

Copyright Through a Liberty Lens

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Abstract

In an effort to stem the tide of ever-expanding intellectual property rights and to establish some affirmative constitutional basis for using intellectual property ostensibly owned by others, scholars have often turned to the First Amendment. While the First Amendment has much to offer, its scope as a doctrinal matter has been greatly limited by the courts in the context of intellectual property. In copyright law, courts (and many scholars) have concluded that free speech concerns have already been built into the law through the fair use doctrine, the idea-expression dichotomy and other statutory and common law limitations. In this article, Professor Rothman proposes a new theoretical model for determining when an individual should be permitted to use another's copyrighted work. She relies on a liberty interest approach grounded in the substantive due process clause. This approach considers when a particular use furthers an individual's liberty interest to such an extent that that interest trumps a copyright owner's rights. The recent revitalization of substantive due process in the Supreme Court's decision in *Lawrence v. Texas* provides an opportunity for considering such an alternative approach. Even though a substantive due process/liberty frame would provide a narrower band of permitted uses than a broad First Amendment approach would, the protection may well be deeper, more compelling and less malleable in the face of Congressional expansionism and the scholarly focus on economic modeling and the incentive rationale.

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Introduction

Much legal scholarship in the intellectual property field focuses on when people should be able to access, use¹ and alter intellectual property (“IP”) owned by another without legal liability for infringement. Much of this scholarship, particularly in the copyright arena, has focused on the First Amendment as the last and best protection of use rights when doctrines internal to IP law and the Progress Clause² fail to insulate users from liability. Scholars and advocates continue to beat the First Amendment drum despite the Supreme Court’s decision in *Eldred v. Ashcroft*³ which virtually eliminated the First Amendment as a defense in copyright cases. After *Eldred*, most courts do not even feign

¹ Jessica Litman has recently criticized the word “use,” because for her it evokes piracy rather than the legitimate acts of reading, listening or watching. See Jessica Litman, *Lawful Personal Uses*, 85 *Texas L. Rev.* 1871 (2007). Although I agree with her sentiment, I think “use” is more neutral than she does and also significantly more linguistically efficient than listing in a more positive frame all the things one can do when one “uses” IP.

² U.S. Const., Art. I, Sec. 8 provides “The Congress shall have power to []promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” I use the term “Progress Clause,” as have some others, because it best expresses the intent and language of the clause and also because nowhere does the clause expressly provide for either “copyrights” or “patents.”

³ 537 U.S. 186 (2002).

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engagement in First Amendment analysis in copyright cases, and even before *Eldred* the First Amendment had little success as a defense to uses of copyrighted works.⁴

In this article, I consider a paradigm shift away from using the First Amendment to evaluate uses of copyrighted works and toward using a substantive due process, liberty-based and individual-focused approach. While a liberty analysis would likely protect significantly fewer uses than a First Amendment approach might (if it were ever embraced by courts), the protection would likely be much more robust for these liberty-based uses. In particular, recent moves to lockdown content using technology and arguments to require all content to be licensed no matter how it is used all withstand First Amendment scrutiny, but for reasons I discuss may not withstand a liberty-based analysis in individual cases.

The Supreme Court's recent decision in *Lawrence v. Texas*⁵ opens the door to considering the applicability of substantive due process and liberty rights in the context of IP. Although *Lawrence* involved intimate association, its movement away from privacy-based rights and toward a broader, more robust, liberty-based understanding of individual rights provides a foundation for scrutinizing limits on individual autonomy in a variety of contexts.⁶ Although one does not have a First Amendment "right to make other people's speeches,"⁷ one should have a right to use someone else's IP to express one's own reality in speech or otherwise – not as part of the furtherance of a political, democratic dialogue but as a fundamental expression of who one is.

The shift in perspective that I suggest is not simply a theoretical matter, but is likely to have an enormous impact given the shifting landscape of copyright law and copyright infringement actions. Increasingly, areas once thought outside the likely scope of copyright enforcement, such as personal and research uses, are coming under scrutiny. We have already begun to see this in the suits filed against individual file sharers. As more and more interaction with copyrighted materials occurs online, we will increasingly see copyright infringement actions against individuals because of the ease with which technology can track these previously difficult-to-detect uses. In recent years, there have been suits filed against individuals for using copyrighted works on MySpace and Facebook pages where visual collages and music are often included. Technological advances in digital rights management ("DRM") also make it possible to control what copying individuals do and the Digital Millennium Copyright Act ("DMCA") makes most efforts to circumvent such technological devices and mechanisms illegal.

⁴ One notable exception is the recent decision by the tenth circuit in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007); see also *infra* notes ____.

⁵ 539 U.S. 558 (2003).

⁶ See *id.*; see also Laura A. Rosenbury & Jennifer E. Rothman, *Beyond Intimacy* (2008) (draft on file with authors).

⁷ *Eldred*, 537 U.S. at 221.

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Not only are personal uses increasingly at risk of infringement actions, but many uses by individuals of other's copyrighted works that previously had either gone under the radar or were private in nature are becoming more public. This happens through MySpace and Facebook type websites, where personal diaries are made public or at least public to one's "friends," as well as through blogs and other online postings that describe people's experiences in ways similar to daily diaries of yore. In such online venues, individuals regularly incorporate copyrighted works, such as art and music, that they have encountered in living their lives and that have become meaningful to them. One blogger, for example, catalogues New Yorker short stories that he reads, provides a synopsis and comments briefly on his view of the stories. Should the New Yorker be able to prevent this recounting of its short stories, silencing the blogger's description of his own experiences? Should The New Yorker be able to insist that the blogger keep his personal experiences to himself? First Amendment and fair use analyses likely leave this blogger at risk of being found liable for copyright infringement, but my proposed liberty analysis would protect the blogger and other documentations of lived experiences even though many of these experiences include interaction with copyrighted material.

Consider also a professional violinist who is known for a particular signature piece, a variation he developed from Sergei Prokofiev's *Romeo and Juliet*, which until recently was in the public domain. Should the resurrection of this musical composition by the Uruguay Rounds Agreement Act (URAA)⁸ prevent our violinist from continuing to play his signature piece? Many of these issues raise both First Amendment and due process concerns. Under current First Amendment doctrine and theory, however, the violinist's use is unlikely to be permitted. Under my proposed liberty analysis there is a stronger basis that the violinist's use should be permitted regardless of the copyright owner's rights and without regard to compensation because of the very personal nature of the use. Note that by personal, I do not mean private.

Part I of the article considers the primacy of the First Amendment approach in copyright scholarship, both by copyright and constitutional law scholars. I observe both the theoretical and doctrinal challenges for this approach, in particular noting how it has failed to date to provide meaningful protection for use rights. Part II begins the substantive due process and liberty turn and develops a theory for why a due process, liberty interest paradigm provides a stronger foundation for use rights than a free speech approach does. The liberty framework moves use rights away from a society-based, law and economics approach, towards an individual autonomy-based approach that transcends the current market-driven focus of copyright law. In Part III, I consider specific categories of uses of copyrighted works that I contend should be privileged under this liberty approach. In particular, I focus on uses of copyrighted works that are

⁸ Pub. L. No. 103-465, 103d Cong., 2d Sess., 108 Stat. 4809 (1994).

integral to constructing one's personal or cultural identity. In Part IV, I consider both some limitations and implications of this liberty-based approach.

I. The Primacy of the First Amendment in Existing Copyright Scholarship

The vast majority of scholarship related to the constitutional dimensions of copyright law has focused on its relationship to the First Amendment.⁹ Much of this scholarship has trumpeted the essential harmony of copyright law's objectives with those of the First Amendment. To a lesser extent such scholarship has considered the narrow range of circumstances in which the two constitutionally-mandated objectives come into conflict. There are two primary, though not exclusive, features of this First Amendment and copyright literature. The first I call the incorporation approach which addresses the fact that almost all scholars who have written on the topic have suggested that there are built-in free speech protections in copyright that limit the scope of First Amendment review. Even those who think that there should be greater independent First Amendment scrutiny in copyright cases still conclude that these built-in limits on copyright law further free speech goals – a conclusion that necessarily makes the First Amendment less effective in challenges to copyright laws.

The second feature of the First Amendment literature in the copyright arena I call the democratic society approach. I focus on this aspect of the literature because the vast majority of scholarship in the field situates itself in the democratic society approach to the First Amendment. The democratic society approach provides an understanding of the First Amendment that justifies free speech protections in the name of promoting democracy. The democratic society perspective on the First Amendment leads to a very particular vision of what sort of uses of copyrighted works should be constitutionally protected and when – favoring uses that contribute to broad public debates, news reporting and that are transformative.

In this section I elaborate on these two primary features of the First Amendment and copyright literature and then discuss more broadly why the First Amendment has been of fundamentally limited value in the copyright arena.

⁹ The First Amendment in relevant part provides that: “Congress shall make no law [] abridging the freedom of speech, or of the press” U.S. Const., Amdt. I. I note that a few recent articles have focused on internal limits in the Progress Clause itself or on whether such limits apply to copyright legislation passed pursuant to the commerce clause. See, e.g., Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 *Colum. L. Rev.* 272 (2004) (considering the possibilities of passing more expansive copyright protection through the commerce clause); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *Yale L.J.* 2331 (2003) (contending that courts should review copyright laws with great deference to Congress); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 *U. Ill. L. Rev.* 1119 (2000) (viewing the Progress Clause as setting forth absolute limits on the scope of copyright law).

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Even though most copyright and First Amendment scholars have contended that copyright law is not immune from First Amendment scrutiny, they have generally concluded that speech protective features internal to copyright are sufficient in the vast majority of cases. As a result, there is rarely any role for the First Amendment in copyright law. Additionally, there are real structural impediments to the First Amendment approach that suggest that the substantive due process approach that I propose may have more traction and theoretical weight.

A. The Incorporation Approach

The first common element of almost all scholarship on the First Amendment and copyright law is that copyright law has a number of built-in speech protections, such as the idea-expression dichotomy, the lack of protection for facts, and the fair use doctrine. Scholars and courts have taken different views of whether these built-in or *incorporated* doctrines are coterminous with the First Amendment or whether there is still room for First Amendment scrutiny and if so, when. In this subsection, I will consider the three primary understandings of how the First Amendment relates to these internal copyright doctrines.

1. Copyright and Free Speech Living in Harmony

Copyright law unquestionably restricts what we are permitted to say and do. We are not, for example, generally free to speak the copyrighted words of others without permission. Yet, until the 1970s few scholars even considered whether there was anything in the essence of copyright law that stood in opposition to free speech principles. The two scholars generally credited with first considering the potential conflicts between copyright and First Amendment law, Melville Nimmer and Paul Goldstein, ultimately concluded that the two are not in opposition.¹⁰ They both claimed that copyright generally serves First Amendment goals by encouraging the creation, distribution and publication of works.¹¹ Thus, the incentive rationale that for many stands at the heart of the constitutional basis for copyright protection serves the First Amendment's interest in promoting speech.

Both Goldstein and Nimmer further concluded that the internal limits of copyright law were generally sufficient to protect First Amendment interests implicated by the potential need to refer to or use copyrighted works. In particular, both scholars viewed the idea-expression dichotomy,¹² the fair use

¹⁰ Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983, 990, 998, 1001 (1970); Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180 (1970).

¹¹ Paul Goldstein, Copyright and the First Amendment, *supra* note __, at 990, 998, 1001.

¹² 17 U.S.C. § 102(b); see also *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

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doctrine¹³ and the lack of protection for facts,¹⁴ as speech protective features of copyright law that are generally sufficient to address any First Amendment concerns. This view has been largely adopted by the courts, most convincingly and finally by the Supreme Court in *Eldred* in 2002.

Nevertheless, both scholars contended that on very rare occasions the First Amendment might require copyright law to yield. This view was driven in part by a narrow reading of fair use. Both Goldstein and Nimmer thought that the fair use defense should only apply in instances where a defendant could demonstrate that the use of another's copyrighted work would not cause potential or actual market harm. Goldstein, Nimmer, and shortly thereafter, Robert Denicola,¹⁵ advocated that when market harm was possible and the public interest was at stake, the First Amendment, rather than fair use, should be the preferred avenue for assessing whether a use should be permitted.¹⁶ I will discuss the particular parameters of their narrow First Amendment exception when I discuss their embrace of the democratic society approach to applying the First Amendment in the copyright context.¹⁷

2. The First Amendment and Copyright Law Out of Balance

The Nimmer and Goldstein portrait of copyright law and the First Amendment as a harmonious seamless blend dominated copyright scholarship for nearly thirty years. But as the scope of copyright law began to expand (with the 1976 Copyright Act, subsequent amendments to copyright law, and court decisions), more and more scholars became concerned that Goldstein and Nimmer had been too confident that the internal copyright protections would provide sufficient protections for free speech. In particular, the passage of the Sonny Bono Copyright Term Extension Act (“CTEA”) in 1998,¹⁸ which substantially lengthened the copyright term, concerned a new era of copyright scholars and spurred them to revisit the role of the First Amendment in copyright cases. Other changes that concerned these scholars were the 1976 Act's expansion to cover derivative works and the expansion of infringement in the courts to consider private and personal copying.¹⁹ The Digital Millennium Copyright Act

¹³ The common law fair use defense is now codified in 17 U.S.C. § 107. The seminal common law articulation of the defense can be found in *Folsom v. Marsh*, 9 F.Cas. 342 (D. Mass. 1841).

¹⁴ 17 U.S.C. § 102(b); see also *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁵ Robert Denicola, *Copyright and Free Speech*, 67 Cal. L. Rev. 283 (1979) (writing shortly after the enactment of the 1976 Copyright Act).

¹⁶ I note that Nimmer and Goldstein's understanding of fair use has not generally been adopted by the courts, which have treated fair use as including some non-market free speech analysis. As a practical matter though fair use has primarily become an analysis of market harm.

¹⁷ See *infra* Part I.B.

¹⁸ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998).

¹⁹ See *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984). Although the *Sony* case ultimately concluded that timeshifting of television shows was fair use, the Supreme

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(“DMCA”) also caused alarm among constitutional and copyright scholars with its anti-circumvention provisions that made it unlawful to produce devices or publish information to facilitate copying, even for fair use, when works were protected by technological barriers to copying.²⁰

With these changes to copyright law, a new portrait began to develop of the relationship between copyright law and the First Amendment – one that suggested that while the two had once been working hand-in-hand, they were now increasingly at odds. Perhaps the most influential of these works is Neil Netanel’s *Locating Copyright Within the First Amendment Skein*.²¹ Professor Netanel claimed Nimmer’s and others’ confidence in the internal speech limits of copyright was no longer merited. Because of the continuing expansion of copyright law, in particular the extension of copyright terms, application to personal uses and derivative uses, Netanel advocated vigorously for expanding independent First Amendment review in copyright cases. He was less concerned with individual infringement findings, and more concerned with challenging these broad changes to copyright law. Rather than considering the role of the First Amendment in as-applied challenges in the context of specific uses, Netanel wanted to use the First Amendment to provide scrutiny in facial challenges to recent expansions of copyright law.

Using this global approach, Netanel contended that the extension of copyright terms, by delaying the entry of works into the public domain, worked against both copyright’s and the First Amendment’s goals of promoting progress and if left unchecked would ultimately generate less, rather than more, speech.²²

Although Netanel recognized that doctrines internal to copyright law provide some degree of protection for speech, he was less confident than Nimmer of the efficacy of these internal restrictions. Netanel presented a very fair

Court made no categorical exclusion for private, noncommercial home copying. The Court’s analysis suggests that if individuals copy shows for other reasons, such as to create a library, or prepare clips for the classroom, such uses may be deemed unfair.

²⁰ 17 U.S.C. § 1201 (2000).

²¹ Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stan. L. Rev.* 1 (2001). A few scholars had sounded the alarm even earlier, but their approach was not grounded in the First Amendment. See, e.g., L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vand. L. Rev.* 1 (1987) (criticizing the move towards treating copyright law as proprietary rather than regulatory regime).

²² To remedy this problem Netanel suggested that the intermediate scrutiny approach that the Supreme Court applied in *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997) (upholding the FCC’s must-carry provisions), should apply in the copyright context. I note that Netanel deemed copyright law to be a content neutral speech restriction and therefore the intermediate scrutiny approach from *Turner* would provide an avenue for heightened (rather than rational basis) scrutiny. Some scholars have contended that copyright is a content-based speech restriction meriting strict scrutiny. See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147, 206 (1998); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *Yale L.J.* 1, 5-6, 48-49, 53 (2002) (concluding that at least in some instances copyright law is applied in a content-based manner).

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critique, as have others, of the value of the idea-expression dichotomy.²³ In essence: Ideas and facts cannot always substitute for expression. This is true not only in the narrow news-photograph exception that Nimmer delineated, but more broadly. Even assessing what the idea is of an underlying work may be virtually impossible. It is difficult to imagine how one could adequately describe T.S. Elliot's poem *The Wasteland* using only its ideas and facts. A room full of English professors could not even agree on the ideas, or even the facts, imbedded in the poem.

Netanel also criticized the sufficiency of the fair use exception. I agree that it is often not up to the task – though it is unclear whether that is a problem of application or structure. Netanel's notion that fair use has increasingly become a question of market analysis is absolutely true, though both Goldstein and Nimmer contended that this is a good thing and exactly what the fair use doctrine was meant to do.

Despite his advocacy of independent First Amendment scrutiny, Netanel contended that the fair use analysis should itself be modified to take into consideration free speech interests. I wholeheartedly agree with him on this point and I think courts have long agreed with this position. Once one concludes that the fair use analysis should or does incorporate free speech concerns, however, it once again becomes difficult to advocate for independent First Amendment review. Moreover, Netanel does not move as far away from the market approach as he suggests. If there is likely harm to an actual or potential market for the copyrighted work than Netanel concludes that the use is likely unfair.

Around the same time as Netanel wrote, Lawrence Lessig also warned that copyright law had become out of balance with First Amendment principles.²⁴ Like, Netanel, the primary focus of Professor Lessig's critique was the extension of copyright terms far beyond the "limited times" initially conceived at the time of the passage of the Constitution. Ultimately, Netanel's and Lessig's calls to apply greater First Amendment scrutiny failed when the Supreme Court expressly rejected their approaches in its decision in *Eldred*.

Neither Lessig nor Netanel challenged Nimmer and Goldstein's fundamental view that copyright law had a number of built-in speech protections.²⁵ Nor did they challenge the notion that copyright and First Amendment law seek to further the same essential goals. At their root, both Lessig's and Netanel's critiques could be folded into a challenge to the new laws based on constitutional limits internal to the copyright clause – namely that the

²³ Netanel, *Locating Copyright*, supra note __; see also Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 *Law & Contemp. Probs.* 93 (1992).

²⁴ Lawrence Lessig, *Copyright's First Amendment*, 48 *UCLA L. Rev.* 1057, 1061-67 (2001).

²⁵ See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 *Vand. L. Rev.* 891 (2002).

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laws did not ultimately “promote progress” as required by Section 1, Clause 8 of the Constitution – rather than requiring a separate First Amendment analysis.²⁶

Despite concluding that copyright law had fallen out of balance with free speech objectives, both Lessig and Netanel agreed with the underlying notion that copyright protection promotes free speech ideals. Several other scholars have recently challenged this conclusion, contending that copyright law is at its essence in opposition to free speech objectives. Yochai Benkler, for example, challenged the notion that copyright law increases the supply of information.²⁷ He concludes that content providers had become increasingly concentrated and the conduits for disseminating information had shrunk. Copyright was being used as a device to limit rather than expand the development and dissemination of information. In many ways Benkler’s approach echoes Goldstein’s earlier concern that enterprise monopolies could disrupt the beneficial effects of copyright law.²⁸

Several First Amendment scholars have also viewed copyright with greater skepticism than IP scholars have. Some have contended that enforcement actions under copyright law are generally content-based restrictions on speech, meriting strict scrutiny.²⁹ Jed Rubenfeld, for example, criticizes what he deems the absurd notion that restricting the use of expression could be anything other than a content-based speech restriction. As he notes, the Supreme Court did not protect the right of Cohen to express *the idea or fact* contained in his statement “Fuck the Draft,” but instead protected his right to that exact *expression*. Despite Rubenfeld’s and other’s calls that copyright should not get special First Amendment treatment, the reality is that courts have long treated copyright as virtually immune from First Amendment scrutiny.

3. The Definitional Balance

Courts have long rejected independent First Amendment scrutiny in copyright cases. The Supreme Court has emphasized that copyright and the First

²⁶ I note that those who argued, including Lessig, that the internal limits of the Progress Clause also required striking down the CTEA and other recent expansion of copyright law, also failed to convince the Supreme Court of their position. See, e.g., *Eldred*, 537 U.S. 186. For examples of claims that Progress Clause’s internal limits made the CTEA and other copyright laws unconstitutional see, e.g., Petitioner’s Brief filed in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), No. 01-168 (May 20, 2002); Heald & Sherry, *supra* note __. But see Schwartz & Treanor, *supra* note

²⁷ See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999). Interestingly, the quote that Benkler relies on for the title of his article and within his article relates to ideas, not information. It is therefore somewhat incongruous since copyright law does not restrict the dissemination of ideas.

²⁸ See Goldstein, *Copyright and the First Amendment*, *supra* note __.

²⁹ Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 Yale L.J. 1 (2002); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Lemley & Volokh, *supra* note __.

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Amendment have a “definitional balance.”³⁰ The Court pointed to “built in First Amendment accommodations,” such as fair use and the idea-expression dichotomy to conclude that only very rarely should courts engage in independent First Amendment scrutiny.³¹ Although the Supreme Court contended that “copyrights are [not] categorically immune from challenges under the First Amendment,”³² the space the Court allows for independent First Amendment challenges is quite small. Only when Congress “alter[s] the traditional contours of copyright protection” is any further First Amendment scrutiny merited.³³

The Supreme Court did not give examples of what would alter these traditional contours; however, a fair conclusion would be that a copyright statute would have to rise to the level of protecting ideas or facts or perhaps eliminating the fair use defense. Other than those examples, however, little First Amendment scrutiny seems likely in the future under the Supreme Court’s analysis.³⁴ Thus, *Eldred* greatly limits challenges to infringement findings for uses of expression as well as challenges to digital rights management and the DMCA’s anti-circumvention laws.

B. The Democratic Society Approach

Although the scope of the First Amendment review that scholars think should apply in the context of copyright law has changed over time, from narrower to broader independent scrutiny, scholars have primarily fit their analysis into one primary paradigm of First Amendment law – that of Meiklejohn’s “democratic society.”³⁵ By so contextualizing the First Amendment analysis, scholars have shored up arguments against First Amendment scrutiny, contrary to their intention, and looked at uses primarily from one limited vantage point – one aimed at public dialogue on matters of common, public interest. The democratic society rubric and its corollary marketplace of ideas approach, both

³⁰ *Eldred*, 537 U.S. at 219.

³¹ *Id.*

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

³³ *Eldred*, 537 U.S. at 221; see also *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2007) (holding that URAA provision restoring copyright protection to foreign works that had fallen into the public domain warranted external First Amendment review because the restoration altered the traditional contours of copyright law); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (rejecting call for 1st amendment review in challenge to Copyright Renewal Act and CTEA and concluding that term extensions and shift to opt-out renewal system did not alter traditional contours of copyright).

³⁴ See, e.g., *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (rejecting First Amendment review despite restoration of works previously in the public domain); *Chicago Bd. of Education v. Substance Inc.*, 354 F.3d 624, 631 (2003) (“The First Amendment adds nothing to the fair use defense.”); but see *Golan*, 501 F.3d 1179 (letting a First Amendment challenge to the URAA restoration provisions proceed in district court).

³⁵ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (4th ed. 2007) (originally published in 1948).

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feed into the notion that the primary aim of both copyright law and the First Amendment are in harmony – a conclusion that makes it more difficult to challenge copyright on First Amendment grounds. Both copyright law and free speech protections are generally thought to maximize speech relevant to the democratic dialogue and to encourage the production and dissemination of ideas. Because copyright promotes the production of speech, restrictions on speech that ultimately shore up the copyright system are generally not only tolerated, but celebrated. This structural symbiosis, as I will discuss, presents a formidable hurdle for locating use rights in the First Amendment.

Although some scholars have contrasted their democratic society approach to copyright law with the market-based approach of their predecessors, when it comes to what uses should be permitted and the role the First Amendment has to play in the context of copyright law, both approaches adopt the same democratic society understanding of the First Amendment. For example, although Netanel criticized the neoclassicists for overly focusing on the market, he sees the market as an important means of achieving the democratic project and both Netanel and the neoclassicist copyright scholars situate their exceptions to copyright's exclusive rights in the democratic society project of the First Amendment.

In Nimmer's discussion of the interplay between copyright law and the First Amendment, for example, he situated his First Amendment analysis in the democratic society rationale for free speech.³⁶ Although he noted that some scholars and jurists have also considered free speech as an important component of individual self fulfillment, he rejected consideration of this principle in the copyright context: "[F]ree speech as a function of self-fulfillment does not come into play. One who pirates the expression of another is not engaging in *self-expression* in any meaningful sense."³⁷ Nimmer explains that there is "no First Amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression."³⁸ The Supreme Court adopted this view in *Eldred* when it concluded that one had no First Amendment "right to make other people's speeches."³⁹

I think this conclusion is fundamentally flawed because it denies the unavoidable interweaving of copyrighted expression into our lives both as cultural and personal artifacts. Nimmer and the Supreme Court both view those who use other's expression as being either pirates or lazy rather than as referring to a very real part of their world. One reason I think self-expression is largely discounted in the copyright context is that copyright scholars and the Supreme Court focus on the value of the expression only when that expression furthers the larger democratic project, rather than when that expression furthers individual values.

³⁶ See, e.g., Denicola, *supra* note __.

³⁷ Nimmer, *supra* note __, at 1192 (emphasis in original).

³⁸ Nimmer, *supra* note __, at 1203.

³⁹ *Eldred*, 537 U.S. at 221.

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Although some, such as Netanel, have recognized the value even in this self-government objective of creative expression, the individual is a secondary consideration.

Nimmer saw a role for the First Amendment in limiting copyright protection, but only when the use at issue furthered the “democratic dialogue” about an issue of great public import. He thought that such a situation would primarily arise only in the context of graphic works where it might be difficult to communicate a work’s message without using the expression itself. In such circumstances, the idea-expression dichotomy would not afford sufficient protection for free speech. Nimmer gave two examples of when an independent First Amendment analysis should enter the picture and copyright should yield to free speech. The first is the photographs from the My Lai massacre during the Vietnam war. The second is the Zapruder footage of the assassination of John F. Kennedy.⁴⁰ In each case, Nimmer viewed the works as essential to the democratic dialogue on a matter of great public importance in which only the expression itself of the work could adequately convey the message. Nimmer viewed such works as protected by the First Amendment, even though a purely market-based fair use approach, one that he preferred, would not protect such uses.⁴¹ Nimmer’s First Amendment right, however, would not be a right to “free” speech, but instead to use the copyrighted works for a reasonable royalty or under a compulsory licensing scheme. In his view, no right exists to use such works without payment. Moreover, I note that Nimmer’s carve-out for graphic works demonstrates that it is very difficult to use ideas and facts to substitute for actual expression. Nimmer was dismissive of this point outside of graphic works and additionally made value-laden judgments even about which graphic works were worthy of special treatment – dramatic news photos were, but cultural photos were not.

Paul Goldstein similarly adopted a Meiklejohnian approach to the First Amendment when analyzing that amendment’s role in copyright law. Goldstein thought infringement could only be overcome when the public interest writ large was at stake.⁴² If the use of a copyrighted work was one that furthered the broad public interest, than that use should be allowed without regard to market effect. Like Nimmer, Goldstein gave the example of the use of the Zapruder footage, but Goldstein was also willing to extend First Amendment protection beyond graphic

⁴⁰ See *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) (holding that the reproduction of frames from copyrighted film of Kennedy’s assassination in book was fair use).

⁴¹ I note that in the Zapruder case, the court actually found a fair use, but Nimmer (and Goldstein) contended that this decision and ones like it perverted the purpose of fair use. Both Nimmer and Goldstein contended that the fair use doctrine should only be about uses that had no impact on a work’s market or when market failure made it impossible for permission to be either granted or negotiated. For a modern articulation of this view of fair use see Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 *Colum. L. Rev.* 1600 (1982).

⁴² Goldstein, *Copyright and the First Amendment*, *supra* note __.

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works to include biographical material in the public interest, such as previously published material about the public figure Howard Hughes.⁴³

Similarly, Robert Denicola rejected the relevance of the individual development theory of the First Amendment in the copyright context. Instead, he focused his analysis on the democratic society and marketplace of ideas. Like Nimmer and Goldstein, Denicola's First Amendment exception to copyright protection was based on necessity, the public interest, and the furtherance of a public dialogue. His primary example, like Nimmer's, was the visual record of historical events.

When Netanel's article, *Locating Copyright Within the First Amendment Skin*, is read in conjunction with his earlier work defending (and limiting) the copyright regime on the basis of a democratic society approach, it becomes clear that his First Amendment approach should also be situated in the democratic society paradigm.⁴⁴ Netanel expressly places copyright in the "democratic paradigm" and defines copyright as "in essence a state measure that uses market institutions to enhance the democratic character of civil society."⁴⁵

Netanel's approach allowed copyright to break out of the market-focused approach that had dominated much of copyright scholarship since the 1970s, but it came with baggage. It has shored up an understanding of copyright-in-service to democracy and of copyright and the First Amendment working towards the same goals. By so focusing the scope of copyright law, Netanel and others leave open ample room for excluding uses and even copyright protection for works that are judged as sitting outside the democratic process. Netanel's approach also promotes a broad societal view of permissible uses rather than an individual-based view of such uses.

Like Nimmer and Goldstein, Netanel enumerates several areas of preferred uses of copyrighted works. He suggests that special protection may be warranted for "news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment."⁴⁶ Although some of these enumerated categories go beyond the expressly political, they all focus on a public dialogue on common ground.

⁴³ See *Rosemont Enters., Inc. v. Random House, Inc.*, (2d Cir. 1966) (holding use of copyrighted works in biography on Howard Hughes fair use). Interestingly, in both examples, the Zapruder footage and the Howard Hughes biography, courts had upheld fair use defenses. Nimmer and Goldstein were critical of these decisions not because of the ultimate outcome but because of the route the courts took to get there. (Although Nimmer didn't think that fair use or the First Amendment should insulate the defendants in the Rosemont/Howard Hughes case.) Because Nimmer and Goldstein thought fair use should only apply in the market failure context and since in both cases some market harm was proven, they both preferred that courts undertook an independent First Amendment analysis.

⁴⁴ Netanel, *Locating Copyright*, supra n. 21, at; see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283 (1996).

⁴⁵ Netanel, *Democratic Civil Society*, supra note __, at 290.

⁴⁶ Netanel, *Locating Copyright*, supra note __, at 7.

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Netanel’s approach requires consideration of the purpose behind the use and values expressions that contribute to political or social commentary more than other expressive works. He is concerned with “public education, self-reliant authorship, and robust debate.”⁴⁷ His focus undervalues individuals, both creators and users.

Netanel claims that moving to a democratic paradigm will allow consideration of the “public interest in expressive diversity and political competence” which ordinarily are not easily monetizable in the market-based approach.⁴⁸ I agree with this critique of the purely market-driven approach that views copyright law solely about allocative efficiency, and places unbridled faith in the market to optimally allocate copyrights.⁴⁹ For establishing the basis of copyright law and property protections for creative works, the democratic paradigm has much to recommend it over the pure market view. But Netanel’s replacement simply reframes the discussion in perhaps a less limited, but still highly constrained way. Although Netanel cursorily admits that speech has a role in promoting “individual autonomy,”⁵⁰ he did not consider autonomy in his analysis of what uses should be permitted when the First Amendment is applied in the copyright context. Netanel’s focus was on copyright law itself and facial challenges to those laws, such as the CTEA, not as-applied challenges, which are at the heart of most copyright infringement issues that effect individual’s self-expression.

The few scholars who have engaged with the First Amendment and copyright law without adopting the democratic society paradigm, have failed to provide a developed alternative vision for when the First Amendment should step in to limit the scope of copyrights.⁵¹ Benkler, for example, noted that the First Amendment could be situated in either a democratic society or self-governance rubric, but he didn’t choose a particular approach. Instead, he primarily challenged the notion that copyright could truly be deemed the engine of free expression when many of the recent expansions to the law removed information from the public domain and media concentration meant fewer and fewer companies were controlling more and more content.

⁴⁷ Netanel, *Democratic Civil Society*, supra n. 44, at 291.

⁴⁸ Netanel, *Democratic Civil Society*, supra n. 44, at 291.

⁴⁹ Rothman, *The Questionable Use* (critiquing incorporation of industry-developed and driven customs into IP law).

⁵⁰ Netanel, *Locating Copyright*, supra note __ at 62.

⁵¹ See, e.g., Benkler, supra note __; Rubinfeld, *Freedom of Imagination*, supra note __; Baker, *First Amendment Limits*, supra note __.

C. Limits of the First Amendment Approach to Copyright Uses

On a pragmatic level, the First Amendment approach doesn't work simply because it hasn't done a good job of persuading courts that it has much to offer.⁵² In the copyright arena it has virtually been eviscerated by *Eldred*'s "definitional balance" and was routinely rejected even before *Eldred* since most courts concluded that the idea-expression dichotomy and the fair use doctrine were sufficiently speech protective. Despite the recent calls by scholars for greater First Amendment scrutiny in copyright cases,⁵³ the Supreme Court's decision in *Eldred* was a direct repudiation of this approach. At this point, little room is left for future First Amendment challenges in the copyright arena.

It is nevertheless useful to consider in a bit more detail why the First Amendment approach has failed in order to get a better sense of how a substantive due process and liberty-based analysis might open up some new doors. First, one of the primary reasons that the First Amendment has failed to provide limits on copyright protection, as I have mentioned, is that copyright and the First Amendment are viewed as working towards common purposes. The copyright regime is viewed as promoting speech interests by providing incentives to create.⁵⁴ Putting aside both longstanding and recent challenges to the legitimacy of the incentive rationale,⁵⁵ if one accepts, as the courts and many scholars have

⁵² *Eldred*, 537 U.S. 186. Prior to *Eldred* only one appellate court had upheld a First Amendment challenge in a copyright infringement action. See *Suntrust Bank v. Houghton Mifflin Co.* (11th Cir. 2001); see also Netanel, *Locating Copyright*, supra note __ at 3 (noting in 2002 that First Amendment defenses had been "summarily rejected" in copyright cases). Even district courts have virtually all rejected First Amendment defenses. The reasoning of one of the only district courts to hold that the First Amendment protected the use of a copyrighted work was expressly rejected by its appellate court. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers Inc.*, 626 F.2d 1171, 1172 (5th Cir. 1980). Since *Eldred* only one appellate court has permitted a First Amendment challenge to copyright laws to proceed. See *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

⁵³ See also Lawrence Lessig, Essay, *Copyright's First Amendment*, UCLA Law Rev. (2001).

⁵⁴ *Eldred*, 537 U.S. at 219; *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright as the "engine of free expression").

⁵⁵ See, e.g. Kal Raustalia & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Virg. L. Rev. 1687 (2008); Emmanuelle Fauchart & Eric Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, Org. Sci. (forthcoming 2008) (manuscript at 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781). For an earlier incarnation of this argument, see Justice Breyer's, then Professor Breyer's, article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970). Although the case for the incentive rationale is generally overstated and there are very compelling arguments that the copyright extensions and resurrections do little to add to the incentive to create, I nevertheless think that at its core providing some copyright protection is crucial for supporting a robust, independent (i.e. not patron or government supported) production of creative works. Even though many authors, musicians and artists would continue to create absent any remuneration, the amount of time they could devote to such work would be greatly reduced by the necessity of

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uniformly done, that copyright protection generates more speech, then one must engage in balancing these two speech interests. When doing this evaluation courts and scholars generally adopt a utilitarian approach in which the result that leads to the most speech overall is the best one. All trespasses to another's copyrighted work risk reducing speech in the future or elsewhere and thus courts engage in broad utilitarian calculations of the overall speech markets. This makes the First Amendment of very limited value in copyright cases. As the Supreme Court has articulated, copyright is the "engine of free expression"⁵⁶ and accordingly the First Amendment has little to offer in copyright cases.

The fact that most copyright scholars situate their First Amendment analysis in the democratic society paradigm only exacerbates this tendency. Under such an understanding of copyright law, First Amendment scrutiny is limited to a question of whether a particular change to copyright law reduces incentives to create new works, something that by its own terms the Progress Clause can already be read to provide. Moreover, the democratic society approach primarily values uses of copyrighted works that engage directly and broadly with a public, politically-focused dialogue. The democratic society approach overvalues ideas and undervalues expression because only the ideas underlying the expression are generally perceived to be relevant to the democratic dialogue.⁵⁷ It will only be in extreme circumstances that politically relevant ideas are not capable of alternative descriptions, such as Nimmer's examples of the My Lai massacre and the Kennedy assassination film. Even broader democratic society approaches that consider popular culture as part of a participatory culture that is important for democracy favor transformative uses because only such uses are viewed as contributing to the democratic dialogue.⁵⁸

I do not question that copyright serves democratic purposes, nor that we are better off with a system that encourages creation without "reliance on state subsidy, elite patronage, and cultural hierarchy,"⁵⁹ but there are very real losses to individual liberty under such an approach. There is no doubt that democracy and its promotion has benefits for individuals, but much is still lost for the individual in the democratic society approach. Individuals in this approach are of secondary concern and their role only relevant when in service to broader societal goals other than autonomy. The democratic society focuses on groups, not individuals.⁶⁰

A third reason that the First Amendment is of limited value in copyright cases is that the First Amendment routinely yields to property rights. As I will

getting a "day job" to support themselves. The quality of works might also suffer since the materials for creation can be costly, and artists would no doubt need to cut corners.

⁵⁶ See Netanel, *Democratic Civil Society*, supra note __, at 341 (quoting *Harper & Row*, 471 U.S. at 558).

⁵⁷ See, e.g., Nimmer, supra note __.

⁵⁸ See, e.g., Netanel, *Locating Copyright*, supra note __, at 16-19 and n. 61.

⁵⁹ Netanel, *Democratic Civil Society*, supra note __, at 339.

⁶⁰ See, e.g., Netanel, *Democratic Civil Society*, supra note __, at 342.

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discuss at greater length in the next part, the Supreme Court has often favored the protection of property rights over speech interests. As the Supreme Court said in *Eldred*, the First Amendment rights of a potential user do not extend to the right to “make other people’s speeches.”⁶¹ Although a number of scholars have highlighted that copyright and other IP rights should not be treated like property, but rather as speech, courts continue to conclude otherwise.

Finally, because over the years a number of carve-outs from First Amendment protection have been made, IP – particularly copyright and patent law which are expressly provided for in the Constitution – can be viewed as an exception to speech protection. While generally such exceptions have attached where courts have deemed the speech to not have any value – e.g. obscenity, defamation, true threats, incitement and child pornography – copyright and other IP laws seem to be treated by courts as exceptions to speech protection.⁶²

II. The Substantive Due Process and Liberty Turn

In a world of ever-expanding copyright laws, substantial statutory damages for copyright infringement and criminal enforcement of copyrights, the failure of the First Amendment approach is particularly glaring. Given my analysis in Part I about why the First Amendment has not provided much assistance, I now turn to the question of whether there are any other constitutional limits that might provide a grounding for protecting certain uses of copyrighted works. The recent reinvigoration of substantive due process in *Lawrence v. Texas*⁶³ provides a window into one possible avenue for evaluating when individual uses of copyrighted works might deserve constitutional protection.

In striking down Texas’ ban on homosexual sodomy, the Supreme Court in *Lawrence* set forth a robust reading of the Constitution’s liberty right, a right set forth in both the Fifth and Fourteenth Amendments. The *Lawrence* Court embraced “liberty” as an affirmative individual right and suggested that it means something different than the privacy right that had dominated substantive due process analysis since *Griswold v. Connecticut*.⁶⁴ While I do not contend that we are returning to a *Lochner* approach to substantive due process, in which courts act as superlegislatures, striking down any laws that they view as irrationally limiting economic liberties, I do think that *Lawrence* signals a renewed

⁶¹ *Eldred*, 537 U.S. at 221; see also *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding that there is no First Amendment right to speak in shopping malls).

⁶² See, e.g., *Eldred*, 537 U.S. 186; *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987) (rejecting First Amendment defense to use of “Olympics” for “gay olympics” competition under quasi-trademarks statute); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (rejecting First Amendment defense to right of publicity action for broadcast of human cannonball carnival act on nightly news).

⁶³ 539 U.S. 558 (2003).

⁶⁴ 381 U.S. 479 (1965).

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understanding of *personal* individual liberties.⁶⁵ While the evolution of this approach to personal liberties will no doubt take some time and its path is difficult to predict, I contend that in a certain set of circumstances the use of copyrighted works is an essential requirement of the exercise of personal liberties.

My claim here is less a doctrinal one – that courts should consider substantive due process defenses instead of First Amendment ones – than a theoretical one. My primary contention is that a liberty analysis, derived from substantive due process cases, provides a compelling and promising lens for looking at uses of copyrighted works. Uses of copyrighted works should be permissible when they relate to essential aspects of an individual’s personhood. One could contend that this “liberty approach” is still a First Amendment analysis, but an autonomy-based one rather than a democratic society approach. Or one could say that I have adopted a Meiklejohnian approach of putting the self-expressive aspects of free speech into the liberty rubric of the Fifth Amendment. I do not seek in this article, however, to resolve debates among constitutional law scholars about the true purposes of the First Amendment or its interplay with the substantive due process clause. My point is that a liberty, autonomy-based focus on IP use rights, in particular with regard to copyrights, leads to a very different approach than that which is predominately advocated within the context of scholarship about copyright and the First Amendment. Additionally, my approach allows me (and hopefully others, including courts) to connect up with a developed body of constitutional law, but a different one than is routinely invoked in the context of copyright law.

The liberty turn requires courts and scholars to consider the impact of restrictions on uses of copyrighted works on individuals, rather than more broadly on the “public interest,” the “democratic society,” or our political process. As the Supreme Court in *Lawrence* said “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁶⁶ The liberty protected by the due process clause, according to the Court, “has a substantive dimension of fundamental significance in defining the rights of the person.”⁶⁷ Although many of the substantive due process cases focus on marriage, procreation, families, and child rearing, the underlying justifications for keeping the government out of these realms resonates with a certain subsection of uses of copyrighted works.

Consider this language from *Planned Parenthood of Southeastern Pennsylvania v. Casey*: “[C]hoices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the

⁶⁵ *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating labor law on basis of interference with the liberty to contract).

⁶⁶ *Lawrence*, 539 U.S. at 562.

⁶⁷ 539 U.S. 558.

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universe, and of the mystery of human life.”⁶⁸ Copyrighted works in certain circumstances, as I will discuss in the next part, do make up the meaning and existence of individuals and accordingly define their “personhood.”⁶⁹ The Court has described the liberty interest as one which protects individuals and their ability “to be free in the enjoyment of all [their] faculties.”⁷⁰ One can not truly be free if one cannot refer to either one’s own life or the realities of the external world. Often doing both requires explicit reference to copyrighted works ostensibly owned by others. When an individual describes his own reality, he cannot help but refer to works created by others. None of us exists in a vacuum. I recommend to all my students to try spending an hour without making reference to or encountering a copyrighted work or trademark. Almost no one can do it. When you add in publicity rights holders the task becomes even more challenging. I will develop in Part III what exactly I mean by uses that implicate an individual’s liberty right, but here I want to suggest some reasons why I think a substantive due process, liberty approach is a more promising place to situate use rights than the traditional First Amendment approach.

The strongest distinction between the two approaches is that the liberty framework shifts what is being compared in ways that are more likely to protect certain types of uses. The First Amendment approach compares property with speech, or speech with speech. By contrast, a liberty approach to evaluating uses would compare property rights with liberty interests, liberty with liberty interests, or speech with liberty rights. This second set of comparisons is likely to be more favorable to uses than treating uses as speech rights for the reasons I will discuss.

A. The First Amendment/Free Speech Approach

I. Property v. Speech

Under the First Amendment approach, uses of other’s copyrighted works are generally treated as either property or speech. When copyright is treated as property, courts routinely dismiss free speech claims, concluding that no one can claim speech rights in someone else’s property. Free speech claims have often yielded to property rights.⁷¹ One may have a right to speak, but not on or with someone else’s property. One can burn a flag in the public square or on your own front lawn, but you can’t burn someone else’s flag or your own flag on your neighbor’s lawn. Similarly, one can make and sell t-shirts with your original photograph on it, but you can’t sell t-shirts with Robert Mapplethorpe’s photograph on it. This is the fundamental point from *Eldred* – you may have a

⁶⁸ 505 U.S. 833, 851 (1992).

⁶⁹ *Id.*

⁷⁰ *Lochner v. New York*, (Harlan, J., dissenting 1905).

⁷¹ See, e.g., *Tanner*, 407 U.S. 551. See also Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State* (draft on file with author) (2008).

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right to make a speech, but you do not have a right to make *someone else's* speeches.

I note that this essential point treats tangible and intangible property as if they are the same. There are good reasons to question this conclusion,⁷² especially when a competing speech interest is at stake since there is no interference with the property owner's ability to use the work in the context of intangible property. There may be some interference with the ability to maximize every possible cent that could be accumulated from purchases of one's copyrighted work, but one person's use does not prevent anyone else, including the owner, from using the copyrighted work. Despite these misgivings, courts have routinely treated copyright like any other form of property. Thus, when the property rights of a copyright holder are compared with the speech rights of a user, the property right will generally prevail.

2. Speech v. Speech

Treating copyrighted works as a form of speech rather than property doesn't make it any easier for individuals to justify the use of copyrighted works. This is true because under such an approach the copyright owner's speech is being compared with the user's speech. Because copyright is viewed as the engine of free expression and courts generally are persuaded by the incentive rationale (and deferential to Congress' assessment of what incentivizes production), users' speech interests become secondary. As discussed, shoring up the copyright regime is viewed as promoting more speech overall. Accordingly, when speech is posited against speech, the copyright holder almost always wins. Some loss of individual speech is permitted because society will be better off with *more* speech overall. In some sense this analysis echoes one justification for time, place and manner restrictions. If everyone could protest on the same day in the same place all of the messages would be drowned out, but if only one message can be conveyed at one time speech is more effective. Copyright – so the argument goes – similarly limits some speech so that there will be more speech (including copyrighted works) overall.

B. The Liberty Approach

The liberty approach avoids the problem of the copyright clause being a speech-producing engine. Under a liberty approach, we do not compare speech with speech, and then ask which speech is more valuable or which speech is more likely to generate the most speech overall. Instead, we compare an individual's liberty interests with a copyright holder's property right, speech right, or even

⁷² See, e.g., Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 Wash. U. L. Q. 417 (2005).

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liberty interest. For reasons I will discuss, each of these categories is likely to be more successful than comparing speech with speech.

1. Property v. Liberty

In the liberty analysis framework we are most likely to find ourselves comparing property rights with liberty interests. Generally speaking, rights to property yield when significant personal liberty interests are at stake. Consider claims of property in slaves versus an individual's liberty right to personal freedom. Consider also the desegregation of private property when such property is open to the public. In each of these examples, individual liberty rights trump property rights.

It is true that in the real property context, liberty interests sometimes do yield to a property holder's interest. For example, one cannot trespass on private property simply because one feels like it. But one can trespass if such trespass is necessary, such as when being chased by criminals or because one needs to stay docked for safety reasons when a storm has hit at sea.⁷³ In the context of intangible property, it also seems reasonable to carve out a necessity defense when one's own identity or ability to communicate is tied up with a particular copyrighted work.

Furthermore, tangible property, whether in land or personal property, is very different from intangible property and there are good reasons why liberty interests should have more currency in the context of intangible property. One of the main justifications for creating property and exclusionary rights in intangibles is that intangible goods are non-rivalrous and can be copied and sold with little effort thus destroying value (and perhaps incentives) for the creator. In contrast, physical property can generally not be held or owned by competing interests. Yet, this very basis for protecting IP suggests a reason for viewing the conflict between property and liberty interests differently than in the context of tangible property. Allowing some uses when a liberty interest is at stake doesn't significantly interfere with the property interests of a copyright holder, i.e. with the ability of a copyright holder to use her work. In contrast, forcing a landowner to permit a carnival on her land is quite intrusive and restricts her full use and enjoyment of her land.

Moreover, although the Constitution provides a basis for copyright law, it is a permissive right granted at the will of Congress and is a property right that is expressly *limited*. In contrast to real property, copyrights are granted at the whim of the legislature. The constitutional protection of liberty rights however is categorical.

⁷³ See, e.g., *Ploof v. Putnam*, 81 Vt. 471 (1908); *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456 (1910).

2. Speech v. Liberty

If courts analyze copyright owners versus users' rights as a battle between a copyright holder's speech rights and a users' liberty rights, the liberty rights are also likely to prevail. Users of other's copyrighted works are not likely to interfere with the initial ability of creators to speak; therefore, the two interests will generally not come into conflict. In some instances one might view such a use as compelled speech (a free speech violation) because a creator is arguably forced to say something she did not intend. However, when the origin of the user's speech is clear, I do not think this is a fair complaint since the users' speech will not be attributed to the copyright owner. Moreover, by putting the work into the public eye, the creator has lost some of her control over what is subsequently done with the work. More often than not copyright owners are not even the creator's of the copyrighted content and the compelled speech argument is therefore somewhat less convincing regardless of audience perceptions.

3. Liberty v. Liberty

The final approach in the liberty context that a court might take is to compare liberty with liberty interests. One possible opposition to my proposed approach is that there are countervailing, perhaps stronger liberty interests by authors and creators over their copyrighted works. While the liberty approach may provide a renewed interest in authors' moral rights (an approach to copyright that has mostly been rejected in U.S. law), even the boosting of moral rights would not present a problem for liberty interests in uses.⁷⁴

Nevertheless, there is no doubt that my general preference for providing room for autonomy and individual expression must be tempered when such autonomy interferes with the autonomy of others.⁷⁵ Thus, individual use rights cannot so interfere with the liberty rights of authors that authors' works will be destroyed, their livelihood destroyed or their incentives to continue creating works decimated. I think that there is a long way to go though before there is any jeopardy of these calamities. It is, however, for this reason that the uses I permit are narrow in scope, as I will elaborate in Parts III and IV.

The distinction between positive and negative liberty interests also makes clear why a comparison of liberty interests should favor users over creators. The federal government has no obligation to grant affirmative liberty rights to creators, but may have an obligation to grant negative liberty rights to prevent the

⁷⁴ I note that many legal scholars have supported the adoption and expansion of moral rights in the United States and there is at least some moral rights protection for visual arts. See 17 U.S.C. § 106A. For a critique of the application of moral rights to visual arts see Amy M. Adler, *Against Moral Rights (in Visual Arts)* (2008) (draft on file with author).

⁷⁵ Cf. *Rosenbury & Rothman*, *supra* note __, at __ (providing liberty in sexual activities cannot result in compelling others to participate even simply as forced voyeurs).

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enforcement of IP laws against individuals who are using other’s IP to further their own individual liberty interest. Moreover, even if some obligations to authors were created by a liberty approach, such obligations are more likely to be in the form of requiring attribution than prohibiting uses.⁷⁶ Additionally, as some have pointed out, because copyright protection most often rests in publishers not creators,⁷⁷ the competing interests weigh more heavily on the side of the individual user.

In the table below I summarize the foregoing discussion and the competing interests at stake between copyright holders and users and the likely outcomes under each comparison.

Table 1. Competing Interests

Category	Copyright Holder’s Interest	User’s Interest	Approach	Likely Outcome
I	(intangible) Property	Speech	Property generally prevails if adequate alternatives for speech	Copyright holder generally wins
II	Speech	Speech	More speech wins	Copyright holder generally wins
III	(intangible) Property	Liberty	Liberty interest is sometimes paramount	User should win under certain circumstances
IV	Speech	Liberty	Creator’s speech rights and audience’s liberty interest must be balanced	Generally no conflict
V	Liberty	Liberty	Creator’s liberty interest and audience’s liberty interests must be balanced	Can Harmonize Interests

4. Other Advantages of the Liberty Approach

Not only does the liberty approach shift what is being compared to a framework that is likely to be more successful for some categories of users in certain circumstances than a First Amendment approach, but the liberty approach

⁷⁶ See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 *Law & Contemp. Probs.* 135 (2007) (discussing online norms in fan fiction culture for providing attribution); see also Rothman, *The Questionable Use*, *supra* note __ at __ (discussing that attribution customs are more worthy of consideration than many other customs).

⁷⁷ *Eldred*, 537 U.S. at 261 (Breyer, J., dissenting).

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has a number of other benefits. First, the free speech approach leads to a degree of moralizing that has been explicitly rejected in the substantive due process context. Users of other's copyrighted works, even when using those works for their own self-expression, are often derisively described as "pirates," "loafers," and "free riders." Shifting the lens to a liberty-based approach will not only focus on articulating positive attributes of the uses, but also will remind scholars and courts alike that moral judgments should be disfavored in constitutional evaluations.⁷⁸

Second, the liberty approach is better designed to transcend market-based analysis. The democratic society approach is ultimately beholden to the market approach because the market drives production. Even the few scholars to have proposed a more individual-focused approach to resolving conflicts between the First Amendment and copyright law have used market harm as a limiting principle and proposed compulsory licensing.⁷⁹ It is therefore difficult to escape the market-based arguments without proposing some other value behind use rights other than the democratic society. The arguments that undergird the copyright-in-service-to-the-First-Amendment view are based, as discussed, on the incentive rationale. This vision of copyright in service to the public is expressed in very broad terms, ones in which the individual gets lost in the shuffle. The liberty approach that I propose shifts the emphasis to the individual and permits a recognition that copyright may not always be in service to individuals' liberty interests. When a conflict arises, the fundamental premise of copyright law cannot be said to be in service to those liberty interests.

This turn shores up efforts to extricate use rights from the straitjacket of law and economics and market-analysis and instead to focus on individual rights that trump the purported entitlements of copyright owners. The liberty approach shifts the focus from whether the public has a privilege to use, view or access copyrighted material to whether an *individual* has a right to do so. I contend that if use of a copyrighted work is integral to an individual's personal or cultural identity then he or she has the right to use, without payment, another's copyrighted work. In Part III, I will address what specifically would be included and excluded under this individual, liberty-based theory.

Third, the argument that built-in speech protections sufficiently protect users has less currency in the liberty lens analysis. The built-in speech protections have the most value under the democratic society approach where ideas and facts and fair use may be adequate. For liberty-based uses, however, the expression is generally more important than the ideas for reasons I will elaborate on in the next Part.

Although I contend that a liberty-based approach has greater theoretical traction than a First Amendment approach, particularly one grounded in a

⁷⁸ See Lawrence, 539 U.S. 558 (constitutional basis for laws must be derived from source other than public morals).

⁷⁹ See, e.g., Baker, *supra* note __; Rubinfeld, *supra* note __.

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democratic society approach, there is no evidence that courts will easily be persuaded as a doctrinal matter. Courts have only rarely considered liberty-based challenges in IP cases and so far there have been few success stories.⁸⁰ If both First Amendment and substantive due process claims are made, courts often view the due process claim as subsumed in the First Amendment analysis.⁸¹ To be fair to my proposed theory, however, very few litigants have raised substantive due process arguments and most predated the decision in *Lawrence*. Moreover, until now there has not been a scholarly theory upon which courts or litigants could rely. *Lawrence* in some sense clears the decks and provides an opportunity to rethink what role, if any, substantive due process and a liberty interest could play in IP cases. I have tried in this section to present a sketch of why as a theoretical matter substantive due process adds something important to the picture. I will now turn to specific liberty interests that I contend are affected by copyright laws.

III. A Liberty-Based Theory of Privileged Uses

In the context of real and personal property, Margaret Jane Radin has told a compelling story of how property can become integral to our personhood.⁸² In the intellectual property context, IP rights not only affect the personhood of creators of intellectual property, but also the personhood of everyone who lives in our society – a society that is populated by such IP. As Ralph Waldo Emerson has said “[w]e are symbols and inhabit symbols.”⁸³ Each of us creates copyrighted works, interacts with and inhabits copyrighted works. Sometimes a story that we read is affecting, sometimes it is not, and sometimes that story becomes so interwoven with our own lives that it is difficult to describe or live our own lives without reference to that story. In the latter instance, I contend that the copyrighted work has so entered an individual’s life that a liberty interest protects certain uses of that work.

The liberty lens takes a very personal and individual approach to uses of copyrighted works. Accordingly, many of the most often debated controversies in copyright law that scholars have devoted much of their time to, especially in the

⁸⁰ One of the only success stories was the district court decision in *Golan* that upheld a substantive due process challenge to the URAA. The Tenth Circuit affirmed the decision but on other grounds. See also *Chicago Sch. Reform Bd v. Substance Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000) (rejecting substantive due process defense in copyright infringement action). Cf. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *Radio Position Finding Corp. v. Bendix Corp.*, 205 F. Supp. 850 (D. Maryland 1962) (rejecting substantive due process challenge to private law that created patent protection in an invention that had fallen into the public domain); Cf. *Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974) (rejecting substantive due process challenge to continued secrecy of abandoned patent applications by USPTO and in particular its basis in supporting state trade secret laws).

⁸¹ See, e.g., *Chicago Sch. Reform Bd*, 79 F. Supp. 2d at __.

⁸² Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982).

⁸³ Ralph Waldo Emerson, *The Poet*, in *The Portable Emerson* 251 (Ed. Carl Bode 1981).

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First Amendment context, are not ones that a liberty analysis has much to say about. The liberty approach would not generally step in to assist with facial challenges to copyright laws, such as a challenge to extensions of copyright terms.⁸⁴ But the liberty approach does have a lot to offer on the topics of personal uses, derivative works, merchandizing, and perhaps to some extent digital rights management and consumer contracts involving copyrights.

There is much scholarly disagreement about when (and if) personal copying is infringing. My personal view is that such copying has long been a violation of the copyright law,⁸⁵ but no one bothered to enforce the law – in the same way that law enforcement has rarely enforced certain restrictions on private sexual activities even though the conduct actually breaks the law.⁸⁶ Nevertheless, because digital technology and the Internet make it easier to track personal uses, there is increased enforcement of copyright laws against individuals for making personal copies.⁸⁷ In part because of recent efforts to enforce copyright law against average, non-commercial users who are sharing music and information, several scholars have tried to articulate reasons to protect readers, listeners and viewers from the ever-expanding copyright enforcement regime.⁸⁸ I think that the battle to roll back copyright law to a day, if ever there was one, when personal uses didn't count is likely to be fruitless.⁸⁹ Moreover, I think that line drawing

⁸⁴ I note, however, that as a work has been under copyright for a longer period of time, it becomes increasingly likely that it has become incorporated in an individual's life history or in the culture or lexicon.

⁸⁵ See Rothman, *Questionable Use*, supra note __, at __.

⁸⁶ Rosenbury & Rothman, supra note __.

⁸⁷ One could certainly claim that the individuals who have been prosecuted for sharing files online are not making personal copies when they make copies available to a large number of online users with whom they are not intimately familiar.

⁸⁸ See, e.g., Jessica Litman, *Lawful Personal Uses*, 85 *Texas L. Rev.* 1871 (2007); Julie Cohen, *The Place of the User in Copyright Law*, 74 *Fordham L. Rev.* 347 (2005); Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts Ent. L.J.* 29 (1994).

⁸⁹ There is an ongoing disagreement among scholars about whether in *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984), the Supreme Court acknowledged that personal copying could be infringing. Many contend that because a fair use was found for the time-shifting actions of recording shows for subsequent watching that the court excluded personal uses from the purview of copyright law. I think quite the opposite is true. If the Court had intended to exclude personal copying from the scope of the Copyright Act it would not have needed to engage in the detailed analysis of what type of use was made. The very fact that the Court emphasized that time-shifting was occurring suggests that the Court would not have been persuaded of fair use if viewers at home were recording and keeping a library of works, rather than simply watching them at a different time. Moreover, as technology has improved digital recordings enable the creation of substitutionary copies in a way not possible at the time of *Betamax* with videocassettes. Additionally, at the time that Sony was decided there was no home market in old television shows. Today there is a robust market for DVDs of old television shows. It is therefore not at all clear that Sony would come out the same way if decided today. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (rejecting the space-shifting defense to copyright infringement in the online music swapping context); *Mai Systems Corp v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that loading software on to computer's temporary memory

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problems abound and a true exclusion for personal copying might swallow up copyright protections themselves by destroying commercial markets all together. I am much more convinced that if a robust and clearly articulated exception for certain personal uses could be expressed and perhaps even codified then that would be a sufficient and perhaps more theoretically sound approach. The liberty approach provides an opportunity to do just that.

The democratic society approach to analyzing copyright uses favors transformative uses, concluding that those uses best add to the democratic dialogue.⁹⁰ The democratic approach thereby devalues non-transformative uses, which are often the ones most close to the heart of individuals. In fact, Netanel deems non-transformative uses “slavish copying” and contends that such copying should fall outside of both First Amendment and fair use protection. As for personal uses, the democratic society vision of copyright does not insulate personal uses and therefore provides no framework for distinguishing legitimate from illegitimate personal uses. Even the few scholars to have suggested that the First Amendment applies outside a democratic society framework have favored transformative uses. Rubinfeld, for example, thinks non-imaginative uses are pure piracy deserving of punishment. Even those who have supported personal uses have favored those which are private and non-commercial.⁹¹ Moreover, such scholars have primarily relied on arguments internal to copyright to justify their position⁹² – a controversial position and one less likely to get traction from the courts or legislature.

In this section, I identify a number of uses of copyrighted works by individuals that I contend should be protected by the liberty interest. I have divided these uses into two main categories – ones that implicate personal identity and ones that implicate cultural identities. In each case, the uses identified are at risk of copyright infringement liability under the current system, but I contend that they should not be because of their integral relationship to an individual’s constitutionally-guaranteed liberty interest.

A. Personal Identity

Copyrighted works often become imbedded in our lives. In particular circumstances, the use of copyrighted works is simply an effort to express oneself – either one’s historical past or some other facet of one’s identity. I consider a

was copyright infringement). Even at the time the decision barely garnered a majority. See Jessica Litman, *The Sony Paradox*, 55 *Case Western L. Rev.* 917 (2005) (detailing the internal Supreme Court memoranda in the case).

⁹⁰ See, e.g., Netanel, *Democratic Civil Society*, supra note __, at 362-63.

⁹¹ Jessica Litman, *Rethinking Copyright* (2008) (draft on file with author); Litman, *Lawful Personal Uses*, supra note __.

⁹² See, e.g., Litman, *Rethinking Copyright*, supra note __; Litman, *Lawful Personal Uses*, supra note __.

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number of examples of how copyrighted works form part of our personal identity – specifically in the context of music, personal letters, diaries, and religious texts.

1. Music as the Soundtrack of Life

I consider music as my first example in part because it is almost unavoidable to hear music playing in the background of our daily lives – whether at sporting events, in the car, or in an office building. Music is truly the soundtrack of our lives and sometimes particular songs are playing at particularly memorable moments in our lives. These songs become permanently etched in our memories. To limit our ability to reference such songs to the name and concepts within them would be to ask each of us to erase our memory banks or to censor our own reality. The liberty interest cannot tolerate such a result.

How many of us have made a mix tape, CD or MP3 playlist for a friend or romantic partner? Often these mixes allow us to share songs that have been important to us throughout the years or that mark a particular time or memory, whether it be a first kiss or learning of the death of someone close to you. A copyright owner should not be able to prevent you from sharing your memories with others. Copyright law should not be permitted to limit such mixes because to do so is truly to control a person's identity.

Consider also the popular websites, MySpace and Facebook, in which individuals are able to create online profiles or diaries that describe themselves. Many individuals have songs that play on these pages. Often these songs have special meaning to the owner of that page. Consider the suggestion from the legal dramedy, *Ally McBeal*, that everyone needs a theme song.⁹³ Once you find your theme song, I contend that a copyright holder should not prevent you from using it – even in a public forum like MySpace.

Singing “Happy Birthday” at your child's first birthday party may have little to do with the democratic project or a public dialogue, but it has a great deal of individual meaning.⁹⁴ Likely throughout your life at every birthday celebration, that song has been sung to you and your intimates. Over the course of time one might be able to contend that you have either taken an ownership interest in it, or at the very least it forms part of your personal and cultural identity.

A liberty approach would protect these personally expressive uses of music – even though they use expression, are not transformative, and have little role in the democratic project. Both the market-focused fair use regime and the First Amendment approaches, however, provide little assistance to an individual

⁹³ The suggestion came from *Ally McBeal*'s therapist – played by Tracey Ullman. Ally ultimately selected “I Know Something About Love” as her theme song.

⁹⁴ The song “Happy Birthday to You” was first published in 1893, and copyrighted in 1935. The copyright is still in effect. See *Profitable “Happy Birthday,”* *Times of London* at 6 (Aug. 5, 2000).

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who wants to use a particular song in a public venue, on a mix tape or to illustrate an online journal entry or MySpace page. Such uses are non-transformative, public and require use of the song's expression rather than simply the idea or fact of the song.

2. Autobiographies and "Private" Letters

Another area where I think a liberty interest should protect uses is the publication of personal letters when those letters were received by the author of a new derivative work, such as an autobiography. Personal letters are protected by copyright law and such copyrights have often been asserted to restrict biographical works about well-known figures, even when the recipient of the letter has given permission for its publication.⁹⁵ Consider the case of *Sinkler v. Goldsmith*.⁹⁶ In that case Sinkler sought a declaratory judgment that she could publish letters that she had received from Joel Goldsmith. At the time Joel was dead and his wife sought to stop the publication of his letters to Sinkler. Joel had founded a non-traditional spiritual/religious movement, The Infinite Way. Sinkler had joined the movement and developed an extensive correspondence and relationship with Joel. In fact, Sinkler began ghostwriting monthly letters and other works for Joel which were sent to and purchased by his followers. An Arizona district court rejected a First Amendment argument by Sinkler that she had a right to publish the letters that she had received from Joel. The court also rejected a fair use defense because the letters were unpublished.⁹⁷ A liberty approach would have allowed Sinkler to publish the letters that she had read as part of a very personal telling of her life story – a life that included receipt of such letters.

Consider also the diaries of Anais Nin in which she details, among other things, correspondence between her and the writer, Henry Miller.⁹⁸ Why should copyright law stand as an obstacle to her publishing letters she received from Miller? A First Amendment approach to cases like *Sinkler* and the Anais Nin situation would likely treat the copyright holder's interests as primary and conclude that any public interest in the underlying material could be achieved through synopsisizing the underlying ideas and facts of the letters. The liberty

⁹⁵ See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (rejecting fair use defense by biographer who liberally paraphrased from Salinger's letters that had been held in university archives); *Meeropol v. Nizer*, 560 F.2d 1061 (1977) (rejecting fair use finding for defendant's use of Rosenbergs' private letters in biography about the famous couple). Notably, Warren and Brandeis' original call for privacy was based in part on common law copyright protection for unpublished letters.

⁹⁶ 623 F. Supp. 727 (D. Ariz. 1985).

⁹⁷ *Id.*

⁹⁸ Nin's correspondence to Miller was further memorialized with reprints of all of their letters in *A LITERATE PASSION: LETTERS OF ANAIS NIN & HENRY MILLER, 1932-1953* (1987). Copyright in Nin's letters was granted via her will. [I am tracking down status of Miller's copyright].

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approach analyzes the situation quite differently. Recipients of letters would have their own independent liberty right to quote liberally from and to reprint letters in their entirety. Such uses would not defeat the author's copyright in the letters. Instead, for the recipient of the letters, the letters become a part of her reality and identity. Accordingly, copyright law should not stand as an obstacle to an individual publishing a received letter.

Separate from copyright concerns, there are legitimate privacy concerns about publishing private letters. The letter's author might have her own liberty interest in the content of the letter. I contend, however, that unless some particular understanding was reached between the parties prior to receipt of a letter, the party who receives the letter should have the freedom to do with that letter what she wishes. If one wants letters to remain private, one should not send them. The letters do, however, need to be sent in order for a recipient to assert her right to use them. One could not break into someone's house, discover an unmailed letter or unsent email addressed to you and then make it public. A user's liberty interest does not extend to a right or privilege of first access. Access must have already been granted. Accordingly, there is no intrusion into a creator's privacy interests or autonomy interests because the right of first communication remains sacrosanct.

3. Diary of A Copyright Encountered

Not only should individuals be able to replay the soundtracks of their lives and refer to and publish letters they have received, but individuals should also be able to refer to life experiences even if those experiences include copyrighted material. Consider the example of one online journal, the Millions Blog, written by a number of fiction writers, journalists and fans of such works.⁹⁹ One of the contributors to the blog is a self-professed fan of The New Yorker magazine and admits to spending much of his time reading the magazine. In particular, he spends substantial time reading the short stories in the magazine. He decided to write a blog entry about his year of reading New Yorker stories. He catalogued each story, by title, author, date of issue and provided a synopsis of the story as well as some short commentary and some quotations. Suppose The New Yorker decided to sue either on the basis of some copying of the underlying work or for the creation of a derivative work. Should a copyright action by the magazine be successful? Several cases suggest that there could be liability for copyright infringement in such a case.¹⁰⁰ Similar issues have arisen with other blogs – some blogs, for example, aggregate news stories from multiple sources or catalogue

⁹⁹ <http://www.themillionsblog.com/2006/01/year-in-reading-new-yorker-fiction.html>.

¹⁰⁰ *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) (rejecting fair use defense (and 1st amendment arguments subsumed within) for abstracts of news stories). Cf. *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132 (2d Cir. 1998); *Twin Peaks Prods v. Publications Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

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episodes of favorite TV shows. Synopses of TV shows that have been packaged and sold in book form have been found infringing and a similar conclusion for online materials is quite likely.¹⁰¹

I contend that the Millions Blog, however, should be protected by a liberty interest because the author is simply recording his lived experiences, experiences that could not otherwise be described. Fair use would likely fail here – not only have similar cases so concluded, but courts are increasingly rejecting fair use where there is virtually any way that a copyright holder could monetize a use. Given that the blogger could have licensed the stories from the New Yorker, a fair use defense would likely be rejected. In contrast, under a liberty analysis the blogger would be protected since the use was necessary for his self-expression.

[A challenging question is how far this liberty privilege extends. Could our blogger post entire stories on his blog? Or link to the stories on The New Yorker website, but framed with his own website so that viewers would not know that they were on The New Yorker website nor see The New Yorker's advertising? (The actual website has links to The New Yorker website for each story). Compare this scenario to the offline corollary where our home journal writer simply cuts out the story from The New Yorker and pastes it into his journal book. I think there is little question that this old-fashioned cutting and pasting should be protected. Does the simple fact that our journal has gone online and is open to the public change matters? It is still a *personal* use, but not a private one. I am still thinking through the answer to this question. I do think, as I discuss in Part IV.A, that regardless our blogger cannot charge for access to the stories or his blog.]

4. Religious Texts

Copyrighted works often are integral to an individual's religious experiences. Although the Koran and Judeo-Christian bibles are generally thought to be free of copyright protections, various editions of those texts with editor's commentary and new translations are not.¹⁰² Moreover, many religious texts relied on for more recently developed religions are protected by copyright law. Numerous religious groups have used copyright laws to wield power over their members, as well as against dissenters and splinter groups from mainline churches. The First Amendment and internal limits on copyright law have often been of little avail in such instances. The actual expression of the underlying copyrighted works is crucial for religious practice and commentary.¹⁰³ When an individual's free exercise of religion is implicated, the use of copyrighted works

¹⁰¹ See note __.

¹⁰² Cf. *United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152, 1159 (D.C. Cir. 1987) (noting that copyright laws often protect religious texts).

¹⁰³ *United Christian Scientists*, 829 F.2d at 1163 (“Words, of course, stand for religious positions of vast significance in the lives of thousands of believers.”).

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unquestionably implicates a liberty interest because it is a fundamental aspect of an individual's identity.

The liberty approach would be more successful than the First Amendment approach has been in cases implicating religious practice. Consider the Ninth Circuit case, *Worldwide Church of God v. Philadelphia Church of God, Inc.*¹⁰⁴ A religious organization, Worldwide Church of God (“WCG”) was developed by Herbert Armstrong. Armstrong wrote a book entitled *Mystery of the Ages* (“MOA”). The copyright for the book was held by WCG. Two years after Armstrong's death, the WCG decided to stop distributing and publishing MOA in large part because the church doctrine had changed. The new church leaders thought MOA was outdated and culturally insensitive. In particular, its leaders viewed MOA as racist and out of step with the church's current support for divorce and its rejection of Armstrong's belief in divine healing. After Armstrong's death, a splinter group of the church formed as the Philadelphia Church of God (“PCG”) and began using MOA for its services and personal religious observance. PCG copied portions of MOA and distributed them free of charge to its adherents. WCG sued to stop PCG from copying and distributing MOA. The Ninth Circuit rejected First Amendment and fair use defenses in the case. The court focused on the lack of transformativeness in the copying – a common problem in the First Amendment approach. A liberty approach would result in a different outcome because the use by PCG was a highly personal one fundamental to each member's religious autonomy.

B. Cultural Identity

[Elvis impersonators and Elvis music]

[fan fiction]

[merchandizing – Friends of Dorothy t-shirts, Trekkies]

IV. Implications and Limitations

The previous sections have thus far set forth the reasons I contend that a liberty approach to determining privileged uses of copyrighted works is on strong theoretical ground and set forth a number of examples where the liberty interest is raised and should step in to protect otherwise infringing uses. In this final part of the article, I will set forth some limitations on the scope of the liberty interest and set forth some broader implications of the proposed approach.

¹⁰⁴ 227 F.3d 1110 (9th Cir. 2000). See also *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (enforcing copyright law against defendant who used scientology texts in class on scientology and rejecting both fair use and First Amendment arguments that needed access to texts to practice her religion).

A. Some Limitations

First, some limitations on the liberty interest approach. The liberty interest at stake must be sincere, personal and significant. Defendants cannot use a liberty argument as a subterfuge for otherwise infringing activity, by simply stating that the work is important to them personally. Courts will need to carefully evaluate the facts of a specific case to confirm that a defendant is not pretending to attach some important personal meaning where there is none. Large-scale exploitation of a work might be strong circumstantial evidence that something other than a liberty interest is at stake.¹⁰⁵ Such evidence should not, however, be dispositive. Consider the context of selling an autobiography that contains some letters written by a copyright holder. The autobiographer should still be able to sell her work for a profit, unless the autobiography is told entirely or predominantly by another's copyrighted words.

Additionally, uses grounded in a liberty interest should not be monetized. Although, as I will discuss, I think liberty interests should not be tariffed through a compulsory licensing system, reasonable royalty or other paid use approach, I do not think that uses justified by a liberty interest should permit those users to sell another's copyrighted work for a profit. One should, however, be able to recoup costs. For example, the splinter church group should be able to collect copying fees for the *Mystery of Ages* text from participants in their church, but should not be able to charge any additional fees. An author of an autobiography should be able to sell her autobiography even though it contains a copyright holder's letters. To the extent that a work is primarily composed of correspondence written by another, the user would need to compensate the authors or copyright holders of the original letters a portion of the profits derived from the use, but if another's copyrighted work is not the heart of the work then its existence should not prevent an author from profiting from sales of the overall work.

B. Some Implications

1. As Applied v. Facial Challenges

The liberty interest has little to say about many of the facial challenges that litigants and copyright scholars have recently made to such copyright laws as copyright term extensions or the restoration of copyright protection to works that have fallen into the public domain. The liberty interest, however, likely would have something to say about the applicability of some of those laws in individual cases. For example, consider the example from the introduction of the violinist

¹⁰⁵ See, e.g., *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279 (S.D.N.Y. 1997) (despite claim that title of book was inspired by childhood teacher, the timing of the publication suggested that it was a copycat work based on plaintiff's bestseller).

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who has relied on the public domain nature of a musical work that he uses as his signature piece. His relationship to this public domain work rises to the level of a liberty interest and the restoration of that work's copyright status should not effect his continued privilege to use that work. In fact, one of the only IP cases to let a substantive due process argument proceed involved an argument that the plaintiffs had gained a substantive due process or property interest in public domain works that they had used for their work and artistic expression.¹⁰⁶

The one area where I think that the liberty interest approach may have a contribution in a facial challenge is in the context of the DMCA's anti-circumvention provisions and the scope of permissible Digital Rights Management (DRM). Individuals who have a liberty interest in using a copyrighted work must have a way to do so. Either DRM needs to be limited to permit such uses or the DMCA needs to permit the sale and development of devices that permit such uses. Courts have routinely rejected First Amendment challenges to the anti-circumvention provisions of the DMCA,¹⁰⁷ but a substantive due process liberty analysis might lead to a different conclusion.

2. Rights Beyond Contract

Most courts thus far have permitted fair use to be limited or altered by contract.¹⁰⁸ The liberty approach, however, would invalidate provisions of contracts that require consumers to give away their liberty interests in using copyrighted works. In the extreme, courts invalidate contracts for servitude; it should follow that they should also invalidate contracts that require individuals to give up fundamental aspects of their own personal or cultural identity.

[I intend to expand this discussion]

3. Reconceptualizing Fair Use

Judge Richard Posner has described fair use as allowing some copying of other's works when "no more than is reasonably necessary" is copied and the purpose of the copying was one that the "law recognizes as proper."¹⁰⁹ Of course, the question of what is proper is a challenging one. Some have advocated a market-focused approach to fair use, one that increasingly treats almost all uses as unfair since a licensing fee can be extracted for virtually any use. Those who have advocated bringing the democratic society, free speech approach into the fair

¹⁰⁶ *Golan v. Ashcroft*, 310 F. Supp.2d 1215, (D. Colorado 2004), affirmed on other grounds (10th Cir. 2007).

¹⁰⁷ See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (concluding ban on sale and manufacture of devices to circumvent digital rights management does not violate the First Amendment) (the court also considered and rejected a due process claim based on vagueness, not on a substantive liberty interest basis).

¹⁰⁸ See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

¹⁰⁹ *Chicago Bd. Of Education v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003).

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use analysis have had some success. The determination of what are proper uses is often limited to those in the democratic dialogue framework – e.g., criticism and educating our citizens – but rarely is invoked for personal uses. In part this is no doubt a result of less frequent litigation historically in the realm of the personal, but as digital technology makes this more and more possible a shift of focus or at least an additional lens must be added to protect such uses.

Fair use has often been categorized by courts as about the public interest writ large. As the Second Circuit has described, “the [Fair use] doctrine offers a means of balancing the exclusive right of a copyright holder with the public’s interest in dissemination of information affecting areas of universal concern, such as art, science, history or industry.”¹¹⁰ The express fair use provision in Section 107 of the Copyright Act emphasizes these *public* justifications for uses – criticism, news reporting and teaching, but does not engage with more liberty-based and individual justifications for uses.¹¹¹

The fair use factors themselves are also likely to do a better job of protecting public, rather than individual, interests. The first factor – the character and purpose of the use – favors critical uses (whether of a scholarly or creative/parodic nature) and transformative uses. The fourth factor – the effect on the market for the work – also favors critical uses because they are viewed as not interfering with a natural market of the underlying work since a creator will not generally sell or market works critical of his original work.¹¹²

Although I think a separate liberty interest analysis, situated outside fair use, makes the most sense, empowering courts and others to infuse the fair use analysis with consideration of not just the public, but the individual value of the use could also be quite productive. Moreover, if copyright reform is in our future, as some have recently posited, newly drafted fair use factors should take into consideration such individual, liberty-based uses. Recent efforts to revise the federal trademark dilution law were successful in expanding the scope of defenses to give more latitude and guidance to users; perhaps similar successes could occur in copyright law.

¹¹⁰ Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, (5th Cir. 1980); Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (describing fair use as doctrine that permits subordination of “copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry”). [Add legislative history discussion, latman, sen and h.reps]

¹¹¹ See 17 U.S.C. § 107; see also New Era Pubs, Intl. v. Carol Publishing, Grp., 904 F.2d 152 (2d Cir. 1990) (“As long as a book can be classified as a work of criticism, scholarship or research...[the first fair use factor] cuts in favor of the book’s publisher”).

¹¹² Even under the expanded fair use regime in which licensing is broadly included under the market effect umbrella, something I and others have criticized, critical works are generally not expected to be licensed under a voluntary licensing regime. Under compulsory licensing regimes that outcome could be altered.

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4. Liberty as in Free Beer Not Free Speech

[I will address in this section why I don't think compulsory licensing & reasonable royalty approaches should apply in the liberty context]

Conclusion

The liberty approach would lead to a very different set of protected uses than an aspirational First Amendment approach would. I do not contend that a liberty-based approach is sufficient to safeguard all uses of other's copyrighted works that might be warranted. There are instances in which I think the public interest does require, on a First Amendment basis, some dissemination of works. I do not challenge the position of scholars to date that the First Amendment should play a larger role in protecting uses of copyrighted works. Instead, I posit that the liberty-based approach provides a compelling alternative basis for protecting some uses, as well as another way of looking at fair use.

As more and more of copyright law becomes statutory rather than common law and it expands at a breakneck pace, there needs to be some theoretical and constitutional basis for limiting its reach, as well as a framework that one could potentially use for any statutory reforms. Given the recent Supreme Court decision in *Lawrence*, now is a particularly good time to seriously consider such a strategy. Moreover, the liberty-interest approach has implications for uses of other intellectual property, such as patents, publicity rights and trademarks. I will explore some of these subjects in future works, but at least as to copyright a liberty analysis provides a promising avenue for limiting the reach of technology and copyright over very personal, even if public, uses of copyrighted works.