

Copyright Through a Liberty Lens

Jennifer E. Rothman *

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. This approach has almost universally failed to convince courts and has little to offer individuals engaged in personal, rather than political or cultural, expression. In this article, Professor Rothman proposes a paradigm shift away from the First Amendment and toward an alternative constitutional model for determining when uses of copyrighted works should be permitted. The broader understanding of substantive due process and the liberty interest set forth by the Supreme Court in *Lawrence v. Texas* provides a fresh opportunity to consider the role of due process analysis in the context of copyright law. Rothman’s approach provides a strong justification for protecting uses that are tightly connected with an individual’s identity. Even though a liberty analysis would likely protect fewer uses than a First Amendment approach might (if it were ever embraced), the constitutional grounding for these liberty-based uses would be more robust.

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* Associate Professor, Loyola Law School (Los Angeles). Email: jennifer.rothman@lls.edu or jrothman@alumni.princeton.edu.

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Introduction

Scholarship in the intellectual property field often focuses on when people should be able to access, use 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 Clause¹ fail to insulate users from liability. Even though there have been ever-increasing calls by scholars for greater

¹ U.S. CONST., Art. I, Sec. 8 provides that “Congress shall have power to . . . [p]romote 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.”

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First Amendment scrutiny in copyright cases,² there has been a virtually unrelenting rejection of this approach by the courts. Scholars and advocates continue to beat the First Amendment drum despite the Supreme Court's decision in *Eldred v. Ashcroft*³ which greatly limited an already hobbled First Amendment defense in copyright cases.⁴ Since *Eldred*, most courts do not even feign engagement with First Amendment analysis in copyright cases,⁵ and even before *Eldred* the First Amendment had little success as an independent defense in such cases.⁶

In this article, I consider a paradigm shift away from using the First Amendment to evaluate uses of copyrighted works and toward a different, but still constitutionally-grounded theory – a substantive due process, liberty-based one. While a liberty analysis would likely protect significantly fewer uses than a First

² See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1061-67 (2001); 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); see also *infra* note __.

³ 537 U.S. 186 (2002).

⁴ *Id.* For some recent examples of the continued reliance on the First Amendment in copyright scholarship, see, e.g., Edward Lee, *Freedom of the Press 2.0*, GA. L. REV. (2008); Alan E. Garfield, *The Case for First Amendment Limits on Copyright*, 35 HOFSTRA L. REV. 1169 (2008)__; Malla Pollack, *A Listener's Free Speech, A Reader's Copyright*, 35 HOFSTRA L. REV. 1457 (2008); Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 25 WASH. U. J. L. & POL'Y 11 (2006); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201 (2005); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004).

⁵ One recent exception is the Tenth Circuit decision in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) which permitted a First Amendment challenge to the restoration provision enacted as a result of the Uruguay Rounds Agreement Act. *Golan* should not provide much hope for proponents of the First Amendment. First, two other Federal Courts of Appeal have disagreed with *Golan* and instead concluded that the First Amendment does not preclude the restoration of previously public domain works. See *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) *cert. denied*; *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005), *cert. denied*. Second, even if the Supreme Court ultimately concludes that the restoration of copyright protection to public domain works violates the First Amendment, such a holding would have minimal impact in individual infringement cases and most facial challenges to copyright laws.

⁶ See *infra* note __.

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Amendment approach might (if it were ever embraced by courts), the protection would be more robust for these liberty-based uses.

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 the use of a copyrighted work is integral to an individual's identity then he or she has the right to use, without permission, another's copyrighted work. What do I mean by identity and for a copyrighted work to be integral to that identity? Producing a complete definition of identity is challenging,⁷ and not necessary for my purposes. Identity at its heart revolves around our understanding of ourselves whether individually or in the context of broader socio-cultural groups to which we belong.⁸ Regardless of the myriad nuances of defining identity, at a minimum one's identity is composed of one's life history, important life-changing or psychologically-altering experiences, and one's beliefs and values. Each person's life, both past and present, is intertwined with copyrighted materials and therefore one's identity is also wrapped up with copyrighted works.

⁷ Identity has been used in the social sciences and humanities to mean many different things. See, e.g., Rogers Brubeck and Frederic Cooper, *Beyond "Identity,"* 29 THEORY AND SOCIETY 1 (2000) (contending that the term identity means so many things and is so ambiguous that perhaps it should be discarded); Ted C. Llewellyn, *The Anthropology of Globalization* (2002) ("Part of the problem with defining 'identity' is that the term applies to at least three different concepts: first, how the individual perceives himself; second, how the person is popularly perceived; and third, how the individual is perceived by the social scientist). Philosophers use identity to mean sameness and focus on issues like cloning and how to tell if a person is the same if her appearance or other attributes have changed. See, e.g., E.J. Borowski, *Identity and Personal Identity*, 85 MIND 481 (1976). Social psychologists often consider identity in terms of self-categorization or group-categorization. See, e.g., Jan E. Stets and Peter J. Burke, *Identity Theory and Social Identity Theory*, SOCIAL PSYCHOLOGY QUARTERLY (2000) (describing the differences between identity theory and social identity theory). Not surprisingly legal scholars also have not agreed on what we mean by "identity." Amartya Sen has defined identity as "how [a] person sees himself or herself. We all have many identities, and being "just me" is not the only way we see ourselves. Community, nationality, class, race, sex, union membership . . . , and so on, all provide identities that can be, depending on the context, crucial to our view of ourselves...." Amartya Sen, *Goals, Commitment and Identity*, 1 J. OF L., ECON. & ORG. 341, 348 (1985). Nan Hunter has referred to "identity" as "a multilayered concept [that] encompasses explanation and representation of the self." Nan D. Hunter, *Identity, Speech & Equality*, 79 VIRG. L. REV. 1695, 1696 (1993).

⁸ See *supra* note __.

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Identity-based uses of copyrighted works should be protected not because they are private (rather than public) or non-profit (rather than commercial) as some have suggested,⁹ but instead because the specific uses are so integral to an individual's identity that to deny their use would be to deny a person the ability to express, document or engage with herself and her lived experiences. Consider in the following examples what I mean by such identity-based uses of copyrighted works. The first example involves a woman who plays Journey's "Don't Stop Believin'" on a loop on her publicly accessible blog (her online diary) related to one particular entry that describes the painful experience of her being raped. The Journey song had been playing in the background of the car in which she was assaulted. Her blog entry and the playing of the music in conjunction with the text is part of her coping process. Suppose the band objected to her public performance and copying (to a digital format) of its copyrighted composition, lyrics and performance. Under current copyright law, she would likely be liable for copyright infringement. Her use would, however, be protected by my proposed liberty framework - her use is an identity-based one in which she is describing and engaging with her own lived experiences, experiences that incorporate copyrighted works.

The next example involves Samantha Ronson, the current girlfriend of paparazzi magnet and actress, Lindsey Lohan. The paparazzi recently caught Lohan and Ronson kissing in a nightclub and published a photograph of the two of them. Ronson subsequently posted the photo to her MySpace page.¹⁰ Under copyright law she violated the photographer's copyright by posting his picture without permission. Neither the fair use doctrine nor the First Amendment provides Ronson a dependable defense, but a liberty interest approach establishes Ronson's right to post a picture documenting her own life on her own webpage.

Finally, consider the publication of Anais Nin's diaries which contain extensive passages from letters written to her, including many from the prominent author, Henry Miller. Suppose

⁹ See, e.g., Litman; __.

¹⁰ Accessible at

<http://viewmorepics.myspace.com/index.cfm?fuseaction=user.viewPicture&friendID=40137611&albumId=162359>

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that Henry Miller or his estate had sought to enjoin the publication of Nin's diaries because of the inclusion of his copyrighted letters. Again, current copyright law would likely have prevented Nin from going forward without Miller's permission. Under the liberty framework Nin would be insulated from a copyright infringement claim because the letters that he wrote to her had become part of her identity and accordingly their use can not generally be restricted when her motivation in publishing them was to document or explore her own experiences.

In each of these instances copyrighted works have become interwoven with individual's lives, and the uses document (the paparazzi photo on MySpace), contextualize (sharing received letters), or reframe (the song on the blog) these experiences. When the reality of an individual's life or identity is so inextricably tied up with a copyrighted work, a liberty interest (whether located in the due process clause of the Fifth Amendment or the speech protections of the First Amendment) should stand in the way of the enforcement of copyright law.

The Supreme Court's recent decision in *Lawrence v. Texas*¹¹ opens the door to considering the applicability of substantive due process and liberty rights in the context of IP. Although *Lawrence* involved intimate association and has no direct application to IP, 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.¹² Although the Supreme Court has concluded that one does not have a First Amendment "right to make other people's speeches,"¹³ a liberty analysis demonstrates that one should have a right to use someone else's IP to express one's own lived experiences. Such an approach is justified not by the furtherance of a political, democratic dialogue (the standard requirement of the dominant First Amendment analysis), but rather as a fundamental expression of who one is.

¹¹ 539 U.S. 558 (2003). See discussion *infra* Part IV.B.4.

¹² See *Lawrence*, 539 U.S. 558.; see also Laura A. Rosenbury & Jennifer E. Rothman, *Beyond Intimacy* (2008) (draft on file with authors). As I will discuss, *Lawrence* is not wholly novel in so concluding, but in many ways is a look back to an earlier understanding of "liberty." See discussion *infra* Part III.

¹³ *Eldred*, 537 U.S. at 221.

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The shift in perspective that I suggest is not simply a theoretical matter, but is likely to have a significant 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 private uses are coming under scrutiny. Technological advances in digital rights management (“DRM”) 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. Statutory damages for copyright infringement have greatly increased – now \$150,000 per incident – and copyright infringement and circumvention of digital rights management devices are both criminal offenses.¹⁴ Criminal penalties for using copyrighted and non-copyrighted expressive works are likely to increase.¹⁵ These stiffer penalties mean that an individual who is using another’s copyright even in a non-profit, localized capacity has much to lose if caught and found to have committed infringement.

Gone are the days when minor copyright infringements went unpunished and undetected. We have already begun to see this in the suits filed against individual file sharers.¹⁶ As more and more interaction with copyrighted materials occurs online, we will increasingly see such actions against individuals because technology now can track these uses.¹⁷

¹⁴ 17 U.S.C. §§ 504(c), 506(a); 18 U.S.C. § 2319.

¹⁵ See, e.g., *U.S. v. Martignon*, 492 F.3d 140 (2d Cir. 2007) (upholding Congressional authority to enact criminal bootlegging statute in excess of authority under Progress Clause) (the court did, however, remand for consideration of whether law was barred by First Amendment or Due Process Clause); (add proposed criminal IP divisions at DOJ).

¹⁶ See, e.g., *Arista Records LLC v. John Does 1-19*, 551 F. Supp. 2d 1 (D.D.C. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp.2d 153 (D.Mass. 2008); *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004). More than 29,000 individuals have been sued for using the Internet to exchange music and movies since 2003. Austin Wright, *College Ordered to Give Up Names of Students*, VIRGINIA PILOT & LEDGER-STAR, June 21, 2008. Even more individuals have received warning notices of copyright infringement with offers of settlement. Tens of thousands of cease and desist letters have been sent and since 2007 more than 7000 college students have received such letters. Id; see also Susan Butler, *Casting the Net: the RIAA Provides an Inside Glimpse into its Battle Against Illegal File Sharing*, BILLBOARD 10 (June 14, 2008).

¹⁷ There are numerous companies, such as Mediasentry and Audio Magic, that provide fingerprinting technology that can track uses of copyrighted songs and videos to

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Many uses of copyrighted works that previously had been private in nature are becoming more public and therefore are increasingly at risk of being shut down or punished by the copyright system. This happens, for example, 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 more private 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.

It is only a matter of time before suits are filed against individuals for using copyrighted works on MySpace and Facebook pages where visual collages and music are often included without permission from copyright holders. In fact, MySpace has already been sued by the recording industry on a contributory and vicarious liability theory for facilitating the "unlawful" use of copyrighted music by its members.¹⁸

In recent years, a number of scholars have begun to worry about the enforcement of copyright law against such "personal uses." They have primarily relied on arguments internal to copyright law or its history to justify their position— a controversial position and one not likely to be greeted with much success in the courts or legislature.¹⁹ Moreover, even those who have supported a copyright-free zone for personal uses have generally limited uses to those which are private and non-commercial.²⁰

My criticism of the personal use literature is not only that it is too narrow, but also that it is too broad. Making private uses a copyright-free zone risks destroying markets by providing too much room for unpaid uses of copyrighted works. If any one can download a song without payment for personal use, why would anyone pay for a song? Perhaps some altruistic downloaders

specific files and sources. See, e.g., Butler, *supra* note __. There are also software and services that monitor the copying of text.

¹⁸ See, e.g., Complaint, UMG Recordings, Inc. v. MySpace, Inc., No. CV 06-07361 (C.D. Cal.) (Nov. 17, 2006). A number of suits have also been filed against YouTube on similar theories.

¹⁹ See, e.g., Litman, *Rethinking Copyright*, *supra* note __; Litman, *Lawful Personal Uses*, *supra* note __.

²⁰ See, e.g., Jessica Litman, *Rethinking Copyright* (2008) (draft on file with author); Litman, *Lawful Personal Uses*, *supra* note __.

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would actually pay for music (as we saw when the band Radiohead enacted a pay-what-you-think-the-album-is-worth scheme), but once an entitlement to personal downloads is established even the likes of Radiohead aren't likely to see much cash coming in from fans.

The greatest disappointment of the personal use literature, however, is that it fails to provide a broader theory for why personal uses should be exempted from copyright enforcement. A more compelling theoretical foundation is necessary if a zone of protected personal uses is going to hold up under Congressional or judicial scrutiny. Such a theoretical underpinning will also help to differentiate between personal uses that should be permitted and those which should not.

Part I of the article considers why the First Amendment approach that has dominated copyright scholarship has not lived up to its hype. I develop three primary theories for why the First Amendment has generally been rejected in copyright cases. First, copyright has traditionally been viewed as an exception to the First Amendment. Second, copyright has a number of built-in speech protections that have been considered to adequately represent free speech interests. Finally, copyright has been viewed as the “engine of free expression,”²¹ and accordingly the First Amendment and copyright law are treated as a symbiotic pair working together towards the same goal of promoting more speech. I conclude this Part with some thoughts on why – even if the First Amendment approach were more successful – it would provide little protection for the identity-based uses that I contend would be insulated by a liberty-based approach.

In Part II, I develop my theory of why a due process, liberty interest paradigm provides a stronger foundation for use rights than a free speech approach does. Under the First Amendment paradigm speech is often compared to speech, and users generally lose out because copyright is viewed as generating more speech overall. In contrast, when the paradigm shifts to one focused on liberty, users' rights become paramount over competing speech, property and even liberty interests of the copyright holders. The central liberty involved in identity-based uses of copyrighted works revolves around the *freedom of a person* not the *freedom of speech*

²¹ Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985).

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– *what* is being said is much less important than *why* it is being said or by *whom*.

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 integral to constructing one's personal identity. In the IP context, liberty stands for the right of individuals to describe and share their own lives, express their emotions and to publicly communicate the expression of personally significant copyrighted works. 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 number of non-exclusive examples of how copyrighted works form part of our personal identity – specifically in the context of music, personal letters, diaries, and religious texts. 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.

In Part IV, I address some limitations and implications of this liberty-based approach. In particular, I conclude that for this narrow set of identity-based uses no permission nor payment need be made and entire works may be used. I also suggest some implications of the liberty-based approach for DRM, the DMCA's anti-circumvention provisions and contracts limiting use rights.

I. The First Amendment Fallacy

The vast majority of scholarship related to the constitutional dimensions of copyright law has focused on its relationship to the First Amendment.²² The First Amendment has been the primary

²² See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1061-67 (2001); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 206 (1998); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1978); 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*

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avenue for proponents of users rights to provide a constitutional and theoretical basis for limiting the scope of copyright holder's privileges. This approach has continued to dominate copyright scholarship despite its unequivocal failure to convince courts over a nearly forty-year period. Courts have long rejected independent First Amendment scrutiny in copyright cases, and the Supreme Court's recent decision in *Eldred v. Ashcroft*²³ virtually slammed the door shut on First Amendment review.²⁴

Although the Court in *Eldred* suggested that “copyrights are [not] categorically immune from challenges under the First Amendment,”²⁵ the space the Court left open for independent First Amendment challenges is quite small. Only when “Congress has altered the traditional contours of copyright protection” is any further First Amendment scrutiny merited. The Supreme Court did not give examples of what it meant by traditional contours, though one might reasonably conclude that a copyright statute that

Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970). A few scholars have expressed concern over conflicts between copyright law and free speech interests, but have proposed remedies unrelated to 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).

I note that a few recent articles have focused on internal limits in the Progress Clause itself, as well as that Clause's relationship 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).

²³ 537 U.S. 186 (2002).

²⁴ *Eldred*, 537 U.S. 186. Courts after *Eldred* with one notable exception, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007), have all rejected independent First Amendment review in copyright cases. See, e.g., *Chicago Bd. of Education v. Substance Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”); see also *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (rejecting First Amendment challenge to restoration of copyright to public domain works) *cert. denied*; *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005) (same), *cert. denied*. See also Netanel, *Locating Copyright*, supra note __ at 3 (noting in 2002 that First Amendment defenses had been “summarily rejected” in copyright cases).

²⁵ *Eldred*, 537 U.S. at __ (quoting) *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001).

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protected ideas or facts or perhaps eliminated the fair use defense would merit First Amendment scrutiny.²⁶

My goal with this section is to consider some of the reasons the First Amendment has failed both to protect individual users and to limit statutory expansions to copyright law. The First Amendment has generally been rejected in copyright cases for three primary reasons. First, copyright has traditionally been viewed as an exception to the First Amendment. Second, copyright has a number of built-in speech protections that have been considered to adequately represent free speech interests. Finally, copyright has been viewed as the “engine of free expression,”²⁷ and accordingly the First Amendment and copyright law are treated as a symbiotic pair working together towards the same goal of promoting more speech. I conclude this discussion of the First Amendment with some thoughts on why – even if the First Amendment approach were more successful – certain types of uses, ones that a liberty-based approach might protect, would still be left out in the cold.

A. Copyright as an Exception to Free Speech

Copyright law unquestionably restricts what we are permitted to say and do; after all, it substantially limits our ability to speak (or display or sing) the copyrighted words (or images or music) of others without permission.²⁸ Nevertheless, courts have rarely considered whether copyright runs afoul of the First Amendment. One of the main reasons for this is that copyright law has often been considered an exception to the free speech protections of the First Amendment. This understanding explains

²⁶ The recent decision in *Golan* suggests that perhaps resurrection of copyrighted works from the public domain is another such example, although two federal courts of appeal have concluded otherwise. See, e.g., *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007); *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

²⁷ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

²⁸ Several scholars have highlighted this obvious, though often overlooked, proposition. See, e.g., Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 1 (2002) (contending that copyright law imposes content-based speech restrictions deserving of strict scrutiny); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 *VAND. L. REV.* 891 (2002) (same); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *DUKE L.J.* 147, 206 (1998) (same).

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both the dearth of scholarly interest in the subject until the late 1960s,²⁹ and also the continued hesitancy of courts to provide more searching First Amendment review. The temporal proximity of the adoption of the Progress Clause, the First Amendment and the first copyright act suggests that the Founders did not see any conflict between the two constitutional clauses.³⁰ This historical comfort continues to heavily influence the courts, as evidenced by the Supreme Court’s recent description of copyright law and the First Amendment as having a “definitional balance.”³¹

Even apart from the historical reconciling of the two constitutional clauses there are other reasons why copyright law has been deemed an exception to free speech. Although the language of the First Amendment seems absolute,³² it has never been so interpreted by the courts and even scholars who have argued for more absolute free speech protections have placed significant limits on their theories.³³ There have long been a

²⁹ Early treatises and histories of copyright law (as well as more recent ones) simply did not address the issue. See, e.g., Lyman Ray Patterson, *COPYRIGHT: A HISTORICAL PERSPECTIVE* (1968); Horace G. Ball, *LAW OF COPYRIGHT AND LITERARY PROPERTY* (1944); Richard C. DeWolf, *AN OUTLINE OF COPYRIGHT LAW* (1925); Arthur W. Weil, *AMERICAN COPYRIGHT LAW* (1917); Eaton S. Drone, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* (1879). Some scholars implicitly considered dangers to free expression, but none to my knowledge considered bringing the First Amendment to bear. See, e.g., Ralph R. Shaw, *LITERARY PROPERTY IN THE UNITED STATES* (1950) (expressing concern over possible dangers to academic freedom).

³⁰ The draft of the Constitution was completed in 1787 and ratified by all 13 states by 1790. The Bill of Rights, including the First Amendment, was finished in 1789 and ratified in 1791. The first copyright act was passed in 1790. 1 Stat. 124; 1st Cong., 2d Sess., c. 15 (May 31, 1790). To date there is no evidence that there was any debate or concern regarding the interplay of the two provisions.

One possible explanation for this oversight that I will not discuss in detail here is that for many years the focus of copyright development was on whether the right should exist at all, with whom it should vest (authors or publishers) and whether the right was a natural one – protected by common law – or only a statutory privilege. Changes in copying technology and the expansion of the scope of statutory copyright law no doubt have driven scholars from the late 1960s to today to consider potential conflicts between the First Amendment and copyright law that were not as apparent in 1790.

³¹ *Eldred*, 537 U.S. at 219.

³² U.S. CONST. Amdt 1.

³³ See, e.g., Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (2001 ed.) (first published in 1948) (contending that political speech deserved absolute protection, but other speech deserves less absolute protection under a liberty analysis contained within either the Fifth or Fourteenth Amendments).

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variety of exceptions to speech protections, such as for obscenity, fighting words, true threats, incitement, and child pornography.³⁴ Copyright and other IP laws have often been viewed as one of these categorical exceptions to the First Amendment.³⁵ Even Justice Douglas, one of the great proponents of free speech, pointed to copyright law as the only constitutional route for state-sponsored censorship.³⁶

A discussion of why we have such exceptions and what the justifications for these exceptions are is outside the scope of this article; I briefly note, however, two of the most common explanations. The first is that categories of unprotected speech are considered of no or low value. For example, defamatory speech generally sits outside the First Amendment's protections because the statements at issue are false and therefore valueless.³⁷ Similar arguments have been made about uses of another person's copyrighted work; in particular, that using another's copyrighted work has little value because someone else's speech is being made. Accordingly, no new ideas have entered the marketplace of ideas.

A second explanation for speech exceptions is simply that for a given category of speech pressing competing public goals are so well established that a *categorical*, rather than an individual, speech exception has been made. The exceptions for true threats and incitement are good examples of such categorical determinations.³⁸ In the context of copyright law the argument for a categorical exception is that as a society we are better off with the

³⁴ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement is exception to First Amendment); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity is categorical exception to First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words are an exception to the First Amendment); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. PUB. POL'Y 283 (2001) (discussing the speech exception for true threats and when threats should be categorized as "true").

³⁵ See, e.g., Eugene Volokh, *THE FIRST AMENDMENT AND RELATED STATUTES, PROBLEMS, CASES AND POLICY ARGUMENTS* (2nd ed 2005).

³⁶ *U.S. v. 12, 200 Ft. Reels of Super 8mm Film*, 413 U.S. 123, 130-31 (1973) (Douglas, J., dissenting). Justice Douglas suggested, however, that some First Amendment review remained even in copyright cases.

³⁷ I note, however, that at least as to public figures to prevent a chilling effect on the press, the Supreme Court has limited liability even for falsehoods if they were not printed with actual malice (i.e. knowledge or reckless disregard as to the statements' veracity). See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

³⁸ Rothman, *True Threats*, supra note __.

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incentives that copyright provides to creators even though some speech is sacrificed in the process.³⁹

I do not think that copyright was meant to be a categorical exception from the First Amendment. Its scope is simply too wide to leave unmonitored by free speech concerns. At the same time, I do not think it is possible that the First Amendment was intended to shut down copyright law. Accordingly, there must be some balance reached between copyright law and free speech concerns. Such a balance must mean something more than the “definitional balance” proposed by the Supreme Court because a definitional balance means that the two bodies of law are already balanced by definition and no further scrutiny is required – except perhaps if the definition of copyright itself is changed.⁴⁰

B. Incorporation of Speech-Protective Features

Even though scholars have generally rejected the exceptionalist approach, their efforts to read both constitutional provisions together has lead to a number of conclusions that make First Amendment review unlikely. The first conclusion is that copyright law has a number of built-in speech protection that are sufficient in almost every instance to address First Amendment concerns.⁴¹

These *incorporated* speech protections include the idea-expression dichotomy, the lack of protection for facts, and the fair use doctrine.⁴² The idea-expression dichotomy sets forth the principle that copyright only protects the expression of ideas, not the underlying concepts. For example, anyone is free to write a story about a school for young wizards but if the details and plot

³⁹ See discussion *infra* Part I.C.

⁴⁰ The “traditional contours” discussion in the opinion is likely limited to such definitional alternations in copyright law.

⁴¹ See, e.g., 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); but see Note, Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?* 19 COPYRIGHT L. SYMPOSIUM 43 (published 1971) (written & submitted to competition in 1969) (criticizing the speech-protective fair use decisions in *Rosemont* and *Geis* and viewing copyright simply as an exception to the First Amendment).

⁴² 17 U.S.C. §§ 102(b), 107; *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). The seminal common law articulation of the fair use defense can be found in *Folsom v. Marsh*, 9 F.Cas. 342 (D. Mass. 1841).

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(i.e. the expression) get too close to Hogwarts from the Harry Potter series then copyright law will come into play. One can copy underlying facts, but one cannot copy the original selection and arrangement of these facts.⁴³ The fair use doctrine provides an exception or defense to copyright infringement for certain uses deemed “fair.” The doctrine is codified in Section 107 of the Copyright Act which sets forth four factors that courts must consider when evaluating uses.⁴⁴ The first factor considers the purpose of the use, particularly whether it is for profit or not, as well as whether the use is transformative. The second factor considers whether the underlying work merits thick or thin copyright protection. The third factor considers the “amount and substantiality” of the material used by the defendant. The fourth and final factor considers the impact of the use on the market or value of the copyrighted work.

Numerous concerns have been raised about the adequacy of these built-in doctrines. I will only briefly mention a few here. First, ideas and facts can not always substitute for expression.⁴⁵ Sometimes the expression itself is the idea or fact at issue or the idea can simply not be separated from its expression. It is difficult to imagine, for example, 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 facts, let alone the ideas, imbedded in the poem.

⁴³ See *Feist Pubs.*, 499 U.S. at __.

⁴⁴ Section 107 provides in pertinent part that: “[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

17 U.S.C. § 107.

⁴⁵ See, e.g., Netanel, *Locating Copyright*, supra note __; Rubinfeld; see also Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992) (describing how copyrighted works can become facts that should be available for use).

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The fair use doctrine that many scholars identify as the most speech-protective of the internal doctrines of copyright law has been deemed virtually impossible to predict and one of the most murky and mystifying concepts in the law.⁴⁶ Fair use has also increasingly become beholden to a market effects analysis and whenever licensing is theoretically possible such a defense is generally rejected.⁴⁷

Despite concerns about the adequacy of these internal doctrines, courts and scholars have almost universally pointed to this incorporation of First Amendment protections as greatly limiting the scope of independent First Amendment review.⁴⁸ Although the Supreme Court in *Eldred* stopped short of saying that these built-in or incorporated doctrines are coterminous with the First Amendment, it suggested that in almost every case these built-in doctrines are the sole avenue of speech protection.

Even scholars, such as Neil Netanel and Lawrence Lessig, who have contended that there should be more independent First Amendment scrutiny of copyright law have acknowledged that these built-in doctrines are speech-protective and generally sufficient in the vast majority of copyright infringement cases.⁴⁹ This concession turns out to be much larger than Netanel and others may have thought, leaving little room for First Amendment review. Netanel and Lessig's hope of striking down the CTEA (Sonny Bono Copyright Term Extension Act) on the basis of the First Amendment was undercut in part by their acceptance of incorporation; courts are much less concerned about the excesses of term extensions if there are built-in doctrines that ameliorate any damage to free speech interests in individual cases.

C. Copyright as the “Engine of Free Expression”

⁴⁶ __; see also Jennifer E. Rothman, *Why Custom Cannot Save Copyright's Fair Use Defense?*, 93 VA. L. REV. IN BRIEF 243 (2008); Richard A. Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L. REV. IN BRIEF 207 (2008), available at <http://www.virginialawreview.org/inbrief/2008/01/21/epstein.pdf>; Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

⁴⁷ See Rothman, *The Questionable Use of Custom*, supra note __; James Gibson, *Risk Aversion*, YALE L.J.

⁴⁸ See, e.g., *Eldred*, at __; Nimmer, supra note __, at __; Goldstein, supra note __, at __.

⁴⁹ See, e.g., Netanel, *Locating Copyright*, supra note __, at __; Lessig; but see Rubinfeld, supra note __, at __.

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Another reason that the First Amendment has failed to limit copyright law, is that the copyright system is considered to further First Amendment goals. Nimmer and Goldstein both concluded that copyright law and the First Amendment were essentially harmonious because copyright itself serves First Amendment goals by encouraging the creation, distribution and publication of works.⁵⁰ Put another way, 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.

If the copyright regime is viewed as promoting speech interests by providing incentives to create, then there is little room for First Amendment scrutiny. As the Supreme Court has articulated, copyright is the “engine of free expression” and accordingly the First Amendment is no obstacle to the enforcement of copyrights.⁵¹

Putting aside both longstanding and recent challenges to the legitimacy of the incentive rationale,⁵² if one accepts, as the courts and most scholars have done, that copyright protection generates more speech, then one must engage in balancing these two speech interests (*generating* speech versus *allowing* speech). When doing this evaluation, courts and scholars generally adopt a utilitarian

⁵⁰ Goldstein, *Copyright and the First Amendment*, supra note __, at 990, 998, 1001, Nimmer, supra note __, at __.

⁵¹ *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”); see also Netanel, *Democratic Civil Society* at 341.

⁵² 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*, 19 *ORG. SCI.* 187 (2008). 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 compelling arguments that copyright extensions, particularly retrospective ones, 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 the 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 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.

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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 type of calculation makes the First Amendment of very limited value in copyright cases.⁵³ Moreover, speech that uses or incorporates prior works is not valued as much as works viewed as wholly novel (to the extent that such works exist) because such derivative works do not add (as much) to the "marketplace of ideas."

The fact that most copyright scholars situate their First Amendment analysis in the democratic society paradigm exacerbates this symbiotic view of copyright law and free speech. Although there are many different approaches to the First Amendment,⁵⁴ the vast majority of scholarship in the copyright arena situates itself in a "democratic society" approach to interpreting and applying the Amendment.⁵⁵ The democratic society approach to the First Amendment justifies free speech protections in the name of promoting democracy. The democratic society rubric and its corollary, the "marketplace of ideas" approach, both feed into the notion that the primary aim of both copyright law and the First Amendment is to encourage the production and dissemination of ideas. As I will discuss in subpart D below, there are other problems with the democratic society

⁵³ See also discussion *infra* Part II.A.

⁵⁴ Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (4th ed. 2007) (originally published in 1948) (contending that the First Amendment should be protected when it furthers the objective of self-government); C. Edwin Baker, *Harm, Liberty and Free Speech*, 70 S. Cal. L. Rev. 979, 981 (1997) (speech should be protected "because and to the extent that it is a manifestation of individual autonomy"); Charles Fried, *The New First Amendment Jurisprudence: A Threat To Liberty*, 59 U. CHI. L. REV. 225 (1992) (positing autonomy as the primary principle of the First Amendment); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (identifying self-fulfillment as the primary objective of the First Amendment); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. PUB. AFF. 204 (1972) (—); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (—).

⁵⁵ It is beyond the scope of my argument to resolve the long-standing debates on the purposes behind and the scope of the First Amendment. Nevertheless, the fact that copyright scholars have generally rejected the applicability of autonomy interests in the realm of copyright and First Amendment defenses is undeniable and has led to a particular understanding, a problematic one, for how the First Amendment should be analyzed in copyright cases.

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approach, but at the very least it feeds into the blanket exemption of copyright law from First Amendment scrutiny.

It is true that even under the democratic society rubric some limits on copyright law might be recognized if changes to the law actually discourage the creation of new works. Both Netanel and Lessig, for example, have claimed that the extension of copyright terms, by delaying the entry of works into the public domain, works 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. Overall, however, this approach solidifies the general understanding that copyright furthers First Amendment goals more broadly and therefore copyright law should not be limited in individual cases on the basis of free speech concerns.

D. The Democratic Society Justification

Even if it were a more successful vehicle in copyright cases, the currently articulated First Amendment approach is a highly restrictive one. In particular, the primacy of the democratic society perspective 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 debate, and that are transformative.

1. The Personal is Not Political

In the democratic society view of the First Amendment, individuals are of secondary concern and their role only relevant when in service to broader societal goals other than autonomy (or self-fulfillment or self-expression). As Alexander Meiklejohn said “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.”⁵⁶ Simply put, the democratic society focuses on groups, not individuals.⁵⁷ Scholars and jurists have often rejected the application of self-fulfillment and autonomy-based justifications for the First Amendment in the context of copyright law. Nimmer, for example, thought that “free

⁵⁶ Alexander Meiklejohn, *POLITICAL FREEDOM* (1948).

⁵⁷ See, e.g., Netanel, *Democratic Civil Society*, supra note __, at 342.

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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.”⁵⁸ Nimmer was not alone in his views – scholars and courts have routinely viewed those who use another’s expression as either lazy or pirates, rather than as individuals referring to a very real part of their world.⁵⁹

Not only does the democratic society rubric dismiss individual-based goals of the First Amendment, such as autonomy, self-fulfillment or self-expression, but it also favors particular types of uses – ones that constitute public dialogue on political issues, rather than on cultural or artistic matters. Expression that furthers individual values is simply not important. Nimmer, for example, saw a role for the First Amendment in limiting copyright protection only when the use at issue furthered the “democratic dialogue” about an issue of great public import. Paul Goldstein similarly contended that copyright infringement should only be excused, without regard to market effect, when the “infringed material is relevant to the *public interest* and the appropriator’s use of the material independently advances the *public interest*.”⁶⁰ Uses that furthered an individual’s interests were simply not matters for the First Amendment.

Even scholars who have expressed a broader view of what types of uses should be viewed as meriting First Amendment protections have suggested that only uses which contribute broadly to a cultural dialogue are worthy of independent free speech protection. Neil Netanel, for example, expressly placed copyright in a “democratic paradigm” and defined copyright as “in essence a state measure that uses market institutions to enhance the *democratic character* of civil society.”⁶¹ Although Netanel admits that speech has a role in promoting “individual autonomy,”⁶² he does not consider autonomy in his analysis of what uses should be permitted when the First Amendment is applied in the copyright context. To the extent that individual expression is valuable it is primarily because it is in service to his preferred goal of furthering

⁵⁸ Nimmer, *supra* note __, at 1192 (emphasis in original).

⁵⁹ See also Denicola, *supra* note __, at __ (rejecting the relevance of the individual development theory of the First Amendment in the copyright context).

⁶⁰ Goldstein, *Copyright and the First Amendment*, *supra* note __, at 988.

⁶¹ Netanel, *Democratic Civil Society*, *supra* note __, at 290 (emphasis added).

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

the democratic project. Accordingly, Netanel favors uses that are transformative and that contribute new material to the democratic dialogue.⁶³

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.”⁶⁴ Although some of these enumerated categories go beyond the expressly political, they all focus on a public dialogue on common ground rather than on individual justifications for using copyrighted works. Ultimately, Netanel is concerned with “public education, self-reliant authorship, and robust debate,”⁶⁵ not with individual creators and users. There is nothing wrong with these scholars’ concerns about public dialogue and matters of broad public concern. Many of the uses of copyrighted works they pinpoint are deserving of protection; however, identity-based and personal uses are also valuable and need their own basis for protection. The dominant democratic society view provides little comfort for those wanting to engage in such uses.

2. Discounting Expression

The democratic society justification also favors the use of ideas rather than expression because only the ideas underlying the expression are generally perceived to be relevant to the democratic dialogue.⁶⁶ In Nimmer’s view there is “no First Amendment justification for the copying of expression along with ideas simply because the copier lacks either the will or the time or energy to create his own independently evolved expression.”⁶⁷ Nimmer concluded that the only situations meriting First Amendment protection were graphic works generally related to the news because otherwise the ideas and facts would be adequate.⁶⁸ Nimmer imagined that such an exception would only apply in

⁶³ See, e.g., Netanel, *Locating Copyright*, supra note __, at 16-19 and n. 61.

⁶⁴ Netanel, *Locating Copyright*, supra note __, at 7.

⁶⁵ Netanel, *Democratic Civil Society*, supra n. , at 291.

⁶⁶ See, e.g., Nimmer, supra note __.

⁶⁷ Nimmer, supra note __, at 1203.

⁶⁸ Id.

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extreme circumstances.⁶⁹ Similarly, Denicola thought that the First Amendment would primarily come into play in the context of a visual record of historical events.⁷⁰

In First Amendment cases, outside of copyright law, the Supreme Court has not differentiated between expression and ideas or facts. As Jed Rubenfeld has noted, 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*.⁷¹ The need to use expression is particularly true in the context of more personal, identity-based uses. In fact, if only the broad principles of self-government and the public interest in democratic dialogue mattered there would be many alternatives to “Fuck the Draft,” but if one’s ability to express one’s exact sentiments matters then nothing comes close to “Fuck the Draft.”⁷² Moreover, it seems a dangerous precedent for courts to have the power to determine when ideas and facts are sufficient stand-ins for the prohibited expression.

3. Transformative Uses

The democratic society justification to analyzing copyright uses also favors transformative uses because those uses supposedly add more to the democratic dialogue.⁷³ Netanel deems non-transformative uses “slavish copying” and contends that such copying should fall outside of both First Amendment and fair use protection.⁷⁴ Even the few scholars to have suggested a non-democratic society have favored transformative uses. Jed Rubenfeld, for example, thinks that “non-imaginative” or non-

⁶⁹ Nimmer gives two primary examples of the narrow circumstances when the First Amendment should protect the use of expression. The first is the famous photograph from the My Lai massacre during the Vietnam War. The second is the film footage of the assassination of President John F. Kennedy. 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.

⁷⁰ Denicola, *supra* note __, at __.

⁷¹ Rubenfeld, *supra* note __, at __.

⁷² Cf. *USOC v. SFAA* (rejecting a First Amendment defense to trademark infringement and holding that there were adequate alternatives to the “Gay Olympics,” such as the “Gay Games”).

⁷³ See, e.g., Netanel, *Democratic Civil Society*, *supra* note __, at 362-63.

⁷⁴ *Id.*

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transformative uses are pure piracy.⁷⁵ Transformative uses do add to the “marketplace of ideas”; however, these very emphasis on increasing or maximizing overall speech ignores the fundamental value of non-transformative uses. It is often such non-transformative uses that are the closest to the heart of individuals and which should accordingly be protected by a liberty interest. I discuss in Part III a number of example of identity-based uses that depend on non-transformative uses of copyrighted works.

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 consider why shifting the paradigm to a substantive due process, liberty-based approach could provide a more robust grounding for protecting certain uses of copyrighted works.⁷⁶

The recent reinvigoration of substantive due process in *Lawrence v. Texas*⁷⁷ 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 protection of negative liberty rights, as set forth in both the Fifth and Fourteenth Amendments.⁷⁸ The Court in *Lawrence* embraced the concept of “liberty” as an individual right distinct from the more limited privacy right that had dominated substantive due process analysis since *Griswold v.*

⁷⁵ Rubinfeld, supra note __ at __.

⁷⁶ The Progress Clause itself may limit what copyright laws Congress can pass, but it says nothing about how to resolve individual cases of copyright infringement and conflicts with any competing interests of a defendant in a given case.

⁷⁷ 539 U.S. 558 (2003).

⁷⁸ The Fifth Amendment provides in pertinent part that : “No person shall be ... deprived of life, liberty, or property, without due process of law....” U.S. CONST. Amdt. V. The Fourteenth Amendment has a virtually identical provision precluding violations of due process by the states. See U.S. CONST. Amdt. XIV. The Fourteenth Amendment’s protection of “liberty” has been held to incorporate the protection of free speech and the specific dictates and law of the First Amendment against violation by the state.

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Connecticut.⁷⁹ The Supreme Court in *Lawrence* described liberty in broad terms: “Liberty presumes an *autonomy of self* that includes freedom of thought, belief, expression, and certain intimate conduct.”⁸⁰ 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.”⁸¹

I do not think that *Lawrence* and its progeny will usher in a new *Lochner* era of substantive due process review in which courts routinely strike down laws viewed as irrationally limiting economic or other liberties.⁸² I do, however, think that *Lawrence* signals a renewed understanding of individual liberties – one that brings liberty out of the closet of privacy. While the evolution of this approach to personal liberties will no doubt take some time and its path is difficult to predict,⁸³ *Lawrence* provides a powerful signal that some uses of copyrighted works that are essential to a person’s “autonomy of self” should have constitutional protection.

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 both from our understanding of substantive due process and from the self-expression (rather than the marketplace of ideas) justifications for the First Amendment, provides a compelling and promising lens for looking at uses of copyrighted works.

One could contend that this “liberty approach” is still a First Amendment analysis, but an autonomy-based one rather than a

⁷⁹ 381 U.S. 479 (1965).

⁸⁰ *Lawrence*, 539 U.S. at 562 (emphasis added).

⁸¹ *Lawrence*, 539 U.S. at 558.

⁸² *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating labor law on basis of interference with the liberty to contract).

⁸³ Some courts are already resisting the broader approach of *Lawrence* and are clinging to the more specific, though now questionable, approach of *Washington v. Glucksberg*, 521 U.S. 702 (1997). *Glucksberg* required courts to only consider as substantive due process rights, rights that are “deeply rooted in this Nation’s history and tradition,” *Id.* at 721. Courts have also generally continued to rely on the strict scrutiny and rational basis frameworks despite language in *Lawrence* that calls into question these approaches to evaluating violations of substantive due process rights. See, e.g., *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc) (rejecting substantive due process right to access to experimental drugs by terminally ill patients on basis that was no historical root of right and that government position was rationally related to state interest).

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democratic society approach.⁸⁴ Or one could say that I have adopted a Meiklejohnian approach of putting the self-expressive aspects of free speech into the “liberty” provision of the Fifth Amendment. I do not seek, however, to resolve here debates among constitutional law scholars about the true purposes of the First Amendment or its interplay with the substantive due process clause.⁸⁵ My point instead is that a liberty and autonomy-based focus on IP use rights leads to a very different understanding than that currently advocated by scholars concerned about the scope of copyright law. This paradigm shift changes the focus of constitutional review in copyright cases and allows me (and hopefully others, including courts) to connect up with another developed body of constitutional law. The central liberty involved in identity-based uses of copyrighted works revolves around the *freedom of a person* not the *freedom of speech* – *what* is being said is much less important than *why* it is being said or by *whom*.

I will develop in more detail in Part III some examples and categories of uses that implicate an individual’s liberty right, but in

⁸⁴ Some Supreme Court justices and scholars have pointed to the self-expression and self-fulfillment roles of the First Amendment. See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (“To permit the continued building of our politics and culture, and to assure *self-fulfillment* for each individual, our people are guaranteed the right to express any thought, free from government censorship.”) (emphasis added); *C.B.S. Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, (Brennan, J., dissenting) (“The First Amendment values of *individual self-fulfillment* through expression and individual participation in public debate are central to our concept of liberty.”) (emphasis added). See also *supra* note __.

⁸⁵ I note that at least with regard to the Fourth Amendment one common understanding in constitutional law, though the matter is far from settled, is that a more specific constitutional provision trumps a less specific one. See *Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (contending that no separate substantive due process scrutiny is merited when Fourth Amendment analysis applies directly); *Albright v. Oliver*, 510 U.S. 266, 273-74 (same). Numerous scholars and jurists, however, have suggested otherwise, especially in the context of the First Amendment and substantive due process. See *Albright v. Oliver*, 510 U.S. 266, 286 (1994) (Souter, J., dissenting) (contending that more than one constitutional provision can apply even if a specific constitutional provision is on point); *Griswold*, 381 U.S. 479 (suggesting that the right to privacy may be protected by a concurrence of several different constitutional provisions); *U.S. v. Martignon*, 492 F.3d 140, 152 n.7 (2d Cir. 2007) (suggesting that criminal law penalizing recording of musical performances might run afoul of both the First Amendment and the Due Process Clause); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (noting that the right of intimate association may be located in a variety of constitutional provisions, including the First, Fourth, Fifth, and Fourteenth Amendments, but concluding that there is no need to locate the entirety of the right in a single constitutional provision).

this part I suggest the reasons why a substantive due process, liberty approach is a more promising place to situate use rights than the dominant First Amendment approach. At its core, the liberty approach shifts the landscape from comparing speech and favoring approaches that maximize speech to an approach that compares liberty interests more broadly and maximizes liberty overall.

A. The First Amendment/Free Speech Approach

Under the First Amendment approach, uses of other's copyrighted works are generally treated as either property or speech. In either case, the copyright owner's countervailing privileges and rights are likely to be paramount.

1. Property v. 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. The Supreme Court in *Eldred* emphasized that there is no First Amendment right to "make other people's speeches." In other words, there is never a free speech right to use someone else's copyrighted works.⁸⁶ Admittedly, I find this conclusion problematic on First Amendment grounds because it seems to covert the "freedom of speech" into "freedom of [*your own, original never before said*] speech" – a quite limited reading of the First Amendment that I do not think can stand any serious scrutiny. I will not belabor this critique here because my primary aim here is not to debunk the roadblocks to the adoption of a more searching First Amendment scrutiny, but instead to consider the value of an alternative approach.

The facile sentiment expressed in *Eldred* undeniably dominates the First Amendment analysis in copyright cases and connects up with other free speech cases in which property rights greatly limit the scope of the First Amendment.⁸⁷ One may have a

⁸⁶ *Eldred*, 537 U.S. at 221.

⁸⁷ There are good reasons to question the treatment of intangible property as being the same as tangible property, 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. Despite these misgivings, courts have routinely analogized

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right to speak, but usually not on, and almost never with, someone else's property.⁸⁸ 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. 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 does not 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. As discussed, because copyright is viewed as the "engine of free expression" users' speech interests become

copyright to real property. See Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L. Q. 417 (2005).
⁸⁸ See, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976) (no First Amendment right to strike or picket on private property of shopping center); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (no First Amendment right to handbill in shopping mall and holding that there are generally no "rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."). See also Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State* (January 9, 2008) (working paper), draft available at <http://ssrn.com/abstract=1082114>. *But see* *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that one could not prohibit leafleting in a company town because although the town was privately owned it functioned like a traditional town and accordingly needed to permit some zones for free speech).

There are a number of ways to distinguish the speech cases related to real property. First, in the context of tangible property, there are almost always alternative methods of speech. If a person cannot burn another person's American flag, she can always buy or borrow another one. She could even make her own flag. When copyrighted works are at issue, however, there is no substitute or alternative method to making the same speech. If the copyright holder does not give permission for the use there are no other avenues for making the same expressive statement. This critique fits more broadly into an overall critique of the tangible property analogies for IP. It nevertheless remains the case that the language of copyright and the First Amendment treats the copyright holder's property as inviolable and paramount to any speech interests of the user.

A second potential difference in the copyright context is that the property-based speech restriction depends on the content, though not the viewpoint, of the speech. By contrast, in the tangible property context speech restrictions based on property rights generally turn on time, place and manner restrictions that are unrelated to the specific content of the speech.

secondary. Shoring up the copyright regime is viewed as promoting more speech overall.⁸⁹ Some loss of individual speech is tolerated because society will be better off with *more* speech in the aggregate. 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. Accordingly, when speech is posited against speech, the copyright holder almost always wins.

B. The Liberty Approach

The liberty approach avoids the problem of copyright law 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 liberty interest. For reasons I will discuss, each of these categories is likely to be more successful for a potential user than the First Amendment approach.

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 do yield when significant personal liberty interests are at stake. This is particularly true when private property has been opened up to the public in some way. It is on this basis that many of the civil rights acts were passed and enforced without being considered takings of private property.⁹⁰

⁸⁹ See discussion *supra* at Part I.C.

⁹⁰ Cf. *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (rejecting plaintiff's argument that Civil Rights Act requiring non-discrimination in rental of motel units unconstitutionally burdened the owners property rights). Although these cases involve the constitutionality of government statutes, the logic behind the courts' rejection of property and liberty challenges to such laws is telling.

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Liberty-based uses of copyrighted works only arise when an individual has lawfully accessed or encountered the copyrighted work. In every instance, the copyright holder has therefore opened his or her work up to the public. By doing so creators are aware that such works will be integrated into others' lives. By making their works public, creators must yield to the countervailing interests of individuals who have incorporated their works into their lives.⁹¹

The arguments for preferring liberty rights over property rights are particularly strong in the context of intangible property. First, intangible goods are non-rivalrous so allowing some uses when a liberty interest is at stake does not significantly interfere with the ability of a copyright holder to use her work. In contrast, in the context of tangible property the impact of a use by a third party is much more significant, for example, forcing a landowner to permit a carnival on her land would be quite intrusive and would restrict her full use and enjoyment of her land. Allowing a limited set of free (or even reasonably fared) uses would potentially reduce a copyright holder's income, but it would not be so detrimental as to either destroy the value of the work or discourage future creations by other authors or copyright owners.⁹²

Moreover, although the Constitution provides a basis for copyright law, it is a privilege granted at the will of Congress, not a common law right; therefore it is an expressly *limited* property right.⁹³ By contrast, protection of liberty rights, at least negative ones, is granted by the Constitution and generally thought of as an

⁹¹ Cf. *Marsh v. Alabama*, 326 U.S. at 506 (“Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”);

⁹² I discuss whether and when one must pay for such uses in Part IV.

⁹³ There has been scholarly debate on this point since the inception of copyright law and it continues today, but the issue has been settled by the Supreme Court. *Wheaton v. Peters*, 33 U.S. 591 (1834) (holding that whatever its origins, copyright is now a creature of statutory privilege). At the time of the decision in *Wheaton*, the copyright statute only applied to published works (unpublished works were still governed by common law copyrights) – this is no longer the case. See also Mark Rose, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1995); L. Ray Patterson, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968). Cf. *Donaldson v. Beckett*, ___ (1774) (majority of House of Lords in England concludes that statutory copyright law – under the Statute of Anne – eliminates any common law protections for copyrights that might have existed prior to its passage).

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expression of an *a priori* natural right.⁹⁴ Accordingly, liberty interests should prevail against copyrights when the two rights come into conflict.

2. Speech v. Liberty

If one analyzes copyright owners versus users' rights as a battle between copyright holders' speech rights and users' liberty rights, the liberty rights are also likely to prevail. Users of others' 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. When the origin of the user's speech is clear, however, I do not think there is a compelled speech problem. 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. Very often copyright owners are not the creators of the copyrighted content – a fact that makes the compelled speech argument even less convincing.

3. Liberty v. Liberty

The final possible comparison in the liberty context is to compare liberty with liberty interests. One possible opposition to my proposal is that there are countervailing, perhaps stronger liberty interests by authors and creators over their copyrighted works. One person's liberty interest cannot run roughshod over another's.

If one takes as one's primary goal autonomy and individual expression, then the rights of users must be tempered when their autonomy interests interfere with the autonomy of others, especially that of creators who also have a liberty interest in a

⁹⁴ Negative liberty interests are those that prevent the government from taking action, e.g., such as enforcing copyrights or other laws in contravention of a person's liberty. Positive liberty rights are those that would require the government to take affirmative steps to satisfy a liberty interest, such as requiring the government to give everyone affordable public transportation or a free car. I do not address affirmative liberty interests here.

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particular work.⁹⁵ The distinction between positive and negative liberty interests makes clear why a comparison of liberty interests should favor users over creators here. 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 enforcement of copyright laws against individuals who are using other's copyrighted works to further their own individual liberty interest. Moreover, even if some obligations to authors are created by a liberty approach, such obligations are more likely to be in the form of requiring attribution rather than prohibiting uses.⁹⁶ Additionally, because copyright protection often rests in publishers not creators, the competing interests weigh more heavily on the side of the individual user because the creator has already given up his or her liberty interest.

Additionally, because the works have been made public the author has voluntarily given up some of her liberty interest in the work. Creators knowingly release their works (and copyrights) to publishers, producers and distributors and are aware that members of the public will then interpret their work as they please, often incorporating the works into their lives. In fact, many creators hope that people will do just that. Creators cannot have it both ways, relinquishing their liberty rights and then trying to regain them to prevent others from exercising their own liberty rights.

In contrast to speech where the limitation on one person's speech leads to more speech overall, in the context of copyright law, the limitation on one person's liberty seems to have a limited effect on the other's person's liberty. So under a utilitarian framework, liberty would be maximized overall by permitting some liberty-based uses of copyrighted works.

⁹⁵ Although I focus here on autonomy interests, I recognize that it can be difficult given cultural and psychological constraints to ever be purely autonomous. *See, e.g.*, Martha Fineman, *THE AUTONOMY MYTH* (2005). Nevertheless, I think that providing individuals with greater freedom to express themselves and their experiences is a step in the right direction toward greater, if not complete, autonomy.

⁹⁶ 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).

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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 | No Right to "Make Someone Else's Speeches" | Copyright Owner Preferred |
| II | Speech | Speech | More Speech Overall Favored | Copyright Owner Preferred |
| III | (intangible) Property | Liberty | Liberty Interest Should Generally be Favored | User Preferred if Liberty at Stake |
| IV | Speech | Liberty | Interests Must be Balanced | Generally No Conflict |
| V | Liberty | 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 than a First Amendment approach, but the liberty approach also 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," or "free riders." Shifting the lens to a liberty-based approach will not only focus on articulating positive attributes of the uses, but also

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will remind scholars and courts alike that moral judgments should be disfavored in constitutional evaluations.⁹⁷

Second, the liberty approach is better designed to transcend market-based analysis. The democratic society justification for the First Amendment is ultimately beholden to the market because the market drives production and more speech overall is the paramount value of this paradigm. 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, reasonable royalty or some other tariffing scheme.⁹⁸ It is therefore difficult to escape the market-based arguments without proposing some other value behind use rights.

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 an individual's liberty interest. When a conflict arises between the liberty interests of a copyright holder and a user, the fundamental premise of copyright law cannot be said to further those liberty interests overall. Accordingly, an individual determination must be made in each case rather than having a blanket preference for copyright holders.

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 rubric where ideas and facts and fair use are generally adequate. For liberty-based uses, however, the expression is generally more important than the ideas or facts, for reasons I will elaborate on in the next part. Moreover, fair use, as I also will discuss, is primarily driven by market concerns and has little room to consider uses that are driven by autonomy-based motives.

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 a more detailed treatment of the specific liberty interests that I identify and when I

⁹⁷ See *Lawrence*, 539 U.S. 558 (constitutional basis for laws must be derived from source other than public morals); Suzanne Goldberg, *Morals-Based Justifications For Law-Making: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 101 (2004).

⁹⁸ See, e.g., Baker, *supra* note __; Rubinfeld, *supra* note __; see also Netanel, *supra* note __ at __.

contend enforcement of copyright law unconstitutionally limits an individual's negative liberty interests.

III. Privileged Uses Under A Liberty-Based Theory

The liberty lens that I propose takes a very personal and individual-based 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 First Amendment context, are not ones that a liberty analysis has much to say about. The liberty approach would not generally step in, for example, to assist with facial challenges to copyright laws, such as a challenge to extensions of copyright terms.⁹⁹ But the liberty approach does have a lot to offer on the topics of “personal uses,” derivative works, and to some extent digital rights management, anti-circumvention laws and consumer contracts limiting fair use rights or expanding the scope of copyrights.

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.¹⁰⁰ 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. 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.

Driven in part by recent efforts to enforce copyright law against average, non-commercial users, several scholars have tried to articulate reasons to protect readers, listeners and viewers from

⁹⁹ 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 into an individual's life history or into the culture or lexicon.

¹⁰⁰ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

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the ever-expanding copyright enforcement regime.¹⁰¹ Jessica Litman, for example, concludes that “copyright law was designed to maximize the opportunities for nonexploitative enjoyment of copyrighted works in order to encourage reading, listening, watching and their cousins.”¹⁰² She refers to such personal uses as “copyright liberties.” Her point is not a liberty-based one, however, but rather that copyright historically provided room for readers and listeners (i.e. users) and that such internal constraints should continue to be read into copyright law.

I agree with Litman that there should be greater consideration of personal uses by the current copyright system and a recognition that the public has always been at the heart of the copyright system. Nevertheless, several features of her and other approaches to personal uses give me pause. First, I’m doubtful 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.¹⁰³ Second, a broad exclusion for personal copying might swallow up copyright

¹⁰¹ 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).

¹⁰² Litman, *Lawful Personal Use*, supra note ___, at 1879.

¹⁰³ 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, rather than some other use, suggests that the Court would not have been persuaded of fair use if viewers at home were recording show to create a home library of works. Moreover, as technology has improved digital recordings enable the creation of substitutionary copies in a way not possible at the time of Betamax. 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 because there is unquestionably now an existing market for purchasing television shows. Compare *Sony* with *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) and *Mai Systems Corp v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that loading software on to computer’s temporary memory infringes its copyright). Even at the time *Sony* 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).

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protections themselves by destroying commercial markets all together. At the same time, Litman's and others' vision of permissible uses is a highly constrained one. A use is a personal one, in Litman's view, only if the use is made for "herself, her family or her close friends" and is private.

Finally, and most importantly, the personal use literature to date has failed thus far to develop a fleshed out legal theory for why personal uses should be protected at all and which uses should be permitted and which should not. Litman grounds her proposal in the Progress Clause itself and copyright history, rather than on any broader theoretical or constitutional foundation. My liberty-based approach provides the opportunity to establish such a foundation for personal uses.

The promotion and protection of "personhood" and "autonomy of self" have long been considered constitutional goals set forth in the substantive and procedural protections of the "liberty" provided for in the Fifth and Fourteenth Amendments. Even though procreation, marriage, child-rearing, and more recently intimate association have often dominated substantive due process analysis, 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 universe, and of the mystery of human life."¹⁰⁴ Copyrighted works in certain circumstances make up a significant part of the meaning and existence of individuals and accordingly define their "personhood."¹⁰⁵ What a person reads has long been considered a fundamental piece of who that person is. As Justice Marshall said "[w]hat [a person] eats, or wears, or reads" all sit "close to the heart of the individual."¹⁰⁶ Without some liberty to use copyrighted

¹⁰⁴ 505 U.S. 833, 851 (1992).

¹⁰⁵ *Id.*

¹⁰⁶ *Kelley*, __U.S. at 252-53 (Marshall, J., dissenting)

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works without permission (and without payment) a person cannot be said to truly be in “possession and control of his own person.”¹⁰⁷

For some time now, the liberty interest has primarily been located in a privacy-based conception of the “right to be let alone.”¹⁰⁸ But for liberty rights to mean anything in the context of copyrighted works, something more affirmative in nature than a mere “right to be let alone” must be protected. The Supreme Court has described the liberty interest as one which protects individuals and their ability “to be free in the enjoyment of all [their] faculties.”¹⁰⁹ 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 and use of copyrighted works. When an individual describes his own reality, he cannot help but refer to works created by others. 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. Individuals personally invest in copyrighted works and when they do they acquire some liberty interest in using them.

Copyright holders cannot own reality. 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. My goal in this section is to highlight some examples when I think that the liberty interest should protect uses of copyrighted works from liability for copyright infringement. I defer a more detailed discussion of limits on this principle to the next section.

I will now consider a number of non-exclusive examples of how copyrighted works form part of our personal identity – specifically in the context of music, personal letters, diaries, and religious texts. 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

¹⁰⁷ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

¹⁰⁸ *See Olmsted v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“([T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.”); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁰⁹ *Lochner v. New York*, (Harlan, J., dissenting 1905).

relationship to an individual's constitutionally-guaranteed liberty interest.

A. 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 refer to such songs 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 individual uses of songs or even mixes of such songs because to do so is truly to control a person's identity.

Consider 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.¹¹⁰ 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. One example that I recently saw was a MySpace page of an out and proud gay man who in addition to posting a vibrant rainbow flag on his page has the song “Proud” by the band Queer as Folk playing on his page.¹¹¹

¹¹⁰ The suggestion came from Ally McBeal's therapist – played by Tracey Ullman. Ally ultimately selected “I Know Something About Love” as her theme song.

¹¹¹ See <http://profile.myspace.com/index.cfm?fuseaction=user.viewprofile&friendid=65173388>.

Consider also the example from the Introduction of the woman who tries to work through her experience of being raped by playing on her publicly accessible blog (her online diary) the Journey song that had been on in the background when she was raped. Her use is an identity-based one in which she is describing and engaging with her own lived experience. Current First Amendment and internal copyright doctrines provide her little protection for her use.

In some instances copyrighted works are not personally unique to an individual, but form part of a broader component of our culture or subculture. 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.¹¹² Likely throughout your life at every birthday celebration that song has been sung to you and your intimates. Over the course of time it forms part of your personal and cultural identity.

The liberty approach protects these personally expressive uses of music – even though they use the actual expression of copyrighted works in their entirety, the uses are not transformative, and have little role in the democratic project. Both the market-focused fair use regime and the First Amendment approaches provide little assistance to an individual 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. As I will discuss in Part IV, under the liberty approach, an individual must still initially pay for a song, but should not have pay again for posting it, performing it or changing it to a digital format.

B. Autobiographies and “Private” Letters

Another area where a liberty interest should protect uses is the publication of personal letters when those letters were received by the author of a new 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-

¹¹² 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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known figures, even when the recipient of the letter has given permission for its publication.¹¹³ Consider the case of *Sinkler v. Goldsmith*.¹¹⁴ In that case, Lorraine Sinkler sought a declaratory judgment that she could publish letters that she had received from Goldsmith. At the time of the lawsuit, Goldsmith was dead and his wife sought to stop the publication of letters he had sent to Sinkler. Goldsmith had founded a non-traditional spiritual/religious movement, *The Infinite Way*. Sinkler had joined the movement and developed an extensive correspondence and relationship with Goldsmith. In fact, Sinkler began ghostwriting monthly letters and other works for Goldsmith 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 Goldsmith. The court also rejected a fair use defense because the letters were unpublished.¹¹⁵ A liberty approach would have allowed Sinkler to publish the letters that she had received as part of her personal telling of her life story – a life that included not just the fact of those letters but their content.

Consider also the diaries of Anais Nin in which she details, among other things, correspondence between her and the writer Henry Miller.¹¹⁶ A First Amendment approach to cases like *Sinkler* and Anais Nin's diaries treats the copyright holder's interests as primary and concludes that any public interest in the underlying material could be achieved through synopsising the underlying ideas and facts of the letters. The liberty 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

¹¹³ 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. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹¹⁴ 623 F. Supp. 727 (D. Ariz. 1985).

¹¹⁵ *Id.* The fair use defense is almost always rejected when a work is unpublished. See, e.g., *Harper & Row*.

¹¹⁶ See *Diaries of Anais Nin*. 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).

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.¹¹⁷

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 and then make it public. A user's liberty interest does not extend to a right or privilege of *first* access.¹¹⁸ Access must have already been granted. The right of first communication remains sacrosanct.

C. 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 their works.¹¹⁹ One of the contributors to the blog is an avid reader of *The New Yorker* 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 stories in *The New Yorker*. He catalogued each story, by title, author, date of issue and provided a synopsis of the story. Suppose *The New Yorker* decided to sue either on the basis that he copied the underlying work or that he created a derivative work.¹²⁰ Should a copyright

¹¹⁷ Her right does not extend to a third party author, though she could use a publisher to put out the work.

¹¹⁸ There may, however, be a right to continued access once initial access is given.

¹¹⁹ <http://www.themillionsblog.com/2006/01/year-in-reading-new-yorker-fiction.html>.

¹²⁰ Derivative works are those which are based on an original work but which are not substantially similar to the original; for example, sequels, merchandizing etc.

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action by the magazine be successful? Several cases suggest that there could be liability for copyright infringement in such a case.¹²¹ Similar issues have arisen with other blogs – some blogs, for example, aggregate news stories from multiple sources or catalogue episodes of favorite TV shows – in each instance the websites have been held liable for copyright infringement.¹²²

I contend that the blogger, 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 motivated by his intent to document and describe his lived experiences.

Identity-based uses can involve images, as well as words and music. Consider the example from the Introduction – the one in which Samantha Ronson, Lindsey Lohan’s girlfriend, posted to her MySpace page a paparazzo’s photograph of her and Lohan kissing. Under current copyright law, Ronson violated the photographer’s copyright by posting the picture without permission.¹²³ Neither the fair use doctrine nor the First Amendment provides Ronson a likely defense, but a liberty interest approach establishes Ronson’s right to post a picture documenting her own life on her own webpage.

When an individual is documenting his or her own life, the privileges of copyright holders cannot prevent such uses of their copyrighted works. This is true whether the use is private or public, commercial or not.

Copyright holders have the exclusive right to prepare derivative works. 17 U.S.C. § 106.

¹²¹ *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).

¹²² See *supra* note __.

¹²³ I note that Rohan and Lohan’s right of publicity is not violated because there would be a successful newsworthiness/First Amendment defense by the photographer.

D. 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.¹²⁴ Moreover, most religious texts for more recently developed religions are still 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.¹²⁵ 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.¹²⁶ When an individual's free exercise of religion is implicated, the use of copyrighted works unquestionably implicates a liberty interest because one's religious faith and beliefs are fundamental aspects of an individual's identity.

Consider the Ninth Circuit case, *Worldwide Church of God v. Philadelphia Church of God, Inc.*¹²⁷ A religious organization, Worldwide Church of God ("WCG") was developed by Herbert Armstrong. Armstrong wrote a book entitled *Mystery of the Ages* ("*Mystery*"). The copyright for the book was held by WCG. Two years after Armstrong's death, the WCG decided to stop distributing and publishing *Mystery* in large part because the church doctrine had changed. The new church leaders thought *Mystery* was outdated and culturally insensitive. In particular, its leaders viewed *Mystery* 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

¹²⁴ 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).
[add cites]

¹²⁵ [add scientology lawsuits].

¹²⁶ *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.").

¹²⁷ 227 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).

began using *Mystery* for its services and personal religious observance. This splinter group wanted to continue to practice the religion as originally set forth by Armstrong. Accordingly, the PCG copied portions of *Mystery* and distributed them free of charge to its adherents. WCG sued to stop PCG from copying and distributing *Mystery*. 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 and fair use approach.¹²⁸ 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 and personal identity.

IV. Implications and Limitations

Thus far, I have set forth reasons that a liberty approach is on strong theoretical ground and suggested a number of situations in which the liberty interest is raised and should insulate otherwise infringing uses from liability. In this final part, I suggest some limitations on the scope of the liberty interest as well as some implications of the proposed approach.

A. Some Limitations

All constitutional rights (and most laws) present line drawing problems for courts and scholars. If the challenges of demarcating protected and unprotected zones or balancing competing interests stood as obstacles to constitutional rights, such rights would be meaningless. Nevertheless, some limiting principles are necessary to prevent a liberty approach from destabilizing copyright law. Such accommodations have been considered elsewhere where competing constitutional rights are involved and one must consider the nature and strength of rights on both sides of the equation.¹²⁹

Substantive due process rights cannot be limitless. The Supreme Court in recent years has articulated a test restricting substantive due process rights to those that are rooted in history and

¹²⁸ See discussion *supra* Part I.D.

¹²⁹ See, e.g., *Hudgens*, 424 U.S. at 522.

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tradition.¹³⁰ The Supreme Court in *Lawrence*, however, made clear that the historical and traditional grounding of the specific right, e.g., homosexual sodomy, is less important than the theoretical grounding of those specific rights in larger longstanding historically-embraced principles such as intimate association or personal autonomy. Taking autonomy as a jumping off point provides a strong foundation for a variety of more specific rights. Limits on substantive due process should focus more on competing or conflicting interests than on initially justifying specific rights that are grounded in principles of autonomy. In the context of copyright law, the liberty interest in identity-based uses directly stems from our understanding of personhood and autonomy of self.¹³¹

When copyrighted works are used to describe one's own experiences and the use is presented as such there should be the greatest level of constitutional protection afforded such uses. 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 when there is none. The motive of the use must be an identity-driven one, not one to profit from the work of another. Such determinations of motive are made elsewhere in IP cases and throughout the law,¹³² and there is no reason to think they will be any more difficult to make in the context of copyright cases and the proposed liberty-based analysis.

Even though the motive is not to profit from the use, there can be an overall interest making a work for profit. Take for example the context of selling an autobiography that contains some letters written by someone else but sent to the writer. The autobiographer should be able to sell her work for a profit, unless the autobiography is told entirely or predominantly by another's copyrighted words.

¹³⁰ See *Glucksburg*.

¹³¹ See discussion *supra* Part III.

¹³² 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); [add ACPA & related cases].

Not every use of another's copyrighted work will raise a liberty interest sufficient to overcome copyright protection. Under a broad view of autonomy, there may be a general liberty interest in using copyrighted works, but such uses may cause a variety of harms – to copyright holders, creators and the public more broadly (if there is damage to overall copyright system). The accommodation of such competing interests will require weighting of the relative interests, as well as the likely harms derived from the uses. For reasons discussed in Part III, when a user's liberty interest is robust, the creator's competing property, speech and liberty interests are unlikely to outweigh the user's rights.¹³³

Identity-based uses of copyrighted works are at the center of the liberty interest. The liberty interest in such instances will be nearly absolute. As uses move away from these central identity-based uses, they will increasingly be less compelling when compared against the competing interests of copyright holders, creators and broader calculations of the public interest.

B. Some Implications

1. Liberty-Based Uses Do Not Require Permission

When identity-based uses are at issue, no injunctions, criminal charges or other penalties should apply. Consider the previously discussed scenario in which a woman posts the Journey song "Don't Stop Believin" to her blog. The song was playing when she was assaulted and she therefore has an unequivocal liberty-based interest to use this particular song. Journey might well decline to give permission for such a use. Musicians often refuse to grant permission to television shows and films to have its music playing during rape scenes and Journey might not want the public to form negative associations with their song. Regardless of whether she asks for permission or is denied permission, the use is a constitutionally protected one and no liability can follow her use.

But what if she decides to fictionalize her story in a semi-autobiographical webisode (or movie)? She still has a liberty-based interest in being able to describe reality, even in fiction, but the specificity of the Journey song is no longer as important. The

¹³³ See discussion *supra* Part III.

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rape scene in her webisode is no longer about her life, but about her character's life. In the context of the webisode, the song is fungible – it does not really matter whether the song is by Journey or another band – though there may be certain songs that are more appropriate than others given the themes and period of the work and the lyrics and popularity of the song. Nevertheless, there is likely an array of song choices that can be made.¹³⁴

2. *Generally Without Payment*

Scholars who have called for greater First Amendment scrutiny in copyright cases have almost uniformly suggested that such uses should be paid for in some manner – whether in advance through a licensing regime or after the fact via the assessment of reasonable royalties.¹³⁵

The modern law and economics movement has no doubt exacerbated this trend in copyright scholarship leading to a presumption that payment is always warranted. Such a conclusion, however, is out of step with long-standing principles of copyright law which has always accepted some free (as in gratis) uses. Fair uses have never been *fared* uses – if a use is a fair one, one need not ask permission to use the copyrighted work *nor* pay for that use.

Identity-based uses of copyrighted works should not be tariffed through a compulsory licensing system, reasonable royalty or other paid use approach. In the context of the Journey song, the blogger has already paid once to access the song and should not have to pay again to copy it or post it publicly to her online diary. Identity-based uses are not fungible and the individual's liberty interest justifies non-payment.

¹³⁴ I leave for another day the implications of the liberty-based approach to uses of copyrighted works in fiction, but because such uses have moved out from the heartland of identity-based uses there will need to be greater accommodation of the copyright holder's interests. I think that injunctive relief in such instances will generally not be warranted, but a compulsory licensing or reasonable royalty approach may make sense in that context in a way that it does not for identity-based uses.

¹³⁵ See, e.g., Nimmer, *supra* note __, at __; Goldstein; see also Neil Weinstock Netanel, *Impose a Non-Commercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (suggesting a non-commercial use levy on internet based uses of copyrighted works via fees on such things as internet access).

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The idea that one may have a right to use property without paying is not unique to copyright law. Even in First Amendment law (outside the copyright context), in the few instances where one can use someone else's property one need not pay for the right to do so. One can, for example, strike on private property – if the strike is directed towards the owner of that property – without paying a rental fee.¹³⁶ To the extent that there is some market harm in the context of identity-based uses of copyrighted works the liberty-based interest trumps the property interests of the copyright holder.¹³⁷

3. Entire Works Can Be Used

Given that identity-based uses are non-fungible, are there any limits on the amount of the underlying work that can be used? In some areas of the law, courts have adopted necessity-based tests to determine how much a person can use of someone else's property or quasi-property. In the context of the nominative fair use defense in trademark law, for example, a defendant can only use so much of a mark as is necessary to make his point. Such a limit in the context of identity-based uses would not make sense since there is often no specific "point" being made in such uses. Moreover, setting a necessary limit will give too much latitude to second guess identity-based uses. The relevant inquiry should instead focus on the motive of the use – if the motive is driven by identity rather than profiting from someone else's work, great latitude should be permitted for uses, including uses of works in their entirety.

The blogger's motivation to use the entire Journey song was derived from her actual experience and her effort to both describe and engage with that experience. Whether she *needed* to use that much of the song for her purposes should not be an inquiry we defer to courts. Similarly, in the case of the splinter church group, the case involving the Worldwide Church of God and the copying of the underlying religious text of its founder – the primary motivation of the copying was not to profit from the copyrighted work of another but to allow religious worship using that text.

¹³⁶ I note that sometimes public spaces require payment of a reasonable permit fee.

¹³⁷ See discussion *supra* at Part III.B.

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Again, concerns about market harm from using the entirety of the works should be dismissed when compared with the fundamental liberty interest involved.

4. As Applied v. Facial Challenges

The liberty interest has little to say about many of the facial challenges that many copyright scholars have focused their attention on, for example copyright term extensions and the restoration of copyright protection.¹³⁸ The liberty interest, however, likely would have something to say about the applicability of some of those laws in individual cases. For example, consider a violinist 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 affect his continued privilege to use that work. In fact, one of the only copyright cases permitting a substantive due process argument to proceed involved an argument that a group of artists had gained a substantive due process interest in public domain works that they had used for their work and artistic expression.¹³⁹

One area where 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,¹⁴⁰ but a

¹³⁸ See, e.g., Netanel, *Locating Copyright* (focusing on using the First Amendment to scrutinize broad changes to the Copyright Act, such as copyright term extension, but virtually dismissing the value of the First Amendment in the context of individual lawsuits).

¹³⁹ *Golan v. Ashcroft*, 310 F. Supp.2d 1215, (D. Colorado 2004), affirmed on other grounds, *Golan v. Gonzalez* (10th Cir. 2007).

¹⁴⁰ 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

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substantive due process liberty analysis might lead to a different conclusion. Otherwise the law is analogous to giving women the right to an abortion, but passing laws prohibiting all doctors from performing such procedures.

5. Rights Beyond Contract

A number of courts have permitted fair use to be limited or altered by contract.¹⁴¹ 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 have invalidated contracts for servitude; it should follow that they should also invalidate contracts that require individuals to give up fundamental aspects of their own identity.

6. Reconceptualizing Fair Use?

The liberty interest that I identify could not simply be incorporated or subsumed into the fair use analysis. 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.”¹⁴² The express fair use provision in Section 107 of the Copyright Act emphasizes these *public* justifications for uses by enumerating criticism, news reporting and teaching, but does not engage with more liberty-based and individual justifications for uses.¹⁴³

rejected a due process claim based on vagueness, not on a substantive liberty interest basis).

¹⁴¹ See, e.g., *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); but see *CBC* (8th Cir. 2008).

¹⁴² *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]

¹⁴³ 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,

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The fair use factors do a better job of protecting public, rather than individual, interests.¹⁴⁴ The first fair use factor, for example, evaluates the character and purpose of the use and favors critical uses (whether of a scholarly or creative/parodic nature) and transformative ones. The fourth fair use 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.¹⁴⁵

Fair use, at least in its current incarnation, is therefore not up to the task of protecting identity-based uses with any reliability. I therefore prefer a separate liberty interest analysis, situated outside fair use. Nevertheless, empowering courts, litigants and others to infuse the fair use analysis with consideration of not just the public, but the *individual* value of the use could be beneficial. Moreover, if copyright reform is in our future, as some have recently posited, then newly drafted fair use factors could take into consideration such individual, liberty-based uses. My goal, however, is not to revitalize fair use – something I’m deeply skeptical will be successful – but instead to provide an alternative independent framework for evaluating the legitimacy of uses that may not be protected by fair use.

Conclusion

Courts have only rarely considered liberty-based challenges in copyright cases and so far there have been few success stories. 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.¹⁴⁶ 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,

scholarship or research...[the first fair use factor] cuts in favor of the book’s publisher”).

¹⁴⁴ I am not alone in so concluding. See, e.g., Jessica Litman, *Lawful Personal Uses*, *supra* note __ at __.

¹⁴⁵ 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.

¹⁴⁶ See, e.g., Chicago Sch. Reform Bd, 79 F. Supp. 2d at __; see also *supra* note __.

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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.

The liberty approach would lead to a very different set of protected uses than the currently articulated 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. My goal here has not been to provide a single system to protect all justifiable uses of copyrighted works, but instead to provide a theoretical and constitutional fail-safe for those uses most integral to individuals.

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. 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. Even when personal uses are not political, private nor non-profit, they still are often fundamental to our personhood and our constitutional right to liberty.