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Article

The First Amendment Implications of Copyright's Double Standard

Raymond Shih Ray Ku¹

I. INTRODUCTION

Copyright law has First Amendment problems. On its face, copyright is consistent with freedom of expression. However, its interpretation is subject to a content-based bias against “entertainment” that renders its application constitutionally problematic and, arguably, unconstitutional. The scope of copyright liability, and the extent to which it both chills and punishes copying for the purpose of expressing one’s “taste and opinion,” imposes a double standard that denies authors of these works the freedom to incorporate the work of others. In contrast, all other authors may borrow freely from other works so long as they do not tell the same story or retell that story in another medium, which this Article describes as “virtual appropriation.” This double standard is created through a series of inconsistent, contradictory, and hypocritical interpretations of copyright and, in the end, is based upon a judicial elitism that dismisses the value of works of entertainment and the creative choices of those authors.

The copyright infringement action brought against Robin Thicke and Pharrell Williams is illustrative. Marvin Gaye’s family argued that Thicke’s and Williams’s smash hit, “Blurred Lines,” infringed Marvin Gaye’s copyrighted music and lyrics to “Got to Give it Up.”² During the litigation, Thicke testified that he wanted Williams to write a song that had the same groove as Gaye’s song.³ In writing the song, Williams testified that the only thing the songs had in common was their feel.⁴ When one listens to both songs, there is a clear similarity of feel between the recordings.⁵ And, the litigation arose because Williams clearly captured the groove.⁶ But should an artist be punished for capturing the groove of another artist? How does one even define the groove or determine what constitutes the groove? Does it matter that the specific question was not whether the recordings had a similar feel, but whether Williams reproduced protected elements of Gaye’s sheet music to achieve that feel? Even though the sheet music did not

¹ Professor of Law, Case Western Reserve University School of Law. Director, Center for Cyberspace Law & Policy. I would like to thank Adam Candeub and the faculty and students of Michigan State University School of Law for their feedback on an earlier draft of this essay. I would also like to thank Mark Lemley, Aaron Perzanowski, Cassandra Robertson, Rebecca Tushnet, and the students of my Fall 2017 Copyright Law class for their insightful comments and criticisms. I would also like to thank the editors of the Virginia Sports and Entertainment Law Journal, especially Jacqueline Malzone for the thoughtful time and effort they put in to publish this article.

² Kory Grow, Robin Thicke, Pharrell Lose Multi-Million Dollar ‘Blurred Lines’ Lawsuit, *Rolling Stone* (Mar. 10, 2015, 9:42 PM), <http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

contain many elements of Gaye's sound recording, the jury was allowed to determine whether Thicke and Williams, nonetheless, copied "too much" from Gaye.⁷ Ultimately, the jury sided with the Gaye family and awarded over seven million dollars in damages, one of the largest verdicts in copyright history.⁸

Decisions like "Blurred Lines" result from an interpretation of copyright law that punishes new authors for copying even the most intangible aspects of a prior work, even if they are unaware that they are copying.⁹ This is not the traditional or "easy" case of copyright infringement where defendants simply duplicate/pirate the copyright owner's work. Instead, authors may be punished for using even the ideas from another work if courts conclude that their purpose is to entertain. As this article demonstrates, this subjective evaluation of the merits of expression is reserved exclusively for so-called works of "entertainment."¹⁰ Under similar circumstances, a historian or painter would not have faced a jury because they would have been protected by the idea/expression distinction, the doctrine of fair use, or both.

As applied to entertainment, copyright is both impermissibly content-based and unconstitutionally vague. In other words, copyright law imposes substantial liability on expression based upon the content of speech and does so based upon rules that do not delineate clear borders between prohibited and permissible expression (i.e., when a speaker may "copy" another).¹¹ Instead, copyright law's blurred lines force future authors of works that might be categorized as entertainment into revising their intended expression, foregoing it altogether, or running the risk of defending against allegations of infringement and the imposition of substantial monetary damages. While the lines may be blurred, the message is clear: copy at your own risk.

Copyright's constitutional problems are the products of an inconsistent, contradictory and hypocritical bias against entertainment. This bias is exemplified by a statement made by a former register of copyright. In rejecting the proposition that file-sharing services -- at the time, Napster -- promoted creativity and human understanding by facilitating access to music and other creative works, the register began his defense of copyright liability with the rhetorical question, "What's the big deal? It's just entertainment."¹² In other words, denying individuals access to the music of their choice is not a significant harm because the music, while valuable financially, has little substantive value. Put another way, there is little, if any, harm when members of the public cannot listen to Bruno Mars either because they cannot afford or are unwilling to agree to the copyright owner's demands. Meanwhile, allowing people to access the song for free denies the copyright owner control of, and, potentially, compensation for the song. The situation is considered different if the public were denied access to educational content or to content that might inspire future thinkers, but not to a pop song. As discussed below, Justice Blackmun made this very argument in *Sony v. Universal City Studios*, the landmark decision in which the Supreme Court concluded that the personal

⁷ *Williams v. Gaye*, 885 F.3d 1150, 1167—70 (9th Cir. 2018).

⁸ *Grow*, supra note 2.

⁹ *Three Boys Music v. Michael Bolton*, 212 F.3d 477, 486 (9th Cir. 2000) (concluding that Michael Bolton subconsciously copied the Isley Brothers' "Love is a Wonderful Thing"); *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976) (concluding that George Harrison subconsciously copied Ronald Mack's "He's So Fine").

¹⁰ See infra Part III.

¹¹ See infra Part V.

¹² Ralph Oman, Former Register of Copyrights (1985-93), Copyright: Beyond the Rhetoric, Panel at Santa Clara Computer & High Technology Law Journal Symposium: The Digital Challenge to Copyright Law (Feb. 2004).

copying made possible by the VCR was a fair use.¹³ Despite losing in that decision, Justice Blackmun's position has largely won the day.¹⁴

The bias against entertainment is not limited to the right of audiences to receive speech. It applies equally to speakers as well. The position that "it's just entertainment" justifies restricting the freedom of authors creating new works that are considered works of entertainment. Once again, we are told that denying an author the freedom to create expression as they see fit, for the purposes they see fit, is not a big deal. If it is not a big deal to deny a listener access to Bruno Mars, it is also not a big deal to deny writers and performers of popular music the ability to "copy" Bruno Mars. Recognizing this judicial and doctrinal bias against entertainment lends clarity to some of the most difficult and opaque areas of copyright law, and reveals an inconsistent, hypocritical, and arguably unconstitutional regulation of speech.

Moreover, as the bias against entertainment is found both implicitly and explicitly in the very copyright doctrines that are supposed to safeguard freedom of expression -- the idea/expression distinction and the doctrine of fair use -- it raises serious First Amendment questions. Why are restrictions upon entertainment not a big deal? How does speech that entertains differ from other speech? How can courts determine when speech is "just entertainment" without injecting their own subjective biases? What must authors do in terms of their own creativity to overcome this bias? Put another way, is it consistent with the First Amendment to allow judges and juries to punish speech they consider unworthy because of a purpose to entertain? This Article argues no, and that the *New York Times v. Sullivan*¹⁵ line of cases dealing with defamation should guide First Amendment analysis of copyright. Because of the inherent difficulty in punishing speech based upon a subjective evaluation of its purpose and creativity, courts must guarantee sufficient breathing space for individuals to express themselves when they choose to do so by incorporating the works of others.

Part II introduces the "What's the big deal? It's just entertainment," argument, and how the Supreme Court responded in two landmark decisions: *Sony Corp. v. Universal City Studios, Inc.*¹⁶ and *Bleistein v. Donaldson Lithographing Co.*¹⁷ Part II.A. demonstrates that the common understanding of these cases overlooks the importance of their relationship to entertainment, and their clear rejection of subjecting works of entertainment to a different standard under copyright law. In *Sony*, this requires a careful analysis of the Supreme Court's justification for concluding that fair use encompasses home video recording of television programming even if that use is not productive.

Part II.B. then argues that the full import of Justice Holmes' famous opinion in *Bleistein*, adopting what has become copyright's bedrock principle of non-discrimination, can only be understood when his opinion is recognized as part of a much larger debate on the scope of Congress' powers to recognize copyright in order to "promote the progress of science and the useful arts."¹⁸ Part II.B. argues

¹³ 464 U.S. 417 (1984) (Blackmun, J., dissenting).

¹⁴ See *infra* Part III.

¹⁵ 376 U.S. 254 (1964)

¹⁶ *Id.* (majority opinion).

¹⁷ 188 U.S. 239 (1903).

¹⁸ U.S. Const. Art. I, § 8, cl. 8. For a similar approach to *Bleistein* but in relation to the definition of progress under the Copyright Clause see Barton Beebe, *Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 *Colum. L. Rev.* 319, 351 (2017). I am deeply indebted to Beebe's work as it led me to reconsider the decision with respect to the relationship between the Copyright Clause and entertainment. But see Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 *U.C. Davis L. Rev.* 1, 10-18 (2013)

that the Supreme Court's decision was a direct response to and rejection of the argument that neither works of "fine art" nor entertainment -- but especially not works of entertainment -- were sufficiently valuable to fall under Congress' power to grant exclusive rights under the Copyright Clause. The Constitutional importance of this conclusion cannot be overstated, as it represents a fundamental rejection of the argument that the Copyright Clause justifies content-based discrimination.

Part III demonstrates that despite the approaches taken by the Supreme Court in *Sony* and *Bleistein*, courts have interpreted the otherwise neutral idea/expression distinction and doctrine of fair use to discriminate against works of entertainment. Part III.A. demonstrates that courts have recognized two separate categories of ideas: those that "advance the understanding of phenomena or the solution of problems" and those that are infused only with "the author's taste or opinion."¹⁹ In Part III.B., this Article demonstrates that the promise that fair use will protect the freedom of future authors to create works of their own when they use other works as raw material for their own creative expression is illusory when it comes to entertainment.

In Part IV, this Article critically examines the principal justification for a double standard: that factual works (works that seek to explain phenomena or to provide solutions to problems) are fundamentally different from entertainment, which critics historically described as frivolous works (those representing the author's taste and opinion). Part IV.A. explores whether there are inherent differences justifying a greater tolerance or need for copying in science than in entertainment and contends that the "facts are different" argument mistakenly conflates conclusions with expression. Because works of science answer problems or propose solutions, it is perhaps inevitable and even desirable that multiple authors reach the same conclusion. However, recognizing that authors should be free to and may inevitably reach the same conclusion does not mean that they must repeat the original author's expression or get there without having to contribute something of their own. Part IV.B. considers the various instrumental justifications for a double standard, and argues that those reasons apply equally to entertainment. Moreover, to the extent that more limited copyright protection is justified based upon the likelihood that future expression will be chilled, Part IV.C. argues that this argument weighs in favor of works of entertainment because the creative expression of those authors is more likely to be chilled by copyright liability.

Finally, Part V considers the First Amendment implications of recognizing copyright discrimination against entertainment, and argues that there are no objective reasons for imposing greater restrictions upon creators of so-called works of "taste and opinion." It begins by explaining the Supreme Court's current understanding of the relationship between copyright and freedom of speech, and its reliance upon the idea/expression distinction and fair use. Part V.A. explains why these doctrines cannot be relied upon to safeguard First Amendment interests. Both doctrines allow judges to engage in a form of copyright *Lochnerism* in which their personal opinions on the value of entertainment not only define the scope of copyright, but alter the boundaries of free speech as well. Part V.B. argues that copyright's double standard represents a content-based regulation of speech. It is void-for-vagueness. As *Bleistein* recognized, attempting to separate the fine arts from entertainment is fundamentally fraught with difficulty. And, to the extent

(arguing that the courts have erroneously expanded reach of the Copyright Clause under the principle of non-discrimination).

¹⁹ See *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 71 (2d Cir. 1994).

that the idea/expression distinction and fair use doctrine are used to justify a double standard, they themselves are unconstitutionally vague.

Part V.C. highlights the First Amendment problems raised by a content-neutral expansion of copyright protection. In other words, is it constitutional to eliminate copyright's double standard by imposing the same heightened standard of liability (currently limited to entertainment) to all works? Part V.C. argues that the expanding copyright under those circumstances cannot satisfy intermediate scrutiny let alone strict scrutiny. Neither a desire for a greater variety of expression nor increasing the gatekeeping powers of existing copyright owners, therefore increasing their relative power in the marketplace of ideas, are legitimate government interests. Not only are these interests illegitimate, they are clearly related to the suppression of expression. Lastly, Part V.D. explains why expanding copyright protection beyond virtual appropriation raises problems with regard to the constitutional fit between ends and means. In other words, exclusive rights arguably suppress more speech than necessary to protect the legitimate interests of authors. In both Parts V.C. and V.D., this Article argues that the *New York Times v. Sullivan* line of cases dealing with defamation should guide this First Amendment analysis.

II. WHO CARES ABOUT HONEY BOO BOO? THE SUPREME COURT.

Modern copyright law traces its origins to the English Statute of Anne, which expressly recognized that the purpose of copyright was to encourage learning,²⁰ and to the U.S. Constitution, which empowers Congress “to promote the progress of science and the useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²¹ In light of these stated purposes, the statement, “What’s the big deal? It’s just entertainment,” seems perfectly reasonable. If the purpose of copyright is to encourage learning and promote progress, one might expect courts to distinguish works that are consistent with the Copyright Clause from those that are not. Doing so would require courts to define “science” and “the useful arts,” and to determine when a work fits within either of those definitions. While physics is a science, is philosophy? Medical journals advance science, but do sculptures? Do cartoons? Nevertheless, it is almost universally accepted that copyright law should not discriminate based upon the subject matter let alone the content of a work. Currently, copyright protects all creative works, scientific publications and broadcasts of NBA basketball, works of fiction as well as pornography, statues, and stuffed animals.²² With respect to stuffed animals and similar works, Justice Douglas once noted that copyright protects,

[S]tatuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, . . . and ash trays. Perhaps these are ‘writings’ in the constitutional sense. But to me, at least, they are not obviously so. It is time we came to the problem full

²⁰ Copyright Act of 1709, 8 Ann. c. 21.

²¹ U.S. Const. Art. I, § 8, cl. 8.

²² See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997) (noting that broadcasts of the NBA and other sporting events are subject to copyright protection); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997) (recognizing copyright protection for Beanie Babies); *Mitchell Brothers Films Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979) (“Congress has not chosen to refuse copyrights on obscene materials . . .”).

face.²³

While Justice Douglas was referring to the Copyright Clause's definition of writings, one may be tempted to argue that the Clause's reference to science and the useful arts is also a lingering question; you would be wrong. As this Part demonstrates, the Supreme Court has responded to the question, "What's the big deal? It's just entertainment?" with a question of its own: "Who are we to judge?" Part II.A. introduces this problem and demonstrates that it was a critical issue in *Sony*. The decision illustrates both the persistence of these doubts, as represented by Justice Blackmun's dissent, and how Justice Stevens' majority opinion may not have been as clear as one might expect. Part II.B. argues that while this uncertainty may be traced back to Justice Holmes' conclusory and almost dismissive opinion in *Bleistein*, when that opinion is recognized as the final word in a much larger debate on the scope of the Copyright Clause, it becomes clear why the non-discrimination principle has been and should continue to be a guiding principle of copyright law.

A. *Sony v. Universal City Studios*: Audiences

"What's the big deal? It's just entertainment," is more than the opinion of one individual. It is a significant, if sometimes unstated, perspective in copyright law. Consider the Supreme Court's landmark decision, *Sony v. Universal City Studios*, in which a majority of the Supreme Court concluded that unauthorized home recording of television programming was fair use.²⁴ *Sony* recognized the freedom of individuals to make copies for personal use even when copyright owners object. In *Sony*, the specific personal use was recording a television program to watch at a different time.²⁵ This personal use led to the growth of video recording from the VCR to the DVR. With respect to music, personal uses include the creation of mixtapes for a Walkman or playlists for an iPhone, ripping music from compact discs to one's computer and uploading music to a digital music player. Individuals are also free to make personal copies of texts and images by hand, photocopier, scanner, or camera as part of personal use.²⁶ On its face, *Sony* clearly holds that the recording of entertainment is as much a fair use as the recording of news or education programming. In other words, it is a big deal to the viewing public.²⁷ Nonetheless, given the reach of the decision, one might find it surprising that the Court did not explicitly address whether the recording of educational programming or news should be treated differently than the recording of a sitcom or reality television. As the following demonstrates, this issue did arise, but only obliquely.

When the Supreme Court concluded that copyright law did not prohibit the home recording of television programming, it did so without distinguishing between the types of programs being recorded.²⁸ As such, it is equally fair to record an episode of PBS's *Frontline* or *Mr. Roger's Neighborhood* as it would be to record an episode of *Seinfeld* or *Here Comes Honey Boo Boo*. The Supreme Court, however, was sharply divided 5-4 in the decision. Writing for the dissent, Justice

²³ *Mazer v. Stein*, 347 U.S. 201, 221 (1954) (Douglas, J., concurring).

²⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442-56 (1984).

²⁵ *Id.* at 455.

²⁶ See generally, Jessica Litman, *Lawful Personal Use*, 785 *Tex. L. Rev.* 1871 (2006-2007) (analyzing both the history of personal uses as fair uses and arguing for expanded recognition).

²⁷ *Sony*, 464 U.S. at 454-56.

²⁸ *Id.* at 443-46.

Blackmun disputed that fair use should include watching television programming like *Honey Boo Boo*. After all, a significant portion of television programming at issue was “just entertainment.”²⁹

Here Comes Honey Boo Boo was a popular television program that follows Alana “Honey Boo Boo” Thompson and her family.³⁰ Honey Boo Boo originally gained popularity as a child beauty pageant participant documented in the program *Toddlers and Tiaras*.³¹ For the purposes of this discussion, whether the copyrighted work is a television program like *Here Comes Honey Boo Boo*, *Dancing with the Stars*, or *Breaking Bad*, a novel such as *Harry Potter and the Half-Blood Prince* or *Fifty Shades of Grey*, a popular song like “Blurred Lines” or “All About the Bass,” or a video game like *Rayman Raving Rabbids* or *Cuphead*, is irrelevant. Instead, this Article uses *Honey Boo Boo* as a proxy for any and all works that may be considered “just entertainment” or, even more harshly, as nothing more than a distraction, a circus, or an opiate for the masses.

The majority in *Sony* concluded that the unauthorized personal recording of broadcast television programs was a fair use because it expanded the audience for programming.³² Home recording allowed members of the public to watch television programs that they would otherwise not have been able to watch.³³ In reaching this conclusion the majority also relied upon the fact that the copyright owners could not demonstrate that such copying was “harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”³⁴ The district court found no evidence that home recording would harm the size of live audiences or the ratings and revenues derived from viewership.³⁵ Likewise, the Court found no evidence that home recording would hurt theatrical releases, reruns, or rentals.³⁶ In the absence of evidence indicating that home recording would harm these revenue sources, increasing access to television outweighed the copyright owners’ desire to control the conditions of that access.³⁷

In contrast, Justice Blackmun argued for the dissent that home recording was not a fair use because watching television was not a “productive use,”³⁸ or as discussed later, a transformative use.³⁹ Simply watching television was not a valuable use of a copyrighted work, and as such, restricting the number of individuals who might watch a television program was not a loss to society. Justice Blackmun compared the relative harms to society of denying an “ordinary user” access to a television show to the harms of denying a scholar access to research materials. According to Blackmun, when the ordinary user of a copyrighted work is denied access, “only the individual is the loser.”⁴⁰ In contrast, “when the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge.”⁴¹ According to Blackmun, the doctrine of fair use

²⁹ Id. at 477-81 (Blackmun, J., dissenting).

³⁰ Here Comes Honey Boo Boo, Wikipedia https://en.wikipedia.org/wiki/Here_Comes_Honey_Boo_Boo (last visited May 28, 2018).

³¹ Id.

³² *Sony*, 464 U.S. at 421 & 454.

³³ Id. at 421.

³⁴ Id. at 451.

³⁵ Id. at 452-53.

³⁶ Id. at 453.

³⁷ Id. at 454.

³⁸ Id. at 478-79 (Blackmun, J., dissenting).

³⁹ See *infra* Part III.B.

⁴⁰ *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting).

⁴¹ Id. at 477-78.

should only protect uses equivalent to the scholar's copying, and he notes that the examples provided by the Copyright Act and by the legislative history are all examples of "productive" or "socially laudable" uses.⁴² According to the dissent, watching television is not a "socially laudable" use.⁴³ There is no loss to society if an audience member cannot watch the trials and tribulations of *Honey Boo Boo*; and even if some loss exists, it is easily outweighed by the interests of copyright owners in setting the conditions for audiences to access copyrighted programming. Justice Stevens' majority opinion responds to the dissenters in a footnote. According to Justice Stevens, while the distinction between productive and unproductive uses may be helpful, it is not dispositive.⁴⁴ "Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional."⁴⁵ In attempting to identify the social good created by gaining access to *Here Comes Honey Boo Boo*, Justice Stevens essentially argues that it is difficult to determine when society benefits:

A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.⁴⁶

In other words, courts should not categorically require a use to be "productive" because we can never say for certain that the unauthorized use will not lead to socially valuable ends.⁴⁷ As such, in the absence of evidence that personal copying will seriously harm the ability of copyright owners to obtain compensation in other markets, expanding the audience for copyrighted works is a sufficiently valuable means to achieve ends that are themselves valuable to the public.⁴⁸

By arguing that that we can never determine ex-ante when a particular act of copying will lead to socially beneficial ends, and without differentiating between the subject matter of the recorded programming, Justice Stevens hints at an answer to the question, "Who cares about *Honey Boo Boo*?". While the majority specifically rejects the dissenting argument that watching television can never be considered a fair use, implicit is also the idea that someone or everyone is harmed if denied the opportunity to watch *Honey Boo Boo*.⁴⁹ In other words, entertainment can equally inform audience members about their profession, their constituents, their civic duty, as well as contribute to more traditional productive copyright uses such as the creation of new works. As such, being free to copy *Honey Boo Boo* is important because the show is an important part of the audience's search for

⁴² Id. at 477-80.

⁴³ See id.

⁴⁴ Id. at 455 n.40.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Rebecca Tushnet expands upon this idea and makes a detailed argument that the basic act of copying itself should be protected by the First Amendment, and interpreting fair use to require a use be productive or transformative, is inconsistent with freedom of speech. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *Yale L.J.* 535 (2004).

⁴⁸ *Sony*, 464 U.S. at 454 ("[T]o the extent that time-shifting expands public access, . . . it yields societal benefits."); see also Beebe, *supra* note 18, at 390 (arguing access is an important element of aesthetic practice).

⁴⁹ Id. at 455 n.40.

meaning, identity, and understanding. It may form the foundation of life choices and public policy decisions. It may also provide an opportunity for reflection, or an opportunity to experience a part of or the full spectrum of human emotion. So even if it may not be a big deal to Justice Blackmun, it is a big deal to the audience that would otherwise be denied access. If unauthorized access to entertainment is important to the audience, it is equally important to the creators of that expression. Unfortunately, crucial elements of the foundational Supreme Court opinion on this subject are just as opaque as the opinions in *Sony*.

B. *Bleistein v. Donaldson Lithographic*: Authors

Equal treatment under copyright originates with the Supreme Court's decision in *Bleistein v. Donaldson Lithographic*.⁵⁰ In that decision, Justice Holmes first articulated copyright's non-discrimination principle.⁵¹ As Barton Beebe's recent article demonstrates, the issues presented in *Bleistein* are far more complicated and nuanced than generally understood.⁵² As this section explains, the implications and meaning of Justice Holmes' opinion and how it might apply with respect to the "just entertainment" argument can only be understood when his opinion is read as part of a larger dialogue. For Beebe, this is an overarching dialogue on the nature and definition of progress in copyright law, and how *Bleistein* has been misunderstood and misapplied as the foundation for a definition of progress focused upon material progress.⁵³ He argues persuasively that *Bleistein* is best understood as advocating for aesthetic progress.⁵⁴ The goal of this section is more modest. It focuses more narrowly on Justice Holmes' opinion as the final word in the dialogue among the Supreme Court justices and the lower court judges in *Bleistein*, and, in that context, what it has to say about the value of entertainment.

The plaintiffs in *Bleistein* created three engravings: one depicted ballet dancers, another depicted trick bicycle riding, and a third depicted performers made to look like statutes.⁵⁵ These engravings were used to print pamphlets advertising the acts as part of a circus.⁵⁶ When *Bleistein* and the other plaintiffs sued for the unauthorized reproduction of these images, Donaldson Lithographic Co. argued that the engravings were not protected by copyright and were uncopyrightable.⁵⁷ According to the district court, because Congress had limited copyright protection for pictorial illustration to the "fine arts,"⁵⁸ "the prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts."⁵⁹ In finding for the defendant, the district court concluded that the engravings were neither pictorial illustrations nor fine art.⁶⁰ With respect to the

⁵⁰ 188 U.S. 239 (1903).

⁵¹ *Id.* at 249-50.

⁵² See Beebe, *supra* note 18, at 338-39.

⁵³ *Id.* at 371-78.

⁵⁴ *Id.* at 386-95.

⁵⁵ *Bleistein*, 188 U.S. at 248.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Bleistein v. Donaldson Lithographic Co.*, 98 F. 608, 610 (C.C.D. Ky. 1899).

⁵⁹ *Id.* In so finding, the court rejected *Bleistein*'s argument that the Copyright Act's reference to pictorial illustrations and to fine arts were separate and distinct. In other words, were they pictorial illustrations? Even this was a source of debate because the posters included photographs and illustrations could be limited illustrations within a book. *Id.*

⁶⁰ *Id.* at 611.

latter, the court considered the pictures to be “merely frivolous, and to some extent immoral.”⁶¹

On appeal, the Sixth Circuit agreed that the prints had no connection with the fine arts.⁶² It then went one step further concluding that it would be inconsistent with the Constitution to protect a work with “no value aside from [the] function” of advertising.⁶³ In its view, Congress only has the power to extend copyright to illustrations when those illustrations are connected to the fine arts.⁶⁴ While an illustration that represented a “work of the imagination” might qualify even if used as an advertisement, the pictures in question were the pictorial equivalent of labels and were incapable of being protected by Congress.⁶⁵

The Sixth Circuit’s interpretation of the role of fine arts is noteworthy for three reasons. First, it raised the stakes of the decision by deliberately elevating the issue from statutory interpretation to constitutional interpretation. As demonstrated by the district court’s opinion, the case could have been resolved by statutory interpretation alone. Nonetheless, the court felt the need to address the constitutional question, and in so doing, converted a statutory requirement into an implied constitutional prerequisite.

Second, it highlighted an important debate over whether the Constitution empowers Congress to protect the fine arts. While the district court found it unnecessary to address the constitutional question, it likewise offered an opinion on the scope of Congress’ power under Article I, Sec. 8.⁶⁶ However, unlike the Court of Appeals, which concluded that the Constitution required a work to be one of fine art, the district court doubted that works of fine art were proper subjects of copyright at all; according to the district court,

Inasmuch as the constitutional provision[s] . . . only authorizes congress to promote the “useful arts,” the curious might moot the question of the power to promote any but the useful arts, and consequently the lack of power to legislate to give exclusive privileges respecting the fine arts, unless in cases where they are also useful arts⁶⁷

While the court recognized that it may be both difficult and undesirable to distinguish between the useful arts and the fine arts, such a distinction was possible.⁶⁸ And, works of fine art and works of imagination are not useful. To borrow from the court of appeals, they had no intrinsic value of their own under the Constitution.⁶⁹ As such, the district court questioned whether Congress had the power to protect either the frivolous or the fine arts. The interpretation is consistent with what Barton Beebe describes as the early American view that the fine arts “were at best useless and at worst corrupting.”⁷⁰ In contrast, the Sixth Circuit opinion was consistent with the turn-of-the-century view that the Constitution’s

⁶¹ Id.

⁶² *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (6th Cir. 1900).

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id. at 996 (quoting *Yuengling v. Schile*, 12 F. 97, 100 (C.C.S.D.N.Y. 1882)).

⁶⁶ *Bleistein*, 98 F. at 609-12.

⁶⁷ Id. at 611. In a dissenting opinion in *Bleistein*, Justice Harlan literally copies the Sixth Circuit opinion and adopts it as his own. *Bleistein v. Donaldson Lithographic*, 188 U.S. 239, 252-53 (1903) (Harlan, J., dissenting).

⁶⁸ *Bleistein*, 98 F. at 611.

⁶⁹ *Courier Lithographing*, 104 F. at 996.

⁷⁰ Beebe, *supra* note 18, at 339.

reference to progress “empower[ed] courts to apply a strict definition of fine arts. The thinking was that only aesthetic works that could satisfy this strict definition would ‘promote the Progress.’”⁷¹

Third, neither court questioned its authority or competency to evaluate whether works were frivolous or of fine art. To the contrary, both courts were so confident that the illustrations in *Bleistein* were not fine art, they found in favor of the defendant as a matter of law.⁷² Under these circumstances, the question was not whether the illustrations were good or bad examples of art, but whether the illustrations could be categorized as fine art.

By the time it reached the Supreme Court, the case raised two fundamental questions for this analysis. First and foremost, is the power to promote the progress of science and the useful arts limited only to those works, or does it include the fine arts? Or, as Beebe describes, does the Constitution grant Congress the power to promote aesthetic progress?⁷³ Second, if Congress has the power to protect works of fine art, were the lower courts correct in their unanimous agreement that the illustrations in *Bleistein* were not examples of fine art? Justice Holmes answered both question with a resounding “no.” Unfortunately, much like Justice Stevens’ answer to, “Who cares about *Honey Boo Boo*?” Justice Holmes’ answer is much too brief and cursory given the weight and future implications of the decision. As Beebe argues, “Holmes’s brief, breezy opinion mask[s] the extraordinary tensions at work in the case and the fateful nature of Holmes’s resolution of them.”⁷⁴

Justice Holmes’s opinion flat-out rejects the argument that the fine arts were not appropriate for protection under the Copyright Clause, and it does so in a single conclusory sentence: “The Constitution does not limit the useful to that which satisfies immediate bodily needs.”⁷⁵ His sole authority for this conclusion is the Court’s earlier decision in *Burrow-Giles Lithographic Co. v. Sarony*, which held that photographs fell within the constitutional definition of writings.⁷⁶ While *Burrow-Giles* held that a photograph of Oscar Wilde could be protected by copyright, it did so by concluding that photographs were sufficiently analogous to writings protected by the first Congress.⁷⁷ As such, the decision did not consider the meaning of progress or the useful arts. Moreover, Justice Miller’s opinion relied upon the original intent of the framers of the Constitution to reach that conclusion,⁷⁸ and it is doubtful that the framers intended to include the fine arts. As Beebe demonstrates, the framers appeared to have deliberately excluded the fine arts.⁷⁹ So, to the extent that *Burrow-Giles* supported Holmes, it did so only

⁷¹ Id. at 357 (quoting U.S. Const. art. I, § 8, cl. 8); see also Snow, supra note 18, at 6-9 (outlining earlier interpretations of the Copyright Clause as excluding works that did not fall within the definition of science).

⁷² *Courier*, 104 F. at 997; *Bleistein*, 98 F. at 613.

⁷³ Beebe, supra note 18, at 327-28.

⁷⁴ Id. at 349.

⁷⁵ *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 249 (1903).

⁷⁶ 111 U.S. 53, 59.

⁷⁷ Id. at 57.

⁷⁸ Id. stating:

The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

⁷⁹ See Beebe, supra note 18, at 337-42. See also Snow, supra note 18, at 8-9 (discussing the Framers’

through a logical syllogism. A photograph of Oscar Wilde does not “satisf[y] immediate bodily needs.”⁸⁰ A photograph can be copyrighted. Therefore, works that do not satisfy immediate bodily needs can be copyrighted. Despite the dubious support provided by *Burrow-Giles* and Holmes’ absolute failure to explain his conclusion, this Article embraces it nonetheless. To the extent that copyright and the Copyright Clause address the broader question of human understanding, that understanding should include works that satisfy intellectual and emotional needs. But what works satisfy those needs?

Even if the fine arts are equivalent to the useful arts, what is the definition of fine art? Once again, Justice Holmes’ response is startling in both its simplicity and its implications. In response to the defendant’s argument that the pictures were just advertisement and not fine art, Holmes answered, “Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd A picture is none the less a picture, and none the less a subject of copyright.”⁸¹ In other words, as long as the work falls within the category of works protected by copyright, such as a book, photograph, sound recording, or audiovisual recording, the content of those works is irrelevant. If the useful arts include the fine arts, the fine arts include the frivolous. It is the medium, and not the message, that justifies copyright protection. After *Bleistein*, copyright is now undisputedly content neutral.

In defense of the non-discrimination principle, the opinion provides a justification that is simultaneously populist and elitist. Justice Holmes argued that

[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, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, . . . —it would be bold to say that they have not an aesthetic and educational value,— and the taste of any public is not to be treated with contempt.⁸²

In other words, copyright protects works that some might consider “highbrow” and “lowbrow.” This is justified in part because sometimes we will mistake treasure as trash, but also because one man’s trash is another man’s treasure. And judges are not immune from either myopia or bias. As such, Justice Holmes uses the subjectivity of art as both a descriptive and normative argument to reject the contention that the Constitution requires courts to define fine art. While fine art may not defy definition, attempting such a definition “is a dangerous undertaking for persons trained only in the law,”⁸³ and impermissibly elitist. Thanks to

understanding of science).

⁸⁰ *Bleistein*, 188 U.S. at 249.

⁸¹ *Id.* at 251.

⁸² *Id.* at 251-52. This Article leaves out Justice Holmes’s reference to commercial value. While I agree with Beebe that the emphasis on commercial value has been misplaced, Justice Holmes’s opinion does not rely as heavily upon the idea of commercial value as some may suggest. See generally Beebe, *supra* note 18 (critiquing Holmes’s reference to commercial value and arguing against an interpretation of progress focusing upon commercial value).

⁸³ *Bleistein*, 188 U.S. at 251; see also Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 Belmont L. Rev. 29, 35 (2016) (“If judges were to consider the aesthetic value of a work in determining whether

Bleistein, copyright protects trash and treasure and everything in between, and copyright cannot judge either.

In light of the preceding discussion, this result is breathtaking. Of course, the importance of establishing the principle of non-discrimination, as *Bleistein* is commonly understood, cannot be overstated. Likewise, any faults in Justice Holmes' opinion may be excused as the decision has withstood the far more demanding test of time. Nonetheless, in this discussion, Justice Holmes' opinion in *Bleistein* is also noteworthy because of why he articulated the principle. The non-discrimination principle was not derived from the text of the Constitution, which makes explicit reference to science and the useful arts. Nor was it attempting to conform to the original understanding of the Constitution. By extending copyright to both works of fine art and works of entertainment, *Bleistein* rejected both the early-American and turn-of-the-20th-century understanding of the Copyright Clause. Instead, the decision put an end to any argument that copyright must be limited only to science and the useful arts, and did so by convincing readers to ignore the text of the Constitution.

A close analysis of both *Sony* and *Bleistein* reveals that the decisions stand for much more than what is commonly understood. They stand for the fundamental proposition that all expression is valuable, and reject the proposition that copyright allows judges to discriminate against works of low value. Expression has value to both speaker and audience alike. Moreover, as the preceding discussion demonstrates, there have always been those that have questioned the value of entertainment and its place in the copyright pantheon. Nonetheless, in both *Sony* and *Bleistein*, the Supreme Court concluded that science, history, art, literature, and, yes, entertainment are all equals. As the remainder of this Article demonstrates, copyright's non-discrimination principle plays more than just an important role in copyright; it is also a crucial First Amendment safeguard against content discrimination. By protecting all expression, including what some may consider frivolous or trash, *Bleistein* anticipated the Supreme Court's extension of First Amendment protection to foul and offensive speech. When Supreme Court famously upheld a defendant's freedom to say, "Fuck the Draft,"⁸⁴ it rejected the argument that Cohen could have conveyed his message in a more refined manner. Echoing *Bleistein*, the Supreme Court responded that "one man's vulgarity may be another's lyric."⁸⁵ By following the non-discrimination principle, *Sony* is consistent with both decisions, even if the majority opinion does so only implicitly. In essence, the Supreme Court's response to "Who cares about *Honey Boo Boo*?" and "What's the big deal? It's just entertainment," is "Who are we to judge?"

III. "It's Just Entertainment"

As the rhetorical question, "What's the big deal? It's just entertainment," implies, discrimination against entertainment remains alive and well. Under these circumstances, discrimination occurs when courts determine the scope of copyright protection for entertainment, and not whether those works should be the subject of copyright. In other words, while copyright protects "trash," it denies new authors of "trash" the same freedom as others. Of course, this is a big deal for

it is protected by copyright, their own subjective preferences could prevent them from recognizing both the objective aesthetic value of the work and its subjective aesthetic value to others.").

⁸⁴ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁸⁵ *Id.* at 25.

these new authors and for the audiences that would enjoy those works. Nonetheless, through the two most important doctrines in copyright law, the idea/expression distinction and fair use, once again, courts have claimed the power to determine whether expression is trash or treasure. Both doctrines are crucial because they determine the boundaries of a copyright owner's rights and when and how subsequent authors may express themselves without fear of copyright liability. The idea/expression distinction initially determines how far copyright protects a work beyond literal reproduction. The fair use doctrine then establishes internal limits to this protection when its literal applications would conflict with copyright's underlying purpose of promoting creativity. Under these doctrines, courts have created a double standard: one for entertainment, and one for everything else. This double standard results in asymmetric copyright protection for works of entertainment that privileges existing copyright holders at the expense of new creative artists.

Before discussing how these doctrines have been interpreted to discriminate against entertainment, consider the three following scenarios. 1) A researcher, whether she is an historian, scientist, or law professor, writes a book by copying (with attribution) a prior work's topic, thesis, and organization in detail in an effort to explain and analyze the same problem. 2) A fan of a television show writes a trivia book based upon the characters and events of the show. 3) A self-proclaimed appropriation artist uses exact reproductions of another artist's work as the centerpiece of his own work. In each of these cases, the author is clearly copying from another. In each case, the copying is extensive. In each case, the author is not relying solely upon the prior work, but adds their own creativity to produce a new work. In examples one and two, the authors are not copying expression but ideas, and in the third example, the author is copying without reference to the ideas and expression of the original artist. In each of these cases, whether the author's new work is considered infringing depends upon the application of idea/expression distinction and the doctrine of fair use, and as the following argues, the conclusion depends almost entirely upon whether the purpose of the new work is "just entertainment."

A. The Idea/Expression Distinction

Based upon the principle that copyright protects an author's writing, the idea/expression distinction limits copyright protection to an author's expression and not the ideas conveyed by the expression.⁸⁶ According to the Supreme Court in *Baker v Selden*, "[t]he very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."⁸⁷ The distinction recognizes the importance of allowing others to copy and borrow from an existing work, and

⁸⁶ See *Baker v. Selden*, 101 U.S. 99, 102 (1879) ("[T]here is a clear distinction between the book as such and the [subject matter] which it is intended to illustrate."). In *Baker*, the Supreme Court was concerned that the plaintiff was attempting to use copyright to protect rights that should otherwise be considered under patent law. *Id.* at 102-03. In addition to the idea/expression distinction, the merger doctrine and *scènes a faire* deny copyright protection when there are a very limited number of ways of expressing an idea. See *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989) ("Where an idea and the expression 'merge,' or are 'inseparable,' the expression is not given copyright protection In addition, where an expression is, as a practical matter, indispensable, or at least standard, in the treatment of a given idea, the expression is protected only against verbatim, or virtually identical copying.").

⁸⁷ *Baker*, 101 U.S. at 103.

protects the creative process by limiting what an author can protect in the first instance. Put differently, “[t]he ‘promotion of science and the useful arts’ requires this limit on the scope of an author’s control. Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither.”⁸⁸ At its most basic level, this means that copyright protects authors from piracy—the verbatim reproduction of their literary form or physical form whether the literary form is text, musical annotation, images or sound, and no matter whether the physical form is a manuscript, sheet music, photograph, or digital recording.⁸⁹

It does not give authors the power to prevent others from drawing from and using the information, knowledge, and ideas contained in their work.⁹⁰ J.K. Rowling can no more prevent others from writing about a school for witches and wizards than Albert Einstein can prevent others from using his theory that energy is equal to the mass of an object multiplied by the speech of light squared. However, copyright law prevents more than verbatim reproduction: a subsequent author may violate the right of reproduction by copying non-literal elements of the work or violate the derivative work right by creating a new work based upon and transforming, recasting, or adapting the original work.⁹¹ In other words, copyright currently protects some of degree of expression beyond the literal text. On its face, the idea/expression distinction is content neutral. In practice, however, courts rely upon two different definitions for “ideas” based upon their subjective understanding of the relative worth of the subject matter copied.

Consider the first scenario, a researcher adopting the theory of another. In *Hoehling v. Universal City Studios*, Hoehling published the book, *Who Destroyed the Hindenburg*?⁹² In that book, he postulated that the Hindenburg was sabotaged by a member of the crew, Eric Spehl, to please his girlfriend and “explod[e] the myth of Nazi invincibility.”⁹³ Subsequently, another author, having consulted Hoehling’s book, not only wrote his own account of the disaster adopting Hoehling’s theory, but also sold the motion picture rights to Universal City Studios.⁹⁴ In turn, Universal City Studios created a motion picture using the theory as part of its depiction of the disaster.⁹⁵ At the outset, the court noted:

[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain. As the case before us illustrates, absent wholesale usurpation of another’s expression, claims of copyright infringement where works of

⁸⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting).

⁸⁹ *Id.* at 581-82.

⁹⁰ *Id.*

⁹¹ 17 U.S.C. § 106 (2012); 17 U.S.C. § 101 (2012).

⁹² 618 F.2d 972 (2d Cir. 1980).

⁹³ *Id.* at 975.

⁹⁴ *Id.* at 975-76.

⁹⁵ *Id.* at 976.

history are at issue are rarely successful.⁹⁶

Hoehling did not dispute the existence of the idea/expression distinction, but argued that because the actual events that led to the Hindenburg disaster were not known at the time (and remain unknown); his conclusion that Spehl sabotaged the airship was more like a story plot based upon his selection and interpretation of facts.⁹⁷ Nevertheless, the court concluded

the hypothesis that Eric Spehl destroyed the Hindenburg is based entirely on the interpretation of historical facts, including Spehl's life, his girlfriend's anti-Nazi connections, the explosion's origin in Gas Cell 4, Spehl's duty station, discovery of a dry-cell battery among the wreckage, and rumors about Spehl's involvement dating from a 1938 Gestapo investigation. Such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors.⁹⁸

According to the court, this limited copyright protection was justified: “[t]o avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.”⁹⁹ In other words, because Hoehling's opinions were of the right kind for society, they were the wrong kind for greater copyright protection. Instead, Hoehling was only entitled to prevent others from “verbatim reproduction” or bodily appropriating his expression.¹⁰⁰ As the preceding illustrates, the idea/expression distinction can draw a very clear line between ideas and expression. However as illustrated by the following discussion of scenario two, the line between ideas and expression is far less generous to new authors when the topic is not history but entertainment.

Castle Rock Entertainment, Inc. v. Carol Publishing Group illustrates how courts interpret the idea/expression distinction under the second scenario when a fan of a work of fiction creates a work of their own based upon non-literal elements of the original.¹⁰¹ In *Castle Rock*, the defendants published the *Seinfeld* Aptitude Test (SAT).¹⁰² The SAT presented readers with trivia questions based upon episodes of the *Seinfeld* television series.¹⁰³ These questions tested the reader's knowledge of characters and events that took place in the various episodes.¹⁰⁴ The defendants argued that the SAT did not infringe the television show because the SAT copied only facts about the show.¹⁰⁵ In other words, the SAT did not copy the expression of *Seinfeld* such as video footage, images, or the script. Instead, the book tested the reader's understanding and ability to recall the characters and events that took place in the show. In rejecting this argument, the

⁹⁶ Id. at 974.

⁹⁷ Id. at 977-78.

⁹⁸ Id. at 978-79.

⁹⁹ Id. at 978.

¹⁰⁰ Id. at 980. If Hoehling's account was written as fiction rather than history, Universal would arguably have infringed his copyright by using his plot without permission.

¹⁰¹ 150 F.3d 132 (2d Cir. 1998).

¹⁰² Id. at 135.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ *Castle Rock Entm't. v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 265 (S.D.N.Y. 1997).

court argued that there are facts and there are facts.¹⁰⁶ The court distinguished between the copying of “true facts” such as those in a telephone book or the “identity of the actors . . . , the number of days it took to shoot the episode . . . , the location of the Seinfeld set, etc.,”¹⁰⁷ and “creative” facts.¹⁰⁸ Under this reasoning, the idea/expression distinction did not protect the creator of the SAT because she did not test whether the reader knows the name of the actress that portrayed Elaine:

Rather, the SAT tests whether the reader knows that the character Jerry places a Pez dispenser on Elaine's leg during a piano recital, that Kramer enjoys going to the airport because he's hypnotized by the baggage carousels, and that Jerry, opining on how to identify a virgin, said "It's not like spotting a toupee." Because these characters and events spring from the imagination of Seinfeld's authors, the SAT plainly copies copyrightable, creative expression.¹⁰⁹

As such, the court distinguished not only between expression and ideas but recognized different categories of facts and ideas as well. The events and characters from a work of fiction, while facts in the literal sense, are not treated as facts for the idea/expression distinction. Instead, they are considered expression.

As explained in a different case, this distinction is justified based upon a cost-benefit analysis similar to that in *Hoehling*. According to the Second Circuit, there is a difference between “ideas that undertake to advance the understanding of phenomena or the solution of problems . . . and those . . . that do not undertake to explain phenomena or furnish solutions, but are infused with the author's taste or opinion.”¹¹⁰ Moreover, this difference justifies greater freedom to copy from the former. In other words, courts have determined that it is important that individuals be free to copy from works “directed to understanding,” but not from those representing an author’s “taste or opinion.” This double standard is justified because the latter “do not materially assist the understanding of future thinkers.”¹¹¹ As such, lower courts unabashedly apply separate standards based upon the content of the speech, and in doing so, judge the relative importance of those works.

Initially, this approach is problematic because it is not clear how one determines whether a work attempts to understand phenomena or provide solutions to problems and, therefore, is more important for society to copy, as opposed to a work of taste and opinion. Such an evaluation is fraught with ambiguity and subjectivity. Is reality television a matter of taste or opinion or is it a way to understand the human condition and human behavior? Is the podcast *Hidden Brain* a means of understanding human decision-making or a series of stories to entertain someone during their drive to work? As discussed above, both *Bleistein* and *Sony* concluded that these are not distinctions that should be made

¹⁰⁶ *Castle Rock*, 150 F.3d at 137-39.

¹⁰⁷ *Id.* at 139.

¹⁰⁸ See Jeanne Fromer, An Information Theory of Copyright Law, 64 *Emory L.J.* 71, 100 (2010) (suggesting that protecting “creative” facts may be inconsistent with information theory).

¹⁰⁹ *Castle Rock*, 150 F.3d at 139.

¹¹⁰ *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 71 (2d Cir. 1994). See generally James Grimmelmann, Three Theories of Copyright in Ratings, 14 *Vand. J. of Ent. & Tech. Law* 851 (2012) (discussing CCC and other cases copyrighting ratings and valuations).

¹¹¹ *CCC*, 44 F.3d at 71.

by the law.

The effort to differentiate between ideas that promote understanding and those representing taste and opinion is also problematic because of how it is implemented. As discussed earlier, the stated purpose of copyright law is to promote the progress of science or, in other words, to promote human understanding and education. Assuming that it is both possible and appropriate to determine what constitutes the work of “future thinkers,” when expression “materially assists” those thinkers, the courts rather perversely provide the works closest to the constitutional purpose with the least amount of protection. Assume we all agree that a paper seeking to understand the relationship between genetics and cancer promotes the progress of science. Because this is an important subject and an endeavor at the core of copyright’s purpose, we guarantee future thinkers freedom to pursue their expression at the expense of past thinkers. In contrast, if we assume that Honey Boo Boo is not an important subject and an endeavor furthest from the constitutional purpose for copyright protection, we restrict the freedom of future entertainers for benefit of the copyright owner of *Here Comes Honey Boo Boo*.

If the idea/expression distinction restricts entertainment relative to other expression, one might expect fair use—the principal defense to copyright infringement—to provide more breathing room. Unfortunately, fair use also ignores the non-discrimination principle and imposes greater restrictions on speech when the author’s purpose is “just entertainment.”

B. The Fair Use Doctrine

If the idea/expression distinction determines when copyright protects against verbatim copying and when it protects significantly more of an author’s expression, the fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute, when . . . it would stifle the very creativity which that law is designed to foster.”¹¹² In determining whether the copying of a protected work is fair, the Copyright Act lists four nonexclusive factors for consideration: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use on the potential market.¹¹³ More simply, fair use considers the why, what, how, and the economic consequences of copying. These factors originated with Justice Story’s opinion in *Folsom v. Marsh*,¹¹⁴ which is often described as the first fair use case in the United States.¹¹⁵ However, as scholars have emphasized, Justice Story used the factors to expand copyright protection at the time rather than as a means for limiting protection.¹¹⁶ As this section demonstrates, with regard to entertainment, courts are once again using these factors, not to avoid rigid application of copyright law, but instead to expand those protections at the expense of new authors. Because these factors are not weighted equally, the first is considered far more significant than the second, this section begins briefly with how expanded protection is clearly achieved with the less weighty second factor - the nature of the copyrighted work.

¹¹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

¹¹³ 17 U.S.C. § 107 (2012).

¹¹⁴ 9 F. Cas. 342 (C.C.D. Mass. 1841).

¹¹⁵ L. Ray Patterson, *Folsom v. Marsh and its Legacy*, 5 J. Intell. Prop. L. 431, 431 (1998).

¹¹⁶ See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. Intell. Prop. L. 1, 16 (1997); Patterson, *supra* note 115, at 447.

1. The Nature of the Work

The fair use doctrine requires courts to consider the nature of the work being copied. Because this inquiry focuses upon what is being copied, it tracks the idea/expression distinction. As such, due to the societal interest in the dissemination of information, copying from works of science or history is more likely to be fair.¹¹⁷ In contrast, the copying from works of entertainment is less likely to be fair because future authors are not the equivalent of future thinkers. Once again, *Castle Rock* is a useful example. In determining whether the creation of a trivia book based upon a television show was fair use, the fictional nature of the television show weighed heavily against fair use.¹¹⁸ This point is so well accepted that the defendants conceded “the scope of fair use is somewhat narrower with respect to fictional works, such as *Seinfeld*, than to factual works.”¹¹⁹ Much like the idea/expression cases, the Supreme Court has justified this disparate treatment based upon the bizarre conclusion that these works are not as important to society, but, nonetheless, are “closer to the core of intended copyright protection than others, with [the] consequence that fair use is more difficult to establish.”¹²⁰

Under these circumstances, one may argue that limiting copying favors creators of entertainment. After all, it provides such works with greater copyright protection, and allows creators of entertainment to liberally borrow from history and other works of science. For example, in *Hoehling*, not only were other historians able to base their works upon Hoehling’s, Universal City Studios was permitted to make a motion picture -- a work of entertainment -- based upon that same work.¹²¹ However, as this Article touched upon earlier, this benefits existing copyright proprietors of entertainment at the expense of future authors of entertainment. As the following demonstrates, this asymmetric treatment of entertainment results from the judgment that creating works of entertainment is insufficiently valuable.

2. The Purpose and Character of the Use

The more important and insidious way fair use discriminates against entertainment is through the first factor, which asks courts to consider “the purpose and character of the use.”¹²² This factor is considered one of the most important factors in fair use, and arguably, should be the most important factor, because it is the only factor that considers whether any given act of copying is the equivalent of mechanical reproduction or creative expression in its own right.¹²³ The prevention of piracy is the core of copyright protection and preserving the freedom of new authors to express themselves is the core of fair use. By requiring courts to consider why the alleged infringer copied, the first factor determines when future

¹¹⁷ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“The public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts.”).

¹¹⁸ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 143-44 (2d Cir. 1998).

¹¹⁹ *Id.* at 143.

¹²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹²¹ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 976-77 (2d Cir. 1980).

¹²² 17 U.S.C. § 107 (2012).

¹²³ The fourth factor is often considered an equally if not even more important factor because it considers the economic harm to authors, and as such, whether a copyright owner is entitled to control that market. Nevertheless, the first factors serve the corresponding goal of determining whether copying produced a copy or produced something different. And, as such, the normative question of whether the copyright owner should control the creation of those works overlaps with what it means to injure the copyright owner in the market for such works.

authors may copy.

According to the Supreme Court, under the first factor, courts must determine whether the purpose of the new work is merely to substitute for the original, “or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹²⁴ If an author uses the prior materials for a different purpose or adds something new, the copying is more likely to be fair.¹²⁵ Judge Leval, who first articulated what has become known as the transformative use test, argued that courts should consider whether the copyrighted work was “used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings” because such uses qualify as “the very type of activity that the fair use doctrine intends to protect.”¹²⁶ While a plagiarist adds “creativity,” their purpose for copying and resulting expression is still intended as a market substitute for the original. In contrast, if a new author’s contribution results in a work with a sufficiently different purpose or is sufficiently “transformative,” the first factor will not only weigh in favor of fair use, at some point, the work may no longer be considered a copy at all.¹²⁷

On its face, the transformative use test suggests that if an author writes a new screenplay for a sequel to their favorite movie or book, or creates a new set of maps or an expansion for their favorite video game, the first factor should weigh in their favor. While the work is based upon another, it does not retell the original story. Instead, the original is used as raw material for a new story. As this section demonstrates, when a work is considered a work of entertainment, no amount of creativity will excuse copying.

In practice, judges interpret the transformative use test to weigh against fair use when the author’s purpose is “just entertainment.” Initially, supporters of this approach may point to the Copyright Act’s codification of fair use, in which entertainment is not listed as an example. Rather, the non-exclusive list includes “criticism, comment, news reporting, teaching, scholarship, or research.”¹²⁸ In other words, the statute itself discriminates against entertainment. Like the Supreme Court in *Bleistein*, courts have rejected such a narrow interpretation, and rightly so. Instead, they have concluded that

[t]he “ultimate test of fair use . . . is whether the copyright law’s goal of ‘promoting the Progress of Science and useful Arts’ . . . would be better served by allowing the use than by preventing it.”¹²⁹

¹²⁴ *Campbell*, 510 U.S. at 579 (citations omitted).

¹²⁵ *Id.*

¹²⁶ Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

¹²⁷ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 143 n.9 (2d Cir. 1998) (“Indeed, if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.”). Rebecca Tushnet cautions that too great an emphasis on transformative use ignores the importance of simply acts of copying and can undermine the First Amendment value associated with non-transformative copying. See generally Tushnet, *supra* note 47. For other criticisms of the transformative use test, see Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U.L. Rev. 559, 620 (2016) (arguing for abandoning transformative use and focusing on market harm instead); Frye, *supra* note 83, at 47 (arguing that courts should “only ask whether the two works are different”); Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 Colum. J.L. & Arts 445, 448-49 (2008) (arguing that transformative use is best determined from the perspective of the reader).

¹²⁸ 17 U.S.C. § 106 (2012).

¹²⁹ *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting *Castle Rock*, 150 F.3d at 141).

More specifically, fair use protects “the ability of authors, artists, and the rest of us to express [the works of others]—or ourselves by reference to the works of others.”¹³⁰ As such, there is no clear or definitive doctrinal reason to discriminate against expression when the purpose of that expression is to entertain. Moreover, as demonstrated in Part II.B., this is specifically prohibited by *Bleistein*.

Consider *Campbell v. Acuff-Rose Music*, the principal Supreme Court decision addressing whether one work of entertainment may fairly copy another as a means of parody.¹³¹ 2 Live Crew wrote and recorded, “Pretty Woman,” a song that copied extensively from Roy Orbison’s “Oh, Pretty Woman.”¹³² 2 Live Crew copied Orbison’s song so extensively, they originally sought and ultimately obtained a license from Acuff-Rose which owns the copyright to Orbison’s song.¹³³ The court of appeals concluded that the parody was not fair use because it was for profit and because it took the heart of the original.¹³⁴ In reaching the conclusion that 2 Live Crew’s song may be fair use, the Supreme Court first concluded that parodies are sufficiently transformative to satisfy the first fair use factor.¹³⁵ According to the Court, parodies “provide social benefit, by shedding light on an earlier work, and in the process, creating a new one.”¹³⁶ And, just as importantly, copying is necessary to provide this social benefit.¹³⁷

Under *Campbell*, the key is commentary, not creativity.¹³⁸ If the new work does not comment upon what it copies, it is not likely to be considered transformative, no matter how much creativity is added. The inquiry is not whether a particular use is sufficiently creative to transform a work into something new. Rather, it is more accurate to describe the Supreme Court’s decision as concluding that copying for the purpose of parody is a means to a legitimate end.¹³⁹ Copying for purposes of commenting on the original is legitimate, whereas copying “to get attention or to avoid the drudgery of working up something fresh” is not.¹⁴⁰ To make this clear, the Supreme Court compared parody to satire, and questioned the legitimacy of copying for purposes of satire because “satire can stand on its own two feet and so requires justification for the very act of borrowing.”¹⁴¹ Even though both involve creativity and humor, authors of satire must explain why their copying represents more than an effort “to get attention.”¹⁴² Following this line of reasoning, the Ninth Circuit upheld an injunction prohibiting the distribution of *The Cat NOT in the Hat! A Parody* in which the author mimicked Dr. Seuss’ style to tell the story of the OJ Simpson murder trial.¹⁴³ The court concluded that there

(alteration in original).

¹³⁰ *Id.* at 705 (quoting *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006)).

¹³¹ 510 U.S. 569 (1994).

¹³² *Id.* at 572-73.

¹³³ *Id.* at 572.

¹³⁴ *Id.* at 573-74.

¹³⁵ *Id.* at 579.

¹³⁶ *Id.*

¹³⁷ *Id.* at 580 (“[T]he heart of any parodist’s claim to quote from existing material, 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.”).

¹³⁸ *Id.* at 580-81.

¹³⁹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) (“[T]he would-be fair user of another’s work must have justification for the taking.”).

¹⁴⁰ *Campbell*, 510 U.S. at 580. This language is particularly ironic from writers who largely quote and paraphrase the works of others.

¹⁴¹ *Id.* at 581.

¹⁴² *Id.* at 580-81.

¹⁴³ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1396 (9th Cir. 1997).

was no new expression, meaning, or message because “[t]he stanzas have ‘no critical bearing on the substance or style of’ *The Cat in the Hat*.”¹⁴⁴ As such, aside from specifically commenting upon the work in question, it is not clear what, if any, entertainment-related use would satisfy the first factor.¹⁴⁵

Consider *Castle Rock* once again. There was no question that Beth Golub authored the SAT, that she used *Seinfeld* as the raw material for her trivia questions and answers, and Castle Rock did not have a trivia book of its own.¹⁴⁶ There was also no evidence that the SAT harmed the profitability or diminished the audience of the television series or any other existing *Seinfeld* works.¹⁴⁷ Despite the fact that the SAT was a new work, the court considered Golub’s creative contributions to be “slight to non-existent.”¹⁴⁸ The court reached this conclusion for two reasons. First, the court considered the writing involved to require only minimal creativity. To support this conclusion the court wrote,

In the time it took to write this last sentence, for example, one could have easily created the following trivia question about the film trilogy *Star Wars*: “Luke Skywalker was aghast to learn that Darth Vader was Luke’s (a) father (b) father-in-law (c) best friend (d) Jerry Seinfeld,” and innumerable other such trivia questions about original creative works.¹⁴⁹

In other words, the court judged the creativity of Golub’s contributions, and found it wanting. As just discussed, this is an unfortunate byproduct of the transformative use test which can ask whether copying was a means “to get attention or to avoid . . . working up something fresh.”¹⁵⁰ According to the court, trivia questions, requiring so little creativity, represent nothing more than a “repackag[ing]” of the *Seinfeld* television series.¹⁵¹

Moreover, in addition to dismissing Golub’s creative contribution, the court considered her purpose illegitimate.¹⁵² According to the court, copying creative facts to create trivia questions for a trivia book does not satisfy the purpose prong for fair use.¹⁵³ Testing trivia is not criticism, commentary, or parody, and the SAT could not be reasonably considered educational.¹⁵⁴ Instead, the SAT was just entertainment.¹⁵⁵ If Golub engaged in a scholarly analysis of *Seinfeld*, parodied the series, or used the show as part of an art exhibition on “nothingness,” her work *may* have been fair – not because it would then be sufficiently creative but because its purpose would not be entertainment.¹⁵⁶ Under these circumstances, courts

¹⁴⁴ Id. at 1401 (quoting *Campbell*, 510 U.S. at 580).

¹⁴⁵ When read in tandem with the fourth fair use factor consideration of market harm, legitimate reasons for copying do not include those purposes that a copyright owner “would in general develop or license.” *Campbell*, 510 U.S. at 592. Yet, according to the Court, “[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.” Id.

¹⁴⁶ *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 135-36 (2d Cir. 1998).

¹⁴⁷ Id. at 136.

¹⁴⁸ Id. at 142.

¹⁴⁹ Id. at 143 n.8.

¹⁵⁰ *Campbell*, 510 U.S. at 580.

¹⁵¹ *Castle Rock*, 150 F.3d at 142.

¹⁵² Id. at 143.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id. (“The SAT’s plain purpose . . . is not to expose *Seinfeld*’s ‘nothingness,’ but to satiate *Seinfeld* fans’ passion for the ‘nothingness’ . . .”).

¹⁵⁶ See *Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir.

should not express any opinion with respect to the creative choices of the allegedly infringing authors, let alone diminish their creative efforts. Under the first factors, courts are determining whether the author's reasons for copying – to write a sequel, engage in satire, or write a trivia book – are sufficiently different than the reasons a copyright owner may have had for creating such a work in the first place. More precisely, they are concluding that the only legitimate reason for copying is for the creation of works that the copyright holder would never willingly create.

Compare the result and reasoning in *Castle Rock* with two subsequent decisions from the same circuit. The first, *Warner Bros. Entertainment, Inc. v. RDR Books*, is closely analogous to *Castle Rock* as it involved extensive copying of “creative facts.”¹⁵⁷ In the second, *Cariou v. Prince*, the alleged infringer does more than copy creative facts; he uses exact copies of the original works with no pretense of commenting upon the originals.¹⁵⁸ Nevertheless, in both cases, the courts concluded that the copying was legitimate because the purposes were for more than just entertainment.¹⁵⁹

In *Warner Bros. Entertainment, Inc. v. RDR Books*, Steven Vander Ark, a fan of J.K. Rowling's Harry Potter series, created “The Harry Potter Lexicon.”¹⁶⁰ The district court described his reasons for creating the Lexicon as follows: “His purpose in establishing the website was to create an encyclopedia that collected and organized information from the *Harry Potter* books in one central source for fans to use for reference.”¹⁶¹ The Lexicon described, among other things, the spells, characters, creatures, places, and events from the series and served as an A-Z, a reference for all of the creative facts from J.K. Rowling's stories.¹⁶² Vander Ark's work was so good that Rowling herself admitted to using it when creating later works in the series.¹⁶³

Knowing that Rowling was interested in publishing a Harry Potter encyclopedia of her own, Vander Ark initially hesitated to expand beyond the website.¹⁶⁴ Ultimately, RDR Books convinced him to publish his own book based upon the website, and the copyright litigation ensued.¹⁶⁵ Rowling and Warner Bros. argued that the Lexicon violated their rights of reproduction and derivative work rights.¹⁶⁶ Because the Lexicon made extensive use of verbatim quotes from Rowling's works, the court concluded that plaintiffs had established a prima facie case of infringement of the right of reproduction in those works.¹⁶⁷ However, more importantly for this discussion, the court concluded that Rowling could not prevent him from using her work for his intended purpose.¹⁶⁸ According to the court, the Lexicon was not a derivative work. The court reached this conclusion even though, like the SAT, the Lexicon was entirely based upon Rowling's creative facts, which

2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006); cf. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) (concluding that a guide to the Harry Potter universe was not a derivative work because the guide had a different purpose than the original).

¹⁵⁷ 575 F. Supp.2d 513 (S.D.N.Y. 2008)

¹⁵⁸ *Cariou*, 714 F.3d at 704.

¹⁵⁹ *Id.* at 708; *RDR Books*, 575 F. Supp. 2d at 539.

¹⁶⁰ *RDR Books*, 575 F. Supp. 2d at 520.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 521.

¹⁶⁴ *Id.* at 522.

¹⁶⁵ *Id.* at 522-23.

¹⁶⁶ *Id.* at 538-39.

¹⁶⁷ *Id.* at 538.

¹⁶⁸ *Id.* at 538-39.

she described as “plundering all of the ‘plums in [her] cake,’”¹⁶⁹ and despite having adopted *Castle Rock*’s protection of creative facts in its reproduction analysis.¹⁷⁰

Instead, the court considered the *Lexicon* to be so transformative it could no longer be considered a copy of *Harry Potter* and, as such, was not only a fair use, but did not fall into the category of works protected under the derivative work right.¹⁷¹ The court reached this result by concluding that the purpose of the *Lexicon* was not a purpose reserved to the copyright owner.¹⁷² According to the court, the derivative work right only prevents others from recasting, transforming, or adapting the original.¹⁷³ In other words, it prevents others from retelling the original story in another medium.¹⁷⁴ Vander Ark did not copy Rowling for the purpose of telling the stories in the *Harry Potter* series in another medium.¹⁷⁵ Instead, the purpose of the *Lexicon* was “to give the reader a ready understanding of individual elements in the elaborate world of *Harry Potter*,” and copyright owners cannot prohibit others from creating such works.¹⁷⁶ Under this approach, a companion or reference guide providing fans with an understanding of a copyrighted work serves a sufficiently different and valuable purpose from the original that it is no longer a copy -- let alone that the copying was fair.¹⁷⁷ This is true even though the work was not intended as a scholarly commentary or analysis of the series.¹⁷⁸ Furthermore, the purpose behind this type of companion work is sufficiently distinct from a companion that tests the reader’s knowledge of the *Harry Potter* series through a series of questions and answers.¹⁷⁹ In distinguishing the *Lexicon* from the *SAT*, the court noted that the purpose of the *Lexicon* was “not to entertain but to aid the reader.”¹⁸⁰

Lastly, consider how one court addressed scenario three and the issue of fine art. In perhaps one of the most expansive fair use decisions to date, *Cariou v. Prince* suggests that creating a new work of fine art is a sufficiently legitimate purpose to justify even wholesale copying.¹⁸¹ Patrick Cariou is a photographer who published a series of photographs of Rastafarians.¹⁸² Richard Prince purchased copies of Cariou’s photographs and then incorporated them into a series of paintings and collages of his own.¹⁸³ Prince’s work was then exhibited and reproduced as part of a catalogue of the exhibition.¹⁸⁴ According to the court, “Prince is a well-known appropriation artist” whose works have been displayed in art museums around the world including the Guggenheim and the Whitney.¹⁸⁵ Using a definition provided by the Tate Gallery, the opinion defines appropriation art as “the more or less direct taking over into a work of art a real object or even an existing work of art.”¹⁸⁶ According to Prince, “he ‘completely tr[ies] to change

¹⁶⁹ *Id.* at 526.

¹⁷⁰ *Id.* at 534-38.

¹⁷¹ *Id.* at 538 n.17.

¹⁷² *Id.* at 538.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 539.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 542 (discussing the transformative nature of a reference source under fair use).

¹⁷⁸ *Id.* at 543 n.20.

¹⁷⁹ *Id.* at 542.

¹⁸⁰ *Id.*

¹⁸¹ *Cariou v. Prince*, 714 F.3d 694, 707-08 (2d Cir. 2013).

¹⁸² *Id.* at 698.

¹⁸³ *Id.* at 699-700.

¹⁸⁴ *Id.* at 699.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

[another artist's work] into something that's completely different."¹⁸⁷ In one work, Prince used a series of heads from Cariou's photographs as part of a collage with images from other artists.¹⁸⁸ In another work, the court noted that Prince did little more than "paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body."¹⁸⁹ The district court rejected Prince's fair use defense, and the Second Circuit reversed.¹⁹⁰

Following *Campbell v. Acuff-Rose*, the district court interpreted fair use as limited to circumstances in which new authors "in some way comment on, relate to the historical context of, or critically refer back to the original," and found Prince's works did none of those things.¹⁹¹ In fact, Prince testified during deposition that he "do[es]n't really have a message," that he was not "trying to create anything with a new meaning or a new message," and that he "do[es]n't have any . . . interest in [Cariou's] original intent."¹⁹²

In reversing, the Second Circuit concluded "Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."¹⁹³ Instead, copying is fair use if one may reasonably perceive that the new work uses the copied work as part of "new expression, and employ[s] new aesthetics with creative and communicative results distinct" from the original.¹⁹⁴ The court concluded that twenty-five of Prince's works clearly satisfied this test and qualified as fair uses as a matter of law because those works had a "new and different" aesthetic.¹⁹⁵

Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative.¹⁹⁶

The five remaining works at issue were remanded for further consideration because the court could not conclude whether they represented a "new expression" by conveying a "new meaning, or message."¹⁹⁷

If *RDR* and *Cariou* are applied to entertainment, authors of entertainment could create their own stories with the works of others so long as they do more than tell the same story or tell the same story in a different medium. The remainder of this article will refer to this standard as "virtual infringement" or "virtual appropriation."¹⁹⁸ A fan of *Harry Potter* would be free to write a story with Hermione Granger as the protagonist without fear of copyright liability or a need to justify her decision. In contrast, this approach would prohibit a computer programmer from recreating the motion picture *Harry Potter and the Sorcerer's*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 700.

¹⁸⁹ *Id.* at 700-01.

¹⁹⁰ *Id.* at 712.

¹⁹¹ *Id.* at 704 (quoting *Cariou v. Prince*, 784 F. Supp. 2d 337, 348-49 (S.D.N.Y. 2011)).

¹⁹² *Id.* at 707 (quoting *Cariou*, 784 F. Supp. 2d at 349).

¹⁹³ *Id.* at 707.

¹⁹⁴ *Id.* at 708.

¹⁹⁵ *Id.* at 710-11.

¹⁹⁶ *Id.* at 706.

¹⁹⁷ *Id.* at 711 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

¹⁹⁸ This test is similar to the concept of thin protection outlined in *Hoehling* and *Feist*, which prevents verbatim or wholesale copying. Virtual infringement—telling the same story or retelling the same story in a different medium—more accurately captures both the scope of the reproduction right which would prohibit plagiarism and the derivative work right.

Stone as computer animation using only ASCII code. While these results would be consistent with a logical and principled application of what the Second Circuit considers transformative use, courts are unlikely to apply this standard to entertainment.

As the preceding discussion illustrates, judges have exhibited both an implicit and explicit bias against entertainment, and *RDR* and *Cariou* are no exception. Both decisions rely heavily upon *Castle Rock*, and consider their outcomes consistent with *Castle Rock*.¹⁹⁹ Neither opinion suggests the need to distinguish *Castle Rock*'s holding that creative facts are protected by copyright. In fact, *RDR* agreed with this conclusion and applied it with respect to the right of reproduction.²⁰⁰ Likewise, neither decision questions *Castle Rock*'s conclusion that it is not a legitimate purpose to create a new work "to entertain *Seinfeld* viewers" or to "sate *Seinfeld* fans' passion for the 'nothingness'" of *Seinfeld*.²⁰¹ The court in *RDR* even described the arguments that the SAT was transformative as "specious,"²⁰² and that efforts to profit from the "entertainment value" of a work weigh against fair use.²⁰³ Instead, the Lexicon did more than entertain and "sate" *Harry Potter* fans' desire for more things *Harry Potter*.²⁰⁴ The Lexicon aided readers by providing them with "a ready understanding of the individual elements in the elaborate world of *Harry Potter*."²⁰⁵ And, *Cariou* distinguished *Castle Rock* on the basis that Prince's work was directed at a different audience than *Cariou*'s while the SAT was directed at the same audience as the television series.²⁰⁶ Because both decisions reject the idea that creating a work of entertainment is a sufficient justification for copying, it is unlikely that other courts will apply the virtual appropriation standard beyond the circumstances of those cases.

Moreover, *Cariou* may well be limited to "fine art." For example, in *Kienitz v. Sconnie Nation LLC*, the defendants printed a t-shirt mocking the mayor of Madison, Wisconsin for attempting to end to an annual block party that he, himself, once attended.²⁰⁷ The t-shirt design began with a picture of the mayor taken by Kienitz at the mayor's inauguration.²⁰⁸ The picture appeared on the City's website, and the defendants copied it from there.²⁰⁹ The image was then digitally modified, colored green, and surrounded by the phrase "Sorry for Partying" in multi-colored text.²¹⁰ Arguably, under *Cariou*, the defendants' use would be considered fair because the image was used as raw material for new expression with a different aesthetic and meaning. Rather than reproduce a dignified photograph of the mayor, the t-shirt used the image as an outline for a

¹⁹⁹ *Cariou*, 714 F.3d at 708; Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 542-43 (S.D.N.Y. 2008).

²⁰⁰ *RDR Books*, 575 F. Supp. 2d at 536.

²⁰¹ *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 142-43 (2d Cir. 1998).

²⁰² *RDR Books*, 575 F. Supp. 2d at 542.

²⁰³ *Id.* at 545 (quoting *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 628 (9th Cir. 2003)).

²⁰⁴ *Id.* at 542 (citing *Castle Rock*, 150 F.3d at 142).

²⁰⁵ *Id.* at 539. *Contra Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993) (concluding that a guidebook to the television series violated the copyright owner's right to control derivative works); *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 11 F. Supp. 2d 329, 335 (S.D.N.Y. 1998) (concluding that the purpose of a *Star Trek* companion book was not sufficiently different from the purpose of the television show).

²⁰⁶ *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

²⁰⁷ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 757 (7th Cir. 2014). See also Adler, *supra* note 127, at 594, 623-24 (arguing for an abandonment of transformative use because works of fine art can be treated as commodities and rarely involve the creation of reproductions or derivative works).

²⁰⁸ *Kienitz*, 766 F.3d at 757.

²⁰⁹ *Id.*

²¹⁰ *Id.*

monochromatic, digital cutout of a political figure and criticized this figure for hypocrisy. While the court concluded that the use did not infringe Kienitz's copyright, it did so primarily because the defendants digitally removed so much of the original image that no copyrightable elements remained.²¹¹

With respect to this discussion, *Kienitz* is noteworthy for two reasons. First, the opinion specifically declines to follow *Cariou*.²¹² Judge Easterbrook's reason for doing so is a skepticism that transformative use, such as the appropriation art in *Cariou*, can be considered fair without "extinguishing" the derivative work right.²¹³ "To say that a new use transforms the work is precisely to say that it is derivative . . ."²¹⁴ To be clear, Judge Parker's opinion does provide an explanation. Using the SAT as his example, he states that transforming another's work is not fair use, "where the infringer's target audience and the nature of the infringing content is the same as the original."²¹⁵ To the extent that *Kienitz* declines to follow *Cariou*, it suggests that Judge Easterbrook considered *Cariou*'s conception of fair use too generous, and its definition of derivative works too narrow. This perspective becomes clearer later in the opinion when the court goes out of its way to criticize the defendants' use the photograph.²¹⁶

Judge Easterbrook's criticism of the defendants' creative choices in *Kienitz* is the second reason the decision is relevant to this discussion. Despite having concluded that the defendant's use of Kienitz's photograph was a fair use, the court goes on to sympathize with Kienitz and argues that the defendants "did not need to use the copyrighted work."²¹⁷ According to the court, they were not commenting on Kienitz or his photo, and there were plenty of "non-copyrighted alternatives (including snapshots they could have taken themselves)."²¹⁸ Under these circumstances, the copying was not fair, but "lazy."²¹⁹ In the Seventh Circuit's view, the goal of fair use is not to provide breathing room for all creativity, but to "facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors."²²⁰ Copying to create a t-shirt, even to send a political message unrelated to the copyright image, does not fall into that class.²²¹ If copyrightable elements of the image remained, the opinion strongly suggests that similar acts of "lazy appropriation" would not be considered fair use even if they might satisfy *Cariou*.²²²

Despite the Supreme Court's admonishment in *Bleistein*, copyright law appears to have come full circle, with judges once again determining what qualifies as art. Fair use depends upon whether an author copies for what judges consider to be acceptable purposes, and not upon whether the author has created something new and different from the original.²²³ Noticeably absent from the list

²¹¹ *Id.* at 759 ("Defendants removed so much of the original that, as with the Cheshire Cat, only the smile remains.").

²¹² *Id.* at 758.

²¹³ *Id.*

²¹⁴ *Id.* See also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) (noting the difficulties created by oversimplification of transformation and its relation to derivative works).

²¹⁵ *Cariou, v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

²¹⁶ *Kienitz*, 766 F.3d at 759.

²¹⁷ *Id.* at 759.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Unfortunately, even if an author has a legitimate justification for copying they must still justify what they copied: a parodist cannot "skim the cream and get away scot free." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (remanding "to permit evaluation of the amount taken, in light of the

of legitimate purposes are copying for inspiration, copying as homage, copying as a point of reference, or copying simply because it strikes the artist as appropriate.²²⁴ When authors incorporate another's work into their own works, the copying is transformative in a literal sense as recognized by *Cariou*. And, copying for these reasons is not the equivalent of copying to create a substitute for the original. Instead, fair use only protects works with a distinctly different purpose than the original, and as *Kienetz* adds, one that would not otherwise be possible if the creator had to negotiate with the copyright owner. Entertaining is not one of these purposes.²²⁵

In tandem with the idea/expression distinction, fair use dramatically restricts the freedom of authors whose works are considered "just entertainment." A scholar may rely almost entirely upon another's work for their topic, thesis, and organization, and quote extensively from the work in short quotes or block quotes. As long as the scholar's work is not the equivalent of wholesale duplication, it is not infringing even if the scholar's own creative contribution is slight and may substitute for the original. While the work may not be considered valuable, and it may even injure the scholar's reputation, the scholar is generally assured that they will not be subject to copyright liability. In contrast, if a musician wishes to capture the feel of another artist, "quote" from a prior work by including a portion of the song, perhaps the riff, bass line, or hook, or sample a portion of the recording, the musician faces a serious risk of a judgment that her work infringes copyright. Similarly, a filmmaker who loves the look of a poster or even a pinball machine and wishes to include it in a film risks infringement.²²⁶ While these acts of copying may occasionally be dismissed as *de minimis*,²²⁷ under fair use, authors must justify their choices, and if the reason for copying is to entertain, courts will most likely consider those choices wrong and lazy.

As the preceding discussion illustrates, copyright law discriminates against works of entertainment. The idea/expression distinction dramatically limits the raw materials available to authors of entertainment, and the fair use doctrine virtually eliminates all uses of that raw material. Courts have reached these results by concluding that copying under these circumstances is just "lazy," a means "to get attention," or "to avoid the drudgery in working up something fresh." Recognizing this bias against entertainment provides greater clarity to the idea/expression dichotomy and fair use doctrine, and explains why courts have concluded that new authors cannot adopt prior authors' characters,²²⁸ look and

song's parodic purpose and characters, its transformative elements, and considerations of the potential for market substitution").

²²⁴ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) ("A secondary author is not necessarily at liberty to make wholesale takings of the original author's expression merely because of how well the original author's expression would convey the secondary author's different message.")

²²⁵ If the concern is substitution, requiring authors to provide additional justifications is entirely gratuitous. While there is a genuine concern that copying for legitimate reasons may still result in substitution, that concern is addressed by the remaining fair use factors. And, those additional factors are still considered even when courts conclude that the purpose of copying is legitimate. Dismissing these artistic purposes is the equivalent of adding insult to injury.

²²⁶ See *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 629 (S.D.N.Y. 2008) (concluding that the inclusion of a pinball machine in the background of a scene in a motion picture was fair use).

²²⁷ *Id.* at 632 (quoting *Ringgold v. Black Entm't T.V. Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)) ("The legal maxim '*de minimis non curat lex*' -- 'the law does not concern itself with trifles' -- applies in the copyright context.")

²²⁸ See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978); *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

feel,²²⁹ sound,²³⁰ or style.²³¹ Likewise, the conclusion that Michael Bolton is just an entertainer might explain why courts have concluded that a new author may be subject to copyright liability even when the author is not aware that he is copying.²³² Copyright imposes these restrictions even when new authors are creative in their own right and when their works communicate a different message.²³³ With the exception of the fine arts, copying for the purposes of entertainment is only fair when the speaker not only copies to tell a different story, but, for a purpose that is altogether different from the original. Despite Justice Holmes' admonishment, courts are once again sorting the useless from the useful and the frivolous from the fine. And entertainment is once again frivolous. However, this time, works of entertainment are not being denied protection. To the contrary. Existing works of entertainment are given the greatest amount of copyright protection to date. Instead, new authors are denied the freedom to tell their own stories if their only value is entertainment.

IV. IS THERE A THERE THERE?

While the non-discrimination principle suggests that courts should avoid becoming the “final judges of the worth” of expression, is there, nonetheless, a non-discriminatory reason for treating entertainment differently? In other words, is there a principled distinction between works that “undertake to advance the understanding of phenomena or the solution of problems,” and those “infused with the author's taste or opinion” that justifies affording different degrees of freedom and protection? Even if one begins with the premise that all creative works are equally valuable, and that works of opinion and entertainment contribute to our understanding of what it means to be human, it is still possible that the pursuit of science and entertainment are sufficiently different to justify different treatment. Even if an action movie about a disaster created by climate change has a greater impact upon public appreciation of climate change than a peer-reviewed article by climatologists, there are still differences between a fictional movie and a scholarly publication. This section explores the argument that inherent differences or instrumental reasons justify different liability standards for science and entertainment.²³⁴

The strongest argument that can be made in defense of separate standards is that there are different risks associated with overprotecting different categories of works.²³⁵ Under these circumstances, copyright's double standard would be justified based upon the nature of the works rather than a judgment that science (or fine art) is more important than entertainment. As Judge Boudin described,

²²⁹ See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

²³⁰ See *Swirsky v. Carey*, 376 F.3d 841, 853 (9th Cir. 2004).

²³¹ See *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987).

²³² See *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

²³³ For example, if Shakespeare's *Romeo and Juliet* were still protected by copyright, Arthur Laurents would have been advised to obtain the copyright owner's permission before producing *West Side Story* or to change the story completely.

²³⁴ For the remainder of this Article, “science” is used as the shorthand for all works that may be considered to advance understanding to provide solutions to problems. In light of *Cariou*, fine art is arguably included in that definition. However, attempting to distinguish between fine art and entertainment directly contradicts the non-discrimination principle. As such, this section does not attempt to differentiate art from entertainment and will at times use them interchangeably. One may find as much beauty in a figurine of Yoda as a statue of David.

²³⁵ Note that the issue is already framed in biased terms by describing the problem as a danger of over-protecting works or suppressing more expression than necessary rather than as a risk of under-protecting works.

Most of the law of copyright and the “tools” of analysis have developed in the context of literary works such as novels, plays, and films. In this milieu, the principal problem . . . is to stimulate creative expression without unduly limited access by others to the broader themes and concepts deployed by the author. The middle of the spectrum presents close cases; but a “mistake” in providing too much protection involves a small cost: subsequent authors treating the same themes must take a few more steps away from the original expression.²³⁶

If courts err on the side of overprotecting science, subsequent research may be chilled. Narrowly interpreting legal restrictions upon future authors reduces this chilling effect -- a basic principle of First Amendment law. This allows any number of scholars or researchers to work on the same question or problem. It allows them to produce works that would otherwise be prohibited for entertainment because they are substantially similar to a prior work or could be considered a derivative work. Under these circumstances, copying advances the goals of copyright, or is at least tolerated as a necessary cost for advancing those goals.

In contrast, this position suggests that if courts err on the side of overprotecting entertainment, works of opinion and taste, little is lost. Chilling the creation of similar works that are “just entertainment” is acceptable because they do not advance human understanding. Entertainers are not thinkers.²³⁷ If substantial copying is considered inevitable or even desirable when advancing science, the same is not true for entertainment. Moreover, requiring artists, as opposed to scholars, to alter their expression comes only at a “small cost.” Some have even argued that copyright restrictions upon new authors increase and promote creativity by forcing them to “take a few more steps away” and work around the original expression.²³⁸

A. Intrinsic Differences?

Aside from relying upon the judicial conclusion that science is more important than entertainment, one can argue that this distinction is justified because factual and scholarly works are distinctly different.²³⁹ Facts are facts, problems need solving, and phenomena need exploring. There is only one set of historical facts for a given incident or a given set of circumstances for a specific problem, and those facts, “do not owe their origin to an act of authorship. The distinction is one

²³⁶ *Lotus Dev. Corp. v. Borland Int'l Inc.*, 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring). The specific facts of *Lotus* demonstrate another example of differential interpretation of the idea/expression distinction with respect to computer programs. Much like *Baker v. Selden*, courts have been reluctant to expand the right of reproduction beyond literal copying for fear of creating patent-like protection. While related to the importance of distinguishing between idea and expression, the essay does not address the effort to distinguish the functional from expression, which is arguably a separate and *sui generis* issue created by Congress's decision to provide copyright protection to computer programs.

²³⁷ See *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 71 (2d Cir. 1994).

²³⁸ For an excellent debate on this topic, see Joseph P. Fishman, *Creating Around Copyright*, 128 *Harv. L. Rev.* 1333 (2015) (arguing in favor of restraint leading to greater creativity); Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 *Harv. L. Rev. F.* 125 (2015) (responding to Fishman); Dan L. Burk, *The “Creating Around” Paradox: Responding to Joseph P. Fishman, Creating and Copyright*, 128 *Harv. L. Rev.* 1333 (2015), 128 *Harv. L. Rev. F.* 118 (2015).

²³⁹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347 (1991).

between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”²⁴⁰

As such, the range of expression is naturally rather than artificially limited. And, because we want answers (or the truth, even if we cannot handle it), copyright allows those interested in working on these problems and topics the freedom to borrow substantially from their predecessors. In the absence of duplicating a work in its entirety, new authors may copy not only the heart of a prior work, but also everything of value contributed by their predecessors. There is no privilege in being the first to provide a given interpretation, proposal, or solution. As the Supreme Court has stated,

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” . . . and a constitutional requirement.”²⁴¹

Under these circumstances, copying and not control is the “means by which copyright advances the progress of science and art.”²⁴²

Consider the Hindenburg. There is only one set of events that led to the destruction of the Hindenburg. As such, there are a finite number of explanations and interpretations of those facts. For historians working on the Hindenburg disaster, there are only so many possible explanations for why the airship caught fire. Spehl was a crewmember. He had a lady friend who was a suspected communist, so it is quite plausible that he did it and did it for her. Under copyright law, Hoehling may have been the first to put those pieces together, but that does not allow him to preclude others from adopting his description of events as their own, even without attributing it to Hoehling.²⁴³ As the Supreme Court stated in *Feist*, allowing others to copy is one of the ways in which copyright advances human understanding.²⁴⁴

In contrast, consider a visual artist, whether painter, photographer, or graphic artist. One could argue that visual artists work with a virtually unlimited number of creative facts. They have an unlimited number of subjects to choose from and a wide variety of options for composing and capturing those subjects, including whether to use paint, camera, or computers. Because of the virtually infinite variations, one could argue that copyright prohibits a photographer from photographing a similar subject with similar choices for capturing and composing the photograph.²⁴⁵ This is true even when there is no dispute that the photographer captured their own photograph or a painter painted their own painting rather than “slavishly” duplicating the original.²⁴⁶ Instead, the visual artist is told to work around the first artist’s work for no other reason than that the original artist put those elements together first.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 349 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting)).

²⁴² *Id.*

²⁴³ While attribution may be required as a matter of academic ethics or if recognized as a moral right, copyright does not require attribution. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

²⁴⁴ *Feist*, 499 U.S. at 350.

²⁴⁵ See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 457-61 (S.D.N.Y. 2006).

²⁴⁶ *Id.*

Metaphysics aside, there is a difference between answering problems and expressing one's tastes. Facts are discovered and not created. But aside from stating a truism, this does not adequately explain the different tolerance thresholds for copying. We may want multiple authors to explore the same specific topic or phenomenon, but there is no inherent value in multiple authors producing the same work. What is the intrinsic value of having a subsequent historian, economist, or law professor repeat the exact same thesis, organization, and conclusion of another?

It is at this point that the "facts are different" argument conflates conclusions with expression. It fails to distinguish between the results of the two creative endeavors and the means of producing those results. In other words, when answering problems or providing solutions, it is inevitable and even desirable for multiple authors to reach the same conclusion or result. Reporters researching an event should discover the same facts. Was Spehl the saboteur? Did Russians interfere in the 2016 U.S. Presidential election, and if so, how? Applying the scientific method, scientists should, likewise, reach the same conclusions and their work should produce the same results. For example, vaccinations do not cause autism, and humans are significant contributors to climate change.

In contrast, in entertainment, there are no separate conclusions to be reached. As an expression of taste and opinion, the conclusion of the creative process, the result, is the work itself. When entertainers reach the same creative conclusion, they have created the same expression. For example, two poets may well conclude that an aspect of love is best expressed with, "A rose by any other name would smell as sweet." Two screenwriters may also decide that heroism and the struggle between good and evil is best expressed as a struggle between monks wielding mystical powers and laser swords. Because there are virtually an infinite number of ways to express the fanciful, independently creating the exact same work while possible, is not inevitable.²⁴⁷

However, while works of science may reach the same conclusion, it is not inevitable nor desirable for subsequent authors to simply repeat what others have said before. Take research in the experimental sciences, for example, which arguably has the strongest case for "repetition." If one researcher publishes an article arriving at a certain result, other researchers must be able to replicate that result, and they must do so by precisely following the prior work. While one might describe the work of these subsequent researchers as copying, they are fundamentally doing and contributing something new. By repeating experiments and then publishing their methods, results, and conclusions, subsequent authors are testing the validity of the original research. The resulting publications are not repeating the work of the original, they are original contributions of their own. Under these circumstances, the value is not repetition, but validation.²⁴⁸

Likewise, it may be desirable for multiple historians to research and publish on the exact same event in history, like the Hindenburg disaster. Because the disaster is historical fact, multiple, if not all authors, examining the topic may

²⁴⁷ The infinite monkey theorem postulates that an infinite number of monkeys typing at keyboards for an infinite amount of time will reproduce the works of Shakespeare.

²⁴⁸ The same can be said for journalism. While there is clearly a value in spreading news and information, there is even more value when subsequent reports corroborate the initial reporting. Because of a failure to appreciate this form of "copying," there is currently what some have described as a "replication crisis" in science in which a significant number of findings are not or cannot be replicated. See Ed Yong, *Psychology's Replication Crisis is Running out of Excuses*, *The Atlantic* (Nov. 19, 2018), <https://www.theatlantic.com/science/archive/2018/11/psychologys-replication-crisis-real/576223/>. This crisis is driven in part by publications favoring "new original" contributions over replication studies.

reach the same conclusion. Yet, this is not the same as repeating and duplicating the work of prior historians to express the same conclusions that the prior researchers reached. It is quite the opposite because the study of facts, like the study of chemistry, only advances when historians make independent contributions of their own. This contribution could be made by adopting a new approach or perspective, contributing new information or insight, or, like the experimental example, simply confirming the work of prior historians. These contributions do not need to be dramatic or paradigm-shifting. The advancement of knowledge is often incremental. Nevertheless, while history is factual and authors do not create those facts, simply repeating another's expression does not advance our understanding of history.

Similarly, there is no inherent reason why science cannot provide more creative and innovative solutions if authors were required to take a few more steps away and work around prior authors.²⁴⁹ Once again, there is no benefit to society when two, let alone two hundred law review articles address the same copyright problem in substantially the same manner to reach the same conclusion especially if this is achieved by copying from a single source. Under these circumstances, one could argue that society would be better served if copyright, in addition to social and professional norms, required subsequent authors to make more than incremental contributions, but rather to make a significant or substantial contribution to the field.

Unless a subsequent researcher discovers some new fact, there appears to be little to no value in having multiple authors making the same claim that Spehl sabotaged the Hindenburg for his girlfriend. For example, why should subsequent historians write about the Spehl hypothesis? Is this the inevitable and natural result of history? Wouldn't society be better off if new authors were required to come up with their own hypotheses, or to write something that no one else has written before? Even if a historian wants to write about the Hindenburg, there is a significant, if not limitless, number of topics and perspectives that they may adopt. What role did the Hindenburg play in Nazi propaganda? What role did the disaster play in the decline in lighter-than-air travel? Likewise, if historians after Hoehling want to write about Spehl as saboteur, they could at least be required to provide independent research confirming or disputing his account. As such, restricting copying could encourage historians to contribute more to the study of history. Is the cost to the historian appreciably different, let alone greater, than the cost to a songwriter? In other words, the same arguments made for the creative costs and benefits of restricting works of entertainment can be made with equal force for restricting works of science. So while there is a very real difference between fact and fiction, between evidence and opinion, there is no inherent reason copyright should treat those works differently. As the Supreme Court has recognized, facts themselves may not be original, but the way an author puts together and expresses those facts is original.²⁵⁰

B. Instrumental Differences?

If there is no intrinsic difference between the factual and the frivolous that justifies a double standard, is there an instrumental justification? More

²⁴⁹ This is a fundamental aspect of patent law. See, e.g., F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 624-26 (3d ed. 1990) (discussing designing around patent claims); Burk, *supra* note 238.

²⁵⁰ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344-45 (1991).

specifically, without judging the relative merits of the two, are there instrumental reasons for tolerating copying when creating works of science but not when creating entertainment? As discussed above, the principal justification for prohibiting only virtual appropriation is preventing copyright liability from chilling creativity and expression. With respect to science, the law tolerates copying that results in little or no contribution, because more rigorous protection could discourage new contributions. If, as discussed above, authors in science could be forced to be more creative if subject to greater copyright liability, what are we afraid of chilling? As the following argues, limiting copyright protection for works of science protects: (1) copying as a fundamental part of the learning and creative process; (2) incremental contributions that may not be recognized or appreciated as such; and (3) works that may not say anything new, but may say it better.²⁵¹ Limiting copyright protection to virtual infringement creates breathing space for all three. It recognizes what Marcel Proust once said,

The only true voyage of discovery, the only fountain of Eternal Youth, would be not to visit strange lands but to possess other eyes, to behold the universe through the eyes of another, of a hundred others, to behold the hundred universes that each of them beholds, that each of them is.²⁵²

The first potential justification for tolerating extensive copying is that copying is integral to the learning and creative process that enables subsequent authors to contribute new works of their own. For example, short of fraudulently passing off someone else's work as one's own, using someone else's ideas and expression is fundamentally part of learning and developing one's own expertise. By copying earlier ideas and earlier expression, new authors study both the form and substance of their chosen subjects. Copying makes it possible for students to build upon, and -- every teacher's dream or nightmare -- effectively critique those that came before them. Limited copyright protection facilitates this process by allowing authors to draw freely from existing work, both privately and publicly, as building blocks for their own work.²⁵³

Second, limited copyright protection may be justified because society, especially those trained in the law, may not appreciate or immediately recognize that something new is being contributed. Justice Holmes made this point about appreciation in *Bleistein*:

At the one extreme, some works of genius would be sure to

²⁵¹ See generally Fromer, *supra* note 108, at 84 (using information theory to explain the importance of examining copyright questions through the lens of information theory). Fromer suggests that:

For one thing, encoding the knowledge copyright law seeks to encourage in redundant forms will help to transcend noisy expression and accomplish copyright law's goals of creating, disseminating, and preserving this knowledge. For another, encouraging expression that is valued in and of itself to be used and reused in multiple contexts will help provide important multiple meanings for this expression to different audiences in varied contexts.

Id.

²⁵² Marcel Proust, *Remembrance of Things Past*, Vol. 5 *The Prisoner*, ch. 2 (C.K. Moncrieff trans., 1923)

²⁵³ In general, there is a very strong case for copying verbatim when copying is used to access a copyrighted work. See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *Fordham L. Rev.* 347, 349 (2005) (emphasizing the need to permit individuals to engage in creative play); Tushnet, *supra* note 47, at 546.

miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke...At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.²⁵⁴

Likewise, the contribution might be so incremental that it would be difficult for those who are not experts or well-versed in the field to recognize. In both cases, neither judges nor juries should be in a position to evaluate the merits of a new work or its contribution. A greater tolerance for copying leaves room for the possibility that what may appear to be nothing new, is in fact, something new, and is accomplished by removing judges and juries from the decision-making process. Lawyers and laypeople have no expertise or standing to evaluate whether a historian's research makes a contribution to the literature any more than they are in the position to diagnose whether a patient is suffering from a heart attack or heartburn.

Lastly, limited copyright protection may be justified for works of science because even when subsequent authors do not say anything new, they may say it better. As long as works of science do not use the complete expression of or plagiarize prior works, they do not infringe copyright. One may quote substantially and repeatedly, adopt the same argument and organization, and otherwise write the same work as long as it is in the new author's own words. This is the true meaning and promise of the idea/expression distinction and fair use. Consider that fair use originally arose from the doctrine of fair abridgement, in which the contribution made by the subsequent author was editing a prior work down to size.²⁵⁵

Allowing future authors the opportunity to express existing works in their own way is not only a value to the author, but to society as well. A new author's expression may be clearer, more persuasive, or simply more enjoyable. Likewise, a new author may be able to reach new audiences. A two-volume edition of George Washington's correspondence may be both more affordable and approachable, and therefore, more valuable to some than the twelve-volume edition from which it copied.²⁵⁶ A *New York Times* article summarizing a scholarly book on economic policy may make what the author expressed in the book easier to understand and more relevant to a wider audience. As such, we may tolerate significant copying in science because the way in which one explains a problem or communicates a solution is a valuable contribution in its own right.²⁵⁷ Just how valuable that contribution may be is ultimately left to the scientific community and the marketplace, not courts.

So do these instrumental explanations justify greater freedom to copy in science but not in entertainment? Once again, the answer should be no. Copying plays a fundamental role in the development of entertainer and scholar alike. Likewise, lawyers and laypeople do not have the expertise to discern whether an

²⁵⁴ *Bleistein v. Donaldson Lithographic*, 188 U.S. 239, 251-52 (1903).

²⁵⁵ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

²⁵⁶ *Id.* at 349.

²⁵⁷ Cf. *Fromer*, *supra* note 108, at 102 (arguing that repetition of material and expression aids in public understanding because "different people or groups are likely to find different...expression most natural to understand and learn from"). In the context of freedom of speech, Judge Learned Hand argued that the First Amendment, "presupposes that right conclusions are more likely to be gathered out of multiple tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

entertainer is offering something valuable or new. Not only do they not have the expertise, but their own personal biases will inevitably play a role in the decision making. As discussed earlier, this was exactly the point made by Justice Holmes when he articulated the non-discrimination doctrine. Judges, juries, and lawmakers have no business determining what is and is not “art” or what is and is not good entertainment.

In fact, the nature of entertainment may suggest that there should be greater tolerance for copying. With many forms of entertainment, the process of copying is inherently part of learning and developing one’s talents. In science, not much is gained by one researcher painstakingly copying word for word, let alone photocopying, another’s article.²⁵⁸ While they may reread articles or copy them for later reference, they do not rewrite other people’s articles to hone their skills. Artists do. A bass guitar player will play music written by others until his fingers bleed. Singers will imitate other singers in the hope of sounding just like them. Painters will paint the same water lilies again and again. Photographers will take countless photos, attempting to reproduce an iconic image with the same look and feel as the original. Under these circumstances, repetition is a fundamental means of developing one’s expressive skills.

In entertainment, repetition can also be more creative and original.²⁵⁹ Copying as imitation is a means of exhibiting one’s talent and setting oneself apart from other artists. Few bass players will ever play like Flea. Few singers will ever sing like Freddie Mercury. Few painters will ever paint like Monet. And, few photographers will capture images like Ansel Adams. Yet, those that can will be considered great entertainers and artists in their own right. So, even when an artist sets out with the specific goal of reproducing another’s work, being able to replicate the work can be a creative achievement, and represents a uniquely personal contribution.²⁶⁰ As a cellist, if I could play the Prelude to Bach’s Suite No. 1 in G Major exactly like Yo Yo Ma, it would be an artistic and creative achievement, and something of my own. In contrast, retyping Justice Holmes’ *The Common Law* word for word is not.

Likewise, the idea that “someone may say it better” applies with equal force, if not more so, in entertainment. The clearest example is the cover song. Once a song is published, other artists do not need the permission of the copyright owner to record their own version. The cover artist is required to pay a statutory fee, but because copyright law does not provide the owner with an exclusive right, the owner cannot prevent the song from being covered.²⁶¹ In principle, the songwriter and/or original recording artist may want exclusivity to allow them to bargain with subsequent artists or remain the sole version of the song. In such a world, if you want to record “All Along the Watchtower,” you will need Bob Dylan’s permission. In the absence of that permission, when individuals want to listen to “All Along the Watchtower,” they would only be able to listen to Bob Dylan’s recording unless Dylan chooses to allow others to record their own

²⁵⁸ Again, this is distinct from copying in order to gain access to a work.

²⁵⁹ See Beebe, *supra* note 18, at 392 (noting that the act of transformation itself is meaningful even if a new work is not produced). See also Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 *Wm. & Mary L. Rev.* 513, 539 (2009) (arguing that fair use should consider more than the creation of a writing and must take into account noncommercial motivations for creating).

²⁶⁰ *Bleistein v. Donaldson Lithographic*, 188 U.S. 239, 250 (1903) (“The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone”); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 268 (S.D.N.Y. 1959) (recognizing copyright protection for another artist’s reproduction of Rodin’s *Hand of God*).

²⁶¹ 17 U.S.C. § 115(a)(2) (2016).

versions. However, because copyright does not currently give Bob Dylan the right to prevent others from covering his song, you can choose among versions sung by Jimi Hendrix, Eric Clapton, Lenny Kravitz, or a long list of other artists. These “copies” are the artists’ attempts to express Bob Dylan’s song in their own way, and, for some, their way may be preferable. In fact, there is a long history of songs becoming famous only after a subsequent artist covers the original.²⁶²

While cover songs are a straightforward example, other areas of entertainment likewise benefit from the idea that “someone may say it better.” A writer may wish to write a sequel to a famous story²⁶³ or tell the story from the perspective of a different character.²⁶⁴ A cartoonist may want to adopt the style of another to illustrate different subject matter.²⁶⁵ A songwriter may want to capture the feel of earlier works²⁶⁶ or even sample portions of the work in their own way.²⁶⁷ The list goes on and on, with authors copying other authors as part of their own works. This is true whether the artist doing the copying is a professional or a fan.²⁶⁸ Yet, currently, all of these creative endeavors, even an act as simple as mounting a copyrighted work,²⁶⁹ are at risk of being prohibited by copyright law.

Finally, judges and laypeople are no more qualified to judge entertainment than they are to judge science. As Justice Holmes argued in *Bleistein*, there will inevitably be works of entertainment that the public does not understand or is not in the position to appreciate, and there will also be works of entertainment that will be rejected based upon the decision maker’s personal opinion and taste.²⁷⁰ Yet, these subjective value judgments are fundamentally part of the question, “Did the alleged infringer take ‘too much’?” Consequently, there are no instrumental justifications for a double standard.

C. The Chilling of Entertainment

A case can also be made that the creation of works of entertainment is much more likely to be chilled by fear of copyright liability. The first and foremost factor is the asymmetric threat of litigation. Authors of entertainment have much more to fear from litigation because the entertainment industry is notoriously litigious.²⁷¹ Copyright owners often have deep pockets to backup threats of

²⁶² See Bob Leszczak, Who Did it First?: Great Pop Songs and Their Original Artists 22 (2014) (“Big Yellow Taxi” originally recorded by Neighborhood, rerecorded by Joni Mitchell, Amy Grant, Counting Crows, among others); Bob Leszczak, Who Did it First?: Great Rock and Roll Cover Songs and Their Original Artists 3, 22 (2014) (Bob Dylan and Jimmy Hendrix, “All Along the Watchtower;” Carl Perkins and Elvis Presley, “Blue Suede Shoes”); Bob Leszczak, Who Did it First?: Great Rhythm and Blues Cover Songs and Their Original Artists (2013).

²⁶³ See *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); BBC, Sequel to *Catcher in the Rye* “Banned in U.S.,” BBC (Jan. 13, 2011), <http://www.bbc.com/news/entertainment-arts-12181223>.

²⁶⁴ See *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (finding the *Wind Done Gone*, a story telling *Gone With the Wind* from the perspective of a slave, to be fair use).

²⁶⁵ See generally *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (concluding that a movie studio violated an Illustrator’s copyright by copying his style).

²⁶⁶ See *supra* Part I (discussing “Blurred Lines”).

²⁶⁷ Compare *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016), with *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

²⁶⁸ See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 *Loy. L.A. Ent. L. Rev.* 651 (1997); see also Eriq Gardner, CBS, Paramount Settle Lawsuit Over ‘Star Trek’ Fan Film, *The Hollywood Reporter* (Jan. 20, 2017, 11:43 AM), <http://www.hollywoodreporter.com/thr-esq/cbs-paramount-settle-lawsuit-star-trek-fan-film-966433>.

²⁶⁹ See *Lee v. A.R.T. Co.*, 125 F.3d 580, 581-82 (7th Cir. 1997); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343-44 (9th Cir. 1988).

²⁷⁰ *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251-52 (1903).

²⁷¹ The Recording Industry Association of American has a long history of using copyright litigation and

litigation. Some are extraordinarily protective of their copyright because they are not authors themselves but instead rely upon those copyrights as a source of income.²⁷² Last, but not least, as the “Blurred Lines” verdict illustrates, there can be a great deal of money at stake. As such, the threat of litigation, the cost of defending a copyright infringement action, and the potential for a multimillion dollar verdict are significant deterrents to engaging in even lawful uses of works of entertainment. There is simply no corresponding threat in the sciences. While there are exceptions, the financial value of copyrights for scholarly publications is so small that universities have only recently begun to claim ownership of the works of their faculty.²⁷³

The following three factors also suggest that science might enjoy more breathing room even when faced with the possibility of litigation. First, authors often explicitly explain how their work adds to the existing body of knowledge. Making one’s contribution clear is part of scholarly norms. As such, authors not only focus on how their works contribute something new, but more importantly, they explain this to the reader. This allows authors to frame their work and its relationship to the work of others. Consequently, to the extent that readers may debate the appropriateness of an author’s use of other’s works, the author has at least had the opportunity to set the terms of the debate.

Second, in science, research is governed by agreed-upon and published standards and guidelines. As discussed above, the scientific method sets a universal standard for determining how to proceed with scientific experimentation and when copying is a contribution. Similarly, institutions and departments create and publish rules and guidelines for what constitutes acceptable research, and establish ethical codes of conduct. While plagiarism may not subject an author to copyright liability, it will certainly subject the author to the censure of peers and their institutions. In other words, in science, authors have a clearer understanding of when and what kind of copying is acceptable even without regard to copyright.

Third, because of the “expertise” associated with science, there is a natural tendency for those not trained in the subject to consider their own competency to make substantive decisions involving science. After all, what does a constitutional law professor know about the Hindenburg or molecular chemistry?

threats of litigation to control all uses of their works. For an excellent summary of their legal campaign in response to file sharing, see Electronic Frontier Foundation, *RIAA v. The People: Five Years Later* (Sep. 30 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later>. While the RIAA and large corporations such as the Walt Disney Corp. may immediately come to mind, individuals have also been known to be especially litigious. For example, Dr. Martin Luther King, Jr.’s family is very aggressive in preventing other from using Dr. King’s speeches without their authorization. See Foley Hoag, *Martin Luther King, Jr. And Copyright: Five Things You Should Know* (Jan. 11 2018), <http://www.trademarkandcopyrightlawblog.com/2018/01/martin-luther-king-jr-and-copyright-five-things-you-should-know/>.

²⁷² While this includes families of the original authors like the Kings and the Gayes, it also includes what some have described as “copyright trolls,” a phrase borrowed from patent trolls describing patent owners that do not use those patents to create inventions, but instead as the basis for generating revenue through the threat of litigation. See Electronic Frontier Foundation, *Copyright Trolls*, Electronic Frontier Foundation <https://www.eff.org/issues/copyright-trolls> (last visited May 28, 2018).

²⁷³ See Ann Spinger, *Intellectual Property Issues for Faculty*, American Association of University Professors, <https://www.aaup.org/issues/copyright-distance-education-intellectual-property/resources-copyright-distance-education-and/intellectual-property-issues-faculty> (last visited May 28, 2018). In contrast, universities routinely assert ownership over faculty patent rights. See *Bd. of Teachers of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 785 (2011) (holding that patented inventions first vest with the inventor); see also Laura Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 *Vill. L. Rev.* 223, 251- 252 (1992); Rochelle C. Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 *U. Chi. L. Rev.* 590, 591-592 (1987).

When people are aware of their own limited knowledge and expertise, research suggests that they are more open to accepting new facts and opinions from those with more.²⁷⁴ As such, one would expect that expert opinions may play an important role when a jury is asked to judge the merits of copying in science. So, even in litigation, authors can anticipate that standards, guidelines, and codes of their profession will play a role. While following the guidelines of one's profession may do nothing to guarantee how well that work will be received, it should provide a degree of confidence that at least the work will not be the focus of a lawsuit.

In art, authors are exposed to much greater subjectivity, and, therefore, have more to fear. Initially, while it may be clear to the author what they contributed, it is not a practice to explicitly describe that contribution. In science, authors frame how their work is viewed in advance. In art, the only immediate evidence will be the work itself. To the extent that the audience perceives a similarity with another work, they develop an opinion about the copying without any context from the author. This subjective interpretation exposes authors to the risk that new contributions may be mistakenly considered plagiarism because of the viewer's first impression.²⁷⁵

More importantly, there are no written standards, published guidelines, or adopted codes in entertainment. There is no comparable professional or institutional consensus on how art is to be created, how it is to be judged, or even what constitutes art. Instead, whether copying in general -- or any given degree or instance of copying -- is acceptable depends upon social norms and the subjective determination of the artist whose work is copied.²⁷⁶ Accordingly, how much is too much will vary from artist to artist and from case to case. Some artists copy others in their own work. Some do not. Some artists encourage others to copy their work. Some do not. Some artists consider copying flattery. Others consider it theft. As such, the copyright owner, who may or may not be the original author, initially decides whether the subsequent author's copying is acceptable to them. If the copyright owner does not like how their work is being used they may object, threaten litigation, and/or actually litigate. If the copyright owner chooses to litigate, the decision as to how much copying is too much is then made by a jury. Because the decisions of individual artists and juries are very difficult to predict, in the absence of virtual protection, the sword of copyright will always hang over the heads of creators of art. Unless one attempts to create something "entirely" new or avoids creating altogether, there are no rules of the road to determine *ex ante* whether an act of copying should be considered acceptable.

Lastly, people are much less hesitant to express an opinion on entertainment. Unlike science, the general public regularly makes judgments about entertainment. We listen to music, watch videos, and read works of "taste and opinion," and in each of these instances, we make decisions based upon our subjective evaluation of the work. Likewise, few of us engage in titration or multivariate regression analysis, but we regularly engage in artistic expression. We

²⁷⁴ See Steven Sloman & Philip Fernbach, *The Knowledge Illusion* 19-23 (2017) (discussing research where subjects were asked to evaluate their knowledge on a subject before and after attempting to explain the topic to others); see also Yuval Harari, *People Have Limited Knowledge*, N.Y. Times (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/books/review/knowledge-illusion-steven-sloman-philip-fernbach.html>.

²⁷⁵ There are of course exceptions, for example, when a parodist notes specifically that the work is a parody.

²⁷⁶ See Dotan Oliar & Christopher Sprigman, *Intellectual Property Norms in Stand-Up Comedy*, in *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* 385 (Mario Biagioli, Peter Jaszi & Martha Woodmansee, eds., 2010); Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511 (2013).

do so even when it is as simple as singing along to music in the car or posting comments on social media. And, while great art requires special talent, engaging in entertainment and making decisions about entertainment require no such expertise; in all of these examples, personal opinion alone is sufficient. If asked to provide this opinion, there is no reason for jury members to defer to members of the entertainment community when asked whether the author took “too much.” In fact, some may bristle at and automatically reject the opinion of “so-called experts.” In science, an author may find some solace and security in following the accepted methods of science and professional guidelines to avoid litigation, and in knowing that if there is litigation, those standards will be considered when determining liability. In contrast, in entertainment, an author has no map to guide them when creating their work or fall back upon when defending their work against claims of “too much” copying. Instead, authors face the very real possibility that the merit of their work will be judged based on the subjective opinions of the least tolerant copyright owner and the least tolerant jury.

As the preceding demonstrates, when the relative values of science and entertainment are removed from the calculus, there are no inherent or instrumental reasons that justify discriminating between factual and fanciful works. Acknowledging that there are no objective reasons to support copyright’s double standard, however, does not mean that we must treat them equally. The following section outlines why the First Amendment’s protection of freedom of expression suggests copyright should only prohibit virtual appropriation and translation.

V. ENTERTAINMENT IS EXPRESSION

How should the law respond to copyright’s double standard? Congress and courts could and, as this Article argues, should protect all expression equally. Because copyright protects authors from virtual appropriation in science, works of entertainment should be subject to the same standard. All authors should be free to express themselves so long as they do not tell the same story or the same story in a different medium. Then, copyright would no longer dismiss entertainment and the corresponding freedom of authors to express themselves. This approach would promote creative expression for all works by prohibiting piracy while still providing the necessary breathing room for new expression. However, recognizing the hypocrisy of a double standard does not mean lawmakers will reject it. Congress and the courts could simply embrace copyright’s current discrimination against entertainment and reject the non-discrimination principle. For example, because current copyright protection favors existing copyright owners, Congress could decide to protect their economic interests rather than the creative freedom of future authors.²⁷⁷ Even so, this section argues that without a principled justification for imposing greater restrictions upon works of entertainment, as applied to those works, copyright violates the First Amendment’s guarantee of freedom of expression. And, continuing to apply a double standard necessarily creates a conflict between copyright and the First Amendment.

A. Unreliable Internal Safeguards

As mentioned earlier, the Supreme Court has not subjected copyright law

²⁷⁷ There is a rich body of literature arguing that copyright does not, in fact, protect authors but instead moneyed interests. See Ronald V. Bittig, *Copyright Culture: The Political Economy of Intellectual Property* (1996); Lawrence Lessig, *Free Culture* (2005).

to additional First Amendment scrutiny. Instead, in the two cases in which the Court directly addressed the question, it concluded that First Amendment scrutiny was unnecessary because fair use and the idea/expression distinction sufficiently safeguarded the First Amendment interests in those cases. Moreover, on its face, copyright complements the First Amendment by increasing the potential financial rewards available to authors and by making markets for copyrighted works more efficient. The unfair competition created by allowing subsequent merchants to sell unauthorized copies in direct competition with the original would significantly undermine the financial incentives to create and disseminate those works. Because of this speech-promoting function, Justice O'Connor wrote that "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression."²⁷⁸ Additionally, as discussed below, to the extent that copyright restricts expression, the internal limits of fair use and the idea/expression distinction generally, on their face, alleviate free speech concerns.

Based upon these twin pillars, the Supreme Court upheld a copyright judgment against *The Nation* for publishing unauthorized excerpts from President Ford's memoirs.²⁷⁹ At the time, the memoir was unpublished and *Time Magazine* had negotiated the exclusive right to publish significant quotations from the manuscript prior to its publication.²⁸⁰ As a result of *The Nation's* actions, *Time* rescinded the agreement.²⁸¹ In upholding the infringement judgment, the Supreme Court rejected *The Nation's* argument that its publication of quotes from Ford's memoirs -- especially the President's explanation for pardoning President Nixon -- was newsworthy, and, therefore, protected by the First Amendment.²⁸² According to the Court, freedom of speech was adequately protected by the idea/expression distinction and fair use.²⁸³

Similarly, in *Eldred*, the Supreme Court upheld the Copyright Term Extension Act, which extended the length of copyright protection by an additional twenty years to its current term of the life of the author plus seventy years.²⁸⁴ In that decision, the plaintiffs argued that the term extension violated both the power delegated to Congress to create exclusive rights for "limited times," and violated the First Amendment's requirements for content neutral regulations of speech.²⁸⁵ With respect to free speech, the plaintiffs argued that term extension was not sufficiently tailored to advance an important government interest.²⁸⁶ While the Supreme Court rejected the plaintiffs' argument that the First Amendment required heightened scrutiny under the circumstances for the reasons discussed before, it also rejected the Court of Appeals conclusion that copyrights are "categorically immune from challenges under the First Amendment."²⁸⁷ Instead, Justice Ginsburg's majority opinion left open the possibility that First Amendment scrutiny may be justified, "but when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."²⁸⁸ In both decisions, the Supreme Court concluded that additional First Amendment scrutiny was unnecessary to protect freedom of expression

²⁷⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

²⁷⁹ *Id.* at 569.

²⁸⁰ *Id.* at 542.

²⁸¹ *Id.*

²⁸² *Id.* at 555-60.

²⁸³ *Id.* at 560.

²⁸⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 193-94 (2003).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²⁸⁸ *Eldred*, 537 U.S. at 221.

because any restrictions of free expression were adequately protected by fair use and the idea/expression distinction.

The twin pillars the Supreme Court has relied upon are erected upon very shaky foundations.²⁸⁹ While the Framers of the Constitution enacted both the Copyright Clause and the First Amendment within several years of one another, copyright was significantly narrower than it is today. The original Copyright Act of 1790 prevented others from selling or otherwise distributing wholesale duplicates of the copyrighted work. Authors could not protect plots, characters, or style. New authors were free to translate a copyrighted work into another language, and as discussed earlier, free to abridge existing works. Likewise, copyright protection only lasted fourteen years with the option of renewing for another fourteen years, and required authors to follow various formalities, including registering, providing notice, and depositing copies of their works, before they were entitled to protection. Under these circumstances, copyright was not so much a restriction upon expression as it was a prohibition against an unfair business practice, and the default rule was no protection. Today, none of these limitations exist. So while it is accurate to say that the Framers recognized the importance of copyright, they would not recognize copyright as it exists today.²⁹⁰ Consequently, one cannot rely heavily upon the Framers' understanding.

Reliance upon fair use and the idea/expression distinction also rests on shaky ground. Addressing free speech concerns by relying upon copyright's internal doctrines of fair use and the idea/expression distinction has been described as "definitional balancing."²⁹¹ Because these doctrines play such a fundamental role in mitigating unconstitutional restrictions upon expression, Harry Rosenfield argues that fair use should be explicitly considered a constitutional doctrine with its scope determined by the First Amendment.²⁹² As demonstrated by the Supreme Court's decisions in *Harper & Row* and *Eldred*, judges have not adopted Rosenfield's reasoning, but have continued to rely upon definitional balancing. However, "[b]y addressing free speech concerns internally within copyright, definitional balancing leaves free speech at the mercy of copyright doctrine. When judges limit the idea/expression distinction or fair use in favor of expanding copyright's property interests, as they have done in recent years, they limit free speech."²⁹³ This is a form of copyright *Lochnerism* that "transforms the constitutional relationship between copyright and the First Amendment from one in which the Constitution defines the limits of copyright to one in which copyright defines the limits of the Constitution."²⁹⁴

By relying upon definitional balancing alone, judges open the door to judicial interpretation of copyright and its relationship to the Constitution based upon their personal economic philosophy:

²⁸⁹ I have discussed these arguments in greater detail elsewhere, so I will only summarize them here. See Raymond Shih Ray Ku, *Free Expression – Reconciling Copyright and the First Amendment*, 57 Case W. Res. L. Rev. 863 (2007); see also Tushnet, *supra* note 47.

²⁹⁰ It is also fair to say that the Framers would not recognize the freedom of speech protected by the First Amendment either. Compare *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (concluding that speech advocating lawless behavior may only be punished for "inciting or producing imminent lawless action and is likely to incite or produce such action"), with *Schenck v. United States*, 249 U.S. 47, 51-53 (1919) (upholding conviction for advocating resistance to the draft).

²⁹¹ See Ku, *supra* note 289, at 869 (citing Melvin B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press?*, 17 UCLA L. Rev. 1180, 1184 (1970)).

²⁹² See Harry N. Rosenfield, *The Constitutional Dimensions of "Fair Use" in Copyright Law*, 50 Notre Dame L. Rev. 790, 796-98 (1975).

²⁹³ Ku, *supra* note 289, at 871.

²⁹⁴ *Id.* at 893.

First, by rejecting the need for additional constitutional scrutiny when Congress expands copyright beyond the Framers' copyright, definitional balancing ignores or manipulates the baseline for evaluating the relationship between copyright and free speech. Second, by ignoring the baseline problem, definitional balancing ultimately allows judges to embed their own disputed vision of property within constitutional law at the First Amendment's expense.²⁹⁵

In short, definitional balancing allows judges to intentionally or unintentionally redefine the relationship between freedom and property rights based upon personal biases without necessarily considering or even acknowledging First Amendment concerns. As a respected member of the Law and Economics school of thought, it should come as no surprise that in *Kienitz*, Judge Easterbrook relied upon economic principles to determine the scope of fair use, and did so without considering the implications for freedom of expression.²⁹⁶

Consider the following decision as another example of the dangers of definitional balancing. In *Mannion v. Coors Brewing Company*, Coors used a black and white photograph of an African-American man, wearing a white shirt and jewelry, on advertising billboards.²⁹⁷ It was undisputed that the image was based upon a photograph taken by the plaintiff Jonathan Mannion and copied many of his artistic choices.²⁹⁸ Originally, Mannion gave permission to the advertising company to use his color photograph of Kevin Garnett shot against a cloudy sky in which Garnett is wearing white clothing, jewelry, and a black cap.²⁹⁹ This photo was used by the company as part of its initial proposal to Coors.³⁰⁰ It was also undisputed that the photograph used by Coors was not Mannion's photograph.³⁰¹ It was taken by another photographer, with a different model, on a different day.³⁰² It was printed in black and white and captured from a different angle.³⁰³ In their defense, the defendants argued that the image used on the billboard was permitted under the idea/expression distinction.³⁰⁴ In other words, they only copied the ideas embodied in Mannion's photograph, and not the actual expression represented by the photograph itself.

In rejecting the defendants' idea/expression argument, Judge Kaplan launched a full scale assault on the doctrine.³⁰⁵ He began by noting that the idea/expression distinction originated with literary works where, "it makes sense to speak of the idea conveyed by the literary work and to distinguish it from its expression."³⁰⁶ In contrast, he argued, it is much more difficult to draw a line between ideas and expression in other contexts, and this is especially true for visual works.³⁰⁷ In fact, according to Judge Kaplan, "it is not clear that there is any real

²⁹⁵ *Id.* at 880.

²⁹⁶ See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758-60 (7th Cir. 2014).

²⁹⁷ 377 F. Supp. 2d 444, 448 (S.D.N.Y. 2005).

²⁹⁸ *Id.* at 447-48.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 448.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 455-56.

³⁰⁵ See *id.* at 455-61.

³⁰⁶ *Id.* at 458.

³⁰⁷ *Id.*

distinction between the idea in a work of art and its expression.”³⁰⁸ A photographer’s original contribution in a photograph, the contribution that entitles it to copyright protection, can be described as its conception, and “the word ‘conception’ is a cousin of ‘concept,’ and both are akin to ‘idea.’”³⁰⁹ Based upon this reasoning, Judge Kaplan concluded that the “idea/expression distinction in photography, and probably the other visual arts thus achieves nothing.”³¹⁰ Because it “achieves nothing,” the only question is whether a jury may conclude that the photographs are substantially similar to one another.³¹¹ Taken to its logical conclusion, this means that one of the principal means of preventing copyright from chilling new expression, the idea/expression distinction, no longer plays any role with respect to photographs and, perhaps, all of the visual arts.

Judge Kaplan reached this breathtaking conclusion by equating what a photographer must do to obtain copyright protection with what copyright will ultimately protect. When photography was first introduced, it was argued that photographs were not writings and, therefore, could not be protected by copyright.³¹² According to this argument, photographs did not “embody the intellectual conception of its author,” but were instead “mere mechanical reproduction[s].”³¹³ In upholding Congress’ decision to protect photographs, the Supreme Court noted that the “ordinary” photograph may lack sufficient originality, but that the photograph in question did “embody the intellectual conception of its author.”³¹⁴ Quoting from the lower court’s findings, the Supreme Court concluded that the photograph was sufficiently original because it embodied the photographer’s

own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.³¹⁵

Initially, Judge Kaplan’s opinion in *Mannion* expands upon *Burrow-Giles* by providing a comprehensive description and classification of the creative decisions made by photographers. According to Kaplan, photographers make creative decisions when they determine how an image should be rendered, when it should be captured, and what should be captured.³¹⁶ In other words, these are the ways in which photographers demonstrate the degree of creativity necessary to obtain copyright protection. In the absence of even a minimum degree of creativity, the image would not receive copyright protection. This means that photographs taken by a monkey cannot be protected by copyright because the monkey did not make decisions with regard to rendering, timing, and subject that would otherwise

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 458-59.

³¹⁰ *Id.* at 461.

³¹¹ *Id.*

³¹² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58-59 (1884).

³¹³ *Id.*

³¹⁴ *Id.* at 59-60.

³¹⁵ *Id.* at 54-55.

³¹⁶ *Mannion*, 377 F. Supp. 2d at 452-54.

“embody the intellectual conception” of an author.³¹⁷

As Judge Kaplan recognized, how to render an image, when to capture it, and what to capture are very much ideas, but as *Hoehling* illustrated, just because an idea is original does not mean it is protected. In *Mannion*, the analysis is considered necessary because of the difficulty identifying the photographic equivalent of the distinction between the book and the writing contained in the book.³¹⁸ However, there is a rather simple and logical equivalent of the idea/expression distinction for photography, and the visual arts in general. In the visual arts, one can distinguish between the print (or the digital era -- the file), and the image contained in the print. Under these circumstances, because Coors copied neither the print nor the image, one could have concluded that the defendants only copied Mannion’s ideas.³¹⁹ However, rather than accept the possibility that copyright may only protect photographs against virtual appropriation, Judge Kaplan obliterates the distinction between ideas and expression altogether.³²⁰ More importantly, for this discussion, he does so without even pausing to consider the First Amendment implications of this decision. While a copyright idealist may consider this result desirable, it is by no means dictated by copyright law, and by reaching this result, the court eliminated one of copyright’s two internal First Amendment safeguards.

While *Mannion* is a particularly dramatic example of the failure of definitional balancing, it is just one of many examples in which courts may lose the First Amendment forest for the copyright trees. With respect to fair use, the clearest example of the corrosive effect of copyright *Lochnerism* can be found in judicial interpretations of what the Supreme Court has described as “undoubtedly the single most important element of fair use,”³²¹ “the effect of the use upon the potential market for or value of the copyright work.”³²² The Supreme Court originally described this factor as determining whether copying was used to “supersede the use of the original work, and substitute . . . for it, such a use will be deemed in law a piracy.”³²³ To make this determination, courts considered “the degree in which they use may prejudice the sale, or diminish the profits, or supersede the object, of the *original works*.”³²⁴ In other words, even if the subsequent author only copies a portion of a work, when the purpose of copying is to displace the original, and may in fact harm the sales of the original work, such copying is not a fair use.

With rare exceptions, like *Sony*, courts generally embrace a much broader and arguably circular definition of relevant market harm. Relying upon the statutory language of “potential market,” courts currently do not limit their analysis to the original market for the work, but instead, consider whether the unauthorized use will harm the market for licensing such uses.³²⁵ In other words,

³¹⁷ See Camila Domonoske, *Monkey Can’t Own Copyright to His Selfie*, Federal Judge Says, NPR (Jan. 7, 2016, 10:34 AM), <http://www.npr.org/sections/thetwo-way/2016/01/07/462245189/federal-judge-says-monkey-cant-own-copyright-to-his-selfie>.

³¹⁸ *Mannion*, 377 F. Supp. 2d at 458-61.

³¹⁹ *Id.* at 461-63.

³²⁰ Judge Kaplan also did not need to reach this conclusion as one could argue that even if all of Mannion’s decisions were ideas, it was the combination of ideas that were entitled to protection. The question would then turn to whether the defendants sufficiently copied enough of these elements to justify going to a jury.

³²¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

³²² 17 U.S.C. § 107 (2012).

³²³ *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

³²⁴ *Id.* at 348 (emphasis added).

³²⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (considering whether the market

rather than limiting the rights of copyright owners to instances in which the unauthorized use would harm the existing value of the copyright by displacing the original, courts presume that unauthorized uses are unfair unless the use is not the kind that a copyright owner would normally consent to or license.³²⁶ In *Harper & Row*, this meant that the magazine's publication of an important news story was not fair because it violated President Ford's right to license the first coverage of his memoir.³²⁷ In *Castle Rock*, this meant that the copyright owner had the exclusive right to control *Seinfeld* trivia books even if the *SAT* increased demand for the television show.³²⁸ Put differently, Wendy Gordon argued that if copyright is a response to market failure, fair use should be interpreted as a response to market failure as well.³²⁹ Under these circumstances, if there is no reason to doubt that a functional market for licensing the use might develop, the use should not be considered fair.

In contrast, a parody of the song "Oh Pretty Woman"³³⁰ and a critical rewriting of *Gone with the Wind*, written from the perspective of a slave,³³¹ could be protected as fair uses because it is assumed that copyright owners would not license such works. (No one would license a negative review.) In general, this means that unless works of art either parody or otherwise critically comment on a copyrighted work, copyright owners not only have the right to engage in the use themselves, but the exclusive right to do so.³³² For example, if the *SAT* was considered a fair use, the decision would not have denied the makers of *Seinfeld* the right or ability to publish their own trivia book or even to license the *SAT*; it would have only denied them a monopoly on all such trivia books and the power to prevent the publication of such works. As such, fair use has shrunk from a doctrine that protected even the abridgement of copyrighted works to one that protects future authors only when they copy in ways or in markets that the copyright owner would not otherwise exploit. Once again, limiting fair use to instances of market failure may be excellent policy. However, by adopting this policy and limiting the scope of fair use, courts reduce the ability of fair use to protect freedom of expression. As Justice Brennan argued in his dissenting opinion in *Harper*,

[T]he Court pursues the laudable goal of protecting "the economic incentive to create and disseminate ideas," [but this] economic interest is achieved . . . through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine.³³³

is one that the copyright owner "would develop or license others to develop"); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1387-88 (6th Cir. 1996) (rejecting circularity argument); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 912, 929-31 (2d Cir. 1995) (rejecting circularity argument).

³²⁶ See *Campbell*, 510 U.S. at 592; *Princeton Univ. Press*, 99 F.3d at 1387-88; *Am. Geophysical Union*, 60 F.3d at 929-31.

³²⁷ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 529, 567 (1985).

³²⁸ *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 145-46 (2d Cir. 1998).

³²⁹ 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).

³³⁰ *Campbell*, 510 U.S. at 591-92.

³³¹ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276-77 (11th Cir. 2001).

³³² Even with regard to criticism and parody, both *Campbell* and *Suntrust Bank* left open the possibility that such uses may not be fair. *Campbell*, 510 U.S. at 591-92; *Suntrust Bank*, 268 F.3d at 1276-77.

³³³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 579 (1985) (Brennan, J.,

While Professor Gordon has considered the implications this may have on speech and how to protect those interests,³³⁴ despite Justice Brennan's concerns, the courts have not. In light of judicial limits placed upon the idea/expression distinction and fair use, the First Amendment does not determine the boundaries of copyright. Instead, copyright defines, and constantly redefines, the boundaries of free expression.

Moreover, for the purposes of this discussion as demonstrated in Part IV, entertainment disproportionately suffers the consequences of this erosion, and both doctrines are the vehicles for the discrimination against creators of such works. One might even argue that artistic freedom is being sacrificed to create the illusion that definitional balancing protects freedom of expression if only for science. Whether this is consistent with the Constitution has yet to be tested.

B. First Amendment Harms

Because of the historic relationship between copyright and freedom of speech, to paraphrase Justice Ginsburg, it is fair to say that the First Amendment "bears less heavily when speakers assert the right to [sell] other people's speeches."³³⁵ However, if definitional balancing cannot be relied upon to protect freedom of expression, especially freedom of expression for works of entertainment, how should copyright be evaluated under the First Amendment? The answer to "What's the big deal? It's just entertainment," may be that it is more than just entertainment, it is freedom of artistic expression. While a full discussion of the First Amendment's protection for freedom of expression and how it should be applied to copyright is beyond the scope of the Article, four problems are readily identifiable. First, as it is currently applied, copyright restrictions are based upon the content of the speech, and as such violate the basic First Amendment prohibition against content regulation. Second, this content-based regulation and copyright's encroachment upon freedom of expression is made possible by the vagueness of both the rights and defenses recognized by copyright. Third, expanding copyright protection beyond virtual appropriation may not satisfy intermediate scrutiny, let alone strict scrutiny, because, as applied, the purpose is to suppress expression. Fourth, even if we were to accept that there is a legitimate purpose unrelated to the suppression of expression, as applied, copyright's exclusive rights are not sufficiently tailored to achieve such a purpose.

In general, the First Amendment makes no distinction between works of science and works of entertainment. Both receive the same treatment and protection. The First Amendment protects works of entertainment ranging from novels to films to video games.³³⁶ With a few exceptions, such as obscene speech and commercial speech, the First Amendment prohibits government from regulating speech based upon its content.³³⁷ In other words, freedom of speech

dissenting).

³³⁴ Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale L.J.* 1533 (1993).

³³⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("The first amendment securely protects the freedom to make - or decline to make - one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."). But see Tushnet, *supra* note 47, at 563-64 (critiquing this precise point).

³³⁶ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("Like the protected books, plays, movies that preceded them video games communicated ideas That suffices to confer First Amendment protection.").

³³⁷ *United States v. Alvarez*, 567 U.S. 709, 717 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of

protects an individual's freedom to express themselves as they see fit whether by wearing a jacket saying "f**k the draft,"³³⁸ burning the American flag,³³⁹ exhibiting a movie that portrays adultery,³⁴⁰ creating a violent video game,³⁴¹ or filming individuals engaging in sexual intercourse.³⁴² As the Supreme Court has recognized, "Under our Constitution, 'esthetic and moral judgments about art and literature . . . are for the individual to make, not for government to decree.'"³⁴³

One might be tempted to argue that Article I, Section 8 justifies content-based discrimination because it refers specifically to science.³⁴⁴ However, as demonstrated in Part II, this interpretation was fundamentally rejected by the Supreme Court in *Bleistein*.³⁴⁵ Moreover, while the Constitution prefaces exclusive rights as promoting the progress of science, this does not justify granting stronger, therefore more restrictive rights to works of entertainment. As Justice O'Connor wrote in *Harper*, "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright, and injures author and public alike."³⁴⁶ In other words, the Copyright Clause might justify content discrimination if Congress chose to provide greater protection to science or to only offer protection to works of science despite the Supreme Court decision in *Bleistein*. However, it does not justify greater exclusivity for entertainment. Again, as discussed in Part II, to the extent that there is textual and historical support for treating works of entertainment differently, it would be to deny Congress the authority to protect such works at all.³⁴⁷ Because courts provide greater protection to entertainment than science, these interpretations violate not only copyright's principle of non-discrimination, but the First Amendment prohibition against content-based discrimination as well.

In addition to regulating speech based upon content, copyright runs afoul of the void-for-vagueness doctrine. Under this doctrine, the Supreme Court has interpreted the First Amendment to prohibit both civil and criminal liability when the regulation of speech is too vague for an average person to understand.³⁴⁸ In other words, even when speech may be constitutionally regulated, the law must be sufficiently clear for individuals to understand what is prohibited and what is

expression] long familiar to the bar.") (internal quotations omitted).

³³⁸ *Cohen v. California*, 403 U.S. 15, 21 (1971).

³³⁹ *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

³⁴⁰ *Kingsley v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689 (1959).

³⁴¹ *Brown*, 564 U.S. at 790.

³⁴² *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000).

³⁴³ *Brown*, 564 U.S. at 790 (quoting *Playboy*, 529 U.S. at 818); see also *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

³⁴⁴ See *Snow*, supra note 18, at 3.

³⁴⁵ See supra Part II.A.

³⁴⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

³⁴⁷ It would be quite plausible to deny copyright protection to works of entertainment and still provide some degree of protection under the commerce clause in the same way trademarks are protected. However, this would inevitably suggest that they would not be entitled to exclusive rights. See *Trade-Mark Cases*, 100 U.S. 82 (1879) (holding that the copyright clause did not authorize Congress to regulate trademarks).

³⁴⁸ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.") (citation omitted).

permitted. Once again, as it is currently interpreted, copyright fails this First Amendment requirement. Initially, what is entertainment? How does one define entertainment? Is it what the Second Circuit described as expression on matters of taste or opinion? Editorials are by definition the opinion of their authors, but they also seek to address problems. Charles Dickens' *A Christmas Carol* is a fictional novel about Christmas ghosts, but it also represents Dickens' understanding of human nature and proposes how we should treat one another. Is an objective, principled definition even possible, or is it closer to the Supreme Court's effort to define obscenity which famously led Justice Stewart to remark, "I know it when I see it?"³⁴⁹

Even if it is possible to define entertainment, when copyright is interpreted to protect more than virtual appropriation, its protections are inherently vague and subjective. With respect to the right of reproduction, what does it mean, in the words of Judge Jerome Frank, "whether defendant took from the plaintiff's work so much of what is pleasing . . . that the defendant wrongfully appropriated something which belongs to the plaintiff."³⁵⁰ What is the total concept and feel of a work?³⁵¹ What is the heart of a work?³⁵² Is a work based upon another because the subsequent author begins with that work and admits that they "copied" it?³⁵³ What does it mean to recast or transform the original?³⁵⁴ It could mean to tell the same story in a different medium,³⁵⁵ or it could mean using any recognizable element in an entirely new work.³⁵⁶ The vagueness of these rights is compounded by the vagueness of the idea/expression distinction and the fair use doctrine.

Once copyright reaches beyond virtual appropriation, it becomes increasingly difficult to draw the line between expression and ideas. In arguably the most famous description of the distinction, Judge Learned Hand wrote,

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.³⁵⁷

According to Judge Learned Hand, in determining when expression ends and ideas

³⁴⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³⁵⁰ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946). For an excellent discussion of nonliteral copyright infringement see Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 Nw. L. Rev. 1821 (2013).

³⁵¹ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

³⁵² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985).

³⁵³ *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 714 (S.D.N.Y. 1987). ("As defendants have conceded access to plaintiff's copyrighted illustration, a somewhat lesser degree of similarity suffices to establish a copyright infringement than might otherwise be required.")

³⁵⁴ Compare *Lee v. A.R.T. Co.*, 125 F.3d 580, 581-82 (7th Cir. 1997) (considering whether the mounting of a copyrighted work on tiles or paper created a derivative work), with *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343-44 (9th Cir. 1988).

³⁵⁵ *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

³⁵⁶ *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1287 (C.D. Cal. 1995) (concluding that a Honda commercial copied enough of the James Bond character to violate copyright in that character).

³⁵⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

begin, “Nobody has ever been able to fix that boundary, and nobody ever can.”³⁵⁸ Judge Hand reiterated this challenge in a subsequent case in which he wrote, . . . Obviously, no principle can be stated as to when an imitator has gone beyond copying the “idea,” and has borrowed its “expression.” Decisions must therefore inevitably be ad hoc.³⁵⁹

Judge Hand’s observations continue to be accurate. As illustrated by the previous discussion of *Mannion*, untethered from the constraints of literal appropriation, the boundary between expression and idea still defies definition.

Similarly, the fair use doctrine provides little guidance for a subsequent author to determine whether their intended use violates copyright law. Initially, fair use is an affirmative defense, and as such, requires an author to pay for legal representation simply to evaluate let alone raise the defense. As such, the defense itself imposes a cost upon the speaker, and this cost will fall disproportionately upon new authors rather than established authors. Furthermore, a legal opinion on fair use will provide little guidance and comfort to authors interested in more than *de minimis* copying. If drawing lines between ideas and expressions is inevitably ad hoc, fair use determinations are expressly made on a case-by-case basis. Even parodies, which are perhaps the closest fair use comes to quintessential example, may be still be considered unfair if the author copies “too much.”³⁶⁰ It should come as no surprise, then, that on more than one occasion, courts, including the Supreme Court, have described the fair use doctrine as “the most troublesome in the whole of copyright law.”³⁶¹

So not only are the two principal protections for freedom of speech not doing their job, they are inherently vague and provide future authors with little-to-no guidance on whether they have gone too far. And, arguably, the vagueness of these rules is what enables judges to dismiss the value of entertainment and obscured entertainment’s disparate treatment in the first place.³⁶² If copyright is not limited to virtual appropriation, the only guaranteed way to avoid liability is for an author to obtain permission from the copyright owner which may or may not require them to pay for that permission, change their expression, or forgo expressing themselves altogether. Under any other circumstances, the fact that a speaker may face these choices would be unacceptable under the First Amendment.³⁶³

With respect to these questions, the Supreme Court’s decision in *New York Times v. Sullivan* and its progeny³⁶⁴ may guide First Amendment analysis of copyright. Both copyright and reputation are considered property interests that may be protected consistently with the First Amendment. In general, liability in

³⁵⁸ *Id.*

³⁵⁹ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

³⁶⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) (“This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see *Harper & Row*, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original.”).

³⁶¹ See *Sony Corp. of Am., v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 661 (2d Cir. 1939)).

³⁶² See Adler, *supra* note 127, at 574-75.

³⁶³ See *Freedman v. Maryland*, 380 U.S. 51 (1965) (requiring a clear definition for obscene speech).

³⁶⁴ 376 U.S. 254 (1964); see, e.g., *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989) (refining actual malice standard); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (concluding that actual malice did not apply to private speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (concluding that the actual malice does not apply to private individuals).

both cases may be considered consistent with freedom of expression. For copyright, this is based upon the Copyright Clause, and for defamation this is based upon the conclusion that false statements of fact are not protected by the First Amendment.³⁶⁵ Both involve actions to vindicate individual rights, and as such are based upon an individual's decision whether to seek redress for a perceived wrong. Some individuals are more tolerant about comments on their reputation, and some authors are more tolerant of unauthorized copying. Additionally, copyright and defamation liability are based upon judicially created standards that do not readily lend themselves to bright line rules. As discussed above, for copyright this includes, among others, determining whether the infringing work is substantially similar and whether it is a fair use. In defamation, this includes, among others, determining whether a statement is defamatory and what constitutes an injury to reputation. Finally, both are also subject to affirmative defenses. At common law, truth is an absolute defense to allegations of defamation much the same way that fair use is a defense to copyright infringement.

With respect to defamation, in *Sullivan*, the Supreme Court concluded that the First Amendment requires that some injury to reputation must be tolerated.³⁶⁶ Initially, the Court made clear that defamation is limited to false statements of facts and cannot be imposed based upon a speaker's opinions or ideas.³⁶⁷ With respect to false statements of fact, the Supreme Court requires public officials and public figures to prove constitutional malice: that the defamatory statement was made with the knowledge that it was false or with reckless disregard for the truth.³⁶⁸ In cases in which private individuals are defamed as part of discussions of public issues, the Court prohibits states from imposing liability without fault, and requires constitutional malice for the imposition of heightened penalties like punitive damages.³⁶⁹ In the absence of imposing these new standards of liability, the Supreme Court concluded that speech would be unconstitutionally chilled by fear of damage awards.³⁷⁰ Under these circumstances, the affirmative defense of truth did not alleviate this concern, because speakers may still be deterred from speaking "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."³⁷¹ Limiting the ability of individuals to successfully vindicate reputational harm was, therefore, necessary to create sufficient breathing room for an open and robust marketplace of ideas.³⁷²

Sullivan and its progeny serve as useful markers for establishing the line between protecting the financial interests of copyright owners and the preservation of a vibrant marketplace of ideas. While the defamation analogy may not dictate whether copyright should be limited to virtual appropriation, it certainly suggests the importance of imposing clearer limits on liability even if clarity is only achieved by tolerating some injury to the copyright owner. While limiting

³⁶⁵ *Gertz*, 418 U.S. at 340 ("there is no constitutional value in false statements of fact").

³⁶⁶ *Sullivan*, 376 U.S. at 271-73.

³⁶⁷ *Id.* at 271-72.

³⁶⁸ *Id.* at 279-81.

³⁶⁹ *Gertz*, 418 U.S. at 349.

³⁷⁰ *Sullivan*, 376 U.S. at 277-79.

³⁷¹ *Id.* at 279.

³⁷² Rather than limiting liability, an alternative approach would not have changed the standard for liability but would have limited the damages that may be awarded. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 771 (1985) (White, J. concurring) ("The necessary breathing room for speakers can be ensured by limitations on recoverable damages . . ."); Richard Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782 (1986); Pierre Leval, *The No-Money, No Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 Harv. L. Rev. 1287 (1988).

copyright liability to virtual appropriation is the clearest way to achieve this clarity, clarity could also be achieved by categorically exempting certain uses including education, news reporting, non-commercial uses, comments, criticism, and parody. Similarly, the defamation cases suggest that liability cannot be imposed without fault. At the very least, this suggests that copyright liability for subconscious copying is unconstitutional. Likewise, because fair use is an affirmative defense, it should no longer be relied upon to create the necessary breathing room for freedom of expression. Like the defense of truth, the possibility of a successful fair use defense is insufficient to dispel the chill of copyright liability. This does not mean that fair use no longer has a role in copyright, only that fair use no longer reconciles copyright restrictions upon expression and the First Amendment's protection of freedom of expression.

C. Insufficient Government Interests

First Amendment scrutiny will also require courts to evaluate the arguments put forward to support greater restrictions upon expression. Is a policy of expanding copyright to make investments in copyright more lucrative or to protect the economic interests of existing copyright holders a legitimate governmental interest unrelated to the suppression of expression? Beyond virtual appropriation, copyright goes beyond the original purpose of preventing market failure and its complementary function of making markets for speech more efficient. While preventing virtual appropriation as a response to market failure is clearly a legitimate if not compelling governmental interest,³⁷³ at first glance, neither the goal of increasing economic incentives nor protecting existing economic interests, represent legitimate let alone compelling governmental interests.³⁷⁴

For the sake of this discussion, let us assume that increasing copyright protection does in fact increase the incentives for authors to create and invest in new works.³⁷⁵ Under these circumstances, copyright would essentially be subsidizing copyright proprietors to increase their power in the marketplace of ideas. By granting exclusive rights to expression beyond virtual appropriation, copyright gives copyright proprietors the power to act as gatekeepers for a wide array of speech markets. This gatekeeping power allows them both to suppress competing expression within a given market and to use that control to generate wealth, thus increasing their relative ability to influence other markets for expression. There is no First Amendment precedent for such a goal.

With few exceptions, the Supreme Court has concluded that it is not a legitimate government interest to regulate expression to improve the marketplace of ideas even if it is to allow speakers with fewer resources or access to media of mass communication to convey their messages as effectively as those with such

³⁷³ While the reproduction prong of virtual appropriation, preventing someone from telling the same story is consistent with copyright as originally conceived at the founding era, the additional protection of derivative works, the power to prevent others from retelling the story in a different medium, was not recognized at the time.

³⁷⁴ Joseph Fishman argues that increased copyright restraint can lead to greater creativity, see Fishman, *supra* note 238. To the extent that the government's interest in suppressing expression is a desire for greater variation of expression, it is at odds with the First Amendment. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643-44 (1994) (finding that 'must carry' rules were content neutral because they focused upon the means television programs were transmitted and not their content).

³⁷⁵ There is virtually no empirical evidence to support this claim. See *Eldred v. Ashcroft*, 537 U.S. 186, 254-55 (2003) (Breyer, J. dissenting). See also Raymond Shih Ray Ku et al., *Does Copyright Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 *Vand. L. Rev.* 1669 (2009).

resources.³⁷⁶ In the few cases that the Court did consider that purpose legitimate, its conclusion was based upon the concentrated market power of the speaker that essentially allowed them to act as gatekeepers.³⁷⁷ The purpose of increasing copyright protection beyond virtual appropriation is the exact opposite of the First Amendment access and campaign finance cases.³⁷⁸ Increasing copyright protection beyond virtual appropriation gives copyright owners gatekeeping power and the ability to use that power to increase the relative wealth disparities in the market. There may be a certain appeal to this when that power is used by the artistic Davids of the world -- an unemployed J.K. Rowling, for example -- to prevent overreaching Goliaths from stealing their works. However, because copyright protection is biased in favor of existing copyright owners, it is more likely that modern day Goliaths -- Walt Disney, for example -- will silence, or at least bully, the artistic Davids. If a purpose of reducing disparities in the marketplace of ideas and preventing certain speakers from acting as gatekeepers does not always satisfy intermediate scrutiny, the purpose of increasing those disparities and providing copyright owners with even greater gatekeeping power should most certainly not.

Even more damning, under these circumstances, exclusive rights are clearly related to the suppression of expression. Increasing a copyright owner's incentives is achieved by preventing others from using copyrighted works as part of their own expression. For example, even without the derivative work right, J.K. Rowling can create and license motion pictures based upon her books, and the reproduction right would prevent others from pirating her books and the motion pictures. The derivative work right, however, grants Rowling the additional power to suppress expression by prohibiting the creation and distribution of any other motion pictures based upon her writings. Likewise, she may suppress any other expression substantially similar to or based upon her works. The suppression of speech is the mechanism that allows Rowling to reap monopoly rewards. While some may believe that Rowling should be entitled to this privilege because it will provide her with greater incentives to write *Harry Potter*, it is unfair, or because borrowing from her is insufficiently creative, regardless of the justification, copyright's purpose is clearly related to the suppression of expression. Once again, under First Amendment analysis, this is problematic, to put it mildly.

Relatedly, to the extent that copyright responds to more than market failure but is a *quid pro quo* between the public and authors, there is no *quid pro quo* for the public. In addition to responding to market failure, copyright is also described as a *quid pro quo* in which the public is willing to provide authors with copyright protection in exchange for creating works, making them available to the public, and upon the expiration of copyright protection, for the work to become part of the public domain.³⁷⁹ Once again, prohibiting virtual appropriation has historically been understood to ensure this *quid pro quo*. However, there is no such guarantee beyond virtual appropriation. While greater protection may provide greater financial rewards for copyright owners, these rewards come with no obligation to create new works of their own. For example, the copyright owners of *Seinfeld* did not have to create a trivia book before they could prevent the creation and publication of the *SAT*, and they were under no obligation to do so.³⁸⁰

³⁷⁶ See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

³⁷⁷ See *Turner Broadcasting*, 512 U.S. at 643-45; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

³⁷⁸ *Buckley*, 424 U.S. at 14.

³⁷⁹ *Eldred*, 537 U.S. at 214.

³⁸⁰ See *supra* Part III.B.

Copyright law allows J.D. Salinger to prohibit the writing and publication of a sequel to *Catcher in the Rye* even when he has no intention of writing a sequel of his own. Authors and copyright owners may wish to create substantially similar works, perform their works publicly, or create any number of derivative works, but they are under no obligation to do so. If they create those works, a limited reproduction right protects those works from piracy. To the extent that copyright owners license such opportunities to others, which is usually what occurs because novelists are not filmmakers, toymakers, or computer programmers, the licensee provides the *quo*. The copyright owner only provides permission.

D. Inadequate Tailoring

Finally, assuming that there are legitimate interests unrelated to the suppression of expression that justify extending protection beyond virtual appropriation, the First Amendment requires courts to consider whether the means chosen are sufficiently tailored to protect those interests while preserving freedom of speech. Courts will need to consider whether protecting copyright holders beyond prohibiting virtual appropriation burdens “substantially more speech than is necessary to further the government’s legitimate interests.”³⁸¹ As the Supreme Court more recently stated,

The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress’ goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished.³⁸²

The Supreme Court’s decision is especially noteworthy because a majority of the Court concluded that the availability of commercial Internet filtering software represented a less restrictive means of protecting children from unwanted exposure to online content.³⁸³ The Court reached this conclusion despite Justice Breyer’s dissenting argument that the majority essentially concluded that doing nothing was a less restrictive alternative.³⁸⁴ Because parents already had the option to use filtering software, he would have asked whether there were less restrictive steps the government could take in addition to the status quo.³⁸⁵ So, are the less restrictive alternatives to protect the interests of copyright owners beyond prohibiting virtual appropriation?³⁸⁶

Depending upon the interest being asserted, there are a wide variety of alternatives to the recognition of exclusive rights in expression. Are alternative protections including the right of attribution -- to be accurately identified as the author -- or alternative means of compensation such as compulsory licensing

³⁸¹ Ward v. Rock Against Racism, 491 U. S. 781, 799 (1989).

³⁸² Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004).

³⁸³ Id. at 667.

³⁸⁴ Id. at 684 (“It is always less restrictive to do *nothing* than to do *something*.”) (Breyer, J., dissenting).

³⁸⁵ Id.

³⁸⁶ Then-Professor Breyer argued that a variety of legal tools and strategies could protect the interests of authors and publishers without resorting to the exclusive rights under copyright law. See Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970).

sufficient to protect the interests of copyright owners?³⁸⁷ Would a right of first refusal or a right of first adaptation for derivative works respond to the moral and fairness concerns when someone wants to retell the same story in a different medium? Does Congress go too far in burdening free expression when it relies upon exclusive rights instead? And, to what extent does the length of copyright protection impact all of these considerations? It may be that copyright protection was sufficiently tailored when authors were required to take affirmative steps to obtain and maintain copyright protection for an initial period of fourteen years. Under those circumstances, the default would be free expression, and when an author took the necessary steps to prevent others from using their work, new authors would be able to make use of them in their lifetimes. It is more difficult to conclude that copyright is narrowly tailored when it prevents three generations of authors from making all but *de minimis* uses of a work as part of their own creative expression.

Consider the derivative work right once again. The derivative work right currently allows copyright owners to control any work based upon and incorporating the original.³⁸⁸ As a supplement to the reproduction right, it goes beyond the original need to prevent market failure. It allows copyright owners to prevent a filmmaker from making a motion picture based upon their novel; a painter from painting a scene from their motion picture, a sculptor from sculpting their character, and sequels and prequels in any means of expression, including those not yet invented. As the creator of *Star Wars: Episode IV – A New Hope*, under the derivative work right, George Lucas could not only create sequels to the original, license toys, costumes, novels, television programs, and video games, but could prevent anyone else from doing the same and even from creating anything new in the Star Wars universe. And, now, because Disney owns the copyright,³⁸⁹ Disney may prevent even Lucas from creating new stories and works based upon his far, far away galaxy. While Lucas introduced audiences to the *Star Wars* universe, he did not create it, at least not in the biblical sense. While he told stories of Luke Skywalker and Darth Vader and about the struggle between Jedi and the Sith, he did not give form to every rock and stone, every creature, every individual in that universe, and he certainly did not tell all the stories that could be told. Yet, copyright prevents anyone from using their imagination and creativity to explore and give form to any part of that universe or to write new chapters in the struggle between the light and the dark. Given the breadth of this right, the derivative work right arguably represents the antithesis of narrow tailoring.³⁹⁰

In this context, copyright and defamation share one last thing in common: both can be vindicated without resorting to monetary damages. This is important because in both cases, it is the fear of crippling financial judgments and the cost of defending against such claims that chills free expression.³⁹¹ While

³⁸⁷ Compulsory licensing allows recording artists to cover other music and allows cable companies to retransmit television broadcasts, among others. It is also an alternative means of compensating copyright holders for downloaded content. See generally Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 305-15 (2002) (discussing alternatives to copyright to promote the creation of music, including a proposal for compulsory licensing).

³⁸⁸ 17 U.S.C. § 106 (2012).

³⁸⁹ Matt Krantz et al., *Disney buys Lucasfilm for \$4 billion*, USA Today, (Oct. 30, 2012, 10:15 PM), <https://www.usatoday.com/story/money/business/2012/10/30/disney-star-wars-lucasfilm/1669739/>.

³⁹⁰ For an excellent critique of the derivative work right, see Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002); see also Tushnet, *supra* note 47, at 541-42.

³⁹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”).

Sullivan addressed this by clarifying and raising the liability standard for successful defamation lawsuits,³⁹² and courts could do the same in copyright, this is not the only solution. In *Dun & Bradstreet v. Greenmoss Buildings*, Justice White argued that the “necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving public figures of any room to vindicate their reputations.”³⁹³ Limiting the remedies available to defamation plaintiffs by recognizing only nominal damages and/or a declaration of falsity, defamation law would still protect individual reputation and freedom of speech.³⁹⁴ This alternative deserves serious consideration as *Sullivan* has been criticized for both inadequately protecting individuals from defamation and, more importantly, failing to reduce the fear and cost of litigation in cases involving public figures.³⁹⁵ With respect to the latter, constitutional malice only shifts the focus of defamation suits from whether the speech was false and injured the plaintiff’s reputation to whether the plaintiff is a public figure.³⁹⁶

To the extent that *Sullivan* did not sufficiently dispel the chill of defamation litigation and liability, Congress and the courts should reconsider copyright remedies in addition to liability. It is difficult to argue with the idea that Lucas deserves recognition, acknowledgement, even praise when others build upon his work as part of their own creative expression. But recognition, acknowledgement, and praise are not the same as control. Limiting copyright’s remedies to require attribution and/or disclaimers or to limit the monetary awards for infringement will certainly represent less restrictive and less chilling alternatives to copyright’s current remedies which include the potential for significant penalties in the form of monetary damages, statutory damages, punitive damages as well as criminal liability, injunctions, and the destruction of the infringing works.

So, what’s the big deal? It’s a big deal because entertainment is speech. It’s a big deal to the entertainers who choose to express themselves with the works of others. It’s a big deal to audiences who want access to that speech. And, it’s a big deal because restricting expression is inconsistent with freedom of speech.

VI. CONCLUSION

The First Amendment and the Copyright Clause can protect and promote freedom of expression. Nonetheless, they also exist in tension with one another. While the creation of exclusive rights to expression can promote freedom of speech, by its very nature, copyright suppresses expression. In other words, it is strong medicine, and like chemotherapy, creating exclusive rights in expression can cure what ails us, but can also destroy what is healthy. In its first incarnation,

³⁹² *Id.* at 279 (requiring plaintiffs in defamation cases involving public officials to provide that the alleged statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not”). For an excellent discussion of the decision, its backgrounds, and a survey of its critics, see John Bruce Lewis & Bruce L. Ottley, *New York Times v. Sullivan* at 50: Despite Criticism, The Actual Malice Standard Still Provides “Breathing Space” for Communications in the Public Interest, 64 *DePaul L. Rev.* 1 (2014).

³⁹³ 472 U.S. 749, 771 (1985) (White, J., dissenting). See also, Epstein, *supra* note 372, at 798; Leval, *supra* note 372, at 1287-91.

³⁹⁴ *Dun & Bradstreet*, 472 U.S. at 771 (White, J., dissenting). See also, Epstein, *supra* note 372, at 798; Leval, *supra* note 372, at 1287-91.

³⁹⁵ Epstein, *supra* note 372, at 783-84; Russell L. Weaver & Geoffrey Bennett, Is the New York Times “Actual Malice” Standard Really Necessary? A Comparative Perspective, 53 *La. L. Rev.* 1153, 1154-55 (1993).

³⁹⁶ Weaver & Bennett, *supra* note 395, at 1154-55.

the Licensing Act, exclusive rights to print became the vehicle for government censorship and the mechanism for monopoly control of the print industry.³⁹⁷ The Anglo-American tradition of protecting freedom of expression, including the adoption of the First Amendment, was a direct response to this threat to speech.³⁹⁸ So too were the Statute of Anne and the Copyright Clause, which repurposed these exclusive rights for the public benefit.³⁹⁹

Very early on, courts recognized that copyright can be a threat to itself. Aggressive interpretation and enforcement of copyright would threaten the very expression it was meant to promote. For well over a century, together with Congress, the judicial branch has attempted to resolve this conflict internally within copyright without reference to the First Amendment. The doctrine of fair use and the idea/expression doctrine became the principle pillars to uphold copyright's value of expression. And while these can and do uphold the freedom of authors to create their own expression, as internal limits within copyright, it raises the very real possibility that judges will overlook the First Amendment forest for the copyright trees. The promise of creative freedom under copyright is not necessarily equivalent to the freedom guaranteed by the First Amendment. Fair use is not free speech. As this Article demonstrates, this problem is real.

Moreover, as this Article argues, the Supreme Court created a third pillar to uphold First Amendment values as well. While courts have interpreted the Supreme Court decision in *Bleistein* as a warning to avoid evaluating the execution of a copyrighted work (i.e., is 2 Live Crew's song a good song, or a good parody?), they have ignored or failed to appreciate the more fundamental significance of *Bleistein*. According to Justice Holmes, the Copyright Clause prohibits Congress and the Courts from discriminating against authors because the subject matter of their works may be considered unimportant or unworthy. To reiterate, the true meaning of the non-discrimination principle is a promise that copyright will treat all works of authorship equally. It will provide authors with the same degree of protection and the same degree of freedom. By adopting this principle, Justice Holmes not only articulated one of the bedrock principles of copyright law, he anticipated what would become one of the bedrock principles of First Amendment law as well: the prohibition against content-based discrimination.

Unfortunately, as this Article also demonstrates, not only have courts ignored or failed to recognize the full implications of *Bleistein*, they have undermined the two other pillars as well. By discriminating against works of entertainment, copyright infringes upon the freedom of expression of authors creating such works. Beginning with a simple, yet disconcerting question, this Article argues that copyright currently suppresses the creativity that it is supposed to promote and does so through a bizarre series of contradictions and hypocrisies allowing judges to restrict expression based upon their subjective interpretation of the value of that expression. The fact that courts engaged in this discrimination for so long neither excuses nor justifies this restriction. As Justice Oliver Wendell Holmes once wrote:

It is revolting to have no better reason for a rule of law than that so
it was laid down in the time of Henry IV. It is still more revolting
if the grounds upon which it was laid down have vanished long

³⁹⁷ See generally Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Rev. Ed. 2003) (discussing the history and origins of copyright law).

³⁹⁸ Erwin Chemerisnky & Howard Gillman, *Free Speech on Campus* 30 (Yale 2017).

³⁹⁹ Goldstein, *supra* note 397, at 40-43; Bettig, *supra* note 277, at 17-23; Patterson, *supra* note 115, at 12-15.

since, and the rule simply persists from blind imitation of the past.⁴⁰⁰

There may be reasons for restricting the freedom of speakers when their speech is primarily intended to entertain audiences. It may likewise be Constitutional to base this discrimination upon subjective evaluations of the value of those contributions or their relative worth compared works of science, social science or fine art. However, blind imitation neither justifies the practice nor supports its Constitutional legitimacy.

While this Article has outlined copyright's First Amendment problems and identified some possible solutions, it is only a beginning. And, while the problem is complicated and addressing it will be challenging, it is a problem that cannot be ignored. In the 18th Century when copyright was adopted, the expressive world was a world of scarcity.⁴⁰¹ The economics of printing and subsequent means of distributing expression relied heavily upon the exclusive rights created by copyright. After all, neither authors nor audiences are served if they cannot reach one another. Copyright made that possible, even if it resulted in distributors gaining significant power and wealth because of their control over the means of distribution. This is no longer the world in which we currently live. The arrival of digital technology has created a world in which expression is no longer scarce by its very nature or due to the economics associated with its creation and distribution.⁴⁰² Just the opposite. We live in a world of potentially limitless abundance. This is a world where everyone can become an author and reach audiences large and small who appreciate their creative expression. Some will create entirely new worlds while others will mix, remix, mashup, and otherwise use the works of others as raw material for their own expression. In the 21st century, the old economics no longer apply.⁴⁰³ And, while copyright may still play an important role in this world, it poses the very real danger of subtracting more expression than it adds.

For artists, it is hard enough to hear one's muse and find the confidence to tell one's story without the noise of others telling you what you can and cannot do, that the story you wish to tell or the way you wish to tell it is not right, proper, or good enough. Copyright should not add fear to that self-doubt -- fear of serious legal consequence for violating rules that defy definition. We all deserve the right to prevent others from pirating our stories, and we all deserve the freedom to tell our stories as we see fit. For too long, copyright has balanced these two principles on the backs of authors of entertainment in a manner that simultaneously exalts and denigrates their works. It is time to end copyright's double standard, and to begin protecting and promoting the rights and freedom of all authors.

⁴⁰⁰ Oliver Wendell Holmes, Jr., *The Path of Law*, 10 *Harv. L. Rev.* 457, 469 (1897).

⁴⁰¹ *Ku*, *supra* note 387, at 294-99.

⁴⁰² *Id.* at 300-05.

⁴⁰³ *Id.* at 323; accord *Beebe*, *supra* note 18, at 388-95 (discussing the implication of understanding the Copyright Clause as promoting aesthetic progress and its implications in a post-scarcity world).