone does not mean the law cannot meet the constitutional role of copyright, while protecting the First Amendment. As long as fair use does not become so broad as to keep people from creating new works, it still meets the justification for copyright. To prevent people from being able to discuss politicians' behavior in office in the hopes that they will write more memoirs is absurd.

If Congress is unwilling to rewrite the copyright statute to broaden fair use to protect the First Amendment, the courts must step forward. This would not require a wholesale declaration of copyright as unconstitutional; simply applying the analytical steps of *Thompson*, *NRA* and *Hustler* would be sufficient.

