2004

Copyright Under Siege: The First Amendment Front

Lackland H. Bloom Jr.
Southern Methodist University, Dedman School of Law

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by
*Lackland H. Bloom, Jr.**

I. Introduction

For the past twenty-five years, I have taught courses in both Copyright and Freedom of Speech. Until quite recently, these two tangentially-related subjects have co-existed in peaceful harmony. Over the years, I have traditionally devoted about ten minutes of Copyright class time to the free speech issue and no time at all in Freedom of Speech class to issues of copyright. That was then; the old world has changed. Now, we have collectively become embroiled in what some are calling the "copyright wars"[1], with the First Amendment (specifically, freedom of speech) as one of the central battlegrounds. In 1970, two of our leading copyright scholars argued that the internal copyright doctrines adequately reconciled copyright with freedom of speech.[2] In 1985 the Supreme Court accepted their analyses;[3] as a result, independent first amendment analysis has not played a role in copyright cases since that time.

Still, over the past decade, the law of copyright – traditionally an arcane and obscure specialty – has evolved into an extraordinarily controversial legal arena. To a significant extent, though not exclusively, this has been caused by the emerging clashes between copyright on the one hand and digital technology and the internet on the other. Some see copyright as the aggressor in the copyright wars, guilty of threatening the digital revolution, the internet, information policy, privacy, freedom of speech and the public domain.[4] Much of this assault on copyright is culturally driven by the Internet's champions. Inevitably, this cultural challenge is now duly reflected in legal argument as well. As copyright law has generated more and more contro-

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* Professor of Law, Dedman School of Law, Southern Methodist University; B.A., Southern Methodist University, 1970; J.D., University of Michigan, 1973. This paper was presented on March 19, 2004 at the Internet and Intellectual Property Symposium at the Dedman School of Law.

1. Peter Yu, *The Escalating Copyright Wars*, 32 Hofstra L. Rev. 907 (2004); Jessica Litman, Digital Copyright (2001) (Chapter 10 "The Copyright Wars").

2. Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L.Rev. 1180 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); *see also* Robert Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979).

3. Harper & Row Publishers, Inc. v Nation Enters., 471 U.S. 539, 556-560 (1985).

4. *See, e.g.*, Jessica Litman, Digital Copyright 151-195 (2001); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 355-360, 400-426 (1999).

versy, several legal scholars have come forth to challenge the traditional reconciliation of copyright and freedom of speech.[5]

Among the aforementioned scholars, whom I will collectively refer to as the "free speech critics", virtually all of them reject the traditional reconciliation of copyright and freedom of speech – though some do believe that the two fields can be harmonized on other grounds. While I regard this genre of scholarship as quite thought-provoking, to the extent that it rejects the traditional reconciliation of copyright and freedom of speech, I ultimately find it unpersuasive. Fortunately, I am not alone; so does the United States Supreme Court, as well as nearly every other federal court that has had occasion to consider the issue.

In a nutshell, my thesis is that the Court's recent opinion in *Eldred v. Ashcroft*[6] should properly be read as the resounding rejection of practically all of the modern first amendment-based copyright challenges. The time has come for the free speech critics to return to the drawing board and, if anything, re-examine free speech doctrine rather than copyright. Moreover, and contrary to recent criticism, the Court's re-endorsement of the traditional reconciliation of copyright and free speech is correct, sensible, and persuasive.

II. Why is Copyright so Controversial Now?

For most of its existence, copyright has been a relatively obscure specialty practiced by a small and somewhat isolated group of attorneys. That is no longer the case. Today most major law firms cannot afford not to have copyright specialists. This change is largely the result of the digital revolution. When widespread computerization, especially at the personal level, swept the country in the early nineteen eighties, copyright began to assume greater prominence because it was the easiest and the cheapest method of

5. *See generally*, Alfred Yen, *Eldred, The First Amendment, and Aggressive Copyright Claims*, 40 Hous. L. Rev. 673 (2003); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Term Extension Is Unconstitutional*, 36 Loy. L. A. L. Rev. 83 (2003); Edward Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Lawrence Lessig, *Copyright's First Amendment* ,48 U.C.L.A. L. Rev. 1057 (2001); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has In Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation,* 42 B.C. L. Rev. 1 (2000); Benkler, *supra* note 4, at 354; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L. J. 2431 (1998); Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L. J. 147 (1998); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283 (1996); Jed Rubenfeld, *The Freedom of Imagination and Copyright's Constitutionality*, 112 Yale L. J. 1 (2002).

6. Eldred v. Ashcroft, 537 U.S. 186 (2003).

obtaining legal protection for software. Then came compact disks, cd-roms, advanced video games, the internet, dvds, mp3s and a host of other digital technological developments of which I am unaware or have forgotten. All of these provided new means by which copyrightable subject matter could be exploited. Much of the underlying content was already protected by copyright prior to digitalization. Digitalization, especially in conjunction with the introduction of the general public to the internet, changed the world of copyright in at least three very significant ways. First, it introduced valuable new ways in which copyrighted material could be exploited. Second, it made it possible for anyone with a computer and subsidiary equipment to make an enormous number of perfect copies of a work inexpensively and anonymously. Third, it made it possible to gather, share, store and distribute information including copyrighted works at a speed, on a scale and with an ease and efficiency never before known. So the digital revolution presented an extraordinary opportunity to exploit copyright as well as an enormous threat of piracy at the same time. This resulted in the introduction of the ordinary person to the law of copyright to an extent that had never before occurred.

Of course, most people had been utilizing copyrighted works on a daily basis but never before had they had the opportunity to gain access to them so readily without payment nor had they the capacity to reproduce and distribute copyrighted works with such ease. In other words, the temptation to infringe became all but irresistible, especially since many did not realize they were infringing or, at the very least, could safely assume that no adverse legal consequences would attach to their conduct. In many instances, the copyright owner could not care less if people copied his work. Indeed, many copyright owners would be flattered that someone actually found their work worth copying. This is hardly the case with commercially distributed entertainment works such as musical recordings, movies and video games, as well as much of the computer application software industry. There, the threat to the copyright owner is great, and the financial stakes are high.

Moreover, widespread public use of the internet gave rise to a subculture which placed an extraordinarily high value on efficient access to and transfer of information. This value is embodied in the popular slogan "information wants to be free."[7] The value of speedy and relatively costless transfer of information is in high tension, if not outright conflict, with copyright. Suddenly, copyright is not simply an obscure legal specialty, but rather a serious impediment to the future of wise information policy. Copyright's critics can easily point to an appealing villain—a wealthy, greedy soul-less Hollywood, especially the music industry with its long standing image of exploiting both artist and consumer. There is delicious irony in the fact that the entertainment industry, which through its products has long championed the courageous rebel who defies the establishment, now finds itself in the position of the very establishment under assault by the anti-copyright rebels.

7. STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT M.I.T. 202 (1987).

Indeed, if the critics of copyright are to put a face on the copyright world, it would be the face of Mickey Mouse.[8] Mickey has a pleasing face, at least to four-year olds, but it is also a face that seems to represent everything that is wrong with copyright to its critics—vast wealth and an intransigent determination to enforce intellectual property rights to the maximum. Beyond that, the copyright on Mickey Mouse would have entered the public domain absent the Copyright Term Extension Act of 1998; thus, it is often referred to derisively by its critics as the Mickey Mouse Act.[9]

The copyright wars truly exploded into the public consciousness, however, with the development of mp3 digital compression technology that made the widespread sharing of music files easy and hence, inevitable.[10] Peer-to-peer file sharing systems such as Napster appeared on the internet, and copyright infringement, to an extent perhaps never imagined, became common place. Although Napster was quickly vanquished in court,[11] more decentralized file sharing systems which may be much more immune to legal challenge followed in the decisions wake.[12]

It is unfair to suggest that copyright is simply playing defense against unfriendly critics. Two recent amendments to the Copyright Act which add significant protection to copyright holders, have also escalated the conflict. The first is the Copyright Term Extension Act of 1998 (CTEA), also known as the Sonny Bono Act, which extended copyright terms by twenty years and gave that protection to all works already in copyright as well.[13] The second is the Digital Millennium Copyright Act ("DMCA"), which made it a crime to circumvent a system designed to deny access to a copyrighted work or to manufacture or distribute a product whose primary use is circumvention of a technological device designed to protect a right of a copyright owner.[14] This legislation was the entertainment industry's legal response to the threat of widespread digital piracy of its product. First, the industry attempted to pro-

8. *See, e.g.*, Yu, *supra* note 1, at 923; Benkler, *supra* note 4, at 21 (worrying about "a world dominated by Disney, News Corp., and Time Warner"); Lessig, *supra* note 5, at 1069 (noting that Disney would like to have perpetual protection for Mickey but relies heavily on public domain works).

9. Yu, *supra* note 1, at 923.

10. Indeed, this may be the only time that a copyright issue has commanded the cover of Newsweek.

11. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see also* In re Aimster, 334 F.3d 643 (7th Cir. 2003) (affirming the grant of a preliminary injunction against a peer-to-peer file sharing system).

12. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

13. Copyrights – Term Extension and Music Licensing Exemption Act, Pub. L. No. 105-298, §§ 102(b), (d), 112 Stat. 2827-28 (1998) (amending 17 U.S.C. §§ 302, 304).

14. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2863 (1998).

tect its copyrighted works in digital form through encryption; but recognizing that its encryption devices would inevitably be hacked, it obtained legal sanction against both circumvention and the manufacture and distribution of circumvention devices. Copyrights' critics lobbied intensively against each of these amendments to the Copyright Act, but achieved little success.[15]

In a sense, a full-blown culture war has developed over the role of copyright in our legal system. A very significant subculture exists that questions the scope and often the very propriety of copyright.[16] This subculture seems to be young, educated, and technologically skilled. The entertainment industry has embarked on a massive public relations campaign designed to emphasize the value of copyright protection.[17] The industry understands that if it loses the cultural war it will, over time, lose the legal war as well.

III. The Copyright-Free Speech Conflict/Controversy

However, for my purposes, this is all a prologue. I intend to focus on the legal war. Specifically, I will focus on one aspect of the legal war: the clash between copyright and the freedom of speech. Obviously, there is some interface between copyright and freedom of speech. Much, though by no means all, of what copyright protects is expression which would seem to fall within the domain of the First Amendment. So the layperson might well wonder why copyright protection does not violate the First Amendment. At least since the early seventies, academics have addressed the issue of the tension between copyright and freedom of speech. Until quite recently, the overwhelming weight of academic authority has concluded that copyright and freedom of speech can, in fact, coexist in harmony.[18] Moreover, the federal courts have been dismissive, if not hostile, to free speech arguments in copyright cases.[19] Within the past five years, however, there has been a significant outpouring of academic writing arguing that contrary to conventional wisdom, the conflict between copyright and freedom of speech is severe and that some aspects and applications of copyright law should be considered unconstitutional.[20]

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15. *See* Litman, *supra* note 4, at 122-45.

16. *See* Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 Yale L.J. 283, 336-341 (1996) (discussing the minimalist critics of copyright).

17. *See* Yu, *supra* note 1, at 921.

18. Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and press?*, 17 U.C.L.A. L. Rev. 1180 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); Robert Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979).

19. *See, e.g*, *Eldred*, 537 U.S. at 186; *Harper & Row Publishers, Inc.*, 471 U.S. at 539; Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001); *A & M Records Inc.*, 239 F.3d at 1004.

20. *See supra* note 5.

Since most of those articles were published, First Amendment arguments against copyright were rejected in two very important cases *Universal Cities Studios, Inc v. Corley*[21] in which the Second Circuit upheld an injunction issued under the DMCA prohibiting the posting on a web site of software which would circumvent the DVD encryption code, and *Eldred v. Ashcroft*[22] in which the Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act. These two decisions hardly end the argument over the copyright/ first amendment conflict, however, much in the reasoning of these cases rejects many of the arguments recently set forth by the academic critics, several of whom filed amicus briefs on behalf of the losing parties in *Corley* and *Eldred*. As such, while it would have been very difficult to convince a federal court three years ago that the First Amendment placed significant limitations on copyright law, it will be even harder today.

The potential conflict between copyright and the First Amendment was first addressed by the authors of two of the leading treatises on copyright, Melville Nimmer[23] and Paul Goldstein[24] in articles in the early seventies. Nimmer was no stranger to the First Amendment; having already written several influential free-speech articles,[25] he went on to argue and win *Cohen v. California* before the United States Supreme Court.[26] Essentially, Nimmer and Goldstein contended that copyright does not raise serious First Amendment problems because there are internal limitations inherent to copyright that effectively diffuse the tension between the two areas. Specifically, Nimmer relied heavily on the idea/expression dichotomy, which ensures that copyright protects the latter but not the former, as well as the fact that copyrights are protected for only a limited time,[27] while Goldstein emphasized a number of doctrines including the idea/expression dichotomy, but especially fair use, which provides a privilege for certain socially important uses of copyrighted material.[28] In addition, both authors pointed out that the very purpose of copyright is to encourage the creation and distribution of material that contributes to the public debate and storehouse of knowledge which the First

21. *Corley*, 273 F.3d at 429.

22. *Eldred*, 537 U.S. at 186.

23. Melville Nimmer, *supra* note 2.

24. Paul Goldstein, *supra* note 2.

25. *See, e.g.*, Rodney Smolla & Melville Nimmer, Smolla and Nimmer on Freedom of Speech (2d 1990); Melville Nimmer, *Is Freedom of Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L J 639 (1975); Melville Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV (1973); Melville Nimmer, *The Right to Speak from Times to Time, First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

26. *See* Cohen v. California, 403 U.S. 15 (1971).

27. Nimmer, *supra* note 2, at 1189.

28. Goldstein, *supra* note 2, at 988.

Amendment protects.[29] Thus, a world absent of copyright would also necessarily be a world significantly poorer of expressive freedom.

In the two major Supreme Court opinions addressing the copyright /free speech tension, *Harper & Row Publishers, Inc. v. The Nation*[30] and, more recently, *Eldred v. Ashcroft*,[31] the Court strongly endorsed the idea that, in fact, these internal copyright doctrines work together with copyright's overall purpose and operation to diffuse the potential free speech conflict. Some copyright critics argue that these devices provide inadequate protection to freedom of speech.[32] I disagree with them. I think that Professors Nimmer and Goldstein and the United States Supreme Court have essentially got it right.

There are two primary ways in which copyright might come into conflict with the First Amendment. Arguably, copyright might violate the First Amendment, if copyright places off limits material that is essential to the exercise of the right to freedom of speech. Alternatively, copyright could also violate the First Amendment, if it prevents access to material that is in the public domain. Those who believe that copyright and freedom of speech are presently in conflict, tend to believe that copyright interferes with one or both of these interests. I will examine these claims in detail. First, however, it should be noted that the issue is not entirely open. Despite the outpouring of claims over the past five years that copyright infringes the First Amendment, just last year, a very solid majority of the Supreme Court in *Eldred v. Ashcroft* clearly re-endorsed the traditional rationale for why copyright does not present serious First Amendment problems. A broad reading of the *Eldred* opinion's disposal of the copyright free speech conflict might conclude "Game Set and Match Copyright!" That would probably be premature, in that *Eldred* did not address every conceivable way in which the copyright/ free speech conflict might arise.

Eldred was a case that addressed the question of whether copyright unduly infringed on the public domain, specifically, by extending new as well as existing copyright terms for an additional twenty years.[33] The plaintiff's strongest arguments against CTEA were based, not on the First Amendment, but rather on the Copyright Clause itself. Specifically with respect to the extension of existing copyrights, the plaintiffs argued that this furthered no legitimate Copyright Clause purpose, in that there was no need to offer any

29. Nimmer, *supra* note 2, at 1186; Goldstein, *supra* note 2, at 990.

30. *Harper & Row Publishers, Inc.*, 471 U.S. at 556-59.

31. *Eldred*, 537 U.S. at 219-21.

32. *See, e.g.*, Netanel, Skein, *supra* note 5, at 13-37 (arguing that the idea/expression dichotomy and fair use are insufficiently protective of freedom of speech and that the free speech benefits of copyright have been overstated); Tushnet, *supra* note 5, at 8-26 (arguing that the idea/expression dichotomy and fair use provide insufficient protection to freedom of speech).

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

further incentive to these authors since the works had already been created.[34] Speaking for the majority, Justice Ginsburg rejected this argument; she explained that the extension to existing copyright holders was justified as a means of creating an incentive to restore deteriorating works, and that the extension also provided incentives by way of harmonizing United States copyright law with that of the European Union and ensuring copyright producers and owners that they would be treated equitably when the law was revised.[35] In addition, she pointed out that Congress has always given existing copyright holders the benefit of term limit extensions.[36]

Turning to the First Amendment argument, Justice Ginsburg noted that the fact that the "Copyright Clause and the First Amendment were adopted close in time . . . indicates that in the framer's view, copyright's limited monopolies are compatible with free speech principles."[37] Moreover, "copyright's purpose is to promote the creation and publication of free expression."[38] Justice Ginsburg then explained how the idea/expression dichotomy and the fair use doctrine accommodate the First Amendment.[39] Finally, the Court distinguished *Turner Broadcasting System v. FCC*,[40] a case upon which the challengers in *Eldred*, as well as recent copyright critics,[41] had relied heavily. The Court pointed out that the First Amendment problem in *Turner* arose because the "must carry" rules compelled speech – by forcing persons to reproduce the speech of others – whereas copyright does not; rather, copyright merely prevents a person from exploiting someone else's speech.[42] The Court did note that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches,"[43] indicating, at least, that there could conceivably be cases in which the use of another's copyrighted material would implicate the First Amendment. Despite this concession, however, in the very next sentence the Court went on to conclude that "to the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."[44] While quite properly rejecting the court of appeals' conclusion,

34. *Id.* at 210-11.

35. *Id.* at 204-06.

36. *Id.* at 204.

37. *Id.* at 219.

38. *Id.*

39. *Id.* at 219-20.

40. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

41. Netanel, Skein, *supra* note 5, at 54-55; Tushnet, *supra* note 5, at 63; Benkler, *supra* note 5, at 371-77.

42. *Eldred*, 537 U.S. at 220-21.

43. *Id.* at 221.

44. *Id.*

which regarded copyright as "categorically immune from challenges under the First Amendment,"[45] it went on to say that when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[46]

In its First Amendment analysis, the *Eldred* Court relied primarily upon its earlier opinion in *Harper & Row Publishers, Inc. v. Nation Enters.*[47] The recent First Amendment critics of copyright could readily explain away *Harper & Row* on the grounds that threats posed by copyright, as well as First Amendment doctrine, had changed sufficiently in the two decades since *Harper & Row* to significantly exacerbate the copyright/free speech conflict.[48] Moreover, the *Harper* Court did not have the benefit of recent scholarship, which argues that copyright often does abridge freedom of speech. Professor Lessig, one of copyright's harshest critics, who represented *Eldred*, and some of the other scholars who have written that copyright raises serious First Amendment questions, filed briefs on Eldred's behalf.[49] However, the Court simply rejected this argument.[50] The *Eldred* Court's strong reaffirmation of the traditional resolution of the copyright/free speech tension should come as a devastating blow to those who have argued that the Court should take a fresh look at the problem and reconsider existing doctrine. Absent any significant legislative change that would qualify as an alteration of "the traditional contours of copyright protection,"[51] which the DMCA may well be, the Court has served notice that it and the lower federal courts will resolve any tension between speech and copyright as they have in the past, through the internal safeguards of copyright: the idea/expression dichotomy and fair use.

IV. ELDRED WAS CORRECT

The *Eldred* Court was correct in concluding that the combination of the idea/expression dichotomy and fair use remains a more than adequate means of protecting free speech against abridgment by copyright in the run of the mill case. Arguably, the enactment of the DMCA constitutes the type of alteration in the "traditional contours of copyright" that requires First Amendment scrutiny; however, even there the threat to freedom of speech is not obviously severe. It should be remembered that providing copyright protection almost certainly results in a net increase—usually a significant net

45. *Eldred*, 537 U.S. at 220-21.

46. *Id.*

47. *Id.*; *see Harper & Row Publishers, Inc.*, 471 U.S. at 539.

48. *See, e.g.*, Netanel, *supra* note 5, at 5; Lessig, *supra* note 5, at 1069-70.

49. *See, e.g.*, Brief of Jack M. Balkin, Yochai Benkler, Burt Neuborne, Robert Post, and Jed Rubenfeld as Amici Curiae in Support of the Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

50. *Eldred*, 537 U.S. at 218-19.

51. *Id.* at 221.

increase—in the amount of expressive material that is produced and made available to recipients either free of charge or for an affordable fee. First Amendment challenges to copyright generally come in two different forms. One challenge is that even with the idea/expression dichotomy and the application of fair use, copyright precludes a person from using material for expressive purposes where the First Amendment should permit such use. Second, copyright might be challenged on First Amendment grounds to the extent it precludes material from falling into the public domain or allows copyright holders to protect much material.

A. Should There Be a First Amendment Right to Use Copyrighted Expression. . .At Least Sometimes?

As noted earlier, one common argument for greater First Amendment scrutiny of copyright centers around the case in which a potential speaker claims that he or she needs to copy, distribute, or display the copyrighted work of another in order to adequately exercise the constitutional right of freedom of speech.[52] The potential liability and threat to freedom of speech by copyrighted material is *de minimis* for several reasons. First, the overwhelming amount of such usage goes undetected. No doubt thousands of time a day, someone e-mails a newspaper column to a friend or posts a cartoon on a traditional bulletin board or web site. Either of these acts would technically violate copyright, but would rarely come to the copyright owner's attention. However, if it were brought to their attention, most copyright owners would not object either because they would be flattered that someone concluded that their work was worth utilizing, would be content that they had already been adequately compensated for creation of the work, would consent to the non-commercial use, or would consider enforcement to be too much trouble. Thus, a great deal of copyrighted work is commonly used by others without any real threat of liability. That is not to say that the potential of liability is irrelevant. Some people will be deterred from using copyrighted material out of legal concerns, especially if they work for an organization that has adopted an intellectual property policy. Of course, others that make small scale, non-commercial use of the copyrighted material will occasionally be sued.

From a First Amendment perspective however, the question is not whether it is convenient to use someone else's copyrighted material to make a point. Rather, the question is whether it is necessary and whether, despite copyright, it is still legally permissible. This is where the internal copyright doctrines of idea/expression dichotomy and fair use come into play. As Professor Nimmer argued over thirty years ago, it is the exception rather than the rule where someone needs to employ the expression of another as opposed to

52. *See, e.g.*, Netanel, *supra* note 5, at 15-16; *see also* Tushnet, *supra* note 5, at 8-16 (arguing that there may be cases in which a speaker needs to use the copyrighted speech of another to make his or her point).

the ideas, in order to adequately make a point.[53] Nimmer identified certain newsworthy pictures as an example, citing the Zapruder film of the Kennedy assassination as well as photographs of the My Lai massacre.[54] This calls up the old adage that one picture is worth a thousand words and prompted Professor Nimmer to argue that perhaps there should be a news photo exception to copyright liability.[55] If the underlying idea is not conveyed adequately without the use of a copyrighted photograph and there exists a significant social reason why the idea should be conveyed, fair use properly understood should be adequate to fill the gap. Nimmer didn't believe this would be the case because he did not think fair use should apply where there was clear, commercial harm to the copyright owner.[56] The codification of the fair use doctrine in 17 U.S.C. § 107[57] clearly rejects this reading of fair use as does subsequent Supreme Court precedent,[58] which emphasizes that commercial harm is only one factor in the fair use equation and not necessarily outcome determinative.

How often will it be necessary for someone to use the copyrighted expression of someone else to adequately exercise First Amendment rights? Certainly occasional quotes will be justified either as *de minimis* or fair use and should not present a problem. As a general rule it should follow that the lengthier the copyrighted work, the easier it should be to rewrite without sacrificing the underlying idea. While most of us are unable to turn a phrase nearly as well as George F. Will or Maureen Dowd, the First Amendment has not been interpreted to demand that speakers are entitled to the best or most effective means of expression.[59] Free speech, though a very important right, has always been balanced against other rights and significant societal interests. Occasionally, the argument is made that some quality of a writer, be it manipulation,[60] hatefulness[61] or stylistic brilliance[62] cannot adequately be

53. Nimmer, *supra* note at 2, at 1192.

54. *Id.* at 1197-1200.

55. *Id.*

56. *Id.* at 1200-01.

57. *See* 17 U.S.C. § 107 (2000) (listing the four primary fair use factors, including harm to the copyright holder).

58. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584-86, 593-94 (1994) (holding that commercial nature of use does not raise a presumption against fair use and noting plaintiff's harm as only one of many factors to consider).

59. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (noting that the First Amendment precludes any statutory right to publicly reply to critical editorials); *see also* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1972) (noting that there is no First Amendment-based right of network television access).

60. *See* New Era Publ'ns Int'l ApS v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (denying fair use where it was ar-

captured other than by lengthy verbatim quotation.[63] As a factual matter, these claims are open to serious question. It is not at all obvious that the user of the copyrighted material, within the boundaries of quotation and paraphrase permitted by fair use, could not convey the essence of the copyrighted work without infringing. At the very least, those instances in which this is not the case are almost certainly the rare exception rather than the rule. Fair use properly applied should ordinarily protect most, if not all, such instances.

Free speech critics[64] of copyright often cite *Cohen v. California* for the proposition that words are not interchangeable and that they often have emotive as well as cognitive significance.[65] *Cohen* is a very significant free speech opinion. In *Cohen*, the Supreme Court invalidated a California law which was applied to punish the plaintiff for wearing a jacket bearing the words "Fuck the Draft."[66] While the *Cohen* Court's conclusions that words are not fungible remains true and important, the case clearly cannot stand for the proposition that a speaker has unlimited discretion to choose whatever language he desires (including the use of copyrighted work) to convey his message. Free speech case law in the areas of campaign finance,[67] broadcast regulation,[68] defamation[69] and obscenity[70] illustrate that a speaker is not

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gued that extensive quotations from an author's diary were necessary to illustrate his devious nature).

61. Houghton Mifflin Co. v. Noram Publ'g Co., 28 F. Supp. 676 (S.D.N.Y. 1939) (finding fair use did not permit verbatim translation of Hitler's *Mein Kempf*).

62. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. year), *cert. denied*, 484 U.S. 890 (1987) (holding that fair use does not cover lengthy quotations when used in order to capture famous author's literary style).

63. *See* Netanel, *supra* note 5, at 14-22 for the argument that the rejection of fair use in these cases should have raised serious First Amendment questions.

64. *See, e.g.*, Baker, *supra* note 5, at 897; Tushnet, *supra* note 5, at 8; Ruberfeld, *supra* note 5, at 14-15.

65. *See Cohen*, 403 U.S. at 26.

66. *Id.* at 16.

67. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976) (finding that federal election law could regulate, and in some instance prohibit, "express advocacy" of a candidate such as "Vote for Candidate X", but could not regulate general-issue advocacy in the absence of those "Magic words").

68. FCC v. Pacifica Found., 438 U.S. 726, 776 (1978) (finding an FCC broadcast licensee could be sanctioned for broadcasting comedy recording containing indecent language).

69. Gertz v. Robert Welch, Inc., 418 U.S. 323, 392-93 (1976) (holding that a defendant may be held liable for defamatory speech, but only upon showing proof of fault).

70. Miller v. California, 414 U.S. 15, 43 (1973) (finding that criminal punishment may be imposed for speech that is legally considered to be obscene).

completely free to choose whatever language best conveys his message when doing so flies in the face of a substantial or compelling state interest. Protection of copyrighted material is just such an interest.

The idea/expression dichotomy has been attacked on the ground that it is simply too vague and uncertain to provide adequate protection of freedom of speech where clarity and fair notice are prized.[71] The "void for vagueness" doctrine itself applies exclusively to criminal prosecutions[72] and is rarely the case in copyright. It is true that the line between idea and expression is notoriously indeterminate. However, the line between protected and unprotected speech does, in fact, sometimes turn on whether or not speech falls on one side or the other of the line that is imprecise at the margin. Obscenity[73] and indecent speech[74] are two examples. Even so, if the idea/expression dichotomy were the only buffer that copyright provided between protected speech and liability for infringement, then perhaps the uncertainty of the standard would in fact raise legitimate constitutional concerns. But it must not be forgotten that in those instances in which it has been established that a defendant did use the copyright owner's protected expression, rather than merely his ideas, the fair use defense will almost inevitably provide a second line of defense. I have argued that Professor Nimmer and the Supreme Court are correct in believing that the idea/expression dichotomy goes a long way toward obviating any free speech problems presented by copyright's restriction on the use of protected expression without consent of the copyright owner. That, of course, is only half of the equation. If anything, the back stop of the fair use doctrine is even more significant in ensuring that copyright law does not trample free speech values. Fair use, a judicially-developed doctrine now legislatively incorporated in section 107 of the 1976 Copyright Act, was explicitly designed to ensure that, in many instances, members of the public have the right to use copyrighted material without the consent of its owner in cases of socially-beneficial purposes. The values protected by fair use are, to a very significant extent, the same or similar to those values that are also protected by the First Amendment.

At the outset, section 107 states that the fair use doctrine is especially protective of uses made for "purposes such as criticism, comment, news reporting, teaching . . . scholarship or research."[75] These are types of uses that clearly are highly valued by freedom of speech as well. Section 107 then lists four factors to weigh when determining whether a specific use of copyrighted work is fair: (1) the nature of the copyrighted work, (2) the purpose of the use, (3) the amount of the work used, and (4) the harm suffered by the

71. *See* Volokh & McDonnell, *supra* note 5, at 2445-52; Tushnet, *supra* note 5, at 20-24; Yen, *supra* note 5, at 675-76.

72. *See, e.g.*, Kolender v. Lawson, 461 U.S. 353, 357 (1983).

73. *Miller*, 413 U.S. at 23.

74. *Pacifica*, 438 U.S. at 735, 737-38.

75. 17 U.S.C. § 107 (1976).

copyright owner.[76] A careful application of these factors will usually do the work to serve any purposes that an independent First Amendment analysis would accomplish. Works of a factual nature, for instance, where there would be a high First Amendment interest in access to the information, will be more readily subject to fair use.[77] A use that is for purposes of research, criticism, informing the public or productive scholarship will also be more likely to support the fair use defense.[78] As noted above, the First Amendment interest in using a large portion of a work will generally be weaker than in using selected excerpts, and the fair use doctrine recognizes this as well.[79] Finally, the fair use doctrine recognizes that a use which poses little, if any, harm to the copyright owner will often be considered fair.[80] This recognizes that the value of freedom of information should usually prevail when there is little harm to the interest protected by copyright.

Carefully applying the fair use doctrine – with the remembrance that it is meant to be applied in such a way as to accommodate free speech values to the extent possible – should greatly diffuse the tension between copyright and freedom of speech.[81] That is not to say that fair use is a mirror image of the First Amendment. Indeed, it is not. Admittedly, there certainly could be cases in which a fair use defense would be rejected while a First Amendment defense might provide protection.[82] However, they are likely to be few. Free speech copyright critics often cite a handful of cases in which they argue that the fair use defense failed, but a First Amendment defense would have or should have succeeded.[83]

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76. *Id.*

77. *Harper & Row Publishers, Inc.*, 471 U.S. at 563 (recognizing a greater fair use privilege with respect to factual works while rejecting a finding of fair use on the facts of the case).

78. *Campbell*, 510 U.S. at 578-79 (noting a greater likelihood of finding fair use in cases of transformative use). *But see*, Rubenfeld, *supra* note 5, at 16-17 for the argument that the First Amendment disapproves of differentiating between different types of speech based on content.

79. *Harper & Row Publishers, Inc.*, 471 U.S. at 565 (holding that the fact alone that a work's substantial portion was copied is evidence of work's qualitative value, to both the originator as well as the copier).

80. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (holding that, generally, plaintiff must show some type of harm in order to successfully defeat a fair use defense).

81. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264-65 (11th Cir. 2001) (recognizing, quite explicitly, the need to remain "cognizant of [the free-speech] protections [that are] interwoven into copyright law").

82. *See* Robert Denicola, *supra* note 2, at 316.

83. Netanel, *supra* note 5, at 81 (citing two cases where a First Amendment defense might have provided protection, although fair use did not); Yen, Aggres-

With regard to that handful of "fair use failure" cases, I disagree that a case-by-case First Amendment backstop is warranted, at least merely by virtue of the cases' existence. Truthfully, in some of these cases the fair use defense was properly rejected, and had a First Amendment defense been presented (assuming, of course, that one was actually available), it, too, should have likewise failed under the facts of the cases in question.[84] In other words, the First Amendment interest is simply not as strong as it is claimed to be. In other instances, the fair use defense was improperly rejected.[85] Thus, the problem lies not with the inadequacy of fair use but rather, simple recognition that with the occasional erroneous application of the fair use doctrine, or for that matter any other legal test, doctrine or defense, including a fair use (or for that matter First Amendment) defense, will be erroneously applied on occasion. This absence of perfection in adjudication hardly justifies rejecting or even rewriting the fair use doctrine.

But assuming that there are at least a few such cases in which a First Amendment defense would have provided better protection than the fair use doctrine, the question then becomes whether it would be worth engrafting such a defense into copyright in order to ensure that even these cases are decided "correctly". I do not believe that the small number of cases that might be decided differently would merit the cost of significantly increasing the difficulty of doctrinal analysis in the area. Presently, the Court has resolved the tension between copyright and free speech with a systemic approach. That is, instead of applying free speech principles in copyright cases

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sive Copyright, *supra* note 5, at 692-94 (discussing "Seinfeld aptitude test" case).

84. Professor Yen relies heavily on *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) involving a Seinfeld Aptitude Test. Yen, *supra* note 5, at 675, 694. He characterizes this as an aggressive copyright claim warranting a First Amendment defense. *Id.* The Second Circuit found upheld the finding of infringement as well as the rejection of the fair use defense. It noted that "free speech, and public interest considerations are of little relevance in this case, which concerns garden-variety infringement. . . . ." *Castle Rock Entm't, Inc.*, 150 F.3d at 146. I could not agree more. The case involved blatant infringement—a very weak and unpersuasive claim for a fair use defense. Like the court I am simply baffled by the claim that this case presented any colorable free speech interest.

85. The case most heavily relied on by Netaniel involves a parody of *Gone with the Wind*. Neil Netanel, Skein *supra* note 5, at 82. At the time of his article, the Eleventh Circuit had vacated a preliminary injunction against the parody of Gone with the Wind using a First Amendment analysis, suggesting perhaps that the First Amendment filled an important gap in the copyright system. Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001). However, the court later issued a revised opinion that reached the same result, but with a very conventional fair use analysis. Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001). Consequently, First Amendment analysis was wholly unnecessary to resolve the issue favorably to the defendant.

on a case-by-case basis, the Court has acknowledged that in the overall big picture, copyright promotes rather than discourages free speech – and that copyright has its own, relatively effective internal checks that serve much the same purpose as a separate First Amendment analysis. The Court has concluded, that, as a general matter, copyright and freedom of speech are consistent; it is simply not a worthwhile endeavor to undertake to inject a First Amendment defense into every potential infringement case, even given the rare instances in which it might make a difference. This is a wise decision.

One of the reasons why in recent years, the claim has been made that there is more of a tension between copyright and free speech than has previously been acknowledged is because over the past few decades, free speech doctrine has become increasingly complicated and, arguably, significantly less coherent than it used to be.[86] If this is true, and I believe that most free speech scholars would agree that it is, two conclusions follow from it. One is that it will be easier to find a copyright/free speech conflict because it is not as difficult to find some strand of free speech doctrine that, if taken out of context, will arguably take you where you want to go. Indeed, in *Eldred*, the challengers made just such an argument.[87] In that case, petitioners attempted to argue that one interpretation of the Court's decision in *Turner v. FCC* (upholding rules that required cable systems to carry local over the air broadcast stations), stood for the proposition that any legal regime which allocated speech rights was necessarily subject to a First Amendment review.[88] As noted above, the Court readily concluded that this was a clear misreading of the *Turner* opinion.[89] It is evidence, however, that given the complexity of modern free speech doctrine, it is not difficult for a clever lawyer to find some First Amendment dicta which at least arguably subjects well-settled copyright doctrine to challenge.

The second conclusion to follow from the aforementioned and widely-accepted notion that free speech doctrine has evolved in complexity is this: requiring or even encouraging the federal courts to work through such complicated and difficult First Amendment theory and related defenses in order to merely resolve garden-variety copyright cases would impose significant costs on the copyright system – increasing the costs of litigation while yielding little, if any, benefit in terms of producing different and more speech-protective results. Moreover, in doing so, courts might even ultimately undermine free-speech values in the long run; as-is, the copyright system is intended to – and almost certainly does – promote free speech since it en-

86. *See* Fred Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. Ct. Rev. 285 (describing the growing doctrinal complexity of free speech law).

87. Eldred v. Ashcroft, 537 U.S. 186, 220 (2003).

88. Turner v. FCC, 522 U.S. 622 (1994) (upholding rules that required cable systems to carry local over the air broadcast stations).

89. *Eldred*, 537 U.S. at 220-21.

courages the people to produce expressive material. Thus, despite recent arguments that the free speech doctrine should be interpreted to place a check on copyright, there is no reason to believe that the ordinary enforcement of copyright law poses any significant threat to free speech values. Consequently, the Court is correct in concluding that the internal copyright doctrines of both idea/expression dichotomy and fair use provide sufficient protection to free speech values.

B. Does Copyright Law Intrude upon the free Public Domain in Violation of the First Amendment?

Even if the enforcement of copyright law with respect to legitimately copyrighted material does not infringe the First Amendment, the question still remains of whether extension of copyright law into the pre-existing public domain should raise serious First Amendment questions. This issue might arise in at least two different contexts: (1) copyright term extension and (2) "fencing-off" portions of the public domain with encryption technology. The first and easiest issue is the situation – presented in *Eldred v. Ashcroft* – when Congress extended the length of copyright terms, thereby preventing material from entering the public domain as soon as it would have before the term's extension. From a First Amendment perspective, it should not make much difference whether the copyright term is extended with respect to existing or future copyrights. This is because, in either case, the public is deprived of the full use of the material for an additional period of time. In *Eldred*, the strongest argument against a twenty-year extension, based on the Copyright Clause rather than the First Amendment, asserted that there was no legitimate Copyright Clause interest in such an extension to pre-existing works since copyright should properly be viewed as an incentive for the creation of new works and, by definition, no further incentive was needed since the works had already been created.[9091] The Supreme Court properly rejected this argument finding that the extension served several legitimate copyright interests including providing an incentive for the preservation of deteriorating works, harmonizing United States law with that of the European Union, and, as a matter of fairness, providing existing copyright holders with the same benefits extended to new copyright holders.[92] Moreover, the Court emphasized that granting the extension to those already in copyright was quite consistent with historical practice.[93] The well accepted test for constitutionality of an exercise of Congressional power, especially with respect to the type of line drawing inquiry before the Court in *Eldred*, was simply whether the congressional action in question was rationally related to a legiti-

90. *Id.* at 211.

91. *Id.* at 211.

92. *Id.* at 204-08.

93. *Id.* at 194-95, 204.

mate interest.[94] By a 7-2 margin, the Court found in *Eldred* that the test was readily met.[95]

The value of convincing the Court to recognize a First Amendment interest in this case would have been to step up the standard of review to the intermediate level in the hopes that the congressional justification would be insufficient. For the reasons described earlier,[96] the Court declined to apply First Amendment principles to what it viewed as a historically routine extension of the length of the copyright term.

The challengers in *Eldred* also argued that Congress could extend copyrights indefinitely by simply adding an additional term of years whenever existing copyrights were about to expire. Thus, ultimately depriving the public of its share of the traditional copyright bargain by precluding copyrighted works from ever entering the public domain.[97] If in twenty years Congress, chooses to further extend existing copyrights, it is difficult to believe that the Court will give Congress the degree of deference recently extended in *Eldred*. Were Congress to proceed with such a course of conduct, presumably the interest in ensuring that copyrighted material eventually became freely available to the public would be worthy of First Amendment protection. Furthermore, *Eldred* notwithstanding, any attempt to extend copyright perpetually would certainly be invalidated under the limited times provision of the Copyright Clause.[98]

The other means by which Congress could infringe on the public domain and indeed the practice which has received the most withering criticism of all, is by allowing copyright holders to arguably fence off portions of the existing public domain through the device of encryption backed by legally enforceable anti-circumvention prohibitions as embodied in the DMCA.[99] The digital revolution has produced opportunities as well as severe threats to copyright. Digitalization combined with the internet produces an enormous new market for the presentation and distribution of copyrighted work, especially music and movies. However, it also presents perhaps the most serious threat of piracy ever faced by copyright since digital copies of pristine quality can be made and distributed anonymously, instantaneously, and in extreme numbers. Copyright's critics, as well as its defenders, fully realize this. The question that divides them so bitterly is what to make of it and what, if anything, to do about it. Copyright content owners, especially the music and motion picture industries, argue that unless some effective protection against digital piracy is provided, the impact will be financially devastat-

94. *Id.* at 204-05.

95. *Eldred,* 537 at 186.

96. *See supra* notes *supra* 33-51 and accompanying text.

97. *Eldred,* 537 U.S. at 198.

98. U.S. CONST. art. I, § 8, cl. 8.

99. 17 U.S.C. § 1201 (1999).

ing.[100] Critics of the DMCA tend to down play the impact of digital piracy on content based industries and, instead, focus on the extent to which legal prohibition of anti-circumvention and the manufacture or distribution of anti-circumvention technology will allow copyright owners to unfairly extend their monopolies by enclosing portions of the public domain to the great detriment of the public.[101]

The DMCA is not a perfect solution. Arguably, it needs to be more flexible with greater provision for legitimate public access to encrypted works.[102] However, it simply cannot be assessed in the abstract. The DMCA is an admittedly strong measure, but it was developed in response to an extraordinary threat. The impact of digital piracy on the recorded music industry has been well documented.[103] Absent vigorous legal remedies against technological circumvention, the impact on the motion picture industry could be quite severe as well. The same may be said of other industries including computer programs and games which are distributed in digital form. Never before have content owners faced this type of threat of instantaneous, pristine quality, anonymous, mass scale piracy. To respond to this threat by simply suggesting that copyright owners should adopt some different marketing model is hardly an alternative at all since the threat remains enormous as long as a copy of the work is available in digital format.

Still, on the other hand, copyright owners ought not to be able to use anti-circumvention technology and the legal enforcement system behind it to deny access to material that is in the public domain, at least to the extent that there is no alternative means of access to the material. If that turns out to be the case to any significant extent, then there may be a need for some legal counter balance whether through amendment to the DMCA providing for additional protection for some types of circumvention including possibly the application of the fair use doctrine or failing that, possibly the application of First Amendment principles. So far, it is not obvious that the DMCA poses a significant threat of locking up a great amount of public domain information that is not otherwise available or easily discoverable.

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100. *See, e.g.*, Peter Yu, *supra* note 1, at 907 (stating that "[e]very year, the industry loses billions of dollars in revenue and faces the potential loss of hundreds of thousands of jobs."); Tim Burt, *Creative Business-Download at Your Peril*, FIN. TIMES, Jan. 28, 2003, at 24 (stating that music sales fell 9-10 % globally and the music industry lost five billion dollars due to on-line piracy in 2002); David Lieberman, *How Dangerous Are Pirates? Music Industry Blames Dying Sales on Copying*, USA TODAY, Apr. 5, 2002, at B1 (recording industry reported that it lost $4.5 billion in sales to on-line music sharing in 2001);.

101. *See, e.g*, Jessica Litman, *supra* note 4, at 29-30; Benkler, *supra* note 5, at 355-58; Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L. J. 519, 524 (1999).

102. *See* Samuelson, *supra* note 98, at 537-46.

103. *See supra* note 94.

To begin with, anti-circumvention technology will generally only protect information made available in digital form. Even as we enter the digital future, it is still almost certainly the case that the overwhelming amount of copyrighted information is not initially produced or distributed in digital form. More importantly, the DMCA only has the potential to fence off public domain material which is available exclusively in digital format. Thus, to the extent that a work is also available in a non-digital format such as a newspaper, analog tape, motion picture on film or videotape, painting in a gallery, etc., access to public domain material within the work will not be blocked by encryption backed by the DMCA's legal sanctions. Just as a large percentage of copyrighted works is made available in digital format, another large portion of those works that are available are not *exclusively* available in digital format. Even with respect to the works that are made available exclusively in digital format, it is unlikely that most of these will be protected by encryption either because it is not cost justified or because the owner does not care whether or not the work is copied. So, it should not be forgotten that the universe of works to which the DMCA effectively prevents access is likely to be a very small segment of copyrighted work, that is, work that has significant commercial value and is likely to be illegally copied and distributed on a large scale basis. This is not to say that there is no reason to be concerned that public access is being denied to public domain material contained in this category of copyrighted work, but we should be clear as to the limited scope of the threat posed by the DMCA. Even within this category, it is important to understand why material within a copyrighted work might be in the public domain. If it is within the public domain because it was originally created prior to the Copyright Act or because it was copyrighted but the copyright has expired, access to the work can almost certainly be obtained independent of the encrypted work. If the material in question falls within the public domain because it is trite or unoriginal, it can probably be readily recreated without access to the encrypted work.

Arguably the most serious threat of enclosure posed by the DMCA is with respect to idea, process, structure, or systems embodied in digital code that is neither patentable nor copyrightable. To the extent that access to such material is necessary or highly useful in advancing technological development and to the extent that a significant amount of it is being completely withheld from public access by the anti-circumvention provisions of the DMCA, then in the absence of statutory amendment, a case for a First Amendment right of access might be made, at least to the extent that it could be crafted in such a manner as to avoid creating a loop hole for large scale commercial piracy. As of yet, however, the factual justification for the necessity of such a right has not been satisfactorily established.

If this factual predicate is established, *Eldred* would not necessarily stand as a bar to the application of First Amendment principles in that the DMCA almost certainly would fall into the exception noted by the Court in *Eldred* of a law in which Congress has "altered the traditional contours of

copyright."[104] By its own terms, a violation of the DMCA is not infringement of copyright.[105] Moreover, traditional copyright law has never protected against anti-circumvention. The Supreme Court is obviously aware of the DMCA, and it almost certainly added this particular caveat to its general rejection of First Amendment analysis of copyright issues with the DMCA in mind. Consequently, possible enclosure of public domain material is the one area where it may still be possible to raise a First Amendment defense in the copyright domain after *Eldred*, at least on the right record. Indeed, in *Universal City Studios v. Corley*[106] (a pre-*Eldred* decision), the Second Circuit analyzed the issuance of an injunction against the posting of anti-encryption code on a website and ultimately rejected the First Amendment defense; the appeals court based its decision on the fact that the regulation was content-neutral and the effect on the speech component was merely incidental – thus failing to burden "substantially more speech than necessary to further the government's interests."[107]

Conclusion

As scholars like Nimmer and Goldstein recognized some thirty years ago, the conflict between copyright and free speech is more of a case of perception over reality. Copyright's speech–enhancement, taken together with the companion checks of idea/expression dichotomy and fair use – all inherent in copyright law – fundamentally relieves any real, intrinsic tension between the two areas of the law. The Supreme Court initially recognized this in *Harper & Row* and, despite a recent burst of academic criticism, correctly reaffirmed this principle understanding in *Eldred.* With the possible exception of DMCA challenges, it is quite unlikely that federal courts will begin to engage in First Amendment analyses of copyright issues within at least the foreseeable future; happily, it is equally true that freedom of speech will not suffer because of it.

104. *Eldred,* 537 U.S. at 221.

105. 17 U.S.C. § 1201(c)(1) (1999).

106. Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

107. *Id.* at 454-55.