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Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment.

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Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment

Adrian Liu*

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INTRODUCTION

Copyright deals with both property and speech in a unique way. As a property regime, copyright gives authors a bundle of rights, regulating what they can and cannot do with their works.¹ These rights include the right to reproduce, distribute, perform, and display the copyrighted work, as well as the right to create derivative works.² Like ordinary property owners, copyright owners enjoy exclusive rights over their works. Others cannot reproduce or distribute the work without the owner's permission.³ Although copyright applies to intangible property, the rights of copyright owners are analogous to the rights of ordinary property owners. After all, copyright is intellectual property—but property, nonetheless.⁴

At the same time, copyright regulates speech.⁵ Most of the works that receive copyright protection also constitute speech within the meaning of the Constitution. The First Amendment defines speech as any activity that conveys a particular and identifiable meaning and encompasses everything from political speeches to commercial slogans to burning the American flag as a

¹ The Copyright Act provides that the author (or authors, in the case of joint ownership) is the initial owner of copyright in the work. The author may transfer copyright ownership or any of his exclusive rights to another person or entity. 17 U.S.C. § 201(a), (d) (2006). In this Article, “author” refers to the initial owner of copyright, while “copyright owner” refers to the person or entity who owns the copyright, whether by transfer or initial authorship.

² 17 U.S.C. § 106 (2007). In addition, authors of visual works have rights to attribution and integrity. *See id.* § 106A.

³ The exclusivity of the copyright owner's rights are subject to a number of exceptions, including fair use, reproduction by libraries and archives and certain kinds of secondary transmissions. *See id.* §§ 107–112, 117, 119, 121–22. As well, § 115 provides a scheme for the compulsory licensing of non-dramatic musical works.

⁴ ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 13 (7th ed. 2006) (“Copyright is generally regarded as a form of property, but it is property of a unique kind.”).

⁵ The U.S. Constitution recognizes the right to free “speech,” while the Canadian Charter of Rights and Freedoms recognizes the right to the freedom of “expression.” *See* U.S. CONST. amend. I; Constitution Act, 1982, Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, ch. 11, s. 2(b) (U.K.). Putting aside the doctrinal differences between these two rights, this Article uses the terms “speech” and “expression” interchangeably.

sign of protest.⁶ Whether in the form of books, music, art, dance, or even computer programs, most if not all copyrightable subject matter falls under the constitutional definition of speech.⁷ Moreover, the scope of protected speech and the scope of copyrightable subject matter have expanded considerably. Courts tend to take a liberal approach in defining what activities constitute speech and frequently invalidate laws that restrict speech.⁸ At the same time, a wide range of works can obtain copyright. Under the current statute, any work that is original and fixed in a tangible medium automatically receives copyright protection.⁹ With both doctrines' expansive definitions of subject matter, the class of

⁶ For constitutional purposes, speech exists where “[a]n intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.” *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). The First Amendment protects commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 761 (1976) (holding that commercial speech is not wholly outside of the protection of the First Amendment and statutory bans on advertising prescription drug prices violated the First Amendment). The First Amendment also protects flag-burning. *See Johnson*, 491 U.S. at 404 (holding that the act of burning an American flag is expressive conduct within the protection of the First Amendment).

⁷ Examples of copyrightable works that are not speech might include functional forms or charts. *See Cont'l Casualty Co. v. Beardsley*, 263 F.2d 702, 704 (2d Cir. 1958) (granting copyright protection to an insurance form). *But see Baker v. Selden*, 101 U.S. 99, 104 (1879) (holding that a bookkeeping form was too intertwined with the underlying idea to receive copyright). Architecture is given copyright protection under 17 U.S.C. § 102(a)(8) but does not constitute speech. Computer programs are both copyrighted works and speech under the First Amendment. *See Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F. 2d 1240, 1248 (3d Cir. 1983) (holding a computer program is a literary work and therefore protected by the First Amendment, making it an appropriate subject of copyright); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 327 (S.D.N.Y. 2000); *see also McGowan, infra* note 42, at 292 (arguing that not all copyrighted works are speech).

⁸ *See Randall v. Sorrell*, 126 S. Ct. 2479, 2488 (2006) (striking down a Vermont statute limiting campaign expenditures); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (striking down a federal statute regulating visual depictions of child pornography).

⁹ 17 U.S.C. § 102 (2007) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”). Originality refers to a work that is not copied from other works, and possesses a minimal amount of creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991). The Copyright Act has also greatly reduced the formalities of obtaining copyright. *See GORMAN & GINSBURG, supra* note 4, at 41.

copyrighted works that is also First Amendment protected speech is very broad indeed.

Not surprisingly, the fact that copyright simultaneously deals with both property and speech creates significant legal problems. There is an inherent conflict between copyright, which gives exclusive rights over expressive works, and the First Amendment, which guarantees that the freedom of speech will not be abridged.¹⁰ Simply put, copyright law has the potential to violate the First Amendment. Since copyright gives exclusive rights to authors to reproduce and disseminate their works, and these works are also speech, copyright effectively limits the ways in which others can exercise their right to free speech. The most typical example of this conflict is found in the case of copyright infringement. While the copyright owner alleges that the defendant copied a substantial part of his work without permission, the defendant counters that his actions were an act of free speech. The argument is that by penalizing such actions, copyright unduly infringes the defendant's First Amendment rights and should be modified to meet constitutional standards.¹¹ In another context, plaintiffs challenged the constitutionality of legislation that gave copyright owners a right to control access to their works.¹² It was argued that this law substantially restricted the ability of others to access works for their own speech purposes. In all these cases, the basic claim is that copyright restricts speech in a way that runs afoul of the First Amendment.¹³

¹⁰ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

¹¹ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–56 (1985) (holding that a magazine's unauthorized publication of verbatim quotes from the "heart" of unpublished presidential memoirs was not a fair use within the meaning of the Copyright Revision Act).

¹² See *Reimerdes*, 111 F. Supp. 2d at 326 (challenging the Digital Millennium Copyright Act ("DMCA") (112 Stat. 2860 § 1201(a)(1), (2) (1998)), that amended title 17 of the U.S. Code to prohibit the circumvention of technological measures that control access to copyrighted works and the trafficking of devices that do the same). It was argued that the DMCA is unconstitutional because it prevents individuals from accessing protected works in order to make fair use of them. *Id.*

¹³ This Article focuses on the conflict between copyright and the First Amendment as it arises in cases of copyright infringement. However, copyright law is also susceptible to challenges under the Copyright Clause in the Constitution. In *Eldred v. Ashcroft*, the plaintiffs argued that Congress' extension of the copyright term was inconsistent with the

Over the past thirty years, scholars and courts have grappled with the conflict between copyright and free speech. For the most part, the courts have concluded that copyright is compatible with the First Amendment. Copyright's speech-limiting effects are justified by the broader and ultimately speech-enhancing purpose of encouraging the creation of copyrighted works.¹⁴ In addition, the courts assert that the idea/expression dichotomy and fair use doctrine keep copyright in line with the First Amendment.¹⁵ However, most commentators disagree with the courts' presumptive validity of copyright and argue that the existing law does not adequately respect speech interests. Due to the elusiveness of the fair use defense, the ever-increasing duration of the copyright term, and the expanding breadth of authors' rights, the majority of commentators argue that copyright unduly infringes the speech rights of others.¹⁶ As such, they suggest that copyright law is unconstitutional.

The major flaw in this debate is that it ignores the fact that copyright deals with both property and speech. On one hand,

Constitution's grant of rights to authors for "limited times." 537 U.S. 186, 193 (2003); see also *Kahle v. Ashcroft*, 72 U.S.P.Q.2d (BNA) 1888 (N.D. Cal. Nov. 19, 2004) (where plaintiff argued that the elimination of the notice and renewal formalities in the copyright statute fundamentally altered the traditional contours of copyright and thereby infringed the First Amendment).

¹⁴ The Constitution provides that Congress has the 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.

¹⁵ See, e.g., *Eldred*, 537 U.S. at 219–20 (stating copyright law inherently contains First Amendment accommodations because it only allows expressions, not ideas, to be subject to copyright protection).

¹⁶ See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 12–26, 69–74 (2001) (criticizing the idea/expression dichotomy and fair use as inadequate accommodations of free speech, and describing the constitutional challenge to the Sonny Bono Copyright Term Extension Act that was the subject of litigation in *Eldred*); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 541–45 (2004) (arguing that copyright law's continual expansion means that it threatens more speech than ever before); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 11 (2002) (describing the speech-restricting effects of copyright's ongoing enlargement); 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, 414–29 (1999) (discussing how anti-circumvention provisions in the DMCA endanger the freedom of speech).

commentators have attempted to portray copyright as a form of speech regulation.¹⁷ They emphasize the ways in which copyright substantially limits the speech abilities of others. Accordingly, they argue that copyright ought to be evaluated in the same way that other speech laws are evaluated, such as campaign finance or obscenity laws.¹⁸ Others argue that the copyright jurisprudence devalues the speech interests of subsequent speakers and that copyright ought to serve the interests of a broader range of speakers.¹⁹ The common thread amongst these scholars is that they all conceive of copyright as something that restricts speech.

On the other hand, the courts have rejected this characterization of copyright. In most First Amendment cases, judges have summarily dismissed free speech arguments. Courts either insist that copyright has already incorporated free speech concerns—hence the famous, yet conclusory, remark that copyright is “the engine of free expression”²⁰—or they downplay the defendant’s speech interests, claiming that his conduct simply does not engage the First Amendment.²¹ These cases demonstrate the courts’ unwillingness to equate copyright with other speech-regulating laws. They seem to treat copyright as a different kind of regime—a regime that creates entitlements that properly belong to the copyright owner and do not necessarily affect the speech interests of others.²²

¹⁷ See, e.g., McGowan, *infra* note 42, at 291 (“Most free speech critiques of copyright take it for granted that copyright is a governmental restriction on speech.”).

¹⁸ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (holding that provisions limiting campaign contributions violated candidates’ rights to free speech); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (holding that the FCC could disallow certain language from being used in public broadcasts without infringing on the broadcaster’s First Amendment rights).

¹⁹ See, e.g., Tushnet, *supra* note 16, at 565–67 (arguing that pure copyright can serve free speech values); Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright*, 56 U. TORONTO L.J. 75, 76 (2006) (arguing that copyright should serve the speech interests of the broader community).

²⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

²¹ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 189 (2003) (“Protection of [copyright] does not raise the free speech concerns present when the government compels or burdens the communication of particular facts and ideas. The First Amendment . . . bears less heavily when speakers assert the right to make other people’s speeches.”).

²² *Harper & Row*, 471 U.S. at 557.

This Article argues that the conflict between copyright and free speech should be re-examined by treating copyright as a form of property. What the academics fail to consider, and what the courts naturally gravitate to, is the fact that copyright is primarily a property regime that deals with an owner's rights in his intellectual property. The reason why courts do not apply First Amendment analysis to copyright is not because of a desire to immunize copyright from the Constitution or an inability to grasp the defendants' speech interests. Rather, the courts regard copyright as a form of property that does not necessarily affect speech rights at all. Indeed, the defendant's conduct often seems more like a violation of the copyright owner's property rights than a conflicting exercise of free speech. If copyright is property, the defendant who copies another person's work looks more like a thief than a speaker.

Of course, this is not to say that copyright does not affect speech. Since so many copyrighted works are also constitutionally recognized speech, the rules and restrictions imposed by copyright law inevitably impact the right to free speech. However, treating copyright as property does not mean it is exempt from speech concerns. In fact, a property-based analysis can shed more light on how copyright conflicts with the First Amendment and how this conflict can be resolved. The main problem with the courts' approach is that it has failed to acknowledge that property can infringe upon speech interests in its own right. Through the well-established public forum doctrine, the courts have scrutinized property rights and whether they unjustifiably encroach upon individuals' speech rights. The fact that copyright is property, then, does not immunize it from the First Amendment. Instead, it establishes a clear basis upon which copyright can be constitutionally analyzed. Since copyright creates a quasi-public forum, it ought to accommodate the speech interests of the public to the satisfaction of the Constitution.

This Article begins with an overview of the existing cases and commentary that deal with the conflict between copyright law and the First Amendment. While academics portray copyright as regulation that significantly restricts speech, the courts view copyright as a form of property that does not necessarily affect

speech at all. In this regard, a comparison with Canadian jurisprudence is useful because Canadian courts have expressly treated copyright as property. In Part III, it is argued that copyright is a property regime that only incidentally affects speech. In light of its public purposes, however, copyright should be understood as a form of quasi-public property that is meant to facilitate the speech of others. Finally, Part IV of this Article explains that copyright's property status does not exempt it from the First Amendment. Specifically, copyright can be compared to a public forum which ought to be made available for speech purposes that are compatible with the property, and which do not unduly infringe the private interests of the owner. In this way, viewing copyright as property does not foreclose free speech concerns, but instead provides a clear and novel framework with which to understand the conflict between copyright and free speech.

I. THE CONFLICT BETWEEN COPYRIGHT AND FREE SPEECH: THE EXISTING FRAMEWORK

A. *The Commentators Treat Copyright as Speech Regulation*

There is extensive literature examining the conflict between copyright and the First Amendment. For the most part, this literature focuses on the way that copyright inherently burdens free speech. In 1970, Melville Nimmer wrote a seminal article describing the way in which copyright and speech potentially contradict each other.²³ Since copyright prohibits the unauthorized use of copyrighted expression, it necessarily abridges the freedom of expression.²⁴ However, Nimmer concluded that existing copyright law adequately accommodated speech interests. Through the idea/expression dichotomy, which reserves expression but leaves ideas free for the taking, and the fair use defense, which justifies copyright infringement for certain public policy reasons, copyright has already determined the appropriate balance between

²³ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180 (1970).

²⁴ *Id.* at 1181.

copyright and speech.²⁵ Although Nimmer identified specific instances in which copyright law may need to be modified to accommodate the First Amendment, he argued that copyright law itself supplied sufficient safeguards for speech interests.²⁶ As such, he implicitly accepted that copyright is a form of speech regulation, though he believed it already contained its own ways to deal with these problems.²⁷

Subsequent scholarship has reached less optimistic conclusions. Some scholars argue that copyright should be analyzed under the First Amendment like other kinds of speech regulation. For example, Lemley and Volokh argue that copyright is a form of content-based speech regulation because its restriction depends on the content of the defendant's speech.²⁸ Since infringement depends on how substantially similar the defendant's work is to the copyrighted work, copyright's prohibitive effects are based on the content of the defendant's work.²⁹ Although other scholars have criticized this analysis, it represents an effort to

²⁵ *Id.* at 1189–91, 1200 (arguing that copyright was the product of “definitional balancing” between the freedom of speech and the need to encourage authors to create works). Other scholars have argued that the idea/expression dichotomy and fair use are too vague or uncertain to adequately protect speech interests. *See* Netanel, *supra* note 16, at 12–26; Rubinfeld, *supra* note 16, at 13–16, 18–21. In doing so, they implicitly accept Nimmer's basic proposition that copyright can accommodate free speech, only they believe that these doctrines need to be modified to meet constitutional standards. The defense of fair use provides that copyright infringement is not a violation if the purpose of the use was for criticism, comment, news reporting, and other similar purposes. *See* 17 U.S.C. § 107 (2006).

²⁶ Nimmer, *supra* note 23, at 1197–99. For example, Nimmer argues that home movie films of the John F. Kennedy assassination and photographs of the My Lai massacre are works where the ideas and expression are so “wedded together” that one cannot conjure up the idea without also using the expression. *Id.* In this case, Nimmer suggests that the substantial speech values at stake would be served by having compulsory licenses. *Id.*

²⁷ *See id.* at 1192 (acknowledging that prohibiting the reproduction of copyrighted works infringes the freedom of speech, but “this is justified by the greater public good in the copyright encouragement of creative works”).

²⁸ *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998). A similar argument is advanced by Jed Rubinfeld. *See* Rubinfeld, *supra* note 16, at 5.

²⁹ Lemley & Volokh, *supra* note 28, at 186; *see also* *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946) (infringement is determined by looking at the substantial similarity of the allegedly infringing work to the original); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (where Justice Learned Hand conducted a detailed, substantive evaluation of the allegedly infringing work to determine whether there was infringement).

portray copyright as regulation that significantly intrudes on speech interests and should be analyzed as such.³⁰

Others contend that copyright is content-neutral speech regulation that ought to be evaluated according to the First Amendment jurisprudence. Netanel argues that copyright law is content-neutral because although infringement is based on the content of the defendant's speech, it is neutral in regards to viewpoint.³¹ Just as copyright protection can apply to a wide range of works, irrespective of their content or artistic merit,³² copyright's corresponding limitation on subsequent speakers applies irrespective of their message or viewpoint.³³ Netanel argues that copyright is better viewed as content-neutral speech regulation that should be subject to more "rigorous" scrutiny.³⁴ Relying on the example of *Turner Broadcasting System, Inc. v. FCC*,³⁵ Netanel compares copyright to a governmental system that

³⁰ See Netanel, *supra* note 16, at 48–49 (arguing that, with respect to copyright law, "content sensitive" does not mean "content-based" within the meaning of the First Amendment); McGowan, *infra* note 42, at 294–96 (arguing that courts make distinctions based on content to identify situations where First Amendment values trump competing values). If copyright is content-based speech regulation, it is subject to higher levels of scrutiny than content-neutral regulation. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

³¹ Netanel, *supra* note 16, at 49. The Supreme Court distinguishes between laws that are content-based and those that discriminate on viewpoint, but it has stated that content-based laws are "presumptively invalid." *R.A.V.*, 505 U.S. at 382. However, viewpoint discrimination is also seen as being particularly objectionable. See *id.* at 391. For present purposes, this article assumes that Netanel considers copyright as content-neutral regulation that deserves less scrutiny than content-based regulation; which may or may not discriminate according to one's viewpoint. Although Rubinfeld argues that copyright is content-based, he notes that where a finding of infringement does not require an understanding of the words used, the prohibition is content-neutral. See Rubinfeld, *supra* note 16, at 48–49.

³² *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (holding that since "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations," the artistic merit of a work did not determine whether it obtained copyright protection).

³³ Netanel, *supra* note 16, at 49; see also Lillian R. BeVier, *Copyright, Trespass, and the First Amendment: An Institutional Perspective*, 21 SOC. PHIL. & POL'Y 104, 130 (2004) (arguing that enforcing copyright does not involve governmental discrimination based on viewpoint).

³⁴ Netanel, *supra* note 16, at 55.

³⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

allocates speech entitlements amongst various speakers.³⁶ Courts determine the constitutionality of these systems by examining the nature of the government's purpose, whether there is satisfactory factual support for the purpose, and the propriety of the government's means.³⁷ Netanel argues that copyright should be subject to the same kind of rigorous scrutiny that was applied in *Turner*.³⁸ His argument explicitly treats copyright as speech regulation that should be analyzed using the same First Amendment standards that apply to similar forms of regulation.

Still others argue that the speech interests of those who borrow from copyrighted works should be taken more seriously. While transformative borrowing ought to receive fair use protection, non-transformative or even verbatim copying can serve valid speech interests. For instance, Tushnet argues that given the nature of what is copied, the speaker's intent, and the surrounding context, even wholesale copying of a copyrighted work can engage First Amendment values.³⁹ Tushnet uses the example of a speaker repeating Dr. Martin Luther King's iconic "I Have a Dream"

³⁶ Netanel, *supra* note 16 at 55–56; *Turner Broadcasting*, 512 U.S. at 662 (holding that provisions requiring cable television system operators to broadcast local stations is subject to intermediate scrutiny, which is applicable to content-neutral restrictions on speech). Moreover, Netanel argues that copyright "brazenly and consistently" allocates speech entitlements to benefit copyright owners while burdening the public at large. Netanel, *supra* note 16, at 69.

³⁷ Netanel, *supra* note 16, at 58 (discussing that in determining the constitutionality of these systems, courts consider whether there are less speech-restrictive means of furthering the governmental interest).

³⁸ *Id.* at 58–59 (describing the court's approach in *Turner* as an application of the intermediate scrutiny standard with "unaccustomed vigor"). Intermediate scrutiny is usually applied to "time, place or manner" regulations, which are justified if they meet an important state interest and are narrowly tailored so as to not burden more speech than is necessary. *See United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (finding that a government regulation is sufficiently justified if it furthers an important government interest and is tailored so it restricts First Amendment freedoms no more than necessary); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (reaffirming that a "time, place, or manner" regulation must be narrowly tailored to a legitimate, content-neutral, government interest). On the other hand, rigorous scrutiny involves more searching inquiry about the government's interest, the factual support for that interest, and whether there is a precise "fit" between the means and ends. Netanel, *supra* note 16, at 58. Although Netanel's article is somewhat unclear about whether the standard of review he argues for is "rigorous scrutiny," "heightened scrutiny," or "intermediate scrutiny," this Article assumes he uses these terms interchangeably.

³⁹ Tushnet, *supra* note 16, at 546.

speech at a civil rights rally to point out that verbatim copying can serve important political and democratic values and further the speaker's self-fulfillment and autonomy.⁴⁰ The speaker has good reasons for copying King—it references the significance of King's original speech, it lends authenticity to the speaker's current speech, and it evokes the historical and political significance that the speech has in the public psyche.⁴¹ In this way, copying copyrighted works can serve interests that are traditionally valued under the First Amendment. To the extent that copyright prohibits such speech, it is a form of speech regulation that unduly diminishes the scope of free speech.

Even scholars who disagree about the First Amendment's application to copyright accept the basic premise that copyright regulates speech. Specifically, David McGowan describes the tension between copyright and free speech as involving the conflicting speech interests of two speakers.⁴² Copyright infringement is the clash between the speech interests of the plaintiff-copyright owner and the defendant.⁴³ However, McGowan argues that the First Amendment is not equipped to resolve such speaker-speaker disputes. He asserts that the First Amendment usually deals with the conflict between an individual's speech and a non-speech-related governmental interest, such as national security or public order.⁴⁴ In these cases, the courts

⁴⁰ *Id.* at 574–78. Tushnet notes that King's "original speech" delivered in front of the Lincoln Memorial was not in fact original, since he had delivered similar speeches on many prior occasions. *Id.* at 575. Tushnet points out that given the context of the 250,000 marchers gathered in Washington, D.C., the speech took on new significance. *Id.* at 575–76. With regard to the speech values at stake, there are three oft-cited rationales for free speech: the discovery of truth, political participation, and self-fulfillment. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–79 (1963).

⁴¹ See Tushnet, *supra* note 16, at 568–81 (describing copying as a means of self-expression, persuasion, and affirmation).

⁴² David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 *U. PITT. L. REV.* 281, 285, 301 (2004).

⁴³ See *id.* at 285 (describing how copyright pits the interests of an "upstream" author against a "downstream" author, thereby implying that both parties have the same speech rights at stake).

⁴⁴ *Id.* at 296. For example, speech regulations created for the purpose of national security or public order include the laws at issue in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that states may proscribe First Amendment rights only when free

determine whether the law's restrictions on speech are justified by the proffered governmental purpose. However, since copyright pits one person's speech interest against another's, and both people have presumptively equal claims to free speech, the First Amendment does not have the tools to adjudicate the dispute.⁴⁵ McGowan's argument is problematic in many ways. It can be argued, for instance, that there are First Amendment cases dealing with speaker-speaker conflict,⁴⁶ or that existing First Amendment doctrine should apply despite the lack of precedent. Nonetheless, he concedes that copyright regulates speech. Thus, while McGowan acknowledges that copyright affects the speech interests of copyright owners and subsequent speakers, he does not think the First Amendment can resolve this problem.⁴⁷

There are good reasons why scholars tend to characterize copyright as a form of speech regulation. Over the past several decades, the courts have continually expanded the scope and meaning of the right to free speech. A wide array of activities, such as commercial speech, campaign spending, nonverbal conduct and silence all constitute protected speech.⁴⁸ The courts have also narrowed the categories of speech that fall outside the

speech or free press is directed to incite or produce imminent lawless action and is likely to produce such action, thereby endangering the public security). *See also* *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (holding that any restraints on expression carry a presumption of unconstitutionality).

⁴⁵ McGowan, *supra* note 42, at 284–85, 300–01 (arguing that the First Amendment does not provide a basis with which to distinguish between the rights of “upstream” versus “downstream” users).

⁴⁶ *See, e.g., Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995) (holding that a state could not require individuals to alter the content of their First Amendment expressions, even though the expressions, as they were, violated a state public accommodation law); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding that requiring the Boy Scouts to allow a homosexual to be a scoutmaster violated the Boy Scouts' First Amendment right of expressive association).

⁴⁷ McGowan, *supra* note 42, at 299 (acknowledging that there are problems with treating copyright as speech restriction, and conceding that it affects “significant amounts of expression”).

⁴⁸ *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that local authorities cannot compel salutation of the United States flag); *see also* *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding the right to speak and the right to refrain from speaking are protected by the First Amendment).

First Amendment.⁴⁹ At the same time, courts often strike down laws that restrict speech in many different contexts.⁵⁰ Given the liberal definition of free speech in American law, it is not surprising that scholars tend to emphasize the speech interests at stake in order to criticize copyright law. The more that copyright looks like intrusive speech regulation, the more likely it is that courts will favour defendants and re-shape copyright law to accommodate their speech interests.

B. The Courts Treat Copyright as Property

The argument that copyright is a form of speech regulation has been largely unsuccessful in the courts. Although the courts concede that copyright is not “categorically immune” from constitutional scrutiny, they have concluded that existing copyright law meets First Amendment standards.⁵¹ In *Eldred v. Ashcroft*, the Supreme Court dealt summarily with the constitutional challenge by declaring that “copyright contains built-in First Amendment accommodations.”⁵² Borrowing directly from *Nimmer*, the Court identified the idea/expression dichotomy and fair use as the accommodations that kept copyright compatible with free speech.⁵³ Without analyzing the specific ways in which copyright burdens speech and how it mitigates those burdens, the Court assumed that copyright is consistent with the First Amendment. This cursory

⁴⁹ For example, the unprotected class of “fighting words” is limited to speech that directly incites anger in others, and not generalized epithets or insults. *See* *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that Cohen’s jacket, which displayed an offensive slogan, did not constitute fighting words because “[n]o individual . . . could reasonably have regarded the words on appellant’s jacket as a direct personal insult”).

⁵⁰ *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) (finding that where a statute is plagued by vagueness, and promulgated to regulate content-based speech, significant First Amendment concerns arise).

⁵¹ *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (rejecting the D.C. Circuit’s holding in *Eldred v. Reno* that copyright was “categorically immune from challenges under the First Amendment” (citing *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001))).

⁵² *Eldred*, 537 U.S. at 219. The petitioners argued that the Sonny Bono Copyright Term Extension Act was a content-neutral regulation that failed heightened judicial review under the First Amendment, but the Court rejected this as “uncommonly strict scrutiny” for copyright. *Id.* at 218–19.

⁵³ *Id.* at 219–20.

treatment of copyright is striking in light of the substantial attention that courts usually give to other speech regulations.⁵⁴ At a minimum, these laws are scrutinized in terms of whether there is a compelling state interest and whether the means chosen is tailored to suit the ends.⁵⁵ It may be that the Court simply believes that copyright satisfies this test, as is suggested by the statement that as long as copyright stays within its “traditional contours,” First Amendment scrutiny is not necessary.⁵⁶ But the complete lack of analysis suggests that the court treats copyright as a different kind of regime that does not need to be subjected to normal First Amendment analysis.

Moreover, the *Eldred* Court questioned whether there is a conflict between copyright and free speech in the first place.⁵⁷ Justice Ginsburg opined that since the Copyright Clause and the First Amendment were adopted at around the same time, the Framers intended for copyright to be compatible with free speech.⁵⁸ The Court argued that copyright does not conflict with the First Amendment since it gives authors an economic incentive to create and distribute their works.⁵⁹ Thus, copyright actually enhances individuals’ speech abilities. Given that copyright’s purpose is to facilitate the creation and dissemination of expression, it cannot properly be conceived of as a speech-restricting regulation. Although copyright may affect some speech, its overall effect is to further the goals of free speech and, therefore, it does not merit First Amendment scrutiny.

Yet there is another important reason why the courts are so resistant to applying First Amendment analysis to copyright. In

⁵⁴ For example, even relatively mundane regulations have been scrutinized under the First Amendment. *See Saia v. New York*, 334 U.S. 558, 559–60 (1948) (invalidating a city ordinance prohibiting trucks with sound amplification devices).

⁵⁵ This refers to the intermediate scrutiny standard, which applies to a wide variety of speech regulations. *See supra* note 38 and accompanying text.

⁵⁶ *Eldred*, 537 U.S. at 221.

⁵⁷ *Id.* at 194.

⁵⁸ *Id.* at 219. However, it can be argued that the co-existence of the Copyright Clause and the First Amendment does not immunize the former from the latter. Congress’ powers are limited by the Bill of Rights, which includes the First Amendment. *See Nimmer, supra* note 23, at 1181–82; Rubinfeld, *supra* note 16, at 12–13.

⁵⁹ *Eldred*, 537 U.S. at 219 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)).

Eldred, Justice Ginsburg explained that the First Amendment “protects the freedom to make—or decline to make—one’s own speech.”⁶⁰ However, Ginsburg further stated that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.”⁶¹ The choice of words is revealing: the First Amendment applies with less force when a person makes *someone else’s* speech. The suggestion is that the First Amendment does not grant a person the right to use another person’s speech as his own. By emphasizing the fact that the speech belongs to someone else, the *Eldred* Court seems to view copyright not as a form of speech regulation, but as a form of property.⁶² The reason the First Amendment does not apply to copyright is because there is a property interest in play instead of a speech interest. In the Court’s view, the speaker who uses the copyrighted work is not so much borrowing the work as he is stealing it—stealing the creative expression of the original work in which the owner has a proprietary interest. For this reason, the Court drew a distinction between a speaker who makes his “own” speech and a speaker who makes “other people’s speeches.”⁶³ The person who makes other people’s speeches is not exercising his right to speech, but is simply misappropriating property that belongs to another.

The *Eldred* Court’s reference to making one’s own speeches does not mean that a speaker must say something novel or original to merit First Amendment protection.⁶⁴ A requirement of novelty or originality would be wholly foreign to the First Amendment.⁶⁵ The right to free speech does not depend on whether the speaker says something new or creative.⁶⁶ A person who waves a placard

⁶⁰ *Eldred*, 537 U.S. at 221.

⁶¹ *Id.*

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See* Nimmer, *supra* note 23, at 1181 (noting that the First Amendment does not only protect speech that is original to the speaker); *see also* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 391 (Cal. Sup. Ct. 2001) (holding that reproductions are entitled to First Amendment protection).

⁶⁶ *See* Nimmer, *supra* note 23, at 1181 (noting the basic principle that underlies opposition to governmental censorship: the First Amendment does not only protect speech that is original to the speaker but protects speech for all men whether or not they

is exercising his right to free speech notwithstanding the fact that someone else wrote the slogan, or the slogan was an unoriginal, generic phrase like “War is Terrorism.” It would be inimical to the values of free speech to require speakers to say something unique in order to gain the protection of the First Amendment.⁶⁷ Evidently, the notion of originality is derived from copyright. Copyright only applies to original works—works that are not copied from another source and that possess a minimal amount of creativity.⁶⁸ This threshold is low, but it nevertheless bars works which are almost identical to existing works.⁶⁹ When *Eldred* and other cases suggest that free speech does not encompass the right to make other people’s speeches,⁷⁰ this cannot be understood to introduce an originality requirement into the First Amendment.⁷¹ The problem with an individual taking another person’s speech is not that speech must be original to that individual, but that the speech actually belongs to someone else. In other words, the court’s language of “other people’s speeches” must refer to the

qualify as artistic creators); *see also* Comedy III Prods., 25 Cal. 4th 387 at 391 (holding that reproductions are entitled to First Amendment protection).

⁶⁷ Given the values of autonomy, self-fulfillment, and truth-seeking that underlie the right to free speech, it would seem that a person’s intention to engage in expressive conduct suffices for First Amendment protection. *See* Emerson, *supra* note 40, at 878–79.

⁶⁸ *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citations omitted).

⁶⁹ *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that the photographer’s role in posing the subject, and selecting and arranging the costume and draperies constituted sufficient originality for copyright purposes); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 104–05 (2d Cir. 1951) (holding that mezzotint reproductions of existing works could obtain copyright).

⁷⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

⁷¹ The Canadian jurisprudence has also referred to the need for originality. In *Michelin*, the court reviewed the cases of *Canadian Tire Corp. v. Retail Clerks Union*, [1985] 7 C.P.R. (3d) 415 (F.C.T.D.) (Can.) and *R. v. Lorimer* [1984], 77 C.P.R. (2d) 262 (F.C.A.). *Cie générale des établissements Michelin v. CAW* [1996] 71 C.P.R. (3d) 348, (F.C.T.D.) (Can.). These cases considered the relationship between the Charter and copyright. The *Michelin* court concluded, “it appears that [these cases] found that the infringers’ use of the copyrighted material demonstrated insufficient original thought to be labeled protected expression under Section 2(b).” *Id.* ¶ 84. The court went on to reject the need for originality and held that because the definition for expression under § 2(b) was not equivalent to the definition of “original works” under the Copyright Act, the defendant’s works were examples of expression, even though they were not original works for the purposes of the Copyright Act. *Id.* ¶ 91.

proprietary aspect of speech in order to be consistent with the First Amendment.⁷²

The notion that copyright is property regulation instead of speech regulation animates other cases as well.⁷³ For example, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the defendants argued that their copying of a Gerald Ford memoir was justified because of the public's First Amendment interests in the work's contents.⁷⁴ The Court rejected this argument because, although the work was one of high public interest, the copyright owner possessed the exclusive right of first publication.⁷⁵ The Court stated that "[t]he author's control of first public distribution implicates not only his personal interest in creative control but his *property interest* in exploitation of prepublication rights"⁷⁶ The Court indicated that copyright gives authors a property right in the form of a right to benefit from the initial publication of the work.⁷⁷ The court went on to say that as a property right, the right to first publication is likely to outweigh any claim of fair use.⁷⁸ In this way, the court treated the copyright owner's interest as a property right that would not be easily displaced by speech interests. Indeed, *Harper & Row* featured both the intangible and tangible appropriation of property. The fact that the defendants had actually obtained a stolen copy of the manuscript lent further support to the notion that the issue was about property, not speech.⁷⁹ As in *Eldred*, the court rejected the First Amendment

⁷² See *Eldred*, 537 U.S. at 221.

⁷³ See Rubinfeld, *supra* note 16, at 24 (describing earlier cases in which the courts have suggested that copyright is a property right).

⁷⁴ 471 U.S. 539, 556 (1985).

⁷⁵ See *id.* at 553, 555–56.

⁷⁶ *Id.* at 555 (emphasis added).

⁷⁷ *Id.*

⁷⁸ *Id.* (“Under ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use”). The *Harper & Row* Court’s emphasis on the right to first publication was so substantial that Congress subsequently amended the Copyright Act to make it clear that unpublished works did not necessarily rule against a finding of fair use. See 17 U.S.C. § 107 (2006) (“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.”).

⁷⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (describing the clandestine circumstances under which the defendants obtained a copy of the manuscript).

challenge because it viewed copyright as a property right, so that the defendant's conduct was more like a misappropriation of the copyright owner's property than an exercise of free speech.

Interpreting the court's approach to copyright and free speech through the lens of property gives a better explanation of their jurisprudence to date. The courts have declined to apply normal First Amendment doctrine in copyright cases.⁸⁰ This is not because they fail to appreciate the conflict between copyright and speech or the significance of the defendant's speech interests. Nor are they trying to exempt copyright from the requirements of the First Amendment.⁸¹ Neither of these explanations is compelling given the court's able application of First Amendment doctrine in other contexts. Instead, courts see copyright as a set of property rights that belong to authors and copyright owners. As such, speech interests are not necessarily implicated in every case where another person makes speech using copyrighted material. Instead, many of these cases are better understood as situations where the subsequent speaker misappropriated property that belongs to another person.

C. Copyright as Property: The Canadian Example

A comparison with the Canadian copyright jurisprudence is instructive. Although Canadian case law regarding copyright and free speech is relatively under-developed, there are cases that have directly acknowledged the link between copyright and property. By way of background, subsection 2(b) of the Canadian Charter of Rights and Freedoms (the "Charter") guarantees the freedom of expression.⁸² Although Canadian courts have adopted a comparably broad definition of expression, the freedom of expression under the Charter is arguably more limited than the

⁸⁰ See *supra* notes 20–22 and accompanying text.

⁸¹ See Rubinfeld, *supra* note 16, at 7 (describing copyright's magical immunity from First Amendment scrutiny).

⁸² Subsection 2(b) provides, "Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

freedom of speech under the First Amendment.⁸³ This may be due to the fact that the Charter contains a limitations clause in § 1, which provides that constitutional rights are subject to the reasonable limits that are found in a free and democratic society.⁸⁴ Together with a different social and political climate, the right to free expression has received less liberal interpretations than free speech in the U.S.⁸⁵ In terms of copyright, the U.S. and Canada have similar copyright statutes, granting a similar set of exclusive rights and protecting a comparable breadth of works.⁸⁶ One notable difference is that fair use is called “fair dealing” under the Canadian statute and is limited to the enumerated purposes of research, criticism, commentary, review, and news reporting.⁸⁷

⁸³ See *Irwin Toy Ltd. v. Que.*, [1989] 1 S.C.R. 927, ¶ 56 (Can.) (defining expression as including activity which conveys or attempts to convey a meaning, but excluding violence); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (upholding a law which criminalized hate speech under the Charter). *But see R.A.V. v. City of St. Paul.*, 505 U.S. 377 (1992) (striking down a statute prohibiting the placement of symbols known to arouse anger or alarm based on race, creed or gender).

⁸⁴ Section 1 provides, “[the Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). The limitations clause may restrain the interpretation of the freedom of expression because it explicitly recognizes that Charter rights are not absolute, and provides guidelines for the court to determine the limits of such rights. See *Comm. for the Commonwealth v. Can.*, [1991] 1 S.C.R. 139, ¶ 7 (Can.) (describing section 1 of the Charter as one of the “fundamental differences between the American Constitution and the *Charter*”) (per Lamer J.).

⁸⁵ See Rubinfeld, *supra* note 16, at 7. In general, the Canadian courts have expressed caution about applying American constitutional law to the Charter. See *Keegstra*, 3 S.C.R., ¶¶ 52–61.

⁸⁶ Canada Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (listing the exclusive rights to produce, reproduce, perform, publish, and broadcast the work). Although the Canadian statute does not explicitly grant a right to create derivative works, it grants the rights to translate and adapt the work, as well as the right to convert a dramatic work into a non-dramatic work, or vice versa. In addition, the Canadian statute grants moral rights to all copyrighted works. *Id.* § 14.

⁸⁷ For the purposes of criticism, review, or news reporting, the original work and its author(s) must be identified. There is no need for identification if the work is used for research or private study. *Id.* § 29–29.2. The term “fair dealing” is derived from English copyright law. See The UK Copyright Service, UK Copyright Law Fact Sheet, Aug. 11, 2004, http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law. The Canadian courts have distinguished fair dealing from fair use. *Cie Générale des Établissements Michelin v. C.A.W.*, [1996] 71 C.P.R. (3d) 348, ¶ 71 (F.C.T.D.) (Can.).

Unlike U.S. courts, Canadian courts have held that fair dealing does not include additional kinds of purposes and that parody is not a form of criticism that can be shielded by fair dealing.⁸⁸

The key Canadian case dealing with the conflict between copyright and the freedom of expression is *Cie Générale des Établissements Michelin v. C.A.W.*⁸⁹ CGEM Michelin, the international tire-making company, brought a claim of copyright infringement against a labor union.⁹⁰ In order to unionize employees at Michelin factories in Nova Scotia, the union distributed leaflets and posters depicting the well-known Michelin corporate logo, the Michelin Tire Man or “Bibendum.”⁹¹ In the leaflets, the union portrayed the Michelin Tire Man not as the smiling marshmallow figure he normally is, but as a menacing giant about to crush tiny employees positioned under his foot.⁹² Not surprisingly, the union did not obtain Michelin’s permission to reproduce the logo.⁹³ The defendants argued that their use of the Michelin Tire Man was a parody sheltered by fair dealing, or alternatively, that their constitutional right to freedom of expression protected their conduct.⁹⁴

In *Michelin*, the Canadian court rejected the union’s constitutional challenge and explicitly recognized copyright as a property right.⁹⁵ Despite the arguably important values served by the union’s activity, the court found that its freedom of expression had not been restricted.⁹⁶ In the court’s words, “[t]he Charter does

⁸⁸ See *CCH Can. Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, ¶ 54 (Can.) (holding that although the fair dealing purposes ought to be interpreted liberally, they were limited to those enumerated in the statute); *Michelin*, 71 C.P.R. (3d), ¶ 71 (holding that parody is not a form of criticism under the Canadian Copyright Act).

⁸⁹ 71 C.P.R. (3d) 348 (holding that parody is not a form of criticism under the Canadian Copyright Act).

⁹⁰ *Id.* ¶ 3.

⁹¹ *Id.* ¶ 8.

⁹² *Id.*

⁹³ *Id.* ¶ 3.

⁹⁴ *Id.* ¶ 71 (rejecting the defendant’s argument that parody is a form of “criticism” under fair dealing).

⁹⁵ *Id.* ¶ 93.

⁹⁶ It could be argued that the union’s purpose of recruiting employees to its organization served an important political function. See James Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HAST. CONST. L.Q. 189 (1984).

not confer the right to use private property—the Plaintiff’s copyright—in the service of freedom of expression.”⁹⁷ With this statement, the court clearly circumscribes the freedom of expression at the point where it conflicts with the copyright owner’s property right. No matter what the definition of the freedom of expression may be, it does not grant speakers the right to use a copyrighted work to make speech.⁹⁸ In the court’s view, the union may have been expressing itself, but such expression was not protected where it involved misappropriating someone else’s property. As such, the union was not exercising its freedom of expression but was akin to a trespasser who uses private property to express himself or herself.⁹⁹ This decision reflects the way in which courts treat copyright as property, as well as their tendency to elevate property rights over speech in copyright cases.¹⁰⁰

In summary, both the U.S. and Canadian jurisprudence demonstrate the courts’ unwillingness to treat copyright as a form of speech regulation. The courts do not apply normal First Amendment analysis to copyright because they view copyright as a property right that does not necessarily affect the speech interests of others. Although they do not say as much, the *Eldred* Court’s opinion that free speech does not include the right to use another person’s speech¹⁰¹ suggests that they understand copyright infringement as an act of appropriation rather than expression. However, the courts are mistaken to conclude that copyright’s property status removes it from the scrutiny of the First Amendment. It is as property that copyright must be analyzed for whether it unjustifiably infringes on the free speech of others.

⁹⁷ *Michelin*, 71 C.P.R. (3d) 348, ¶ 85.

⁹⁸ *Id.* ¶ 93.

⁹⁹ The court noted that the defendants were not claiming the right to distribute anti-Michelin leaflets on the company’s premises, for that would clearly constitute an illegal trespass. Rather, the defendants argued that they had a right to actually use the company’s property to express themselves. In this way, the court suggests that the use of copyrighted property is akin to, or perhaps even more invasive than, trespass. *See id.* ¶ 96.

¹⁰⁰ *See Craig, supra* note 19, at 85.

¹⁰¹ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

II. COPYRIGHT IS QUASI-PUBLIC PROPERTY

Aside from the courts' interpretations, is copyright better characterized as property or speech regulation? Given the nature of the copyright scheme, it is arguable that copyright gives property rights to authors and owners to allow them to control and exploit their works. The main purpose of copyright is not to regulate speech, but to establish a set of property rights that give authors the economic incentive to create works. In this way, copyright is a form of property that only incidentally affects the speech interests of others. However, characterizing copyright as property does not mean it is immune from First Amendment concerns. Since copyright has public dimensions, it is a form of quasi-public property that must accommodate the speech interests of others.

A. *Copyright is a Property Right*

From the perspective of authors and owners, copyright has more to do with property rights than speech rights. The exclusive rights enjoyed by the copyright owner form the crux of copyright law.¹⁰² The statute provides that an owner can transfer these rights to another person or entity, but only if the transfer is signed and in writing.¹⁰³ The fact that copyright entitlements must be transferred in a voluntary transaction between the parties illustrates the proprietary nature of copyright.¹⁰⁴ Like other property rights, the state decides whom the entitlement belongs to, but it does not determine the value of the right nor compel the owner to

¹⁰² See 17 U.S.C. §§ 106, 106A (2006). The Digital Millennium Copyright Act gives additional rights to control access to and prevent the circumvention of technologically protected works. *Id.* § 1201(a)–(b).

¹⁰³ *Id.* § 204. Notably the statute specifically provides that where there is no voluntary transfer, state action purporting to seize or expropriate the rights is invalid. See *id.* § 201(e); see also *Effects Assoc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (affirming that a transfer of copyright must be in writing).

¹⁰⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (describing a property rule as one where “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller”).

participate in the transaction.¹⁰⁵ Thus, copyright creates property rights rather than liability rules, which govern both the assignment of the entitlement and its value.¹⁰⁶ In addition, the exclusivity of copyright suggests that it is a form of property.¹⁰⁷ The most powerful aspect of copyright is not that owners can sell, reproduce or perform their works, but that they possess an exclusive right to do so. Certainly, owners are able to sell and disseminate their works in the absence of copyright, and copyright does not directly assist them in these activities. Copyright limits the number of people who can carry out these activities and gives them the ability to prevent others from doing the same. In this way, a copyright owner is similar to an owner of tangible property—both possess an exclusive entitlement to their property. As owners, they enjoy exclusive possession of their property and have the right to exclude others.¹⁰⁸

Furthermore, the rights granted by copyright are the intellectual property equivalents of the rights belonging to owners of real property.¹⁰⁹ Like landowners, copyright owners possess rights that allow them to use and enjoy their property.¹¹⁰ For example, the copyright owner's rights to reproduce and distribute his work are analogous to the real property owner's rights to develop and sell his land—both are ways in which the owners exploit and profit from their property.¹¹¹ Similarly, a property owner's ability to exclude trespassers is comparable to the copyright owner's ability

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Liability rules are also ex post rules—that is, the value of the entitlement is determined after the injury occurs. In contrast, the value of a property entitlement can be determined before transfer or destruction.

¹⁰⁷ BeVier, *supra* note 33, at 136 (“Since the very definition of a property right is that it is an ‘exclusive right,’ the Copyright Clause explicitly contemplates propertization.”).

¹⁰⁸ JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 422–24 (3d ed. 1989).

¹⁰⁹ See BeVier, *supra* note 33, at 136 (noting that the Copyright Clause does explicitly contemplate propertization).

¹¹⁰ See SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 74 (4th ed. 2005) (noting that a life tenant has a real property owner's right to undisturbed possession and of use and enjoyment of land).

¹¹¹ See BeVier, *supra* note 33, at 108 (arguing that giving property rights to individuals encourages them to use the property in ways that enhances its value).

to refuse to license his work.¹¹² Both actions involve retaining exclusive control and a degree of privacy over one's property.¹¹³ Likewise, bringing an action for copyright infringement is akin to an action for trespass because they target unauthorized uses of property. In this way, copyright is analogous to a property right because it relates to how an owner can control, exploit and dispense with the copyrighted work.

Of course, one important difference between copyright and ordinary property is the incorporeal nature of intellectual property. Unlike tangible property, the copyrighted property does not consist of the physical copies of a work, but of the intangible expression therein.¹¹⁴ This intangibility means that the boundaries of a copyright owner's property are not as clearly defined as the boundaries of ordinary property, such as a piece of land. Nevertheless, the owner's rights are the same—the copyright owner holds an exclusive entitlement to the copyrighted expression.¹¹⁵ The incorporeal nature of the property does not detract from the proprietary nature of the owner's interest. Furthermore, an individual can enjoy a copyrighted work in ways that do not apply to ordinary property. For example, one can highlight or annotate his copy of a copyrighted book without infringing the copyright owner's rights.¹¹⁶ In contrast, it is

¹¹² *Id.* at 137–38 (“[T]here is a close analogy between what a court does in a copyright case and what a judge does who enforces a trespass law . . .”); see CRIBBET & JOHNSON, *supra* note 108, at 422 (describing a property owner's right to exclude trespassers).

¹¹³ See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (enjoining biographer from reprinting unpublished letters); see also NIMMER, *supra* note 23, at 1196–1203 (examining the privacy and copyright interests of persons such as photographers and biography subjects).

¹¹⁴ See 17 U.S.C. § 202 (2006); *Forward v. Thorogood*, 985 F.2d 604, 605 (1st Cir. 1993) (rejecting the argument that copyright ownership is based on physical possession of the work).

¹¹⁵ BeVier defends the applicability of property rights to copyright by pointing out that the property rights perform the same function as copyright. Whether applied to tangible or intangible property, the rights are meant to encourage “optimal production and investment.” BeVier, *supra* note 33, at 112.

¹¹⁶ The user's annotations are not infringing provided that they do not amount to a recasting or transformation of the underlying work—in which case, they may infringe the owner's derivative work right. Additionally, an owner of a copy of a work can sell or transfer that copy without violating the copyright owner's right to distribution or first sale. See 17 U.S.C. § 109(a).

relatively difficult for someone to use another person's property without permission. Yet this difference only demonstrates the public aspects of copyright. It does not demonstrate that intellectual property is not property. Users' ability to enjoy copyrighted works is predicated on the owner's decision to make the work available to the public. Although copyright also protects unknown, unpublished works, it is unlikely that others could make use of these works.¹¹⁷ An important difference between copyright law and the laws governing ordinary property is that copyright actively encourages the public availability of a work, whereas ordinary property rights provide no such incentive.¹¹⁸ Finally, copyrighted property is non-rivalrous in nature.¹¹⁹ Books and music are not scarce, limited resources in the same way that a tract of land is. Although there are less physical constraints on the existence of copyrighted property, the nature of the copyright owner's rights remain the same.¹²⁰ Despite the intangibility of the property, the owner enjoys exclusive ownership in the copyrighted expression. In this way, while there are notable differences between copyright and tangible property, they do not change the fact that copyright owners possess a proprietary entitlement over their works.

The remedies that are available to a copyright owner further illustrate the proprietary nature of copyright. The Copyright Act provides that if there is copyright infringement, the owner is entitled to either a temporary or final injunction to prevent further

¹¹⁷ While it is possible for a person to reproduce an unpublished work without stealing it, it is likely that this requires the actual theft of the work or a similar form of appropriation. Like the defendants in *Harper & Row*, there would be an issue regarding the physical appropriation of the author's property, in addition to the issue of copyright infringement. See *infra* notes 60–79 and accompanying text.

¹¹⁸ Property law may encourage an owner to put his land to useful purposes, but it does not encourage him to make his land available to the public, for a fee or otherwise. See BeVier, *supra* note 33, at 108 (arguing that property rights give owners an incentive to make decisions that will enhance the property's value).

¹¹⁹ *Id.* at 111.

¹²⁰ BeVier makes a related argument by pointing out that the non-scarcity of copyrighted property does not mean it should not be propertized. *Id.* at 111–14.

infringement.¹²¹ Injunctive relief is also available to owners of ordinary property, who can obtain injunctions to prevent trespass, nuisance or other interferences with their property.¹²² Although the courts and legal scholars have recognized that awarding damages may be preferable to an injunction in some copyright cases—for the reason that injunctions unduly prevent others from exercising their right to free speech—the copyright statute makes injunctive relief the primary mode of copyright enforcement.¹²³ This reflects the notion that copyright infringement is not simply a contractual or tortious claim for which monetary damages is normally adequate compensation. Instead, copyright owners have the right to directly enjoin the infringer's activity, much like an owner of real property.¹²⁴ Nor is the availability of injunctive relief, a consequence of the gravity of the offence. Copyright infringement is not an inherently dangerous or irreversible offense that requires an injunction in order to provide an effective remedy. Rather, copyright's remedies indicate a parallel to property rights.

Some have argued that copyright is not a property right because the property that it deals with is also speech.¹²⁵ While an ordinary property owner can exclude trespassers for a variety of reasons, a copyright owner excludes others because of their expression. In other words, copyright is speech regulation because

¹²¹ The Copyright Act, 17 U.S.C. § 502 (2007). The statute also provides for impounding orders, damages (including statutory damages), profits, attorney's fees, and criminal penalties. *Id.* §§ 503–06.

¹²² CRIBBET & JOHNSON, *supra* note 108, at 397.

¹²³ See Rubinfeld, *supra* note 16, at 6 (commenting that courts regularly issue prepublication and preliminary injunctions in copyright cases); Lemley & Volokh, *supra* note 28, at 158–59 (commenting that preliminary injunctions are the expected remedy and plaintiffs are treated favorably); McGowan, *supra* note 42, at 328–31 (arguing against replacing injunctions with damages). *But see* Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130–35 (1990) (arguing that damages, rather than injunctions, should be the presumptive mode of remedy); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (noting that “the goals of copyright law . . . are not always best served by automatically granting injunctive relief” for copyright infringement); *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (2001) (holding that injunctive relief was improper given the lack of irreparable injury to Suntrust and the First Amendment concerns at stake).

¹²⁴ CRIBBET & JOHNSON, *supra* note 108, at 397.

¹²⁵ See *e.g.*, Rubinfeld, *supra* note 16, at 25; Netanel, *supra* note 16, at 39.

it makes speech a part of the offense.¹²⁷ In this way, copyright is comparable to a trespass law that prohibits trespassers because they want to hold a political protest.¹²⁸ Such a law aims directly at the speaker's communicative conduct and, worse still, it targets the content of his or her speech.¹²⁹ However, it is inaccurate to say that copyright law always penalizes others for their expressive activity. The prototypical case of copyright infringement involves the wholesale reproduction of a copyrighted work without the owner's consent.¹³⁰ In these cases, it is likely that the defendant used the copyrighted work for appropriative purposes rather than speech purposes. Most verbatim copying is done for the purpose of simply appropriating the existing work—indeed, that would be one reason why the work was copied verbatim in the first place. When copyright prohibits such copying, then, it is aimed at conduct that does not necessarily implicate speech interests.¹³¹ Moreover, copyright does not penalize copying for the purpose of restricting the freedom of expression.¹³² Copyright prohibits copying in order to protect the rights of authors and owners and to incentivize the creation of works. Since the purpose of the regulation is unrelated to the suppression of speech, copyright does not penalize others for their expression, but for their conduct that harms the copyright owner's property rights. Therefore, copyright regulates conduct for its effects on property interests and not for the fact that it is speech.¹³³

¹²⁷ See Rubinfeld, *supra* note 16, at 25–26 (“Copyright law, however, does render people liable because they are speaking—and indeed, because of what they say”).

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See McGowan, *supra* note 42, at 292 (pointing out that most “garden-variety infringement suits” do not implicate the political suppression of speech); see also Nimmer, *supra* note 23 at 1201–03 (arguing that there are cases where there is simply no First Amendment justification for the copier's actions).

¹³¹ See BeVier, *supra* note 33, at 139.

¹³² See *id.* at 139–40.

¹³³ See Rubinfeld, *supra* note 16, at 27–30 (arguing that copyright cannot be property because that would result in too much private power over speech). Rubinfeld assumes that copyright is private property, such that it would entitle copyright owners to control others' speech with little censure from the First Amendment). See *id.* at 27–30

It may be, as Tushnet argues, that the mere act of copying serves valid speech interests.¹³⁴ Although this can be true in certain cases, there is no principled way to discern which cases of copying are speech-related and which are not. Factors such as the intent of the speaker and the surrounding circumstances are likely to be highly subjective.¹³⁵ More importantly, free speech does not encompass the right to express oneself in a particular way. Generally speaking, free speech is a negative right in that it prevents the state from interfering with speech, but it does not require the state to provide resources for individuals to make speech in any specific way.¹³⁶ In other words, the First Amendment does not guarantee the right to use a particular form of expression. For example, courts apply low level scrutiny to laws that regulate the time, place and manner in which speech is made, reflecting the fact that the First Amendment does not absolutely protect any one method of speech.¹³⁷ Even categorical restrictions may be legitimate if alternate modes of communication are available. For example, the doctrine of fighting words prevents an individual from using particularly abusive language to insult another, but it does not prevent that individual from expressing the same sentiments using different words or in different circumstances.¹³⁸ In the context of copyright, the courts have

¹³⁴ Tushnet, *supra* note 16, at 546.

¹³⁵ *Id.* at 568, 574 (arguing that copied works can “feel like the products of the copier’s own personality and be perceived by others as such,” and that copying a work can “suit the situation”).

¹³⁶ Nimmer, *supra* note 23, at 1203 (noting that the First Amendment protects the right to speak, but does not require the government to subsidize speech).

¹³⁷ See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (emphasizing that the law only prohibited the individual’s speech at certain times of day). *But see* *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the speaker was entitled to use his particular choice of words to make his expression); see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that flag-burning in protest of the government was protected speech). These cases can be distinguished on the grounds that the particular form of expression was inextricably linked to the speaker’s viewpoint, such that prohibiting such activity would amount to viewpoint discrimination. In contrast, prohibiting the specific method of copying an existing work does not also penalize the speaker’s viewpoint. Copying is infringement whether the speaker expresses a positive or negative message.

¹³⁸ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (noting that a speaker like Chaplinsky could have uttered his words in the absence of the police officer, or written down his words instead of vocalizing them). In general, the constitutionality of

commented that the Constitution does not require giving a speaker the optimal means with which to exercise his speech rights.¹³⁹ In this way, copyright's prohibition against unauthorized reproduction merely reflects the fact that free speech does not protect the wholesale copying of a copyrighted work. Assuming that there are other means of expression available, the First Amendment does not protect a speaker who chooses the specific means of copying an existing work to express himself.

The more problematic cases are where a speaker does not simply reproduce a copyrighted work, but makes his own changes or additions to the material. Unlike wholesale copying, the speaker is not merely asserting a right to use a specific, existing means of expression. Instead, the speaker argues that despite copying a substantial portion of the original work, he also exercised his right to free speech and should receive the protection of the First Amendment.¹⁴⁰ In these cases, the copyright owner's property interest comes into conflict with the subsequent speaker's speech interest. The conflict arises because the speaker wants to use an existing work for his expressive purposes, but that work is the exclusive property of another person. In other words, copyright becomes like a trespass law that prevents a speaker from using someone else's property to conduct a political rally. Although the speaker wishes to use a particular property for his speech, he also has a genuine speech interest in using that property. As such, although copyright primarily deals with property rights, there are instances where copyright effectively restrains the legitimate speech interests of other speakers. Copyright restricts free speech because it prohibits the reproduction of an existing work, even if a speaker makes sufficiently expressive additions or alterations. While the courts assert that the idea/expression dichotomy and fair

speech restrictions is highly dependent on the surrounding context. *See* Schenck v. U.S., 249 U.S. 47 (1919) (setting out the "clear and present danger" test for incitement).

¹³⁹ *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original."). This case was the appellate court's decision affirming Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

¹⁴⁰ One must copy a substantial portion of the copyrighted work in order for there to be a finding of copyright infringement. 17 U.S.C. § 107 (2006).

use adequately accommodate these concerns, many scholars have criticized their effectiveness in respecting the right to free speech.¹⁴¹ Given the vagueness of both doctrines and their failure to directly address speech interests, they do not sufficiently safeguard First Amendment interests. Therefore, although copyright is property, it can nevertheless restrict the speech interests of other speakers.

Copyright is a form of general regulation that primarily deals with property but has incidental effects on speech.¹⁴² Copyright creates a set of property rights for authors and owners to control and exploit their works. Like ordinary property laws, copyright does not necessarily restrict the speech interests of others. However, consistent with its status as property, there are circumstances where copyright can affect the legitimate speech interests of other speakers. As with ordinary property, there are situations where the copyright owner's property rights conflict with a subsequent speaker's right to free speech. Even a neutral trespass law can have speech consequences when it restrains a speaker from holding his political rally.¹⁴³ After all, even as property, copyright is not immune from the First Amendment. Characterizing the conflict between copyright and free speech as being solely about speech is problematic because it is unclear whether copyright actually enhances or restricts the right to free speech. Rather, the proper analysis is to weigh the owner's property interest against the subsequent speaker's speech interest. Therefore, while the courts are correct to treat copyright as a form of property, they are mistaken to assume that this forecloses the free speech arguments. As property, copyright remains open to challenges under the First Amendment.

¹⁴¹ See *supra* note 25 and accompanying text.

¹⁴² See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (holding that enforcement of a public indecency statute did not violate the First Amendment); *City of Erie v. Pap's A.M. t/b/d/a "Kandyland"*, 529 U.S. 277 (2000) (holding that public indecency statute satisfied the standard for restrictions on symbolic speech).

¹⁴³ Of course, it may be that the prohibition of the rally is justified. Nonetheless, there needs to be a balance between the property interest and the speech interest.

B. Copyright is Quasi-Public Property

As discussed above, the courts' characterization of copyright as property leads them to conclude that copyright satisfies First Amendment concerns. Although the courts do not articulate as much, they seem to assume that copyright is a private property right belonging to the copyright owner. Certainly, that would explain why there is virtually no analysis of the constitutionality of copyright. Since the Constitution only applies to state action, the actions of private property owners are not subject to the First Amendment.¹⁴⁴ Furthermore, private property is generally not subject to the public forum doctrine, which requires certain kinds of property to be available for speech purposes.¹⁴⁵ If copyright is private property, then the constitutional rights of other speakers have little bearing on its validity.¹⁴⁶

Indeed, there is a longstanding perception that copyright is a form of private property, much like other forms of intellectual property.¹⁴⁷ Copyright assigns property rights to private individuals who have the personal prerogative to reproduce, distribute or license their works.¹⁴⁸ The state does not dictate how or under what circumstances a copyright owner must license his work or exercise any of his other exclusive rights.¹⁴⁹ Moreover, the Copyright Act withholds protection to works created by or

¹⁴⁴ See *Shelley v. Kraemer*, 334 U.S. 1, 13, 19 (1948) (holding that while purely private conduct was not subject to the Fourteenth Amendment, the courts could not use their power to enforce a covenant which would deny persons their equal protection rights).

¹⁴⁵ Courts have applied the First Amendment to private property in one case, but it has not been followed. See *Marsh v. Ala.*, 326 U.S. 501 (1946) (balancing the "Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion"); RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 121 (2003); BeVier, *supra* note 33, at 122–24 (noting that the First Amendment empowers the private property owner with the power to exclude).

¹⁴⁶ The First Amendment may have some bearing, however, because there are limited circumstances where the courts have applied the Constitution to private property interests. See *Shelley*, 334 U.S. 1 at 13, 19 (1948).

¹⁴⁷ See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990) (discussing fair use as an exception to the "copyright owner's rights of private property").

¹⁴⁸ See BeVier, *supra* note 33, 136–37 (emphasizing that the Copyright Clause of the Constitution assigns authors rights to reproduce, distribute, and license their works).

¹⁴⁹ See *id.* at 137 (stating that copyright is the institutional decision to assign the copyright to the private owner).

commissioned for the government, suggesting that copyright is meant for private individuals only.¹⁵⁰ Both the American and Canadian courts have characterized copyright as a private right. For example, the courts have held that copyright is protected by due process and the just compensation clauses of the Constitution, in the same way that ordinary property is.¹⁵¹ Similarly, the courts have viewed fair use as an exception to the copyright owner's "private property rights in his expression."¹⁵² Interestingly, there are also cases where the copyright owner argued that the government's use of his copyrighted work violated his private property rights and amounted to a regulatory taking subject to the Fifth Amendment.¹⁵³ In the Canadian context, the court has explicitly characterized copyright infringement as a form of trespass onto the copyright owner's private property.¹⁵⁴ Thus, there is a widely shared belief amongst copyright owners and the courts that copyright is a form of private property.

However, to treat copyright as private property is to ignore the underlying purposes of copyright law. Although copyright grants property rights, they are imbued with a public purpose. By enacting copyright law, the government grants exclusive rights to authors in order to increase the number of works available to the

¹⁵⁰ See 17 U.S.C. § 105 (2006) ("Copyright protection under this title is not available for any work of the United States Government . . ."); *id.* § 101 (defining a work of the United States Government as "a work prepared by an officer or employee of the United States Government as part of that person's official duties"). See also Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516 (9th Cir. 1997) (holding that model codes are "not subject to copyright holder's exclusive prerogatives"); *Veeck v. S. Building Code Congress Int'l Inc.*, 293 F.3d 791 (5th Cir. 2002) (holding that federal agencies adoption of work as a standard did not render the copyright invalid).

¹⁵¹ See, e.g., *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) ("An interest in copyright is a property right protected by the due process and just compensation clause of the Constitution.").

¹⁵² *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986).

¹⁵³ See, e.g., *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 877 F. Supp. 1386, 1392–93 (1994) (holding that an "interest in copyright is property interest protected by the due process clause.")

¹⁵⁴ See *Cie générale des établissements Michelin v. CAW*, [1996] 71 C.P.R. (3d) 348, ¶ 85 (F.C.T.D.) (Can.) (stating that the Canadian Charter of Rights and Freedoms does not confer the right to use "private property—the Plaintiff's copyright—in the service of freedom of expression").

public.¹⁵⁵ In other words, copyright is an incentive—the state gives the owner the statutory protections of copyright in order to encourage the production and communication of his work to the public.¹⁵⁶ The nature of the copyright owner’s rights is meant to facilitate the dissemination of his work to society at large. With the exclusive rights to reproduction and distribution, the owner can enjoy the profits from the sale of the work and prevent others from usurping those profits. Likewise, the rights to performance and display facilitate the presentation of visual or dramatic works to the public. Even the right of first publication exists for the purpose of incentivizing the initial public distribution of the work.¹⁵⁷ Although a work does not need to be published or made known to others in order to obtain copyright, copyright has little application if a work stays completely private.¹⁵⁸ It is only when the owner chooses to disseminate his work to the public that copyright’s protections become most relevant. In this way, copyright’s exclusive rights relate to the ways in which an owner makes his works available to the public.

Further evidence of copyright’s public purpose is found in the Constitution. The Copyright Clause expressly states that copyright is meant to promote the “progress of Science and the useful Arts.”¹⁵⁹ The progress of the arts involves creating conditions whereby authors and owners are encouraged to create works and communicate them to others.¹⁶⁰ To accomplish this purpose, copyright has chosen the means of giving owners certain exclusive rights in their works. With the statutory ability to profit from and control the distribution of their works, copyright encourages authors to expend their efforts and resources to create more works.

¹⁵⁵ This kind of incentive also underlies patent law, in which a limited monopoly is given to the inventor in order to incentivize his disclosure of the new product.

¹⁵⁶ See BeVier, *supra* note 33, at 112.

¹⁵⁷ See 17 U.S.C. § 106(3) (2002).

¹⁵⁸ At the same time, it is true that copyright protection exists regardless of whether or not an author publishes his work or otherwise makes it public.

¹⁵⁹ The Constitution provides that Congress has the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

¹⁶⁰ See *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (2001) (“The Copyright Act promotes public access to knowledge because it provides an economic incentive for authors to publish books and disseminate ideas to the public.”).

In this way, property rights are a means to an end. Copyright grants property rights for the ultimate purpose of encouraging the continual creation of works for the benefit of the public. Indeed, many scholars have argued that the public purpose of copyright ought to play a greater role in the understanding of copyright. Although authors and owners have private rights over their works, the public has an equally important right to be able to access and enjoy those works.¹⁶¹ Copyright includes the rights of copyright owners as well as users.¹⁶²

The public purpose of copyright is also reflected in the Copyright Clause's requirement that copyright be granted to authors for "limited times."¹⁶³ The term "limited times" means that the period of time in which an owner enjoys copyright's privileges must be finite. The purpose of limiting the term is to prevent owners from having perpetual control over their works. After the owner has been given a reasonable amount of time to exploit his work, the work loses copyright protection and falls into the public domain. In this way, the limited times requirement ensures that copyrighted works will eventually enter the public domain where it is available to the public without restrictions.¹⁶⁴ Although Congress has continually extended the copyright term and such extensions have been found to be constitutional, the courts make it clear that the Constitution requires the copyright term to have a definite expiry date.¹⁶⁵ In this way, the limited duration of copyright ensures that works will eventually be fully available to the public.

Given copyright's public purposes, it is more properly characterized as quasi-public property. Although authors and owners possess somewhat private rights over their works, these rights serve an important public purpose. They are meant to

¹⁶¹ See Craig, *supra* note 19, at 76 (arguing that copyright should serve the speech interests of the broader community).

¹⁶² See Richard Bronaugh, Peter Barton, & Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3 (2003).

¹⁶³ *Supra* note 159.

¹⁶⁴ See *Suntrust*, 268 F.3d at 1262 (describing the goal of the Copyright Clause as ensuring that works enter the public domain after the author's rights expire).

¹⁶⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 209–10 (2003) (noting that regime of perpetual copyrights was not included in any of the copyright acts).

encourage the creation and dissemination of works for the benefit of the public. Unlike rights in real property, which have roots in natural law and the structure of government, copyright is a statutory creation imbued with a specific purpose.¹⁶⁶ The copyright owner's rights owe their existence to the Copyright Act and are governed entirely by that statute.¹⁶⁷ Thus, copyright must be interpreted in light of the statute's purposes. Copyright does not give property rights to authors and owners for their own sake, but for the overarching goal of furthering the progress of the arts. Of course, copyright is not purely public property. Public property usually consists of property owned by the government or private individuals that is generally accessible to the public.¹⁶⁸ Although the state can regulate public property, in general it cannot exclude others from making reasonable uses of the property.¹⁶⁹ In contrast, copyright is more exclusive in that the owner can control the ways in which his work is used or deny its use altogether.¹⁷⁰ However, the private aspects of the owner's rights must be moderated by the public purposes of copyright. Since the owner's rights are statutory creations, they must adhere to the legislative purposes for copyright. Therefore, since copyright has both private and public aspects, it is best viewed as a form of quasi-public property.

In this light, the doctrines of the idea/expression dichotomy and fair use can be understood as ways of ensuring that the public benefits from copyrighted works. The idea/expression dichotomy establishes that the expression in the work belongs exclusively to

¹⁶⁶ See, e.g., JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, ch. 5 (1689) (treating property as a natural right that flows from a person mixing his labour with nature). Property rights are also explicitly mentioned in the U.S. Constitution—"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

¹⁶⁷ GORMAN & GINSBURG, *supra* note 4, at 6 (stating that the courts have found that copyright does not exist at common law and is entirely a creation of Congress).

¹⁶⁸ Shopping malls are an example of privately owned property that could be considered public property.

¹⁶⁹ See WEAVER & LIVELY, *supra* note 145, at 113–14 (describing how public forums are subject only to content-neutral regulation).

¹⁷⁰ For a discussion about the consequences when copyright owners fail to license the use of their works, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991).

the copyright owner, but the ideas are available to the public.¹⁷¹ Others are free to borrow the ideas contained in the copyrighted work because they are not protected by copyright. Although the distinction between ideas and expression is notoriously vague, the doctrine nevertheless ensures that with every copyrighted work, there are ideas in it that are free for the public to use and borrow from.¹⁷² Similarly, the fair use defense is not only a safety valve for free speech, but a way to allow the public to use copyrighted works in productive ways.¹⁷³ The enumerated fair use categories of criticism, review, commentary and news reporting are all endeavors that are particularly useful to the public.¹⁷⁴ Apart from an author's personal speech interest in writing a movie review, for example, the public benefits from the information and opinions contained in the article. Fair use does not simply defend against copyright's encroachments on speech, but actively promotes those uses of copyrighted works that are beneficial to society. Thus, these doctrines help serve copyright's purpose of increasing the availability of works to the public.

It could be argued that copyright is exclusively private property because the state assigns copyright to private individuals. Instead of creating a state-owned or state-monitored system whereby the government owns and controls copyrighted works, the Copyright Act confers copyright and its exclusive rights on parties in their private capacity.¹⁷⁵ Indeed, in *Michelin* the court explicitly refused to treat copyright as quasi-public property.¹⁷⁶ The court reasoned

¹⁷¹ See *Baker v. Selden*, 101 U.S. 99, 105 (1879); see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (outlining Judge Learned Hand's oft-quoted statement about how to discern a work's idea from its expression).

¹⁷² See *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (2001) (describing how the idea/expression dichotomy "embodies the First Amendment's underlying goal of encouraging open debate and the free exchange of ideas").

¹⁷³ Andrew Inesi, *A Theory of De Minimis and a Proposal for its Application to Copyright*, 21 BERKELEY TECH. L.J. 945, 983 (2006) (describing fair use as a safety valve that avoids overly "rigid application of the copyright statute" (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990))). The safety valve rationale also underlies the freedom of speech. See *Nimmer*, *supra* note 23, at 1188 (discussing a balancing of the interests of the creator and the interests of free speech).

¹⁷⁴ See 17 U.S.C. § 107 (2006) (providing that the purposes of criticism, comments, news reporting, teaching, scholarship and research can be shielded by fair use).

¹⁷⁵ See *BeVier*, *supra* note 33, at 107–08, 113.

¹⁷⁶ *Cie générale des établissements Michelin v. CAW*, [1996] 71 C.P.R. (3d) 348 (Can.).

that the existence of a state-sanctioned copyright system did not render it public.¹⁷⁷ Although the court did not elaborate, it seemed to accept that copyright is private property because it is owned by private individuals.¹⁷⁸ However, the fact that copyright belongs to individuals does not diminish the fact that it is a statutory creation with a public purpose. The Copyright Act defines the owner's rights and their meaning must be interpreted in light of the statute's goals.¹⁷⁹ Indeed, the U.S. Supreme Court's own declaration that copyright is the "engine of free expression" belies its inextricable link to a public purpose.¹⁸⁰ Copyright is an institution that is meant to further the basic values of the First Amendment—that is, the creation and distribution of speech to the general public.¹⁸¹ Thus, although copyright grants rights to private individuals, it must incorporate the public goals of copyright law in order to be consistent with its own statutory grant.¹⁸² In this way, copyright is distinguishable from ordinary property laws because the state does not encourage property owners to make their property available to the public. Rather, property rights are granted for the purpose of simply allocating ownership of a scarce resource and encouraging the beneficial use of property.¹⁸³

Furthermore, it is inaccurate to suggest that copyright is private property simply because it is the copyright owner who possesses the right.¹⁸⁴ The identity of the property owner is not determinative of whether the property is public or private. For example, the government owns many properties that would not be regarded as public. The Oval Office or judges' chambers are properties that are owned by the state, but their function and

¹⁷⁷ *Id.* at ¶ 102. The court stated that copyright's registration under a state-formulated system did not diminish the private nature of copyright. *But see*, Craig, *supra* note 19, at 95 (stating that a lower court was overstepping its bounds by declaring copyright to be a form of private property).

¹⁷⁸ *Cie générale des établissements Michelin v. CAW*, [1996] 71 C.P.R. (3d) 348, ¶ 102 (Can.).

¹⁷⁹ *See* Craig, *supra* note 19, at 95 (noting that copyright is statutory law and therefore legislation must respect its statutory purposes as well as Charter values).

¹⁸⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

¹⁸¹ Craig, *supra* note 19, at 108–10.

¹⁸² *Id.* at 113.

¹⁸³ *See* BeVier, *supra* note 33, at 112–13.

¹⁸⁴ *See id.* at 137.

purpose make them essentially private places.¹⁸⁵ These examples suggest that the purposes to which a property is put to influence whether it is public or private. Moreover, unlike private property laws, copyright contains its own exceptions for public uses. Through the doctrine of fair use, the state requires copyrighted property to accommodate other individuals' interests. A book reviewer may borrow from the book as long as it satisfies the conditions for fair use. The Copyright Act also contains numerous exceptions for libraries, archives, and educational institutions which use copyrighted works for public purposes.¹⁸⁶ Therefore, it does not matter that the state does not own copyright or control a copyright owner's use of his property. The public nature of copyright derives from the statute's public purposes, irrespective of to whom the rights are assigned. At the same time, it is true that copyright grants its property rights to private individuals who have substantial control over how that property is used. Given the co-existence of these public and private features, copyright ought to be viewed as quasi-public property.

C. Re-Characterizing the Conflict as Between Property and Speech

Treating copyright as property clarifies the conflict between copyright and speech. When copyright is viewed as speech regulation, there is an inevitable stalemate between the speech rights of the author and the subsequent speaker. Both parties can claim a right to free speech, and the First Amendment does not provide a clear basis for determining whose claim should prevail.¹⁸⁷ This is exacerbated by the fact that copyright's benefits and burdens do not necessarily fall on any particular group of speakers. Copyright owners can also be subsequent speakers, and vice versa.¹⁸⁸ Given the ease of obtaining copyright and the wide

¹⁸⁵ See generally WEAVER & LIVELY, *supra* note 145, at 113.

¹⁸⁶ See 17 U.S.C. § 108 (subject to certain conditions, "it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work").

¹⁸⁷ See *supra* note 181 and accompanying text. The analysis is particularly complex when copyright claims to have already accommodated others' speech rights. See McGowan, *supra* note 42, at 332–33.

¹⁸⁸ See McGowan, *supra* note 42, at 301.

availability of copyrighted works, there is little difficulty for an individual to be both a copyright owner and someone who borrows from other people's works. As such, it is not clear whether copyright prefers one speaker's interests over another's. Moreover, when copyright is regarded as speech regulation, it possesses an internal logic that is somewhat inconsistent. It seems contradictory for copyright to claim that it can enhance speech overall by restricting the speech of some. In general, courts are highly skeptical of arguments that the freedom of speech can be served by limiting some kinds of speech.¹⁸⁹ Therefore, treating copyright as speech regulation makes it difficult to determine whether copyright strikes the right balance between the speech interests on both sides.

On the other hand, if copyright is treated as property, there is no need to resolve this conundrum. The courts weigh the copyright owner's property interest against the conceptually separate speech interest of the defendant. The conflict between copyright and the First Amendment is a clash between property and speech, instead of between the speech rights of different parties. In this way, the courts do not need to decide whose speech interest they want to favor and whose speech interest they are consequently disfavoring. Instead, they can simply determine whether the copyright owner's property interest justifies the infringement on the defendant's speech rights.

At the same time, copyright is not a private property right that is completely immune from the Constitution. Given the public purposes of copyright law, the property rights of authors and owners are meant to facilitate the greater volume and availability of speech to the general public. Since copyright is a quasi-property interest, it must be evaluated for whether it adequately accommodates the speech interests of others.

¹⁸⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (holding in part that limiting independent political expenditures and fixing a ceiling on campaign expenditures is unconstitutional as impermissibly burdening the right of free expression); *Denver Area Educ. Telecomm. Consortium Inc. v. FCC*, 518 U.S. 727, 297 (1996) (holding in part that a provision permitting the operator of a public access channel to prohibit patently offensive or indecent programming violates the First Amendment).

III. COPYRIGHT & THE PUBLIC FORUM DOCTRINE

If copyright is quasi-public property, how must it accommodate the right to free speech? One way of answering this question is to analogize copyright to a public forum that must meet First Amendment standards. There is a well-developed jurisprudence dealing with the constitutional right to use public forums for expressive purposes.¹⁹⁰ Free speech is primarily a negative right to be free from governmental interference.¹⁹¹ It does not necessarily grant individuals the right to access places or resources in order to make speech.¹⁹² Nonetheless, the courts have recognized that in order for free speech to be a meaningful right, some places or venues must be available to the public for speech purposes. Accordingly, the courts have considered different kinds of public forums and what kinds of speech restrictions may justifiably be placed on these places.

If copyright is a public forum, then the conflict between copyright and free speech is between the copyright owner's property rights and the subsequent speaker's interest in using the copyrighted work as a forum. The conflict arises because a speaker wishes to use an existing work as a forum for his speech, but that forum is property that belongs to the copyright owner. In this way, the tension between copyright and free speech does not pit the speech interests of one person against another's, but deals with the more familiar First Amendment question of whether a forum ought to accommodate the kind of speech that the defendant wants to make.

A. *Overview of the Public Forum Doctrine in the U.S. & Canada*

The First Amendment recognizes that individuals have a right to use public forums for speech purposes and limits the government's ability to regulate these places. The term "public

¹⁹⁰ See generally Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965).

¹⁹¹ See U.S. CONST. amend. I.

¹⁹² Nimmer, *supra* note 23, at 1203 ("The First Amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker, and particularly a subsidy at the expense of authors whose well-being is also a matter of public interest.").

forum” refers to property that is, for the most part, open to the public to use for speech.¹⁹³ In the United States, the courts distinguish between three kinds of forums: traditional public forums, designated public forums, and nonpublic forums. Traditional public forums are those places that are historically viewed as being open to the public, such as streets, sidewalks and parks.¹⁹⁴ Designated public forums refer to places that are not traditionally open to the public, but have been designated by the state to be used for speech or assembly purposes.¹⁹⁵ For example, the government may open up a school auditorium for the purpose of holding a town hall meeting. Nonpublic forums include government-owned property that is closed to the expressive activities of the general public, such as courtrooms or the Oval Office.¹⁹⁶ The existence of nonpublic forums reflects the fact that not all public property must serve as a forum for speech. With regards to private property, the public forum doctrine generally does not apply.¹⁹⁷ Since the Constitution only applies to state action, property belonging to private parties is not subject to the First Amendment.¹⁹⁸

In public forums, the government may regulate speech only if there is a compelling state objective and the means chosen is

¹⁹³ See *WEAVER & LIVELY*, *supra* note 145, at 113.

¹⁹⁴ See *Hague v. Comm. Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

¹⁹⁵ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (defining designated public forums as those where the state opens property “for use by the public as a place for expressive activity”).

¹⁹⁶ See *WEAVER & LIVELY*, *supra* note 145, at 113. Other examples include jails and teachers’ mailboxes. *Id.*

¹⁹⁷ *Id.* at 121.

¹⁹⁸ See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). While this is true, as a general matter, there have been cases that suggested there is a right to use private property for speech purposes. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (holding that when owners sufficiently open up their property to the public their First Amendment rights will apply). *Lloyd Corp.*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

narrowly tailored to achieve that objective.¹⁹⁹ Generally speaking, the regulations must be content-neutral and leave open alternate methods of communication.²⁰⁰ For example, a law that restricts the times of day or the volume of speech in a public park is justified in the interests of protecting citizens from unwanted noise, but a wholesale prohibition of distributing leaflets is not a justified means of controlling litter.²⁰¹ Thus, these cases demonstrate that while public forums are available for a wide variety of speech purposes, it is permissible for the government to impose minimal restrictions for non-speech related reasons where there are ample alternate means of expression available. These regulations are often referred to as “time, place, and manner” regulations because they merely govern the form of expression, as opposed to its content or viewpoint.²⁰²

The Canadian courts take a different approach in their public forum analysis.²⁰³ In the seminal case of *Committee for the Commonwealth of Canada v. Canada*, a divided Supreme Court articulated three different ways to determine the availability of public places for expressive purposes.²⁰⁴ This case involved the members of a political group who distributed leaflets at a public airport.²⁰⁵ The group claimed they had a right to use the airport as a forum for their expression.²⁰⁶ Writing for three members of the

¹⁹⁹ *Perry Education Ass’n*, 460 U.S. at 45. In other words, the applicable standard of scrutiny is intermediate scrutiny. For a discussion of the intermediate scrutiny standard, see *supra* note 38.

²⁰⁰ See *WEAVER & LIVELY*, *supra* note 145, at 116.

²⁰¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (upholding a municipal regulation requiring performers to use certain sound equipment and technicians for concert in New York City’s Central Park); *Schneider v. State*, 308 U.S. 147, 162 (1939) (invalidating an ordinance prohibiting distribution of handbills on public streets because it restricted the right to free speech more than necessary to control litter).

²⁰² See, e.g., *Ward*, 491 U.S. at 791.

²⁰³ The American courts’ categorical approach to public forums has been criticized as being overly rigid and placing undue emphasis on physical places instead of the free speech values at stake. See C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); see also *Comm. for the Commonwealth v. Can.*, [1991] 1 S.C.R. 139, ¶ 9 (Can.) (Lamer J. explicitly declining to follow the American public forum jurisprudence).

²⁰⁴ *Comm. for the Commonwealth*, [1991] 1 S.C.R. 139 (Can.).

²⁰⁵ *Id.* ¶ 52.

²⁰⁶ *Id.* ¶ 53.

Court, Justice Lamer held that the freedom of expression does not grant an unqualified right to use public forums for speech.²⁰⁷ An individual has a right to communicate in a public forum only where his communication is compatible with the principal function of that place.²⁰⁸ For example, a speaker has no right to shout political messages in a library, but may wear a t-shirt bearing those messages.²⁰⁹ In contrast, Justice L'Heureux-Dubé emphasized that the freedom of expression encompasses a right to use public property for speech and any restrictions must be justified under § 1 of the Charter, the limitations clause.²¹⁰ Accordingly, the right to use government property for speech involves a consideration of various factors, such as the traditional status of the place, whether the public is ordinarily admitted, and the compatibility of the place with the expression.²¹¹ Under this approach, the courts balance the individual's speech interest against the government's interest to determine if there is a right to access a particular forum.²¹² Lastly, Justice McLachlin's opinion struck a middle ground. While she agreed that the freedom of expression did not confer an absolute right to use government property, the degree to which a forum is available to the public depends on whether the expression is tied to one of the underlying values for expression.²¹³ When the speakers' use of the forum is related to the attainment of truth, political participation, or individual self-fulfillment, they have a claim to access government property for its expression.²¹⁴

Thus, the foregoing summary of U.S. and Canadian public forum doctrine outlines several different approaches to determining the extent to which public property must be available to the public for speech purposes. The courts consider a variety of criteria, including the traditional or designated function of a place, its compatibility with speech, and the underlying speech values at

²⁰⁷ *Id.* ¶ 9.

²⁰⁸ *Id.* ¶ 17.

²⁰⁹ *Id.* ¶ 18.

²¹⁰ *Id.* ¶ 114.

²¹¹ *Id.* ¶ 148.

²¹² *See id.* ¶¶ 150–56.

²¹³ *Id.* ¶ 243.

²¹⁴ *Id.* ¶¶ 243–44.

stake. All of these considerations can help determine how copyright ought to accommodate the speech interests of others.

B. Copyright as a Public Forum

How is copyright a public forum? If copyright creates property rights in intangible expression, and these rights serve a public purpose, the copyrighted work can be conceived of as an incorporeal space containing ideas and expression. Every copyrighted work consists of expressive property owned by the copyright owner, and expression or ideas that are available to the public. By enacting the Copyright Act, the state sanctions the creation of forums in which both copyright owners and the public have an interest. These copyright forums serve many expressive purposes. First, the forum provides copyrighted works to the public. As discussed above, copyright grants exclusive rights to authors and owners in order to encourage them to distribute and disseminate their works to others.²¹⁵ With copyright's protections, authors and owners can allow the public to enjoy their works without the fear of misappropriation or the loss of control over their works. Second, the copyright forum allows others to use and access copyrighted works. Individuals can read books and enjoy music as part of their First Amendment rights to access literature, the arts, and other materials that lead to a more informed and enlightened citizenry.²¹⁶ Third, and most importantly, the forum allows owners and users to share copyrighted works amongst themselves. Although copyright owners have exclusive rights over the copyrighted expression, the unprotected ideas are available to subsequent speakers for expressive purposes. And, although the expression is the exclusive property of the copyright owner, the fair use doctrine requires that it be made available to other speakers for certain purposes that are beneficial to the public. In all these ways, copyright acts as an intangible public forum that serves many speech-related purposes.

²¹⁵ See *supra* note 138 and accompanying text.

²¹⁶ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246.

Indeed, the courts acknowledge that public forums need not be tangible places. In *Rosenberger v. Rectors and Visitors of the University of Virginia*, a religious publication was denied funding from a university fund that subsidized the costs of student publications.²¹⁷ This was challenged as being unconstitutional viewpoint discrimination under the First Amendment.²¹⁸ The Court described the university's student publication fund as a forum that was "metaphysical" rather than "spatial or geographic."²¹⁹ Nevertheless, the rules governing public forums applied.²²⁰ Since the university created the fund in order to facilitate student speech, the fund was an intangible public forum.²²¹

Similarly, copyright is an incorporeal forum that owes its existence to state action. Through the Copyright Act, the state has created a system of entitlements for copyright owners that encourages them to disseminate their work to the public and ensures that the public can enjoy these works. Unlike the fund in *Rosenberger*, the government's grant of copyright protection does not directly subsidize authors' speech but uses the more indirect means of granting property rights to authors and owners. Nevertheless, these property rights perform the same function as the university fund—they incentivize the creation of speech and its availability to the general public.

Hence, copyright is analogous to a traditional or designated public forum because copyrighted property is meant to serve a distinct public purpose. Although the courts have not recognized copyright as a traditional public forum, it has many of the same characteristics. The courts describe traditional forums as those that are "immemorially . . . held in trust for the use of the public" and whose use forms part of the rights and liberties of citizens.²²² Likewise, copyright has a longstanding history in English law which, through the adoption of the Statute of Anne in 1710,

²¹⁷ 515 U.S. 819, 824, 830 (1995).

²¹⁸ *Id.* at 827.

²¹⁹ *Id.*

²²⁰ *Id.* at 830.

²²¹ *See id.*

²²² *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

created copyright law to protect authors and make their works accessible to the public.²²³ In 1776, the U.S. Constitution formally adopted this notion of copyright and expressly gave the federal government the power to enact the Copyright Act.²²⁴ This statute reflects many of the principles that are found in the original Statute of Anne.²²⁵ Thus, copyright has an extensive history of facilitating speech that dates back to the adoption of the Constitution, as well as the common law and English statutes that preceded it. Copyright has the historical underpinnings of a right that has long been recognized as a way of facilitating speech. Moreover, the definition of traditional public forums should not be static but ought to embrace new places that play the same role as traditional forums.²²⁶ Just as streets for automobile traffic were not envisaged at “time immemorial,” copyright can qualify as a traditional public forum even though it did not fall under the original definition. The Internet is an example of new technology that functions as a public forum because it provides an arena for speech and communication that is open and easily accessible. Indeed, the courts’ recognition of parks and sidewalks as traditional forums is itself relatively recent.²²⁷ Therefore, although the courts have not treated copyright as a traditional public forum in the past, there is no principled reason why they cannot begin to do so.

Even if copyright is not a traditional public forum, it qualifies as a designated public forum. The cases indicate that the key factor in determining whether a place is a designated public forum is the government’s intention.²²⁸ By enacting the Copyright Act, the state expressly created a property regime to fulfill the public purpose of promoting the progress of the arts. Congress’

²²³ See GORMAN & GINSBURG, *supra* note 4, at 2–3; see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001) (“[T]he Statute of Anne was [meant] to encourage creativity and ensure that the public would have free access to information.”).

²²⁴ See U.S. CONST. art. I, § 8, cl. 8.

²²⁵ See GORMAN & GINSBURG, *supra* note 4, at 4–5.

²²⁶ *But see* *United States v. Am. Library Ass’n*, 539 U.S. 194, 205–06 (2003) (holding that “doctrines surrounding traditional public forums may not be extended to situations where such history is lacking” such as the Internet).

²²⁷ See WEAVER & LIVELY, *supra* note 145, at 114.

²²⁸ See *id.* at 118; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

legislative action in creating a comprehensive copyright scheme demonstrates a clear intention to create a forum that facilitates speech. Although a state is not bound to create a designated forum nor keep it open indefinitely, during the period in which the property is open to speech it is treated as though it was a traditional public forum.²²⁹ Thus, once the state decided to create copyright law, it can be treated like any other public forum for the duration of its existence. Moreover, the government's purposes help define the nature and extent to which the forum has been designated for speech purposes. As argued above, there is a close connection between copyright and its public purposes. The nature of owners' rights is such that copyrighted works are meant to be distributed and disseminated to the public. Therefore, the copyright forum was created for the purpose of making works available to others. In addition, Congress' decision to make copyright widely available indicates its intention to expand the breadth of the forum in which speech is to be accommodated. By giving copyright protection to a wide range of owners and works, copyright seeks to widen the forum in which the public can engage. Therefore, copyright law creates a designated forum that is meant to facilitate a broad range of speech and a wide right of public access.

An obvious example of the forum-like nature of copyright is the concept of the public domain.²³⁰ The works in the public domain consist of those whose copyright protection has expired or could not receive copyright in the first place. Within this domain, a vast array of expressive material, including Shakespearean plays and his plot device of star-crossed lovers are available for public use, without any of copyright's constraints.²³¹ The public domain is essentially the intangible equivalent of public forums. The public can make use of works in the public domain as freely as they can take to the streets for speech. Like sidewalks and parks,

²²⁹ See WEAVER & LIVELY, *supra* note 145, at 118.

²³⁰ See Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS 597, 598 (2007); Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. TELECOMM. & HIGH TECH. L. 17, 27 (2003).

²³¹ There remains the possibility of non-copyright-related constraints, such as privacy, defamation, or the right to publicity.

the public domain is not owned by anyone but is collectively owned by the public.²³² Most importantly, they serve a similar purpose: they ensure that there is space, both physically and metaphysically, for people to make speech and communicate it to others. In this way, the public domain fulfills the First Amendment promise of having places available for free speech, just as public forums do.

However, the analogy is not limited to the public domain. All works, whether copyrighted or uncopyrighted, have the potential to be used as a venue for speech, and all works, whether copyrighted or uncopyrighted, are subject to the First Amendment. As argued above, copyrighted works are quasi-public property and the extent to which they must be available to the public depends on an evaluation of the copyright owner's property interest and the public's speech rights. Uncopyrighted works in the public domain are true public forums—completely public property that is freely accessible to the public and unconstrained by copyright's property regime. In other words, the public domain is a good example of how copyright is a public forum, but the analogy applies to all of copyright.

C. How Copyright Measures Up as a Public Forum

Generally speaking, copyright is consistent with the public forum doctrine. Under the First Amendment, time, place and manner regulations can apply to speech in public forums if there are ample alternatives for communication.²³³ By prohibiting the wholesale reproduction of copyrighted works, copyright only prohibits a specific manner of expression. The speaker is free to borrow small portions of the copyrighted work or create a similar message using uncopyrighted expression. Thus, the speaker has many alternative ways to express his idea. Moreover, copyright's

²³² *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (holding that public forums are property being “held in trust for the use of the public.”). *See also* Julie Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121, 124–66 (L. Guibault & P.B. Hugenholtz eds. 2006) (comparing the public domain to a “cultural landscape” whereby people can use material in creative ways).

²³³ *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

prohibition of copying is not directed against the content of the defendant's speech. Since copyright penalizes a reproduction for its physical similarity to the original work, the restriction does not depend on understanding the meaning of the copied defendant's speech.²³⁴ In addition, the purpose of copyright is unrelated to the suppression of speech. Copyright's prohibition of unauthorized reproduction is meant to protect the property rights of authors and owners. By enforcing these property rights, copyright seeks to incentivize the future creation of copyrighted works, not to restrict the speech of others. Therefore, in its overall scheme, copyright imposes narrow and acceptable limits on expression that uses copyrighted property.

However, as discussed above, copyright's constitutionality is less clear in the case of non-verbatim copying.²³⁵ While copyright's penalizing of such speech remains unrelated to the suppression of speech and its content, there are cases where the defendant may have few alternatives for expression. Parodies provide an illuminating example. By definition, a parody is a work that mimics the original in order to convey a different, often critical message.²³⁶ A parodist quotes from an existing work in order to criticize the work itself.²³⁷ The courts have recognized that a parodist must be able to borrow enough to conjure up the original work and may borrow further material if it is reasonable.²³⁸ In this way, there is a clear need for a parodist to be able to use the original work. In fact, the original work is indispensable to the parodist because the sheer existence of the parody depends on the use of the work. In other words, the only means of creating a parody is to borrow from an existing work. The parodist does not have the alternative of using a different or

²³⁴ Rubinfeld, *supra* note 16, at 48–49.

²³⁵ See *supra* notes 122–23 and accompanying text.

²³⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994).

²³⁷ *Id.* at 569–70 (“[T]he heart of any parodist’s claim . . . is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”).

²³⁸ *Id.* at 588 (“Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as market substitute for the original.”).

uncopyrighted work because the nature of the genre compels the use of the original work. Therefore, if copyright prohibits a parody, it is likely to fail the constitutional requirement of leaving alternative means of expression available. Given the very nature of parodies, there is only one way of creating a parody and that is to borrow from the original work.

At the same time, this does not mean that the parodist has license to commit copyright infringement.²³⁹ It is possible for a parodist to borrow from the original work without taking so much expression that would constitute infringement. Since copyright is quasi-public property, there are portions of the property (for instance, the ideas) that are available to the public to use. Although the parodist has a speech interest to create his parody, his interest must be weighed against the copyright owner's property interest. But since the nature of parody is such that the parodist can only express himself through a single means—that is, by borrowing from the copyrighted work—the First Amendment suggests that the speech interest ought to prevail.

Many scholars argue that if parodies can justify copyright infringement, then so should satires.²⁴⁰ A satire uses an existing work to mock or ridicule something other than the work itself, such as politics or societal norms.²⁴¹ Like parodies, satires often convey a transformative, critical message that reflects the genuine speech interests of the speaker. However, in terms of property interests, copyright's restriction against satires is justified. Copyright prohibits a satirist from copying an existing work, but leaves open numerous means of communication. Unlike a parodist, a satirist does not necessarily have to use a particular work to create his satire, but can choose from an array of works that are conducive to his satirical purposes. For example, an author who wants to ridicule the O.J. Simpson trial using well-known children's stories can choose between the copyrighted books of Dr. Seuss or

²³⁹ See *id.* at 581.

²⁴⁰ Michael C. Albin, *Beyond Fair Use: Putting Satire in its Proper Place*, 33 UCLA L. REV. 518 (1985); Adriana Collado, Note, *Unfair Use: The Lack of Fair Use Protection for Satire Under § 107 of the Copyright Act*, 9 J. TECH. L. & POL'Y 65 (2004).

²⁴¹ See THE OXFORD ENGLISH DICTIONARY 500 (2d ed. 1989).

traditional fairy tales that belong in the public domain.²⁴² In fact, the author is not barred from borrowing elements from the Dr. Seuss books as long as he does not copy a substantial part of the copyrighted expression.²⁴³ As such, the prohibition against satirists' copyright infringement meets constitutional scrutiny because the speaker has alternative modes of expression. The copyright owner's property rights prevail over the satirists' speech rights because there is no compelling reason why the satirist must use a particular piece of property to make his speech. Since the First Amendment does not guarantee that a speaker can use his selected means of expression, satires do not deserve special treatment under copyright law.

Furthermore, the public forum doctrine provides that the interest behind the regulation must be unrelated to the suppression of speech. Since copyright confers property rights for the purpose of promoting the creation of works, copyright generally has a speech-enhancing purpose. However, copyright owners can utilize copyright to suppress speech. In *Suntrust v. Houghton Mifflin Company*, the likely reason why the copyright owner sued the defendant for copyright infringement was because the owner disapproved of the defendant's message.²⁴⁴ This is because the copyright owner had a practice of censoring other authors' use of its work so that they would not "write anything about miscegenation or homosexuality."²⁴⁵ Additionally, there was little evidence that the defendant's work had any adverse economic impact on the original.²⁴⁶ Since the owner appeared to be motivated to suppress the defendant's speech, it was proper for the court to favor a finding of fair use. Although copyright is usually speech-neutral, as applied by the copyright owner in *Suntrust*, it

²⁴² See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (1997) (granting a preliminary injunction prohibiting the publication and distribution of a book that recounted the story of the O.J. Simpson trial in the style of Dr. Seuss).

²⁴³ See *id.* at 1398.

²⁴⁴ 268 F.3d 1257, 1268 (11th Cir. 2001).

²⁴⁵ See *id.*

²⁴⁶ *Id.* at 1276. Judge Marcus in his concurring opinion noted that this gave the subversive nature of Randall's novel additional relevance. *Id.* at 1282. For an interesting discussion of the *Suntrust* case in terms of copyright's treatment of sexualized works, see Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL'Y & L. 273, 294–300 (2007).

restricted another person's speech based on its content. In other words, Suntrust did not use copyright in accordance with its normal purposes, but used it for the specific purpose of censoring the defendant's speech. Moreover, the fact that the defendant prevailed in this case indicates that copyright is not a purely private right. Ordinarily, a private property owner is entitled to exclude others if he disapproves of the content of their speech. A homeowner has the prerogative to prevent a pro-choice rally from occurring on his lawn without violating the First Amendment. Yet the court implicitly accepts that copyright has a public dimension when it recognized the defendant's speech interest in *Suntrust*. The court assumed that copyright is meant to serve public purposes and therefore should not be used to infringe the defendant's legitimate speech interests.²⁴⁷ By preventing a copyright owner from using copyright to suppress speech, the court implicitly recognized the public nature of copyright and how it is subject to the First Amendment.

The Canadian public forum jurisprudence provides further guidance for how copyright ought to accommodate free speech. Justice Lamer's approach in *Committee for the Commonwealth* emphasized the compatibility between expression and a particular forum.²⁴⁸ A speaker has the right to use a public place if his speech is compatible with the function of that place. The notion of compatibility cannot refer to the property owner's approval of the other speaker's message, or whether the original work was intended to be used in these new ways. This would turn copyright into a tool of viewpoint discrimination that would be clearly unjustified under the First Amendment and the Charter's freedom of expression.²⁴⁹ Instead, compatibility refers to a functional analysis that turns on whether the speaker's use of the property would impair the integrity of the property's function. In other words, speech is compatible if it does not threaten the property

²⁴⁷ *Suntrust*, 268 F.3d at 1260–61.

²⁴⁸ *Comm. for the Commonwealth v. Can.*, [1991] 1 S.C.R. 139 (Can.).

²⁴⁹ To borrow Justice Lamer's example, it would not make sense if a librarian could prohibit a speaker from wearing a political t-shirt in a library if the librarian did not support those political views. *Id.* at ¶ 18.

owner's ability to exercise his property rights.²⁵⁰ Copyright incorporates this notion of compatibility through the statutory defense of fair use. For example, fair use considers the impact of the defendant's work on the market for the original.²⁵¹ If the defendant's work is an effective market substitute for the original, then it is likely that the owner's rights over his work have been compromised. With a substitute in the market, the owner cannot profit from the reproduction and distribution of his work. Conversely, if the defendant's work does not affect the market for the original, it is likely that the copyright owner retains the ability to exercise his exclusive rights. Therefore, the market impact factor assesses compatibility because it looks at whether the defendant's use has impaired the copyright owner's ability to enjoy his exclusive rights. Market impact is important not because it is relevant to free speech, but because it is relevant to the owner's property rights. Indeed, the economic effect of speech is not usually considered in the First Amendment analysis.²⁵² However, it is relevant in the context of copyright because the owner's interest relates to the economic exploitation of his work in the market. In this way, the market impact consideration accommodates speech concerns by only disfavoring expression that is not compatible with the copyright owner's economic rights.

Similarly, fair use's consideration of a work's transformativeness recognizes the potential speech interests of the defendant. By focusing on the ways in which the infringing work is different from the original, fair use pays attention to whether the defendant exercised his right to free speech. This is not to say that a speaker must say something new or original in order to gain the First Amendment's protections. Rather, the transformative nature

²⁵⁰ See *id.* at 22.

²⁵¹ 17 U.S.C. § 107(4) (2007). Section 107 provides that fair use is evaluated according to "(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." *Id.* The Canadian Copyright Act considers similar criteria under its fair dealing exception. Canada Copyright Act, R.S.C., ch. C-42, § 29 (1985) (excepting research or private study, criticism or review, news reporting, acts undertaken without motive or gain, and educational instruction or examination).

²⁵² See McGowan, *supra* note 42, at 334–35.

of the defendant's work helps indicate whether he was merely appropriating the owner's property or whether he had genuine speech interests. When a speaker uses another person's property for expressive purposes, he does not simply use the property without doing anything more. A person who enters another person's property does not exercise any obvious speech interest unless he also does something else, like wave a placard or shout a political slogan. The need for the speaker to do something more than just use the property is necessary in order to discern an expressive purpose. In the case of copyrighted property, it is not satisfactory for a speaker to simply reproduce the work. The speaker must contribute expression of his own in order to demonstrate a speech-related purpose. In this way, the transformative factor of the fair use defense helps to determine whether there is a genuine speech interest in play. Therefore, as a general matter, the fair use doctrine helps to attain an appropriate balance between the copyright owner's property interest and the defendant's speech interest. Through the four statutory factors, fair use extends protection to works that represent genuine expressive interests and are compatible with the owner's property rights.

This analysis makes it clear that *Michelin* was wrongly decided.²⁵³ In that case, the union's use of the Michelin Tire Man did not impair the copyright owner's property rights. For one thing, the union did not use the copyrighted work for economic purposes. It used the Michelin Tire Man in order to recruit employees to its organization, not to profit directly from its use of the copyrighted work. Although the union may have had a financial incentive to recruit new members, it did not thwart the copyright owner's right to exploit its work. The Michelin corporation is still able to use its logo to advertise its products and to represent its company image. Therefore, the union's use was compatible with the function of the copyrighted work. In addition, the union used the Michelin Tire Man in a parodic way. The leaflets used the company logo in order to ridicule the logo itself. Unless there is a blanket prohibition on parodies, it is necessary to

²⁵³ See *supra* notes 79–85 and accompanying text.

borrow from an existing work in order to parody it. However, the use of copyrighted logos can be problematic because they are usually short, indivisible works from which a parodist is likely to copy the entire work in order to parody it. Parody's implications for copyrighted logos are beyond the scope of this Article, but the union's parodic purposes do raise significant free speech concerns in this case. Further, it is evident that the union exercised its right to free speech. By altering the Michelin Tire Man to convey an entirely different message, the union copied the work in a transformative way. Unlike a wholesale copier, the union exhibited significant expression of its own to raise genuine speech concerns. Therefore, the court was mistaken to brush aside the constitutional challenges and should have considered whether the copyright owner's property rights justified the infringement on the union's speech rights.

Lastly, the *Michelin* case illustrates another way in which copyright ought to accommodate the speech interests of others. The Canadian jurisprudence recognizes that there is a particularly powerful claim to use a forum for speech purposes where there is a connection to one of the underlying values of free speech. Justice McLachlin's opinion in *Committee for the Commonwealth*²⁵⁴ focused on the link between the use of the forum and the three main goals of freedom of expression. If the defendant's speech in a particular place is related to political or democratic participation, the attainment of truth, or individual autonomy, the forum may need to accommodate that speech. In *Michelin*, the union's activity served several speech-related values—it expressed the union's position against the Michelin corporation and it facilitated the ability of employees to associate with the union. In other words, the union's use of the copyrighted logo was tied to important political and democratic values in being able to express criticism and solidarity within a labor union. In particular, *Michelin's* context of union activity provides a particularly compelling reason to view the speech interests in terms of its far-reaching implications on democratic and social values.

²⁵⁴ *Comm. for the Commonwealth v. Can.*, [1991] 1 S.C.R. 139 (Can.).

CONCLUSION

The conflict between copyright and free speech needs a new approach. The existing debate is mired in a contradictory argument about whether copyright enhances or restricts speech. Meanwhile, the courts seem to assume that copyright is property and copyright is therefore largely immunized from speech concerns. Both of these premises are false; copyright is about property rights, not speech regulation. Yet, even as property, copyright is subject to the First Amendment. Since copyright is not private property, but quasi-public property that facilitates the availability of works to the public, copyright needs to accommodate the speech interests of others. There is a conflict between the copyright and speech, but the conflict needs to be analyzed in terms of the copyright owner's property interest versus the other party's speech interest. It is only by viewing the conflict in terms of copyright's status as property that the values behind copyright and speech can be fully understood and respected.