# Intellectual Property

## Winning the Copyright War: Copyright's Merger Doctrine and Natural Rights Theory as Solutions to the Problem of Reconciling Copyright and Free Speech

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### I. Introduction

*A. Overview*

Concerns that the enforcement of copyright law might conflict with First Amendment free speech rights arose as early as the 1970s,[1] but within the last ten years an increasing number of lawyers, judges, and legal scholars have expressed worries regarding perceived conflicts between copyright and free speech. One legal scholar described the contemporary academic landscape as a "copyright war" between the supporters of copyright law and those who advocate creating a distinct First Amendment defense to copyright infringement.[2] Contrary to the assertions of the scholars who advocate a distinct free speech defense, the truth is that all legitimate conflicts between copyright and free speech can be reconciled using three doctrinal mechanisms: First, copyright's merger doctrine; Second, a natural rights understanding of copyright; Third, a combination of copyright's fair use doctrine and the copyright doctrine known as the idea-expression dichotomy.

*B. The Purpose of Free Speech*

Legal scholars generally believe that the overarching purpose of the First Amendment's provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[3] is to protect the uninhibited marketplace of ideas."[4] As expressed in Justice Holmes's dissent in the *Abrams* case, "[t]he ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[5] As Professor Nimmer has recognized, Justice Brandeis's concurrence in the *Whitney* case implied three other purposes of free speech:[6] enabling democratic self-government by giving the public access to information necessary for educated voting and civic duty; enabling human self-realization and self-fulfillment; and providing a safety valve for dissent by permitting criticism of the government.[7] These general purposes all require a free flow of ideas.

### II. The Merger Doctrine as a Solution to Free Speech Conflicts

The landmark case *Harper & Row v. Nation* decided whether President Ford's copyright in his memoirs prevented newspapers from reporting on the events described, violating the freedom of the press and the free speech interest in the free flow of ideas and knowledge. That case, like other cases throughout copyright jurisprudence and Supreme Court precedent, held that no conflict exists because the idea-expression dichotomy meant that Ford owned his words, but not the facts or ideas expressed therein, and therefore the newspapers were free to report on the events.[8] Most coherent free speech challenges to copyright ask: what if it becomes necessary to use copyrighted expressions in order to report on facts or communicate ideas?[9] Merger doctrine, which already exists within copyright, adequately and fully addresses such concerns.

The solution to making copyright and the First Amendment compatible begins with the idea-expression dichotomy and fair use, but merger doctrine should be applied more liberally and non-traditionally such that when only one way or a limited number of ways of expressing an idea exists, the idea and the expression have merged—and therefore the expression can no longer be protected by copyright.

*A. Defining Ideas and Expressions for the Idea-Expression Dichotomy*

The difficulty of drawing the line between an idea and an expression dates back to the Hand abstraction test, which is not a test so much as an acknowledgement that it is impossible to develop such a test—an arbitrary line somewhere along a spectrum between general/idea and specific/expression.[10] But the idea-expression dichotomy serves to reconcile copyright and free speech only if the line between idea and expressions is drawn properly. Distinguishing between ideas and expressions is necessary in order to determine whether ideas are being restricted.

In fact, the outcome in one merger doctrine case in the Eleventh Circuit was entirely determined by defining the idea as compared with its expression. In this case, *BUC Int'l Corp. v. Int'l Yacht Council Ltd*, defining the idea broadly—as the idea of presenting information about a yacht— enabled the plaintiff to win, but defining the idea narrowly—as the idea of presenting boat listings organized by the rooms in a yacht—would have led to a finding of merger.[11] In another case, *Kregos v. Associated Press*, the Second Circuit decided the merger doctrine issue in part by defining the relevant idea as an outcome-predictive pitching form rather than the idea that plaintiff's specific form was the best way to predict outcomes.[12] The courts in *BUC* and *Kregos* avoided the problem of how to define ideas by defining ideas in an arbitrary manner, which happened to help the plaintiffs in those cases.[13]

To distinguish unprotectable ideas from protectable expressions, consider the following: facts are physical objects out in objective reality and ideas are concepts, theories, analyses

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or principles abstracted from facts and used to interpret facts. Expressions, by contrast, are the means by which language is used to show facts or ideas to another person. For example, the word "dog" is an expression, composed of the letters "d," "o" and "g," but a dog is an idea: a four-legged canine that exists in reality. The letters are the expression that calls to mind the idea. The words "Bill Clinton was the President in 1998" constitute an expression because they show something separate from themselves, a historical fact fixed in physical reality. Another way to phrase this theory is that the idea is the meaning and the expression is the set of symbols or signs that represents and expresses the idea. Language, generally, is a system of physical symbols that show things outside of the language to the mind of the reader or listener.

This theory, inspired by the philosophers Aristotle, Thomas Aquinas, and Mortimer Adler, is comprehensible, capable of being applied to fact patterns in a fairly straightforward manner, and would provide more guidance to a judge than Judge Hand's arbitrary guessing game for isolating idea from expression.

The problem with understanding the idea-expression dichotomy in the realm of fiction is that copyright law actually does protect some ideas. Copyright law merely protects ideas that are specific, such as characters, specific plots, etc., and it does not protect more general ideas, such as the theme or political message of a work of fiction. The Hand abstraction test says that specific ideas are protected and general ideas are not, so the Hand Test presents a spectrum between general and specific and it is necessary to draw an arbitrary line somewhere in the middle.[14] The Hand Test approach provides no legal guidance whatsoever on precisely where to draw the line. A superior approach would say that general ideas are not protected precisely because most general ideas are discovered, not created, and so no philosophical basis exists for assigning ownership to the person who expresses them. In contrast, most specific fictional ideas are created by the imagination, intellectual work, and choices of the author or artist. Creation provides a philosophical basis for giving ownership, either to reward labor, under a natural rights theory, or to provide incentives for creativity, under a utilitarian theory. General versus specific does not matter, but creation vs. discovery does matter. Literary themes are discovered in the sense that any legitimate literary theme is a comment upon the human experience, and human nature is discovered, as opposed to being created by the imagination.

Ideas that are discovered, such as British boarding schools, magic, the heroic quest, and alchemist philosopher's stones, should not be protected, but ideas that are created, such as the character of Harry Potter, should be protected. As can be seen with *Romeo and Juliet* and *West Side Story*, whether forbidden love is an unprotected idea or a protected plot is necessarily a question of degree; but we must decide whether the line to be drawn is completely arbitrary or whether it can be legally defined. *West Side Story*, although based on *Romeo and Juliet*, would not likely have infringed a valid copyright in *Romeo and Juliet*, because forbidden love and tragic love are inherent in the nature of human behavior; they are discovered and not created. *West Side Story* did not copy any original details of *Romeo and Juliet*, merely aspects of its plot and theme that Shakespeare did not himself create. On the other hand, if an author wrote a novel featuring a magical boy at a British boarding school who tried to protect an alchemist philosopher's stone from an evil wizard who murdered his parents, the combination of elements not discovered or suggested by anything inherent in discoverable ideas suggests that it would probably infringe the copyright in *Harry Potter*.

*B. Understanding Merger Doctrine*

The idea-expression dichotomy suggests the proper test for merger doctrine, summarized by one judge as follows: "[u]nder the copyright law doctrine of merger, a close cousin to the idea/expression dichotomy, copyright protection will be denied to even some *expressions* of ideas if the idea behind the expression is such that it can be expressed only in a very limited number of ways. The doctrine is designed to prevent an author from monopolizing an idea merely by copyrighting a few expressions of it."[15]

The two basic flavors of merger doctrine are *Kalpakian* and *Morrissey*. *Kalpakian* would apply merger to any situation where the idea and its expression have literally merged and the idea and the expression are one and the same. In *Kalpakian*, the plaintiff made a pin out of jewels designed to look like a bee.[16] The plaintiff claimed that its jeweled bee pin was substantially similar to a variety of different jeweled bee pins made by the defendant.[17] At trial the plaintiff's witness conceded that given the mechanics of placing jewels on the back of a pin in the shape of a bee he could not imagine how it could be done in a way that would avoid infringing the plaintiff's design.[18]

The *Kalpakian* court opined:

> What is basically at stake is the extent of the copyright owner's monopoly—from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an 'idea' that defendants were free to copy. Plaintiff seems to agree, for it disavows any claim that defendants cannot manufacture and sell jeweled bee pins and concedes that only plaintiff's particular design or 'expression' of the jeweled bee pin 'idea' is protected under its copyright. The difficulty, as we have noted, is that on this record the 'idea' and its 'expression' appear to be indistinguishable. There is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both.
>
> When the 'idea' and its 'expression' are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law.[19]

The paradigm of *Kalpakian* is that the subject matter is such that the idea and its expression have actually merged so that using the idea would inevitably lead to copying and infringing the expression, which turns on whether something inherent in

the idea makes it merge with its expression so that the expression comes from or springs from the subject matter.

*Morrissey* would apply where only one or a finite small number of expressions of an idea are possible, such that ownership of the expressions would enable the copyright owner to control all access to the idea. In *Morrissey*, the court held not copyrightable a sweepstakes contest instruction for entering a box top from a purchased product and the entrant's social security number to enter a contest held by the product's manufacturer.[20] The court reasoned that the contest itself was non-copyrightable subject matter and said:

> When the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires,' . . . if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression.[21]

The paradigm of *Morrissey* is not that the idea and its expression have merged, but that giving copyright protection to a small finite number of possible expressions of the idea would permit monopolizing the idea by owning all possible expressions, thus extending copyright protection to non-copyrightable subject matter.

Although both cases arose in a context of subject matter that might be patentable, no reason to limit it to patent-type cases is visible in the doctrine's rationale. Essentially *Kalpakian* merger doctrine applies wherever only one expression of a non-copyrightable idea is possible and *Morrissey* applies when a small number of expressions of a non-copyrightable idea are possible. In either case, merger doctrine applies if information contained in the idea can only be accessed by means of one or a limited number of expressions.

Merger doctrine asks two questions: First, is the underlying subject matter copyrightable? Second, if the subject matter is not copyrightable, would granting copyright protection for the expression permit the copyright owner to effectively achieve ownership of a copyright in that underlying subject matter? If copyright protection would grant control over all methods of access to non-copyrightable subject matter—the idea of a jeweled bee pin as in *Kalpakian*, the idea of a box top contest entry as in *Morrissey*, or, as discussed below, the facts of the JFK assassination—then merger doctrine applies.

*C. Restricting Access to Information as Ownership of Facts*

Some judges apply a merger doctrine test—sometimes conflated with an idea-expression dichotomy test—that if it is possible to verbally explain or describe an idea using a different expression than the copyrighted expression then merger doctrine does not apply.[22] This test ignores that certain kinds of information, such as visual images, words cannot capture. A complete merger doctrine must take a more nuanced understanding of visual information into account. Because many theories of a distinct First Amendment defense focus on graphic images of newsworthy events,[23] it is worth briefly comparing how information is conveyed either verbally or graphically.

For abstract ideas, little difference exists between verbal description and graphic representation, but for specific physical objects different sets of information about the object may exist, one that can be communicated verbally and another than can be shown only graphically. A simple example of information that can be expressed only visually is color. The color red can be referred to by the word "red" but what that color looks like can be communicated only visually. Some visual expressions merge with an aspect of the expression's idea such that the communication of some information requires using that specific visual expression rather than an alternative expression or description.

Two possible fact patterns where a First Amendment defense to copyright infringement could be considered are the Zapruder film of the assassination of President John F. Kennedy[24] and, as Professor Nimmer posited, photographs of the My Lai massacre in Vietnam.[25] The JFK assassination and the My Lai massacre are facts, not ideas. The fact is the physical object out in reality which no one owns. Information is an aspect or quality or part of the fact. Seeing the fact directly provides certain information that is not conveyed by hearing a verbal description.

Several things in photos and film can be seen but not described, such as color, details, evaluations, and proof. Seeing an object provides a person direct access to its visual information, whereas being told about an object's visual qualities is second-hand information which has been filtered through the analysis of the people who told you about it. Because of this removal from direct perception, the idea of a dog which can be verbally communicated will always contain less information than the visual image of a dog. If someone tells you "the My Lai massacre was gruesome" you have only learned someone else's interpretation of a fact, whereas if you see the photos then you see the thing itself firsthand and form your own conclusions. Both the many details in a photo that it would take several pages of writing to describe, and the information that is lost through second-hand interpretation, are aspects of the fact, which is to say information. This information can only be accessed visually and cannot be transmitted by means of a verbal description of the fact.

A counterargument is that saying "the My Lai massacre was very gruesome" really does convey all the information contained in the photo. That sentence is so interpretive that it necessarily involves accepting someone else's interpretation rather than analyzing the firsthand information of the fact itself. Perhaps in many, or most, instances the subject of a photograph is so simple that most or all of its information can be described verbally. But this would probably not be true of the My Lai photographs or other photographs of gruesome things that elicit a strong emotional impact, and it certainly would not be true of the Zapruder film where forensic conclusions needed to be drawn from detailed visual data, such as from what angle the bullet entered JFK's head.

If any court were to ever use a merger doctrine solution to First Amendment concerns regarding photos and videos, the

judge would be required to make a finding of: 1) What is the fact or idea?; 2) Can it be verbally communicated or is there information within the non-copyrightable fact that can only be accessed visually?; and 3) Are there only one or a small number of possible visual expressions of this information? A merger doctrine inquiry is precisely the right inquiry for the judge to make, not a distinct free speech inquiry. If all of the information regarding the My Lai massacre, every aspect of every fact in complete detail, could be effectively verbally described, then there would be absolutely no need for the photos and Professor Nimmer's concern would make no sense. And if information contained within a fact can only be accessed by means of a few photos then merger doctrine would necessarily apply.

What matters is not the public importance of the facts, but the existence of a collection of important factors: a small finite number of ways to access that information in the facts; facts which are not copyrightable subject matter; and an inability of people to get photos which could provide alternative access to the facts. Although merger doctrine should not be limited to cover only facts of public importance, the merger doctrine would rarely kill copyrights and would not cause a widespread weakening of copyright protection because most facts, even of visual data, are simple enough that they can be adequately verbally described and are not doubtful enough to require visual proof or complicated enough to call for firsthand interpretation. One photograph or graphic expression is rarely the only access to factual information which is important enough to be worth litigating for the plaintiff. Merger doctrine as a solution to First Amendment concerns also would not weaken copyright protection because once the court makes a finding of merger the copyright would only be invalidated with respect to that specific use, such as using a photograph to show forensic shooting data. Merger doctrine should function as something akin to a defense to infringement while leaving the underlying copyright intact. This proposed use of merger doctrine differs from merger doctrine as it has been articulated in the past: traditional merger doctrine normally invalidates entire copyrights.

Judges in other First Amendment cases have been concerned with verbal expressions, such as the use of quotes to show writing style.[26] A linguistic expression is like a photo and contains information which can be described, but one hundred percent of the information cannot be extracted merely from description, and some of the information can only be learned from reading the original text. Writing style can be so difficult to describe that it can only fully be understood by firsthand direct perception; however, only a small amount of copying is necessary to show it. You can usually grasp the style of a novel by reading one page. In the case of a biographer quoting quotes in order to show the style of the writing, one might even say that the fact which the biographer seeks to show is the writing itself, such that this is a case where the fact, which is the writing, and the copyrighted expression, which is also the writing, are one and the same. Merger doctrine applies where the idea and the expression have literally merged.

In this specific context merger doctrine partially resembles the market effect prong of the fair use doctrine. This resemblance arises because the merger doctrine analysis turns on a factual finding that the biographer is quoting for the purpose of showing the style of the writing and is not seeking to copy quotes in order to replicate the author's work, which resembles a distinction between a purpose of scholarly analysis and a purpose to make a profit from the author's creativity. Thus, if a biographer quotes a sentence from a novel that says "the cat was a fat, mangy, lazy ball of fur," because it is a nonfiction account the biographer is probably trying to analyze the author's prose style. But if another novelist lifted that line for his own novel which was about a cat, then he would probably be copying the author's expression not to show the fact of the expression but to use the expression to show the idea. If the alleged infringer were to use too much of the copyrighted work and did not limit himself to just a few quotes, then the excessiveness of use would weigh against a finding of merger and in favor of a finding that the infringer is simply copying the author's words in order to copy the author's speech act.

For another example, an art book might reproduce the image of a painting of a sunset to show the artist's use of color and shading, which is a fact that is merged with the painting, but if the art book reproduced the image with the purpose of showing the sunset to the reader, which amounts to copying the painting in order to sell copies of the painting for profit to people who like the painting, then the merger doctrine would not apply. The difference between fair use and merger doctrine is that fair use justifies use where no economic value was taken from the author, whose ownership right is only a right to economic exploitation, whereas merger doctrine would deny copyright ownership to expressions to the extent that the expression as an expression has merged with the expression as a fact.

### *D. Applying Merger Doctrine to Solve First Amendment Concerns*

Merger doctrine analysis solves many problems when applied to the specific factual scenarios where lawyers and judges have asserted the need for a distinct First Amendment defense to copyright infringement.

#### 1. *Krofft TV v. McDonalds*

In this case the defendant, fast food restaurant McDonalds, copied the plaintiff's television show characters for an ad campaign and then asserted a free speech defense as a rather blatant excuse for open theft.[27] The court reasoned that because free speech's purpose is the marketplace of ideas and copyright law only protects expressions and not ideas, free speech does not conflict with copyright.[28] The court seemed to be heavily influenced by Professor Nimmer's article on copyright vs. free speech, citing with approval his theory of definitional balancing of copyright and free speech interests.[29] The court then considered whether a free speech defense to copyright infringement for graphic expressions of newsworthy events should be created.[30] The court obtained this idea from Nimmer.[31] The court concluded that a free speech defense to infringements of written words should never be created because one can always find alternative ways to express any verbal idea.[32] *Krofft* is not an ideal case to demonstrate the use of merger doctrine on free speech claims, but it shows that claims of a free speech defense can easily be made by thieves seeking to justify stealing intellectual property, and it also shows that the analysis that the

judge is making in this area is the available alternative means of expressing the idea, which suggests merger doctrine more than Professor Nimmer's newsworthy photographs test.

2. *Wainwright Securities v. Wall Street Transcript Corp.*

In this case, Wainwright sued Wall Street Transcript for publishing regular abstracts of Wainwright's financial research reports, and Wall Street claimed freedom of the press and fair use as defenses.[33] The court said that while "news events" may not be copyrighted, copyright protects expression and "analysis or interpretation of events," and rejected the fair use claim of the defendant newspaper because the defendant contributed no research or analysis and was clearly free riding and trying to steal the market for the research reports.[34] The court also said that copyright law's free speech problems are solved by the fair use doctrine, and since the defendant lost on fair use there was no free speech defense.[35]

*Wainwright* was decided as a copyright law case, but it could have been decided using the doctrine of misappropriation, which was created in the World War I-era United States Supreme Court case *INS v. AP*.[36] In *INS v. AP*, the Court held that one newspaper reporting service was not allowed to steal news stories from a rival for economic gain, under a rationale that stealing the value of a news report is unfair to the reporters, even though the news stories were not protected by copyright.[37] Was *Wainwright* a copyright problem or was it *INS v. AP* misappropriation? If *Wainwright* should have been protected then the court should have used the theory of misappropriation, not copyright, because it is basically the ideas expressed in the research reports that Wall Street was copying, assuming that analysis is idea not expression. Although one can argue that the abstracts were derivative works, the bottom line is that this case's facts are very similar to *INS v. AP*.

To apply merger doctrine to these facts it would first be necessary to define where the idea ends and the expression begins, and then see if the idea and expression have merged. Here the idea was the analysis and the expression was the specific wordings, and the court found copying of the expressions so there might have been infringement. However, the plaintiff and the court really objected to the theft of the ideas in the reports, which is beyond the scope of copyright to protect. Reporting on the publication of the reports as news events was merely a subterfuge for Wall Street to copy and distribute the financial analysis in the Wainwright reports, and therefore the entire freedom of the press argument is a pretense in the case.

3. *LA News Service v. Tullo*

In this case, the defendant, a video news clipping service, copied TV news segments of an airplane crash and a train wreck, and the plaintiff service licensed raw footage of newsworthy events to TV stations for TV news segments and owned the copyright to some of the footage that the defendant copied.[38] The court, in reply to a First Amendment defense, held that the idea-expression dichotomy and fair use reconcile free speech and copyright.[39] The court considered applying the Nimmer news photo exception but found it inapplicable to these facts because there was no showing that other footage of the plane crash and train wreck were unavailable, and also the plaintiff's tapes were shown on local TV news immediately after the events; so these facts failed Nimmer's test that the photo does not appear in the media in an area within a month after the event.[40]

This case is interesting because an analysis of the availability of alternative expressions of the information contained in the facts of the plane crash and train wreck, which would look at alternative film and access to that film, would also be fully consistent with a merger doctrine test. If alternative forms of expression of those facts are available then no First Amendment problem exists. If the owner of the film could restrict access to some of the information contained in the facts, which are not copyrightable subject matter, then merger doctrine would hold the film non-copyrightable.

4. *Triangle v. Knight-Ridder*

In *Triangle v. Knight-Ridder*, TV Guide sued the Miami Herald for the Herald's use of the copyrighted image of a TV Guide magazine cover in a televised comparative advertisement which specifically compared the size of TV Guide with the Herald's television supplement and suggested that the Herald came with more extras.[41] The district court judge held no fair use because of the for-profit nature of the use.[42] But the court found for the defendant by creating a new distinct First Amendment defense to copyright infringement.[43]

The ruling was upheld by the Fifth Circuit, but the Fifth Circuit majority opinion held that the Miami Herald had a successful fair use defense and there could be for-profit fair use where there was no market effect.[44] Judge Brown's concurrence touched upon whether the idea and expression had merged.[45] He first attempted to define the idea expressed by the TV Guide cover, and observed that the Miami Herald probably could have found alternative expressions for that idea.[46] He noted that idea and expression merge in the case of some famous works of art, but he stated that usually the copyright interest outweighs the free speech interest in such cases.[47] Judge Brown concurred on the basis of fair use but said that there should never be a free speech defense.[48] Judge Tate in his concurrence stated that if the case were not resolved by fair use then there should be a free speech defense, and there might be other cases where the idea-expression dichotomy would not reconcile copyright and free speech where the use of copyrighted expression was necessary to convey thoughts.[49]

In applying merger doctrine to the facts of *Knight-Ridder*, we would first need to define the idea and then inquire as to alternative forms of expression. If the idea is that TV Guide is of a certain size, or that TV Guide is a magazine that contains television listings, this idea could be expressed either verbally or using other visual depictions that do not include the copyrighted cover image. Thus, under the *Morrissey* doctrine no merger exists here because any idea that the ad seeks to convey could simply be told to the audience. If the idea is the cover itself, akin to *Kalpakian* doctrine, or some information in the image, then the idea and expression would have merged. However, the visual information unique to that cover image was probably not the idea that the ad was trying to convey, because the ad focused on conveying facts about TV Guide and not that specific cover artwork.

If merger doctrine is inapplicable here, one could consider

the need for a free speech defense to ensure the free flow of ideas and information in comparative advertising. If all of the information relevant to the ad can be conveyed by alternative verbal or visual expressions, then no ideas are restricted by copyright protection. Had such ideas been present, merger doctrine could have been applied. Also the Fifth Circuit was correct in its fair use analysis. Comparative advertising should always be a fair use because it is a kind of criticism and academic distribution of information, and is akin to parody in that it has no market effect other than by criticizing the copyrighted expression in a way that the owner himself would never license or seek to market. The use of a copyrighted image in a comparative ad does not incorporate the plaintiff's intellectual property into the defendant's products in such a way that the defendant profits from free riding on the plaintiff, and therefore there could never be a market effect, which is a strong factor in fair use analysis. Trademark law has a rule permitting comparative ads called "nominative fair use," and copyright needs a similar rule. *Knight-Ridder* is a case where the fair use doctrine completely reconciles free speech and copyright.

5. *Harper & Row v. Nation Enterprises*

In *Harper*, the defendant "scooped" the plaintiff by publishing an article with verbatim quotes from President Ford's new memoir regarding the Nixon pardon before the authorized article was published.[50] Should merger doctrine apply to President Ford's memoir? Surprisingly the Supreme Court seems to have considered something akin to this. The majority opinion states:

> Some of the briefer quotes from the memoirs are arguably-necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea expressed as to be inseparable from it. . . . But The Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression. Such use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts.[51]

Thus the Court seems to have made the factual finding that would be called for by merger doctrine analysis, and so there would properly be no merger doctrine defense here. And if the press does not need to use President Ford's copyrighted expressions in order to report upon the facts of the Nixon pardon or to convey the ideas associated with those facts, as the Court found, then it is implausible to say that freedom of the press demands the right to copy those expressions. In such an instance there simply is no freedom of speech interest in the free flow of information for a First Amendment defense to protect, since the press can adequately report on the facts and ideas using the alternative expressions at its disposal.

6. *Time v. Bernard Geis*

This case involved the film of a home movie made by Zapruder which happened to be the only film of the decisive events of the John F. Kennedy assassination.[52] The defendant wrote a book offering a theory explaining the JFK assassination and used photographic frames from the Zapruder film without the copyright owner's permission to illustrate points of his explanation.[53] The court specifically addressed and rejected a *Morrissey* merger doctrine argument. It stated:

> It is said for defendants that aside from all else the Zapruder pictures could not be copyrighted because of the 'doctrine' of a recent decision, Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967). This 'doctrine' is here invoked to avoid an 'oligopoly of the facts of the assassination of President Kennedy'. The Morrissey case involved the rules of a sales promotion contest. The substance of the contest itself was found not to be copyrightable. It was also found that there was a very limited number of ways in which the rules could be expressed. If the rules were made the subject of copyright, then the uncopyrighted substance of the contest would be appropriated by the owner of the rules copyright. The Court declined to extend copyright protection to the rules. Such a decision can have no possible application here. Life claims no copyright in the events at Dallas. They can be freely set forth in speech, in books, in pictures, in music, and in every other form of expression. All that Life claims is a copyright in the particular form of expression of the Zapruder film. If this be 'oligopoly', it is specifically conferred by the Copyright Act and for any relief address must be to the Congress and not to this Court.[54]

In this quote, the judge completely mischaracterizes the merger doctrine inquiry. The judge thought that if the general basic facts of the JFK assassination can be communicated verbally or be graphically depicted then the owner of the Zapruder film does not achieve ownership of the facts. The judge failed to analyze that the Zapruder film is the only film of the actual shooting, and he showed no sign of understanding that the JFK assassination is a fact for the analysis of which visual details are important. The judge displayed no subtle, nuanced appreciation that facts can contain information that can only be expressed by direct visual expressions such as photographs or filming. The judge made no inquiry as to whether ownership of the Zapruder film, as the only photos of the event in existence, would grant the owner total control over access to visual information which is an aspect of the non-copyrightable fact.

The judge failed to begin by clearly defining the idea, then implicitly defined the idea as "JFK was shot," and then held that a verbal or visual depiction of that fact fully expresses the fact, ignoring the forensic details which are not captured by the sentence "JFK was shot" but which can only be accessed via the film. The court in this case appears very skeptical and dismissive of the concept of merger doctrine and never conducted a serious merger doctrine inquiry.

It is worth noting that elsewhere the court argues:

> [t]here is a public interest in having the fullest informationavailable on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained with sketches of the type used at page 87 of the Book and in The Saturday Evening

Post, the explanationactually made in the Book with copies is easier to understand.[55]

The court cannot have it both ways: either the Zapruder film shows information contained in the fact which is necessary to access the fact, in which case merger doctrine applies, or else the content of the Zapruder film can be replicated by artists' sketches of the event, in which case the defendant should have no real need to copy the frames. Why would the frames make explaining the defendant's theory of the event easier than the use of sketches unless the frames conveyed some aspect of the event, some visual information in the non-copyrighted fact, which could not be conveyed by the sketches?

7. *Salinger v. Random House*, *Craft v. Kobler* and *New Era v. Henry Holt*

In the *Salinger* case, a biographer copied quotes from unpublished letters written by novelist J.D. Salinger which were in university library archives.[56] Salinger learned of the biography and objected, and the biographer rewrote the biography to drastically reduce the amount of quoting and to describe most of the letters. However, many of the descriptions are simply rephrasing of direct quotes with minor variations which carry the feel of the metaphors and phrasings used by Salinger in his letters.[57]

Judge Leval in his opinion for the Southern District of New York observed that:

> The use of letters as a source poses a dilemma for the biographer. To the extent he quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.[58]

In the Second Circuit's opinion, which was highly critical of Judge Leval, Judge Newman replied:

> This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing. On the other hand, the biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he "distorts" the expressive content, he deserves to be criticized for "sacrificing accuracy and vividness." But the biographer has no inherent right to copy the "accuracy" or the "vividness" of the letter writer's expression. Indeed, "vividness of description" is precisely an attribute of the author's expression that he is entitled to protect.[59]

Judge Newman gave as an example the fact that the biographer had said Salinger thought Wendell Willkie was "the sort of fellow who makes his wife keep an album of his press cuttings," which was a paraphrase of Salinger's actual quote that Wendell Willkie "looks to me like a guy who makes his wife keep a scrapbook for him," instead of merely reporting in the biography that Salinger thought Willkie was vain.[60]

Could the biographer have conveyed the facts just by saying that Salinger thought Wilkie was vain? If he was writing about Salinger's writing then he needed to quote his writing, but if he was merely trying to communicate Salinger's opinion of Wilkie then he could have said "Salinger believed Wendell Wilkie was vain." The availability of alternative expressions would require a factual finding, and Judges Leval and Newman seem to have made opposite findings of fact. The book must be read to see what idea or fact the biographer was trying to convey, as the application of merger doctrine turns on whether the expression is necessary in order to convey that idea or access information in that fact.

If the biographer was writing about Salinger's writing then the expression and idea merge and it is necessary to use some quotes of the writing in order to show the style of the writing, which could not feasibly be otherwise described. The biographer's need to show style seems to be Judge Leval's meaning when he speaks of accuracy and vividness and says that they can only be shown by quotes. But if, as Judge Newman strongly suggests, the focus of the biography was Salinger's opinions, thoughts, personality, and his life—if it was simply a biography and not literary criticism— then the fact the biographer was seeking to express could be communicated by saying "Salinger believed Willkie was vain." Then the biographer could have communicated his facts without quotes, and the idea-expression dichotomy would adequately address his First Amendment concern.

In *Craft v. Kobler*, a biographer used copyrighted quotes in his biography of composer Igor Stravinsky.[61] Judge Leval considered the fair use defense and said that the fair use doctrine gives latitude to the biographer of an author to quote limited excerpts of published copyrighted work to illustrate the descriptive skill, wit, power, vividness, and originality of the author's writing.[62] Judge Leval's analysis is similar to merger doctrine where the expression and the idea of the expression have merged and it is necessary to copy the expression in order to access facts about the writing's style, although Judge Leval thinks of this as fair use doctrine and not merger doctrine. However, in this case Judge Leval held no fair use because there was too much copying of verbatim quotes for the copying to be justified.[63] *Craft v. Kobler* is a fact pattern where the defendant was copying so much that he went beyond copying to show facts about the writing and was merely appropriating sections of the writing for their value as literary works.

In *New Era v. Henry Holt*, a biographer used extensive quotes from both published and unpublished works of L. Ron Hubbard to write a critical biography, and the case focused on the biographer's fair use defense of the quotes from unpublished works.[64] Judge Leval in the Southern District of New York opinion said:

> Most of these items are justified by a powerfully compelling fair use purpose-a purpose which reasonably requires use of the author's particular words to demonstrate the validity of an important critical point. These are not

> instances like those cited by the Court of Appeals in Salinger and by this court in Craft v. Kobler, 667 F.Supp. 120 (S.D.N.Y. 1987), where the biographer has used the lively expression of his subject to enliven the biography. These are uses for which the biographer's point cannot be effectively demonstrated without using the subject's words-demonstrations of traits of character. Personal qualities of this nature often cannot be shown except by use of the subject's words. It makes no sense in such cases to speak of limiting the biographer to reporting the facts contained in the subject's letters without taking his protected expression. The letters are not being used as a source of facts reported in them. The important facts in such instances are the words themselves. Their value for the biography lies precisely in the subject's choice of words-not as a matter of literary expression-but for what the choice of words reveals about the subject. Thus, as to Hubbard's sentence, "The trouble with China is, there are too many Chinks here," (No. 133, BFM 43), there is no fact reported in it which the biographer has an interest in narrating. What is interesting is that Hubbard said it.
>
> Nor should a biographer/critic be limited to stating her conclusions about the subject's choice of words. It would be preposterous to restrict Miller to writing something like, "Hubbard used a vulgar derogatory epithet exhibiting snobbish bigoted disdain for the Chinese." That would be at once unfair to the biographer, the subject, and the readership, which can reasonably demand to know "What did he say? Let us be the judge of whether it was vulgar, snobbish or bigoted."[65]

Judge Oakes, in his concurrence to the Second Circuit's ruling on the case, described Judge Leval's argument:

> Fair use was justified, Judge Leval said, because some of these passages embodied false mythology about Hubbard; Hubbard's dishonesty; his boastfulness, pomposity, or pretension; his paranoia; his snobbery, bigotry, disdain for Asians, or dislike of the Orient; his cruelty or disloyalty; his aggressiveness, viciousness, or scheming tactics; his cynicism; or his derangement, insanity, or bizarre pseudo-science. Judge Leval found that other passages were necessary to render Hubbard's ideas accurately or to display his early writing style or presentation of himself.[66]

Judge Miner in the Second Circuit's majority opinion, however, disagreed with Judge Leval's analysis and held that showing character traits is not a valid fair use exception for unpublished works.[67]

Judge Leval's argument that these expressions are being used by the biographer not to report the facts but to present the expressions themselves should be characterized as merger doctrine. Information in the quotes cannot be accessed except via the quotes themselves, and this information consists of aspects of the facts of L. Ron Hubbard's life which are not copyrightable subject matter. Judge Leval notes that it should be for the reader to make a firsthand evaluation of what the quotes mean rather than relying on a secondhand rehashing of the content of the quotes, which is a merger doctrine argument that factual information in the quotes can only be accessed by reading them directly. The facts about L. Ron Hubbard that the biographer sought to show were not copyrightable subject matter, and those quotes are one of a small finite number of means of access to those facts about Hubbard; so the *Morrissey* merger doctrine applies. And the Hubbard quotes as expressions have merged with the facts about Hubbard's personality which are implied by the fact that he wrote them—for example, Hubbard's China quote has merged with the fact of his bigotry; so the *Kalpakian* merger doctrine also applies.

8. *Worldwide Church of God v. Philadelphia Church of God*

In this case, Herbert Armstrong, who had founded a church, wrote a religious book shortly before he died.[68] His church, which owned the copyright to the book, stopped distributing the book after his death because its views on religion had changed and it believed the book was racist.[69] Two pastors who were followers of Armstrong founded a new church and printed the book, copied verbatim.[70] They claimed that their sect was for strict followers of Armstrong and that the book was central to its religious practice and required reading for all members hoping to be baptized into their church.[71]

Although the First Amendment was mentioned in this case,[72] the case turned on the four-factor fair use analysis, and the court held that the defendants failed the fair use test.[73] *Worldwide Church* is a case for merger doctrine, not fair use. *Worldwide Church* should be viewed as a merger doctrine case because that book is the only access to the religion of the defendants' sect of Armstrong followers, and the religion itself is not copyrightable. Religious sacred texts are a special case because religions with sacred books can only be adequately accessed by means of the holy books.[74] Therefore, merger doctrine would ask: Is the religion a copyrightable subject matter? The answer is no. Is the holy text one of a finite small number of means of accessing the religion, or the only method of accessing the religion? The answer on these facts is yes. Therefore, merger doctrine would create a defense to copyright infringement for that sect's followers.

## III. The Natural Rights Argument

### *A. Overview*

Under a natural rights framework, free speech is the freedom from interference with your speech. Free speech is not a mandate that other people need to help you to speak. Whether copyright infringement is a form of self-expression or the theft of expression depends upon your philosophy. Copyright as a property right does not actually limit free speech rights when seen through a natural rights lens.

In the context of copyright, the natural rights theory means that a person who creates an original tangible expression has earned the right to own it by the very act of creating it, and another person's use of that expression is a privilege dependent upon the owner's granting permission to use it. In the sphere of ownership protected by copyright law, the labor and effort which give rise to ownership is self-expression. To steal another person's expressions is theft of property because the thief did

not do any work to create the expression and therefore he has not earned any right to the benefits that flow from the expression. In contrast, the creator who owns the expression did do the work necessary to create it and so has earned those benefits which arise from it.

Free speech is supposed to prevent censorship. If the enforcement of copyrights is censorship then the enforcement of private property rights is theft, which is what some Marxist leftists actually believe. Beginning at a point in time when a freshly baked apple pie is sitting on a windowsill, we cannot determine which of two people, let us call them the thief or the baker, should take the pie. At that point in time, for the thief to point a gun at the baker and forcibly take the pie or for the baker to point a gun at the thief and forcibly take the pie is equally coercive. But going back in time to the sequence of events in which the baker baked the pie reveals that the baker made a series of choices and put in an amount of effort to bake the pie. If the baker points a gun at the thief and defends his ownership of the pie then he is merely keeping for himself the rewards of the work that he did. If the thief points a gun at the baker then he is wrongfully stealing the pie and feeding off the baker as a parasite.

Similarly, if we begin with a poem and two people want to recite it, then which person we allow to use it looks arbitrary. However, if we go back in time to see that one of those people is the poet who created it and the other person's use would merely consist of copying and parroting the poet's poem, then the other person's desire to use the poem amounts to theft of the poet's work and forces the poet to come up with expressions for the other person, who is actually a poetry thief. The ability of both the poetry thief and the poet to recite the poem at the same time does not significantly alter the situation because the poet loses the economic benefits which might have accrued to him from the poetry thief's use of the poem, and the poetry thief gains whatever economic benefits arise from use of the poem without paying anything to the poet who created the poem. Copyright does not "distribute" expressions because expressions are created and therefore come with ownerships already attached to them. When a copyright owner sues to enforce his rights he is not censoring someone else's speech; he is not using force to prevent someone else from exercising their creative freedom; he is merely defending his ownership in his creation and preventing theft.

One counterargument against basing copyright around natural rights is that the Copyright Clause of the U.S. Constitution defines copyright law as utilitarian and not natural rights-based, and it suggests an analysis of balancing utilitarian public interests such as economic incentives against interests in public access rather than an analysis based on ownership and private property rights.[75] However, the Copyright Clause does not explicitly say that copyright analysis must look exclusively to utilitarian principles and cannot draw upon natural rights theory. Natural rights might actually promote the progress of science and useful arts by creating strong property rights that function as a more powerful incentive than ownership subject to cost-benefit balancing. To force legal analysis into one philosophical paradigm because of an ambiguous preamble in a Constitutional clause is unduly restrictive. Intellectual property analysis must be free to draw upon whichever theoretical justification seems most logical.

Progressive leftist legal scholars have made several claims which can be construed as counterarguments against natural rights. Progressives sharply dispute the idea that a person earns ownership of his private property by making choices and doing work that creates the property, and they disagree with the belief that one person does not have the right to take another person's property even when motivated by a benevolent or noble purpose.

The leftist critique of copyright ownership has been well-represented in copyright war academic literature. Leftist legal scholars have argued that copying serves free speech purposes.[76] From the thief's point of view, one can say many great things about thievery. Scholars have argued that copyright is a government regulation of speech raising free speech concerns because it "distributes speech entitlements."[77] Copyright does not distribute the right to speak; instead, authors create speech and then copyright merely protects their natural right of ownership in what they created. This notion of speech as "distributed" by copyright is like saying that wealth is somehow already here and the only problem we face is how to distribute it, completely ignoring how wealth was created and who created it. Some scholars have argued that the rights of copyright owners and those who assert free speech interests are equivalent interests which can be balanced and courts face an arbitrary decision of which interests to favor.[78] The interests of the copyright owners are fundamentally different from the copyright infringers because the authors actually created value and the infringers take this value without the permission of the ones who created it.

*B. The State Action Requirement*

The First Amendment protects individuals from the government, not from other individuals. The real evil that free speech was intended to fight is government censorship—to prevent a group of people from using organized coercion, i.e. the police or the army, to ban an idea. To the extent that modern free speech jurisprudence does not agree with this basic principle and has moved away from the state action requirement, the problem lies with free speech doctrines, not with copyright. One solution to copyright-free speech conflicts is to reform free speech jurisprudence to reaffirm the state action requirement.

Leftists might argue that when a copyright holder goes to the courts and the police to enforce his copyright he is involving the government in his actions, and when the courts decide who gets to use the expressions they are actually deciding who gets to speak and therefore copyright enforcement is public. Such criticism would mean that no property is private and all property is public, which would effectively dissolve the state action requirement on the Bill of Rights. When the government enforces copyrights against infringers the government steps into the private individual's shoes and simply enforces the rights that the private individual would be justified in enforcing in a Lockean state of nature, the enforcement of which the individual has delegated to the government through the social contract. Assuming a natural rights vision of property, in a state

of nature an author would be fully justified in taking a gun and forcing other people not to plagiarize his manuscript, as a way to protect the economic benefits which he has earned by his labor. In a civilized society every individual has delegated his use of force to enforce his private rights to the government. Copyright enforcement is private even though it involves the courts and is enforced by the police.

The state action requirement as a limit upon the use of free speech claims to violate private property rights was enunciated in the United States Supreme Court case *Lloyd Corp. v. Tanner*.[79] In that case, Vietnam anti-war protestors sought to assert free speech rights to distribute leaflets in a privately owned shopping mall against the mall owner's will and without the owner's consent.[80] The Court held that the leaflet distributors' First Amendment claim failed because of the state action requirement, such that only government actors and not private individuals were bound to respect the pamphleteers' free speech rights.[81] The Court said that "[i]n addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."[82] Although this case dealt with physical private property, the same state action principle should apply to intellectual property.

*C. Limitations Upon Copyright From Within a Natural Rights Framework*

Does the creation of ideas and the learning of facts by making choices and doing work lead to advocacy of ownership of ideas and facts? No, it does not. If one could own an idea then it might, in theory, be possible to enact private "censorship," although it would not really resemble traditional censorship. However, facts are not created, they are discovered, and so while they can be used as raw material for human creations, no actual creation of facts exists that would justify ownership of facts under a natural rights approach to property. Similarly, ideas are not created, they are discovered, since any idea is inherent in the nature of reality. No natural rights justification for the ownership of ideas can be found within natural rights philosophy. Even if such a justification existed, someone who comes to truly understand an idea essentially rediscovers it and performs the same conceptualizations as the original inventor. Therefore there would be widespread protection on the basis of independent creation. Copyright's duration is justified because the life of the author plus seventy years[83] gives ownership to the creator of the expression and to his heirs, and by the time the work passes into the public domain it is owned by heirs of heirs who did not themselves do any of the work that created it or have any direct interaction with its creator. By contrast, physical wealth, for example in the form of a business passed on from parents to children, is dynamic and must be perpetually maintained through active effort or else it atrophies and decays. When physical wealth is inherited the heirs must continuously maintain and preserve it. Therefore each generation earns its material wealth; so the natural rights basis to strip heirs of intellectual property and add it to the public domain is not present with physical property.

Can fair use doctrine be justified under a natural rights framework? Yes, it can. Fair use can be justified in two situations: First, where no economic harm and no economic competition or usurpation of markets occurred, because in that limited instance the resource really is infinite and the creator lost nothing; second, where the infringer's profit comes not from the copying but from original additions by the infringer in making use of the copy, as embodied in the transformative fair use test. The traditional fair use of scholarship generally does not take economic value from the creator. Where a use is transformative the user is profiting from the user's original contribution and not from the creator; parody would be one good example of this. Fair use doctrine is consistent with the core principle of natural rights-oriented copyright law and does not need to rely upon utilitarianism.

*D. Points of Analogy Between Intellectual Property and Physical Property*

Some law professors argue that intellectual property is different from tangible property because a piece of tangible property can only be used by one person at a time whereas intellectual property can be used by an infinite number of people without being used up—making intellectual property more susceptible to sharing than tangible property. However, intellectual property is fundamentally similar to tangible property. While capitalist systems generally place ownership of one object in the hands of one individual or organization at a time, other systems such as socialism give ownership of one object to a group, commune, or the public as a whole—so for an object to only be used by one person at a time says very little about who owns it. Indeed, there does not necessarily need to be a system of "property" at all for physical objects; anarchy would resemble such a scenario.

While ideas can be used by an infinite number of people without using up the idea, most ideas have a finite economic value from their exploitation. The finite value of intellectual property is the very reason why it is sometimes profitable for copyright owners to enforce their copyrights. If there was no finite limit to the value that could usually be extracted from an idea, then intellectual property laws would be unnecessary. If I write a play and I produce it on Broadway and a copyright thief produces it in Kansas City then it looks like an infinite resource and I have not lost anything. But if a realistic opportunity for me to also produce the play in Kansas City exists, and if the market for the play among Kansas City theatergoers is finite and can be used up, then the copyright thief has stolen some of the finite economic value owed to me as the creator of the play.

*E. "Freedom From" vs. "Freedom To"*

Free speech is preventing muzzles from clamping down on someone's mouth. It does not require handing someone a loudspeaker, and it does not require stealing a loudspeaker that someone legitimately owns and then giving this loudspeaker to someone else free of charge just because it would help the other person to be heard by a wider audience.

This "freedom from" vs. "freedom to" distinction is crucial to the natural rights argument. Enforcing a copyright is not

muzzling a speaker, which is what a free speech violation would look like. Copyright is simply enforcing your property right in your loudspeaker when someone else tries to take it from you. The theft of a loudspeaker would enable the thief to speak more effectively, but the theft of the loudspeaker is not a free speech interest that should be balanced against the owner's property interest. If free speech is merely "freedom from," if it is only freedom from interference and specifically is only freedom from interference by the government, then the theft represents no free speech interest which courts could balance against a copyright interest. The absence of a free speech interest in the theft of expressions might be what the Supreme Court was getting at in *Eldred*, a landmark case which held that copyright does not conflict with free speech. The *Eldred* Court said:

> [Copyright law], in contrast, does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make-or decline to make-one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.[84]

## IV. First Amendment Analysis in *Nation* and *Eldred*

Even if natural rights and merger doctrine are not sufficient to save copyright law from free speech concerns, the Supreme Court of the United States in the two most relevant cases has held that copyright does not violate free speech and that copyright has internal doctrines that alleviate all free speech concerns.[85] One scholar has argued that *Eldred* reaffirms *Nation* and decisively rejects all the recent arguments advanced by lawyers, judges, and scholars calling for a First Amendment defense to copyright infringement.[86]

*Eldred* dealt with a narrow issue and the Copyright Clause was the prime basis for the constitutional challenge. However, the Court in *Eldred* also responded to and rejected a First Amendment argument that captured much of the thinking of copyright's First Amendment critics. Some scholars claim that copyright law violates free speech because a free speech analysis of copyright law must begin with the categories of scrutiny jurisprudence from free speech case law, copyright law is a content-neutral speech regulation that deserves intermediate scrutiny of the most rigorous type, and copyright fails to pass muster under this analysis.[87] Other scholars argue that if the fair use doctrine alleviates free speech concerns then the fair use test should mirror other free speech tests.[88]

Contemporary free speech jurisprudence as separate from copyright jurisprudence does not need to be applied to scrutinize copyright laws. Moreover, the heightened category of scrutiny argument is precisely the First Amendment challenge that the United States Supreme Court squarely rejected in *Eldred*.[89] No need exists to import specific detailed free speech tests, e.g. categories of scrutiny from free speech jurisprudence into copyright jurisprudence so long as copyright doctrines organic to copyright jurisprudence adequately address free speech concerns. The Supreme Court strongly implied in *Nation* and *Eldred* that copyright's idea-expression dichotomy and fair use are copyright's free speech jurisprudence.[90] No judicial authority, nor anything in the Constitution, says that the judicial interpretations of the First Amendment embodied in other free speech jurisprudence are necessarily required to be applied to every free speech problem, particularly where the Supreme Court has provided a different free speech analysis, as it has for copyright.

The Supreme Court has essentially created a unique jurisprudence of First Amendment-Copyright Clause analysis. The new free speech jurisprudence holds that the First Amendment's purpose is consistent with the Copyright Clause's purpose because free speech promotes the free flow of ideas and copyright law provides incentives for the creation and dissemination of ideas.[91] The new jurisprudence holds that the idea-expression dichotomy and fair use render copyright law consistent with free speech.[92] The new jurisprudence holds that copyright does not inhibit the free flow of ideas because ideas cannot be copyrighted, and to the extent that the use of copyrighted expressions are necessary for scholarship, criticism, education, or any other purpose interconnected with the free flow of ideas, the doctrine of fair use is a defense to infringement.[93] And the new jurisprudence holds that the Framers of the Constitution must have thought the Copyright Clause and the First Amendment compatible because they were enacted at about the same time.[94]

Free speech case law comes from the Supreme Court of the United States, so the Court's rulings in *Nation* and *Eldred* should be interpreted as an addition to free speech jurisprudence which specifically preempts the field of judicial tests for analyzing free speech conflicts within copyright.

## V. Conclusion

A strong merger doctrine is necessary for the idea-expression dichotomy to have teeth and perform its proper job: preventing copyright ownership from impeding the free flow of ideas or from granting ownership in ideas and facts. It will also deal successfully with all legitimate cases where lawyers, judges, and scholars have considered the need for a distinct First Amendment defense to copyright infringement. The idea-expression dichotomy means that copyright can never restrict the free flow of ideas because copyright does not grant ownership of or control over ideas. If merger doctrine is used to make sure that the idea-expression dichotomy is given full effect, then it is a logical necessity that copyright law will never impede the free flow of ideas in cases where copyrighted expressions are intertwined with non-copyrightable ideas or facts.

Free speech does not conflict with copyright law and no need exists to import free speech jurisprudence to make copyright law conform to the First Amendment. Copyright's internal doctrines of idea-expression dichotomy, fair use, and merger already fully reconcile copyright and the legitimate free speech concerns of access to information and the free flow of ideas.

**Endnotes**

1 Concerns about reconciling copyright and free speech originated in Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1969-1970).

2 The term "Copyright War" dates back to Jessica Litman, *War and Peace*, 53 J. Copyright Soc'y U.S.A. 1 (2005-2006). More recently, copyright's leftist critics have begun to call themselves the "Copyleft," a term which originated from open source software licenses.

3 U.S. Const. amend. I.

4 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

5 Abrams v. U.S., 250 U.S. 616, 630 (1919).

6 Whitney v. California, 274 U.S. 357, 375–76 (1927); Nimmer, *supra* note 1, at 1187-88.

7 Whitney v. California, 274 U.S. 357, 375–76 (1927); Nimmer, *supra* note 1, at 1187-88.

8 *See infra* Part IV.

9 *See infra* Part II.D.

10 The Hand abstraction test was created in Nichols vs. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.). Talking about drawing the line between idea and expression, Judge Hand commented "[n]obody has ever been able to fix that boundary, and nobody ever can." *Id.* The idea-expression dichotomy is codified in section 102(b), which states: "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2011).

11 BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129 (11th Cir. 2007).

12 Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991).

13 *BUC*, 489 F.3d at 1143-44; *Kregos*, 937 F.2d at 705–07.

14 *Nichols*, 45 F.2d at 121.

15 Toro Co. v. R & R Products Co., 787 F.2d 1208, 1212 (8th Cir. 1986). Merger doctrine is not explicitly codified in the Copyright Act, but it is implied by the idea-expression dichotomy, and it is necessary for the idea-expression dichotomy to function properly with respect to free speech.

16 Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 739–40 (9th Cir. 1971).

17 *Id.*

18 *Id.*

19 *Id.* at 742. The case does not explain precisely why the bee pins are necessarily so similar, but a reasonable hypothesis is that making the pins involved placing sizeable gemstones on a fairly small pin, such that the jeweler could only fit perhaps ten or twenty gems on a single pin. If an artist were forced to draw a picture of a bee using only ten dots of color, it would necessarily resemble most other such works of art because of the limitations of the artistic medium.

20 Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678 (1st Cir. 1967).

21 *Id.* at 678-679. The contest instructions were simple and basic, such that any written instructions telling people to enter a box top and social security number for a contest probably would have infringed the copyright. *Id.*

22 *See infra* Part III.D.1.

23 Such a theory was offered in Nimmer, *supra* note 1, at 1196-1200, using the example of photographs of the My Lai massacre in Vietnam as something that should be subject to a First Amendment defense or be subject to a compulsory license. Nimmer's theory has widely influenced legal scholars and judges.

24 *See infra* Part III.D.6.

25 *See supra* note 23.

26 *See infra* Part III.D.7.

27 Sid & Marty Krofft Television Productions Inc. v. McDonald's Corp., 562 F.2d 1157, 1161–62 (9th Cir. 1977).

28 *Id.* at 1170.

29 *Id.*

30 *Id.* at 1171.

31 *Id.* at 1171 n. 16.

32 *Id.* at 1171 n. 17.

33 Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 93-94 (2d Cir. 1977).

34 *Id.* at 95–97.

35 *Id.* A number of courts have stated or suggested that the fair use doctrine significantly alleviates free speech vs. copyright concerns. The test for fair use is a multi-factor balancing test and the outcome of the test applied to any given set of facts is difficult to predict, but many uses of copyrighted expressions which promote the free flow of ideas, such as educational, academic, or critical copying, are a fair use in most instances, especially if the alleged infringer does not usurp the market for the original. A broad array of potential free speech problems are solved by fair use. However, some scholars assert that alleged infringements could fail the fair use test but still implicate First Amendment interests. The fair use test, codified in section 107, states that:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2011).

36 International News Service v. Associated Press, 248 U.S. 215 (1918) (holding that one newspaper reporting service cannot copy and financially exploit the news stories reported by another newspaper reporting service under a theory of misappropriation, even though news consists of facts which are not copyrightable subject matter).

37 *Id.*

38 Los Angeles News Service v. Tullo, 973 F.2d 791, 792 (9th Cir. 1992).

39 *Id.* at 795.

40 *Id.* at 796.

41 Triangle Publications Inc. v. Knight-Ridder Newspapers Inc., 445 F.Supp. 875, 876-77 (S.D. Fla. 1978).

42 *Id.* at 879–81.

43 *Id.* at 882–84.

44 Triangle Publications Inc. v. Knight-Ridder Newspapers Inc., 626 F.2d 1171, 1175-78 (5th Cir. 1980).

45 Triangle Publications Inc. v. Knight-Ridder Newspapers Inc., 626 F.2d 1171, 1181-82 (5th Cir. 1980) (Brown, J., concurring).

46 *Id.* at 1182.

47 *Id.*

48 *Id.*

49 Triangle Publications Inc. v. Knight-Ridder Newspapers Inc., 626 F.2d 1171, 1184 (5th Cir. 1980) (Tate, J., concurring).

50 Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539,

541–45 (1985).

51 *Id.* at 563–64.

52 Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130, 131-39 (S.D.N.Y. 1968).

53 *Id.*

54 *Id.* at 143–44.

55 *Id.* at 146.

56 Salinger v. Random House Inc., 650 F.Supp. 413, 416–17 (S.D.N.Y. 1986).

57 *Id.* Examples of side-by-side comparison of Salinger and the biographer show this. *Id.* at 419.

58 *Id.* at 424.

59 Salinger v. Random House Inc., 811 F.2d 90, 96–97 (2d Cir. 1987).

60 *Id.* at 96 n. 4.

61 Craft v. Kobler, 667 F.Supp. 120, 121–22 (S.D.N.Y. 1987).

62 *Id.* at 128.

63 *Id.* at 128–29.

64 New Era Publ'ns Int'l v. Henry Holt & Co., 695 F.Supp. 1493, 1497-98 (S.D.N.Y. 1988).

65 *Id.* at 1523–24.

66 New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 586 (2d Cir. 1989) (Oakes, J., concurring).

67 New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 583–85 (2d Cir. 1989) (majority opinion). The First Amendment was also an issue in *New Era v. Henry Holt*, but only regarding whether the proper remedy for infringement was an injunction or monetary damages. *New Era*, 873 F.2d at 584; *New Era*, 695 F.Supp. at 1525–28. In 1992 Congress passed an amendment to section 107 which specified that the traditional four-factor fair use test applies to unpublished works. 17 U.S.C. § 107. The legislative history indicates that Congress intended to overrule *Salinger* and *New Era*. Daniel E. Wanat, *Fair Use and the 1992 Amendment to Section 107 of the 1976 Copyright Act: Its History and an Analysis of Its Effect*, 1 Vill. Sports & Ent. L.J. 47, 61–65 (1994). If those cases were decided today then the plain meaning of the 1992 amendment would almost certainly require that fair use be found. After the 1992 amendments, fair use is even broader than it was before and it is better able to successfully accommodate free speech and copyright.

68 Worldwide Church of God v. Philadelphia Church of God Inc., 227 F.3d 1110, 1113 (9th Cir. 2000).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 1115–16.

73 *Id.* at 1120.

74 This essay does not present a theory of religion, but believers having "access" to a religion means that for religions which have a holy book the only way for the faithful to practice the religion is by reading the holy book, often as part of prayers and rituals but also as a means of establishing a personal connection to the religion's prophets and holy figures. Sacred texts are by their very nature a unique type of literary expression, which should be acknowledged in factual inquiries such as merger doctrine analysis.

75 The Copyright Clause states: "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8, cl. 8.

76 Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004).

77 Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001).

78 David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 Fordham L. Rev. 435 (2005).

79 Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

80 *Id.* at 553–56.

81 *Id.* at 568.

82 *Id.* at 568.

83 17 U.S.C. § 302 (2011).

84 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

85 Eldred v. Ashcroft, 537 U.S. 186, 218–21 (2003); Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539, 555–60 (1985).

86 Lackland H. Bloom Jr., *Copyright Under Siege: The First Amendment Front*, 9 Comp. L. Rev. & Tech. J. 41 (2004).

87 Netanel, *supra* note 77.

88 Lee Ann W. Lockridge, *The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech*, 24 Santa Clara Computer & High Tech. L.J. 31 (2007).

89 *Eldred*, 537 U.S. at 218–21.

90 *Eldred*, 537 U.S. at 218–21; *Nation*, 471 U.S. at 555-60.

91 *Eldred*, 537 U.S. at 219; *Nation*, 471 U.S. at 558.

92 *Eldred*, 537 U.S. at 219–20; *Nation*, 471 U.S. at 556, 560.

93 *Eldred*, 537 U.S. at 219–20; *Nation*, 471 U.S. at 556, 560.

94 *Eldred*, 537 U.S. at 219.