

# LIBERATING COPYRIGHT: THINKING BEYOND FREE SPEECH

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*Scholars have often turned to the First Amendment to limit the scope of ever-expanding copyright law. This approach has mostly failed to convince courts that independent review is merited and has offered little to individuals engaged in personal rather than political or cultural expression. In this Article, I consider the value of an alternative paradigm using the lens of substantive due process and liberty to evaluate users' rights. A liberty-based approach uses this other developed body of constitutional law to demarcate justifiable personal, identity-based uses of copyrighted works. Uses that are essential for mental integrity, intimacy promotion, communication, or religious practice implicate fundamental rights. In such circumstances, the application of copyright law deserves heightened scrutiny. The proposed liberty-based approach shores up arguments that some personal uses should be lawful and suggests that such uses should not be limited to those that are private and not for profit.*

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## INTRODUCTION

Even though there have been ever-increasing calls by intellectual property (IP) scholars for greater First Amendment scrutiny in copyright cases, there has been a virtually unrelenting rejection of First Amendment review in copyright cases.<sup>1</sup> In a world of ever-expanding copyright laws, substantial statutory damages for copyright infringement, and increasing criminal enforcement of copyrights, the limits of the First Amendment approach are particularly worrisome.<sup>2</sup> Instead

<sup>1</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218–21 (2003) (rejecting a First Amendment challenge to the Copyright Term Extension Act and suggesting that only rarely will independent First Amendment review be warranted in the context of copyright law); see also *infra* notes 59 & 64 and accompanying text. One of the only notable exceptions to the rejection of First Amendment review is the recent decision in *Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009) (granting summary judgment on plaintiff's First Amendment claim on remand after reversal by the Tenth Circuit). As I will discuss, there are many reasons to think that *Golan* will not herald an era of greater First Amendment scrutiny in copyright cases. See *infra* notes 63–70 and accompanying text. For citations to scholarship discussing independent First Amendment review in copyright cases, see *infra* note 58.

<sup>2</sup> Copyright terms have been extended eleven times over the last forty years, the works covered by copyright law have expanded, criminal penalties and enforcement have been added, circumvention of digital rights management is now a criminal offense, and statutory damages for copyright infringement can run as high as \$150,000. See 17 U.S.C.

of beating this same old drum, I consider the value of an alternative theory. The alternative paradigm that I propose is grounded in our understanding of the “liberty” protected by the Fifth and Fourteenth Amendments. The liberty lens that I propose does not provide a comprehensive theory of all copyright uses nor does it call into question the freedom of speech approach that has been proposed by other scholars. But it does provide a compelling foundation for certain types of uses by individuals that are integral to those individuals’ identities. Such an approach provides insight into how to distinguish personal uses that should be constitutionally privileged from those that should not.

Identity-based uses of copyrighted works are ones that are integral to constructing personal identity. In particular, I consider uses essential to mental integrity, intimacy, communication, and religious practice. I will provide a few examples here and then elaborate upon these and others in Part IV. The first example involves a woman who plays Journey’s “Don’t Stop Believin’” on a loop on her publicly accessible blog (her online diary) with an entry that describes her experience of being raped. The Journey song had been playing on the car stereo while she was assaulted. Her blog entry and the playing of the music in conjunction with the text is part of her coping process. Suppose the band objects to her public performance and copying (to a digital format) of its copyrighted composition, lyrics, and performance.<sup>3</sup> Under current copyright law, she could easily be found liable for copyright infringement, particularly given the use of the entire song (repeatedly); liability would be even more likely if she sold advertising space on her blog (a common funding mechanism for many blogs).<sup>4</sup>

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§§ 302, 504–506, 1203–1204 (2006); 18 U.S.C. §§ 2319, 2319A, 2319B (2006); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1042 (2005); see also *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, Pub. L. No. 110-403, §§ 208, 301–303, 401–403, 122 Stat. 4256, 4263–69, 4271–73 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., and 42 U.S.C.) (establishing a division in the Department of Justice to enforce copyrights).

<sup>3</sup> Based on my experience working in the entertainment industry, many music labels and performing artists refuse to license their music if it will be played during a scene with a sexual assault.

<sup>4</sup> The copying of the song to a digital format, the creation of a derivative work, and the public performance of the song via digital transmission all violate Section 106 of the Copyright Act. 17 U.S.C. § 106. A fair use defense is likely to be rejected in this instance given that the entire work is used without alteration and without commenting on the underlying work. See *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (“[G]enerally, it may not constitute a fair use if the entire work is reproduced.” (quoting NIMMER ON COPYRIGHT § 13.05[A][3] at 13–178 (1997))); see also discussion *infra* Parts I, II.C, VI. The advertising on the website makes it more likely that the use will be categorized as commercial. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 722–23 (9th Cir. 2007) (holding that an Internet search engine is a commercial service because it sells advertising); cf. *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 307–08 (D.N.J. 1998)

The next example involves the publication of Anaïs Nin's diaries that contain passages from letters written to her, including some from the prominent author Henry Miller.<sup>5</sup> Suppose that Henry Miller or any of the other letter writers had sought to enjoin the publication of Nin's diaries because of the inclusion of excerpts from their copyrighted letters. Current copyright law likely would have prevented Nin from going forward without their permission.<sup>6</sup>

Consider also the use of copyrighted works on the MySpace page of Samantha Ronson, the off-again, on-again girlfriend of paparazzi magnet and actress Lindsey Lohan. A photographer caught Lohan and Ronson kissing at a party at the Cannes film festival and the photograph of the two of them was subsequently published. Ronson posted the photo to her MySpace page.<sup>7</sup> Under copyright law, she violated the photographer's copyright by posting the picture without the copyright holder's permission.<sup>8</sup> Neither the fair use doctrine nor the First Amendment provides Ronson a dependable defense should the copyright holder decide to sue her.<sup>9</sup>

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(suggesting in the trademark-dilution context that a website is commercial because of links to organizations that sell merchandise). A finding that the use is commercial will also weigh against a fair use finding. 17 U.S.C. § 107(1); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.").

<sup>5</sup> See 1-7 ANAÏS NIN, *THE DIARY OF ANAÏS NIN* (Gunther Stuhlman ed., 1931-1974) [hereinafter *NIN, DIARY*]; see also ANAÏS NIN, *A LITERATE PASSION: LETTERS OF ANAÏS NIN AND HENRY MILLER, 1932-1953* (Gunther Stuhlman ed., 1987) (published with permission from the Anaïs Nin estate).

<sup>6</sup> Fair use is often rejected when works are unpublished. See *Harper & Row*, 471 U.S. at 551-52 (rejecting fair use argument when a magazine published excerpts of an unpublished memoir). Unsurprisingly, most personal letters are unpublished. Courts have routinely dismissed fair use defenses for publications of letters on this ground and others. See, e.g., *Sinkler v. Goldsmith*, 623 F. Supp. 727, 732 (D. Ariz. 1985) (allowing a copyright action for the publication of a letter by its recipient); see also *infra* note 269 and accompanying text. Henry Miller apparently gave Nin his permission to publish his letters. See 6 *NIN, DIARY*, *supra* note 5, at 307 ("Henry gave me a present of the copyright on his letters to me.").

<sup>7</sup> See Nicole Carter, *Lindsay Lohan Pal Posts Infamous Photo on MySpace*, NYDAILYNEWS.COM, Jul. 7, 2008, [http://www.nydailynews.com/gossip/2008/07/07/2008-07-07\\_lindsay\\_lohan\\_pal\\_samantha\\_ronson\\_posts\\_.html](http://www.nydailynews.com/gossip/2008/07/07/2008-07-07_lindsay_lohan_pal_samantha_ronson_posts_.html). The photograph is credited as copyrighted by Celebrity Vibe, a "digital news photo service specializing in Celebrity Parties, music, fashion and lifestyles." See *Celebrity Vibe*, <http://www.celebrityvibe.com/> (last visited Dec. 19, 2009). For simplicity, I suggest that the photographer owns the copyright in the photograph, but it is likely that he either sold the copyright to Celebrity Vibe or was an employee of that photo service.

<sup>8</sup> 17 U.S.C. § 106; see also *Natkin v. Winfrey*, 111 F. Supp. 2d 1003 (N.D. Ill. 2000) (permitting copyright infringement action to proceed against Oprah Winfrey for publishing photographs of her that had been taken by freelance photographers); cf. *Cory v. Physical Culture Hotel*, 14 F. Supp. 977 (W.D.N.Y. 1936) (holding that use of photograph of defendant's hotel by defendant infringed photographer's copyright).

<sup>9</sup> Ronson would have an uphill battle with a fair use defense because she posted the photograph in its entirety without alteration or comment and her MySpace page advertises her commercial DJ services. See *supra* note 4; see also *Fitzgerald v. CBS Broad., Inc.*, 491 F.

In each of the preceding examples, copyrighted works have become interwoven with individuals' lives; the uses document (the paparazzo photo on MySpace), contextualize (sharing received letters), or reframe (the song on the blog) these experiences. Under the proposed substantive due process framework, each of these identity-based uses of copyrighted works should merit constitutional protection. These uses are less about self-expression, although they involve such expression, and more about using the very building blocks that construct each person's identity.

The paradigm shift that I propose is particularly important given that many uses of copyrighted works that previously were under the radar are now made public and/or capable of detection.<sup>10</sup> Personal diaries, scrapbooks, and photographs are widely available on blogs, MySpace, Facebook, LiveJournal, and other online formats. In such cybervvenues, individuals regularly incorporate copyrighted works, such as visual art, music, and literature that they have encountered and that have become meaningful to them. It may be only a matter of time before suits are filed against individuals for using copyrighted works on MySpace and Facebook pages. Similar lawsuits have succeeded against individual file sharers who have used peer-to-peer (P2P) networks to download music,<sup>11</sup> and MySpace has already been sued by the recording industry, on a contributory liability theory, for

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Supp. 2d 177, 185–88, 190 (D. Mass. 2007) (rejecting a fair use defense when a photograph was used on a news broadcast in part because the use was commercial and not transformative); *infra* Parts I, II.C, VI.

<sup>10</sup> See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 23–25, 105–33, 189 (Stanford Univ. Press rev. ed. 2003); Julie E. Cohen, Comment, *Copyright's Public-Private Distinction*, 55 CASE W. RES. L. REV. 963 *passim* (2005); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981 (1996) [hereinafter Cohen, *A Right to Read*]; Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1872–74 (2007).

<sup>11</sup> See, e.g., David Kravets, *Jury Dings File Sharer \$675,000, RIAA Prevails—Update*, WIRED, July 31, 2009, <http://www.wired.com/threatlevel/2009/07/jury-dings-file-sharer-675000> (reporting that a twenty-five-year-old student was found liable for \$675,000 in damages for downloading 30 songs); see also *Arista Records LLC v. Does 1–19*, 551 F. Supp. 2d 1, 7–9 (D.D.C. 2008) (denying defendant's motion to quash subpoena and allowing suit to proceed); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 180–81 (D. Mass. 2008) (granting in part and denying in part defendants' motions to quash subpoena, allowing suit to proceed); *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 562–67 (S.D.N.Y. 2004) (denying defendants' motions to quash subpoena and allowing suit to proceed). Since 2003, more than 29,000 individuals have been sued for using the Internet to exchange music and movies. See Austin Wright, *College Ordered to Give Up Names of Students*, VIRGINIAN-PILOT, June 21, 2008, at 1. Even more individuals have received warning notices of copyright infringement with offers of settlement. Wright, *supra*; see also Susan Butler, *Casting the Net: The RIAA Provides an Inside Glimpse into its Battle Against Illegal File Sharing*, BILLBOARD, June 14, 2008, at 10 (“[M]ore than 6,000 letters have been sent to university administrators, asking them to forward the offers of pre-litigation settlement to the file sharers who use the university networks.”).

facilitating the use of copyrighted music by its members.<sup>12</sup> A number of suits have also been filed against YouTube on similar theories.<sup>13</sup> As more and more interaction with copyrighted materials occurs online, we will increasingly see such actions against individuals because technology now can track these uses.<sup>14</sup>

Both the Digital Millennium Copyright Act (DMCA), by making it illegal to assist with the circumvention of digital rights management (DRM), and the use of technological protection measures, by structurally preventing copying, have exacerbated the trend of limiting personal uses.<sup>15</sup> The DMCA also created a take-down notice procedure that encourages companies to remove allegedly infringing postings rather than consider whether they are lawful.<sup>16</sup> Services such as YouTube, Facebook, and MySpace also voluntarily limit what users can do with copyrighted works, and contracts often ask consumers to give away even uncontroversial fair use privileges. Some scholars have expressed very valid concerns that the combination of these private actions will limit uses even beyond what the most conservative reading of copyright law would require.<sup>17</sup>

Many scholars have decried these expansions of copyright law on broad policy grounds. Far fewer, however, have articulated an affirmative theory for why a particular *individual* should be able to use another's copyrighted work. What Jeremy Waldron noted in 1993

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<sup>12</sup> See, e.g., Complaint at 15–17, *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046 (C.D. Cal. Nov. 17, 2006) (No. CV 06-07361).

<sup>13</sup> See, e.g., Complaint at 23–26, *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 07-Civ-2103); see also Complaint at 12–13, *Peermusic, III, Ltd. v. Motive Force LLC*, No. 2:05-mc-02025 (W.D. Pa. Aug. 24, 2009) (alleging a contributory liability theory of copyright infringement in a complaint filed by the music industry against the LyricWiki website that collects song lyrics).

<sup>14</sup> Many companies provide technology to track uses of copyrighted songs and videos. See, e.g., Butler, *supra* note 11; see also DtecNet Home Page, <http://www.dtecn.com/> (last visited Dec. 19, 2009) (advertising “specialized software solutions to track and prevent piracy”).

<sup>15</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) §§ 1201, 1203, 1204 (codified in scattered sections of 17 U.S.C.); see also Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462 *passim* (1998) (analyzing the dangers of DRM and the proprietization of information); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 *passim* (2001) (contending that the DMCA's anticircumvention measure in combination with DRM and TPM alter the fundamental role of copyright law and will greatly limit private copying).

<sup>16</sup> See 17 U.S.C. §§ 512(c)(3), 512(g) (2006); see also Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 621, 623, 641–88 (2006) (analyzing nearly nine hundred cease-and-desist orders and finding a high incidence of questionable uses of the statutory process).

<sup>17</sup> See NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 114–15 (2008); Cohen, *supra* note 15, *passim*; Lunney, *supra* note 15, *passim*; Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 47–50, 55–70 (2007).

remains largely true today—copyright scholarship provides a compelling story of the author but has given much less insight into the “intensity or significance of individual costs” for users who are limited by copyright law.<sup>18</sup> First Amendment approaches may exacerbate this theoretical blindness by focusing on a user “as the bearer of First Amendment rights, or as a dissident citizen trying to have his say in public or cultural life.”<sup>19</sup> Such an approach does not value users in and of themselves as individuals deserving of certain freedoms fundamental to our understanding of “ordered liberty”<sup>20</sup> or the “Pursuit of Happiness.”<sup>21</sup> The First Amendment approach instead has most often been a limited one in which “[f]ar from being an individual right to vindicate one’s autonomy by speaking out as and when one wants—an active right that connotes *liberty*—the First Amendment . . . becomes a matter of the *public’s* right to be the *passive* recipients of information.”<sup>22</sup>

Several First Amendment scholars, most notably Edwin Baker, have presented a more expansive vision of the First Amendment in the context of copyright law—one that embraces the principle that the First Amendment protects a right of “self-expression.”<sup>23</sup> Unfortunately, these advocates of an autonomy-based First Amendment approach have not had any success in persuading courts that individual speech rights should outweigh the speech-producing value of the overall copyright system.<sup>24</sup> One possible reason for this failure is that the broad claim of a general right to self-expression does not provide a basis for distinguishing or limiting uses, making use claims more easily dismissed.

Only a handful of scholars have tried to develop affirmative theories to support use rights outside the free speech rubric. Wendy Gordon, for example, turned the oft-cited natural-rights, Lockean analysis on its head to justify a public right to use intellectual property.<sup>25</sup> Professor Gordon pointed to John Locke’s principle that “enough, and as good” must be left in the commons for others to use

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<sup>18</sup> Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI-KENT L. REV. 841, 845 (1993) (emphasis omitted); see also *infra* notes 29 & 157 and accompanying text.

<sup>19</sup> Waldron, *supra* note 18, at 847 (footnote omitted).

<sup>20</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>21</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>22</sup> Waldron, *supra* note 18, at 857 (emphasis added).

<sup>23</sup> See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 910 (2002); cf. Jed Rubinfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 *passim* (2002) (proposing an approach focused on the protection of imagination).

<sup>24</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); see also *infra* notes 59 & 64 and accompanying text.

<sup>25</sup> See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535–39 (1993).

as a basis to assert the public's right to use nonfungible works.<sup>26</sup> Although Gordon's analysis provides strong arguments for public access, she does not provide individualized bases, other than fungibility, for distinguishing such uses.<sup>27</sup> Moreover, her ultimate doctrinal suggestion that injunctive relief should not apply in many IP cases leaves in place monetary penalties for such uses—penalties that both chill and severely penalize such uses.<sup>28</sup>

More recently, a few scholars, such as Julie Cohen, Jessica Litman, and Joseph Liu, have recognized the lack of a developed theory of the copyright user and have sought to articulate more positive ways of understanding individuals who use copyrighted works.<sup>29</sup> Professor Cohen focuses on identifying justifications for uses of copyrighted works primarily in the context of the Internet, P2P file exchanging, and DRM. She suggests that users have four primary purposes for uses: "consumption, communication, self-development, and creative play."<sup>30</sup> Her project suggests that scholars and policymakers should value such categories of uses and consider "how much latitude the situated user needs to perform [these functions]" in light of the countervailing interests and entitlements of copyright holders and the copyright system.<sup>31</sup> Although Cohen mentions the relevance of privacy, autonomy, and the First Amendment, she does not develop a system for how to distinguish uses from one another or how to compare the interests of users with those of copyright holders, authors,

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<sup>26</sup> *Id.* at 1538–46, 1562–75, 1606–08 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. 11, § 27, at 287–88 (Peter Laslett ed., 2d ed. 1967) (1698)). For another compelling critique of Lockean justifications for strong IP rights, see generally Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 154–66 (Stephen R. Munzer ed., 2001).

<sup>27</sup> *See* Gordon, *supra* note 25, at 1570–72.

<sup>28</sup> *See id.* at 1575–76, 1606. Gordon does suggest that the current monetary penalties should perhaps be modified with judicial supervision akin to a reasonable royalty system. *See id.* As I will discuss, because some uses of copyrighted works are so fundamental to an individual, I do not think an individual should have to pay for those uses. *See infra* Part V. Moreover, reasonable royalty systems are generally determined ex post facto and therefore will have an ex ante chilling effect on uses. The expansion of criminal penalties for copyright infringement in recent years also makes limits on injunctive relief less meaningful.

<sup>29</sup> *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 347–53, 362–67, 373–74 (2005) (contending that copyright law must reinsert the absent user into its analysis); Jessica Litman, *Creative Reading*, 70 *LAW & CONTEMP. PROBS.* 175, 179, 183 (2007) ("We need to take another look at copyright, keeping the significance of readers, listeners, and viewers in mind. When we ignore their role in the copyright scheme, we are left with a copyright law that seems . . . out of kilter."); Litman, *supra* note 10, at 1878–82 (seeking to situate readers, listeners, and viewers at the heart of the copyright system); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 *B.C. L. REV.* 397 *passim* (2003) (noting that "copyright law currently does not have any persuasive or coherent theory of the consumer").

<sup>30</sup> Cohen, *supra* note 29, at 370.

<sup>31</sup> *Id.* at 374.

and the overall copyright system.<sup>32</sup> In fact, Cohen concedes that she has no interest in evaluating “each user’s needs . . . on a case-specific basis[,] [n]or . . . recogniz[ing] . . . certain social patterns of information use as fair use.”<sup>33</sup> Nevertheless, Cohen’s work is an important step in the direction of creating a more positive portrait of the user by articulating affirmative values for some uses.

Similarly, Professor Liu’s work paints a positive picture of users. Liu suggests that users have legitimate interests in using, primarily *consuming*, copyrighted works. He defends “consumptive” rather than “productive” uses.<sup>34</sup> Liu identifies similar bases as Cohen does for meriting user interests: “autonomy, communication, and creative self-expression.”<sup>35</sup> He advocates that legislators and the market should do a better job of taking consumers’ interests to heart. If those parties do not, then Liu suggests that the fair use defense should stand in to protect consumer interests.<sup>36</sup> Liu does not provide a developed framework for distinguishing more or less privileged uses nor does he provide guidance in weighing such uses against the interests of copyright holders.

Taking things a step further, Jessica Litman and a few others have suggested that some “personal uses” should be excluded from copyright’s reach.<sup>37</sup> Like Cohen and Liu, Professor Litman portrays users of copyrighted works in a more positive light.<sup>38</sup> She convincingly con-

<sup>32</sup> In other contexts, Cohen has developed a robust theory of “informational privacy” which no doubt informs and permeates her discussion of uses of copyrighted works. See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 *passim* (2000); see also *infra* note 166 and accompanying text.

<sup>33</sup> Cohen, *supra* note 29, at 373.

<sup>34</sup> Liu, *supra* note 29, at 400.

<sup>35</sup> *Id.* at 399, 406–20; see also Joseph P. Liu, *Enabling Copyright Consumers*, 22 BERKELEY TECH. L.J. 1099, 1113 (2007) (suggesting that autonomy interests apply to “consumption of copyrighted works”).

<sup>36</sup> Liu, *supra* note 29, at 427–28. For a discussion of the challenges of the fair use doctrine, see *infra* Parts I.B, III.C.5, VI.

<sup>37</sup> See Litman, *supra* note 10, *passim*; see also Jessica Litman, *Real Copyright Reform* 9–12, 30–32, 38–39 (Univ. of Mich. L. Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 168, 2009), available at <http://ssrn.com/abstract=1474929> (calling for immunity from copyright infringement liability for nonpublic, noncommercial personal uses). For an earlier incarnation of an argument defending personal uses, see L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 105, 193–96 (1991) (suggesting an exemption for uses that are private and not for sale); see also Baker, *supra* note 23, at 901–04 (proposing a broad exception to copyright protection for non-commercial uses).

<sup>38</sup> I note that to promote this goal, Litman prefers referring to users as “persons,” “people,” “individuals,” or “readers, listeners, [and] viewers” as opposed to “consumers,” “users,” or “fans.” See Litman, *supra* note 10, at 1878–79, 1894. Her point is a useful one, but I have nevertheless adopted the term “users” (although I also use “people” and “individuals” throughout). I do so not only because of its linguistic efficiency, but also because it is broader in scope than the passive activities of reading, listening, and seeing. Moreover, I think the term must be reclaimed from any pejorative connotations by its proud embrace.

tends that “copyright law was designed to maximize the opportunities for nonexploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins.”<sup>39</sup> She refers to such personal uses as “copyright liberties.”<sup>40</sup> Litman’s point, however, is not rooted in the “liberty” of the Fifth and Fourteenth Amendments but instead primarily in copyright history, legal precedents, and the underlying justifications for copyright protection.<sup>41</sup> She posits that since most personal uses have traditionally been permitted, many personal uses should remain free from copyright enforcement.<sup>42</sup>

Litman tries to define personal use broadly as “a use that an individual makes for herself, her family, or her close friends.”<sup>43</sup> Litman’s definition initially seems expansive. She allows that personal uses could be in public or private, commercial or not.<sup>44</sup> But Litman ultimately defines the scope of *lawful* personal uses much more narrowly. She suggests a number of principles for evaluating the legality of personal uses: in particular, she notes that uses that are “noncommercial” should be favored over those that are commercial and that “private” uses should be favored over those that are public.<sup>45</sup>

There is much with which to agree in Litman’s analysis, and I strongly support her call for greater protection of personal uses and a recognition that the public is at the heart of the copyright system. Nevertheless, several features of her approach and other similar approaches to personal use convince me that we need to root protection for personal uses in a more robust and developed framework. As an initial matter, I am doubtful that the battle to roll back copyright law to a day when most personal uses fell outside copyright law will succeed. There is no agreement historically about whether such uses were excluded from or included within copyright’s scope.<sup>46</sup> This is largely true because the parameters of early copyright law did not im-

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<sup>39</sup> Litman, *supra* note 10, at 1879.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 1878–93, 1908.

<sup>42</sup> *See id. passim*; *see also* PATTERSON & LINDBERG, *supra* note 37, at 70–73, 191–97 (examining the historical public-interest focus of copyright law and contending that there has historically been a zone of permissible personal uses). In particular, Litman suggests that section 106 of the Copyright Act should be read to not cover such uses. Litman, *supra* note 10, at 1908, 1920.

<sup>43</sup> Litman, *supra* note 10, at 1894.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 1911–20.

<sup>46</sup> *See* GOLDSTEIN, *supra* note 10, 105–33 (describing the uncertainty about whether private uses are within the scope of copyright); Marybeth Peters, Register of Copyrights, U.S. Copyright Office, *Copyright Enters the Public Domain*, in 51 J. COPYRIGHT SOC’Y U.S.A. 701, 708–09 (2004) (contending that copyright law has not been enforced against individual users because of technological rather than legal obstacles).

plicate personal use,<sup>47</sup> but now that it does, it is difficult to rely on history to curb its application.<sup>48</sup>

Second, given that Litman identifies private and noncommercial uses as preferred,<sup>49</sup> I suspect that if her approach were applied, public and for-profit uses would be left out in the cold. Even Litman's initial attempt at a broad definition of personal uses suggests that uses should only be considered personal if shared with oneself, one's family, or one's close friends.<sup>50</sup> As I will discuss, it may be fundamental to an individual's identity formation and development to use copyrighted works in public—beyond oneself, one's family, or one's close friends.<sup>51</sup> Although one could interpret a use as for "oneself" even if publicly shared, that is not a necessary conclusion from Litman's analysis. I therefore broaden the definition of personal uses to include any use that is driven by a personal, rather than competitive, motivation. As I will discuss, I contend that identity-based personal uses are ones that deserve heightened protection from copyright enforcement.

Moreover, the fact that payment is sought does not necessarily make a use more or less personal. Commercial gain based on selling substitutionary copies of original works without any new material may suggest that a use is not a personal one. But the fact, for example, that a blogger sells advertising on her website or an autobiography is sold for profit rather than given away should not be determinative of whether a use is personal. Although Litman makes no categorical conclusions, her factors strongly favor not-for-profit uses, and her more recent suggestion for revisions to the Copyright Act calls for an

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<sup>47</sup> See PATTERSON & LINDBERG, *supra* note 37, at 70–73, 191–96; Litman, *supra* note 10, at 1873, 1883–93.

<sup>48</sup> I note that the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), does not suggest otherwise. Although the Court acknowledged that the recording of television shows for subsequent watching (time-shifting) was fair use, *id.* at 454–55, this holding does not indicate that the Court excluded personal uses from the purview of copyright law. The very fact that the Court emphasized that time-shifting was occurring, rather than some other use, suggests that the Court relied on "fair use" not "personal use" as the basis of its conclusion. Moreover, technological and market changes since the time of *Sony* suggest that even time-shifting uses might not be held fair today. As technology has improved, digital recordings enable the creation of substitutionary copies in a way not possible at the time of the *Sony* decision. Additionally, at that time there was no home market in old television shows whereas today there is a robust market for such shows. Even at the time, *Sony* barely garnered a majority and the Justices were deeply conflicted about the case. See GOLDSTEIN, *supra* note 10, at 117–33; Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 928–44 (2005).

<sup>49</sup> Litman, *supra* note 10, at 1913–18; see also Litman, *supra* note 37, at 33–36, 38–39 (calling for an exemption from copyright law for noncommercial uses). A number of other scholars have called for a blanket exemption for noncommercial uses. See, e.g., PATTERSON & LINDBERG, *supra* note 37, at 193–96; Baker, *supra* note 23, at 901–04.

<sup>50</sup> Litman, *supra* note 10, at 1894, 1911.

<sup>51</sup> See discussion *infra* Parts III, IV.

exclusion for noncommercial, private use.<sup>52</sup> Others, such as Professor Baker, who have suggested broad exclusions to copyright enforcement, have limited their proposals to noncommercial uses.<sup>53</sup>

At the same time that I worry that Litman's approach would be underinclusive, I am also concerned that any broad exclusion for private, noncommercial copying would significantly damage many major commercial markets given that uses of copyrighted works are increasingly made in private spaces, such as in homes and dorm rooms, albeit over the arguably public medium of the Internet.

There may be some perceived tension between my concerns that the personal-use exemption is both too broad and too narrow. This reflects my commitment to copyright law as an important framework for encouraging and supporting creators, as well as my concern that copyright law has become bloated and overly restricts uses of copyrighted works. The real challenge is in finding a meaningful and normatively supported dividing line between justifiable uses and copyright holders' interests.

Picking up on these calls for greater consideration of consumers, users, readers, listeners, and viewers, and recognizing that there needs to be a stronger foundation for doing so, I seek to develop a constitutional foundation external to copyright law and the Progress Clause to protect individual consumers and users from ever-expanding copyright law. Such a foundation will provide guidance in distinguishing when uses of copyrighted works are more or less fundamental to an individual and assist in determining when an interest in using a work should outweigh the interests of copyright holders, authors, and the copyright system.

This Article considers the value of using the Constitution's protection of "liberty" as a basis for interrogating the scope of copyright. I develop the concept that the underlying values of substantive due process resonate closely with certain uses of copyrighted works—ones that are *integral to an individual's identity*. In such instances the ability of an individual to use a copyrighted work rises to the level of a fundamental right deserving of robust protection from state interference.<sup>54</sup> Using this identity-based model, I explore why and when a use of a

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<sup>52</sup> Litman, *supra* note 37, at 9–12, 30–32, 38–39.

<sup>53</sup> Baker, *supra* note 23, at 901–04; see also PATTERSON & LINDBERG, *supra* note 37, at 193–96; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) (suggesting the possibility of an exemption for noncommercial and private uses). I note that commercial uses have been interpreted in the copyright field to include all uses for which compensation is sought. Rebecca Tushnet, for example, refers to the *New York Times'* use of copyrighted works as a commercial use. See Tushnet, *supra*, at 589.

<sup>54</sup> The creation and enforcement of federal copyright law is state action. See *infra* notes 229–33 and accompanying text.

copyrighted work rises to the level of a constitutionally protected liberty interest. I do this not only to provide a potential defense in copyright cases, but also to provide guidance on the appropriate scope of copyright itself. Copyright is a statutorily created entitlement, and therefore it is eminently appropriate to debate its contours.<sup>55</sup>

Although the Supreme Court has concluded in the context of copyright law that the First Amendment does not bear heavily on the “right to make other people’s speeches,”<sup>56</sup> a liberty analysis demonstrates that one should have a right to use someone else’s copyrighted work to engage with one’s own-lived experiences. Such an approach is justified not by the furtherance of a political, democratic dialogue (the most common First Amendment approach in copyright cases)<sup>57</sup> or even by broad speech-based rights of self-expression, but instead as a fundamental and specific component of who one is.

This Article proceeds in six parts. In Part I, I consider why the First Amendment approach that has dominated copyright scholarship has generally not succeeded in convincing courts to exercise independent First Amendment scrutiny in copyright cases nor in providing much protection for individual users. One cannot move beyond this dominant frame without understanding its limitations.

In Part II, I consider why even if the First Amendment approach were more successful, as currently articulated, it would provide limited protection for personal uses. This is true in part because the First Amendment analysis in the copyright context has most often been situated in a narrow reading of the democratic-society justification for free speech—one that discounts users’ autonomy interests. Even First Amendment theories rooted in self-expression have been of limited value because they have failed to develop more than broad-based speech claims and have often dismissed for-profit uses.

In Part III, I develop what I mean by the liberty-based and substantive due process approach. I situate certain types of uses of copyrighted works—identity-based uses—in the context of long-standing substantive due process protections for identity and personhood. Regardless of whether substantive due process is embraced doctrinally by the courts in copyright cases, thinking about uses of copyrighted works from this perspective can positively influence the way we analyze such uses, even under current copyright law. In this Part, I also consider and reject some likely objections to bringing substantive due process to bear in the context of copyright law. In this discussion, I

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<sup>55</sup> Cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739, 779–82 (1964) (describing property rights as legal constructions by the state and advocating limits on the state’s ability to tie receipt of government entitlements to the sacrifice of individual rights).

<sup>56</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>57</sup> See *infra* Part II.

note ways in which the liberty-based paradigm may escape some of the obstacles that have faced the First Amendment.

In Part IV, I consider specific categories of uses of copyrighted works that should be privileged under this liberty approach. I focus on categories of uses of copyrighted works that are integral to constructing identity. In particular, I consider uses essential to mental integrity, intimacy, communication, and religious practice. In Part V, I discuss the scope of these privileged uses and some relevant limitations. In Part VI, I briefly address the interplay of the liberty approach with existing fair use doctrine.

## I

### CHALLENGES OF THE FIRST AMENDMENT APPROACH

The vast majority of scholarship related to the constitutional dimensions of copyright law has focused on its relationship to the First Amendment.<sup>58</sup> The First Amendment has been the primary avenue for proponents of users' rights to provide a constitutional and theoretical basis for limiting the scope of copyright holders' privileges. This

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<sup>58</sup> See, e.g., NETANEL, *supra* note 17, *passim*; Baker, *supra* note 23, *passim*; Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 *passim* (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 *passim* (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182, 206 (1998); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1059–67 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 *passim* (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 *passim* (1970); Rubinfeld, *supra* note 23, *passim*; Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 *passim* (1971); William W. Van Alstyne, *Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review*, 66 LAW & CONTEMP. PROBS. 225 *passim* (2003).

Scholars have continued to rely on the First Amendment even after *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003), rejected a First Amendment challenge to the Copyright Term Extension Act. See, e.g., DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* *passim* (2009); Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 279–80 (2009); Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 *passim* (2007); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 *passim* (2003) (contending that the First Amendment still has a major role post-*Eldred*); Alfred C. Yen, *Eldred, The First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 688, 695 (2003).

Many other scholars have situated use rights in the First Amendment even if their central projects have not revolved around exploring the relationships between the First Amendment and copyright law. See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 156 (1996); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 261–72 (1998); Tushnet, *supra* note 53, *passim* (promoting the First Amendment values inherent in nontransformative copying); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1547–62, 1566 (2005).

approach has continued to dominate copyright scholarship despite its failure over a nearly forty-year period to convince most courts that it has a major role to play in copyright cases.<sup>59</sup> Although the Supreme Court in *Eldred v. Ashcroft*<sup>60</sup> suggested that the D.C. Circuit “spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment,’”<sup>61</sup> the space the Court left open for independent First Amendment challenges is quite small. First Amendment scrutiny is only merited when Congress “alter[s] the traditional contours of copyright protection.”<sup>62</sup> The Supreme Court did not give examples of what it meant by “traditional contours,” although one might reasonably conclude that a copyright statute that protected ideas or facts or perhaps eliminated the fair use defense would merit First Amendment scrutiny. The recent decision in *Golan v. Holder* suggests that the resurrection of copyrighted works from the public domain might be another such example.<sup>63</sup>

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<sup>59</sup> See Netanel, *supra* note 58, at 3 (noting that in 2002 that First Amendment defenses had been “summarily rejected” in copyright cases); see also NETANEL, *supra* note 17, at 171 (observing in his 2008 book “[c]ourts’ persistent immunization of copyright from First Amendment scrutiny”).

Barton Beebe suggested in his survey of cases invoking fair use from 1978 to 2005 that “First Amendment concerns figured prominently in the opinions”; his point was not, however, that independent First Amendment review had been conducted in those cases. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 573 (2008). Such review was almost never conducted and in the very few instances where it was, the cases were almost uniformly upheld on alternative grounds. See, e.g., *New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (affirming district court’s denial of injunctive relief on the basis of laches rather than the First Amendment and emphasizing that First Amendment considerations are subsumed in fair use analysis); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1171–72 (5th Cir. 1980) (affirming district court on fair use grounds and noting inappropriateness of First Amendment analysis conducted by district court); see generally *First Amendment Cases Provided by Barton Beebe* (on file with author). Most of the surveyed cases that mentioned the First Amendment referred to it in passing unrelated to any significant analysis or by way of noting that the fair use analysis supplants any independent First Amendment review. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263–65, 1267–76 (11th Cir. 2001) (subsuming First Amendment analysis in fair use evaluation). In fact, any mention, however fleeting, of the First Amendment was rare. Out of the 306 fair use cases studied by Professor Beebe, fewer than sixty even mentioned the First Amendment, and of those only five suggested any independent role for the First Amendment; two of those were affirmed on other grounds by appellate courts, one did not actually conduct First Amendment review, one was an unpublished district court decision, and the final one only applied the First Amendment in the context of limiting the scope of relief rather than in the analysis of any defense to copyright infringement. Beebe’s empirical study therefore reinforces the argument that the First Amendment is of limited independent value because of the view that doctrines internal to copyright law, such as fair use, adequately safeguard speech interests. See also *infra* Part I.B.

<sup>60</sup> 537 U.S. 186 (2003).

<sup>61</sup> *Id.* at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).

<sup>62</sup> *Id.*

<sup>63</sup> 611 F. Supp. 2d 1165, 1167, 1176–77 (D. Colo. 2009).

Courts after *Eldred*, with the notable exception of *Golan*, have all rejected independent First Amendment review in copyright cases.<sup>64</sup> In *Golan*, a Colorado district court—after a remand from the Tenth Circuit—held that the provision of the Uruguay Round Agreements Act (URAA) restoring copyright protection to foreign works that had fallen into the public domain violated the First Amendment.<sup>65</sup> Although *Golan* provides some hope that there will be greater First Amendment scrutiny in copyright cases, *Golan*'s value is limited. First, even if the Supreme Court ultimately agreed that the restoration of copyright protection to public-domain works (at least without adequate safeguards for reliance parties) violates the First Amendment, such a holding would have minimal impact in individual infringement cases and most other facial challenges to copyright laws.<sup>66</sup> Second, it is not clear that *Golan* will stand. The case is currently on appeal to the Tenth Circuit,<sup>67</sup> and the D.C. Circuit, without directly ruling on the First Amendment issue, held in *Luck's Music Library, Inc. v. Gonzales* that URAA restoration provisions were constitutional.<sup>68</sup> A First Amendment challenge had been rejected by the district court in *Luck's Music Library*,<sup>69</sup> and was not appealed.<sup>70</sup>

Before considering the value of an alternative constitutional approach, it is useful to understand why the First Amendment has not

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<sup>64</sup> See, e.g., *Kahle v. Gonzales*, 487 F.3d 697, 699–700 (9th Cir. 2007) (rejecting a First Amendment challenge to the renewal and extension of copyright protection, under the terms of the Copyright Renewal Act of 1992, to works that otherwise would have entered the public domain), cert. denied sub nom. *Kahle v. Mukasey*, 128 S. Ct. 958 (2008); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment concerns in copyright cases are subsumed within the fair use inquiry. . . . [I]f the use . . . is not fair use, there are no First Amendment prohibitions against granting a preliminary injunction.”); cf. *Sarl Louis Fer-aud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 482 (2d Cir. 2007) (“With regard to the protections provided by the First Amendment for the unauthorized use of copyrighted material, this court has held that absent extraordinary circumstances, ‘the fair use doctrine encompasses all claims of first amendment in the copyright field.’” (quoting *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993))).

<sup>65</sup> See *Golan*, 611 F. Supp. 2d at 1167, 1174–77. The decision was made after the Tenth Circuit had reversed the district court's opinion that independent First Amendment review was not warranted. See *Golan v. Gonzales*, 501 F.3d 1179, 1187–97 (10th Cir. 2007).

<sup>66</sup> See, e.g., *Kahle*, 487 F.3d at 699–700.

<sup>67</sup> Cross-appeals have been filed in the case. See *Plaintiffs' Notice of Appeal, Golan v. Holder*, No. 1:01-cv-1854-LTB-BNB (D. Colo. June 18, 2009); *Defendants' Notice of Appeal, Golan v. Holder*, No. 1:01-cv-1854-LTB-BNB (D. Colo. June 5, 2009).

<sup>68</sup> 407 F.3d 1262 (D.C. Cir. 2005) (rejecting a challenge to the URAA's restoration of copyright to public-domain works without discussing the First Amendment).

<sup>69</sup> *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118–19 (D.D.C. 2004) (citing *Eldred* and concluding that restoring copyright to public-domain works did not alter the traditional contours of copyright).

<sup>70</sup> The appellants in *Luck's Music Library* did not appeal the district court's rejection of First Amendment review. See *Second Corrected Brief for Appellants, Luck's Music Library, Inc. v. Ashcroft*, 407 F.3d 1262 (D.C. Cir. 2005) (No. 04-5240).

been a more successful defense in copyright cases. My goal with this section is to consider some of the reasons the First Amendment has failed both to protect individual users and to limit most statutory expansions of copyright law. Although there is much to criticize about the unwillingness of courts to conduct First Amendment review in copyright cases, my approach here is to take such rejections as a given.

The First Amendment has been rejected in copyright cases for three primary reasons. First, copyright has traditionally been viewed as an exception to the First Amendment. Second, copyright has a number of built-in speech protections that have been considered adequate to represent free speech interests. Finally, copyright has been deemed an “engine of free expression,”<sup>71</sup> and accordingly the First Amendment and copyright law are treated as a symbiotic pair working together toward the same goal of promoting more speech. I will consider each of these reasons in turn.

#### A. Copyright as an Exception to Free Speech

Although the language of the First Amendment seems absolute, courts have not interpreted it as such, and even scholars who have argued for “absolute” free speech protection have placed significant limits on their theories.<sup>72</sup> Long-standing limits on free speech include exceptions for obscenity, fighting words, true threats, incitement, and child pornography.<sup>73</sup>

Copyright law unquestionably restricts what we are permitted to say and do; after all, it substantially limits our ability to speak (or display or perform) the copyrighted words (or images or music) of others without permission.<sup>74</sup> Nevertheless, courts routinely refuse to conduct First Amendment review in copyright cases.<sup>75</sup> One of the

<sup>71</sup> Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

<sup>72</sup> See, e.g., Stromberg v. California, 283 U.S. 359, 368 (1931); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–27, 36–56, 99–103 (1948) (contending that political speech deserves absolute protection, but other speech deserves less protection).

<sup>73</sup> See, e.g., New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography exception); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement exception); Roth v. United States, 354 U.S. 476, 481–85 (1957) (obscenity exception); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–74 (1942) (fighting words exception); see also Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290–93 (2001) (discussing true threats exception).

<sup>74</sup> Several scholars have highlighted this obvious, although often overlooked, proposition. See, e.g., Rubinfeld, *supra* note 23, at 5–7, 48–49 (contending that copyright law imposes content-based speech restrictions deserving of strict scrutiny); see also Baker, *supra* note 23, at 892 (discussing the “tension” between a copyright holder’s ability to limit speech “on the basis of its content” and the constitutional guarantee of free speech); Lemley & Volokh, *supra* note 58, at 150, 165–69 (“Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please.”).

<sup>75</sup> See cases cited *supra* notes 59 & 64.

main reasons for this is that copyright law has sometimes been considered a categorical exception to free speech.<sup>76</sup> This understanding explains both the dearth of scholarly interest in the role of the First Amendment in copyright law until the late 1960s and also the continued hesitancy of courts to conduct First Amendment review.<sup>77</sup>

The temporal proximity of the adoption of the Progress Clause, the First Amendment, and the first copyright act suggests that the Founders did not see any conflict between the two constitutional clauses.<sup>78</sup> This historical comfort might largely have been driven by the much narrower scope of copyright law at the time.<sup>79</sup> Nevertheless, this traditional understanding continues to heavily influence the courts, as evidenced by the Supreme Court's explanation of the "definitional balance" existing between copyright law and the First Amendment.<sup>80</sup>

Two of the most common explanations for free speech exceptions shore up arguments that copyright is one of those exceptions. The first explanation is that categories of unprotected speech are considered of no or low value. For example, obscene speech sits outside the First Amendment's protections because the statements at issue are deemed valueless.<sup>81</sup> Similar arguments have been made about uses of another person's copyrighted work; in particular, that using another's copyrighted work has little value because it is an expression of some-

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<sup>76</sup> See, e.g., EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* xvii, 179–87 (3d ed. 2008) (referring to speech owned by others (e.g., copyrighted works) as an "exception" to First Amendment protection).

<sup>77</sup> Early treatises and histories of copyright law simply do not address the issue. See, e.g., LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968) (containing no discussion of the First Amendment); HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* (1944) (same); RICHARD C. DE WOLF, *AN OUTLINE OF COPYRIGHT LAW* (1925) (same); ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW* (1917) (same); EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* (1879) (same).

<sup>78</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). The Framers completed drafting the Constitution in 1787, and all thirteen states ratified it by 1790. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 26–28, 44, 175–80, 216 (1990). The Framers completed the Bill of Rights, including the First Amendment, in 1789 and all thirteen states ratified it by 1791. See *id.* at 226–27, 242–44. Congress passed the first copyright act in 1790. 1 Stat. 124, ch. 15 (1790) (repealed 1802). To date there is no evidence that there was any debate or concern regarding the interplay of the two provisions at that time.

<sup>79</sup> Netanel, *supra* note 58, at 4, 13–30; see also PATTERSON & LINDBERG, *supra* note 37, at 51–55, 60–61, 66–73, 81–85, 191–96; Litman, *supra* note 10, at 1872–74, 1883–86.

<sup>80</sup> *Eldred*, 537 U.S. at 219 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)); see also Nimmer, *supra* note 58, at 1184–1204 (applying to copyright the Court's "definitional balancing" method of weighing speech and nonspeech interests and developing an understanding of the definitional balance between the First Amendment and copyright law).

<sup>81</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957) (describing obscenity as "utterly without redeeming social importance").

one else's speech.<sup>82</sup> Accordingly, nothing new has entered the marketplace of ideas.

A second explanation for speech exceptions is simply that for a given category of speech, pressing competing public goals are so well established that a *categorical* speech exception has been made. The exceptions for true threats and incitement are good examples of such categorical determinations.<sup>83</sup> In the context of copyright law, the argument for a categorical exception is that as a society we are better off with the incentives that copyright provides to creators even though some speech is sacrificed in the process.<sup>84</sup> Many scholars and courts have rejected the categorical exception approach in the context of copyright law,<sup>85</sup> but it nevertheless has had at least some influence.

## B. Incorporation of Speech-Protective Features

Another reason that the First Amendment has played a limited role in copyright cases is that courts and scholars have concluded that copyright law includes a number of built-in speech protections that are sufficient to address most First Amendment concerns.<sup>86</sup> These incorporated speech protections include the idea/expression dichotomy, the lack of protection for facts, and the fair use doctrine.<sup>87</sup> The

<sup>82</sup> See, e.g., *Eldred*, 537 U.S. at 221; Nimmer, *supra* note 58, at 1191–92, 1203–04.

<sup>83</sup> See Rothman, *supra* note 73. There is still scrutiny of these categorical exceptions both to determine if something really is, for example, a true threat, and also to protect against content- or viewpoint-based discriminations unrelated to the primary purpose of the categorizations as disfavored speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–90 (1992) (noting that the categorical approach is limited in scope and cannot be used to enforce ulterior content- or viewpoint-based restrictions).

<sup>84</sup> See *Eldred*, 537 U.S. at 218–19 (citing *Harper & Row*, 471 U.S. at 558); see also *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (“[C]opyrights are categorically immune from challenges under the First Amendment.”), *aff’d on other grounds*, 537 U.S. 186 (2003); Nimmer, *supra* note 58, at 1192, 1203–04 (“In some degree [copyright protection] encroaches upon freedom of speech in that it abridges the right to reproduce the ‘expression’ of others, but this is justified by the greater public good in the copyright encouragement of creative works.”). I will discuss this treatment of copyright as the “engine of free expression” in more depth in Part I.C.

<sup>85</sup> See, e.g., *Eldred*, 537 U.S. at 221; Lessig, *supra* note 58, at 1071–73; Netanel, *supra* note 58, at 4–6, 37–47, 85–86; Nimmer, *supra* note 58, at 1194–95, 1197–98; Van Alstyne, *supra* note 58, at 225–26, 228–28, 236–38.

<sup>86</sup> See, e.g., *Eldred*, 537 U.S. at 219–20; Goldstein, *supra* note 58, at 1009, 1011–14, 1016–22; Nimmer, *supra* note 58, at 1189–93.

<sup>87</sup> See 17 U.S.C. §§ 102(b), 107 (2006); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 350–51 (1991); Nimmer, *supra* note 58, at 1189–90. There are a number of other copyright doctrines that could also be considered speech protective but they are less frequently mentioned in scholarship on the topic. Such doctrines include the requirement of originality, and the prohibition on protecting *scènes à faire*s and functional or useful features, as well as the rarely successful *de minimis* use defense. These doctrines tend to have less applicability in the broader political and cultural contexts often addressed in the First Amendment scholarship or in the personal use scenarios that I discuss. This is true in part because most of these analyses focus on the initial copyrightability of works rather than on whether someone can copy expression that merits copyright protection.

idea/expression dichotomy sets forth the principle that copyright only protects the expression of ideas, not the underlying concepts.<sup>88</sup> Similarly, one can copy facts, but not the original selection and arrangement of those facts.<sup>89</sup> The fair use doctrine provides an exception or defense to copyright infringement for certain uses deemed “fair” or “reasonable.”<sup>90</sup>

The existence of these built-in protections has led most courts and several prominent scholars to conclude that there is rarely, if ever, a need for independent First Amendment review.<sup>91</sup> This conclusion has remained despite numerous concerns about the adequacy of these built-in doctrines. I will mention only a few of these concerns here. First, ideas and facts cannot always substitute for expression. Sometimes the expression itself is the idea or fact at issue, or the idea cannot be separated from its expression.<sup>92</sup> It is difficult to imagine, for example, how one could adequately describe T.S. Eliot’s poem *The Waste Land* using only its ideas and facts. A room full of English professors could not even agree on the facts, let alone the ideas, imbedded in the poem.

Although copyright law has developed a merger doctrine, which purportedly denies copyright protection when the idea and expression are merged together such that a “given idea is inseparably tied to a particular expression,”<sup>93</sup> the doctrine has been read narrowly. In the scenarios raised by personal use and most First Amendment challenges, the original work is unique and expresses something that does not monopolize an idea, other than of that particular copyrighted work itself.<sup>94</sup> If the merger doctrine were read so broadly, then no copyrighted work would retain copyright protection once it was published because the expression of the work would merge with the idea of that work. The merger doctrine instead has applied when a defen-

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<sup>88</sup> For example, anyone is free to write a story about a school for young wizards, but if the details and plot (i.e., the expression) get too close to Hogwarts from the *Harry Potter* series, then copyright law will come into play.

<sup>89</sup> *Feist*, 499 U.S. at 350–51.

<sup>90</sup> See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1941–44 (2007) (discussing one common interpretation of fair use as being a use that is “reasonable”). The doctrine is codified in section 107 of the Copyright Act, which sets forth four factors that courts must consider when evaluating uses. 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–94 (1994) (interpreting the four statutory fair use factors).

<sup>91</sup> See, e.g., *Eldred*, 537 U.S. at 219–21; *Nimmer*, *supra* note 58, at 1189–93, 1203–04; see also *supra* notes 59 & 64 and accompanying text.

<sup>92</sup> See, e.g., NETANEL, *supra* note 17, at 61–62; Netanel, *supra* note 58, at 13–20; Rubinfeld, *supra* note 23, at 13–16; see also Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93, 96–104 (1992) (describing how copyrighted works themselves can become facts that should be available for use); see also *infra* Part II.B.

<sup>93</sup> NIMMER ON COPYRIGHT at § 13.03[B][3] (1997).

<sup>94</sup> See discussion *infra* Part II.B.

dant seeks to create something new and there is only one or a very few ways to create such a work, for example a jewel-encrusted bee,<sup>95</sup> or when the underlying work is reporting facts for which there are a very limited number of possible expressions, such as a map or building codes.<sup>96</sup> The merger doctrine therefore has rarely applied in instances when personal, political, or cultural uses are at stake; in such instances, a defendant most often copies or quotes the underlying expression and the merger doctrine is usually rejected.<sup>97</sup>

As I have discussed elsewhere, the fair use doctrine that many scholars identify as the most speech protective of the internal doctrines of copyright law is challenging to predict and one of the most murky concepts in the law.<sup>98</sup> Fair use has also increasingly become beholden to a market-effects analysis, and courts often reject such a defense when licensing of a copyrighted work is theoretically possible.<sup>99</sup> Fair use is therefore much less speech protective than one

<sup>95</sup> See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

<sup>96</sup> See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l Inc.*, 293 F.3d 791, 801 (5th Cir. 2002) (en banc); *Kern River Gas Termination Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir. 1990).

I note that some of these examples would not meet the originality requirement or could be analyzed using the exclusion for protection of facts and ideas or functional features without need to resort to the merger doctrine.

<sup>97</sup> *Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 259 F.3d 25, 36 (1st Cir. 2001) (“The merger doctrine does not, however, allow the identical reproduction of photographs of realistic objects when there are sufficient details in those photographs to make them unique.”); *CCC Information Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 71–73 (2d Cir. 1994) (rejecting merger defense when the underlying work was copied).

<sup>98</sup> See Rothman, *supra* note 90, at 1910–11 & n.28; Jennifer E. Rothman, *Why Custom Cannot Save Copyright's Fair Use Defense*, 93 VA. L. REV. IN BRIEF 243, 245, 248 (2007); see also *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (describing “the issue of fair use” as “the most troublesome in the whole law of copyright”); Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (expressing concern that because of the fair use doctrine’s lack of clarity, judges may evaluate fair use on the basis of “ad hoc perceptions of justice”); Lloyd L. Weinreb, *Commentary, Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138–40 (1990) (terming fair use a “thicket” and the statutory provision “muddled” and “inconsistent”). *But see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 *passim* (2009) (criticizing us naysayers and suggesting that fair use is more workable than we have claimed).

<sup>99</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 & n.9 (1985) (concluding that the fourth fair use factor—which focuses on market harm—is “undoubtedly the single most important element of fair use”); Beebe, *supra* note 59, at 584–86, 616–17 (determining that 83.8% of the time the fourth factor correlates with outcome of dispositive opinions); Rothman, *supra* note 90, at 1931–37 (describing the frequent rejection of fair use when any market harm—even potential licensing markets—is found); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 *passim* (2007) (discussing how copyright’s reach expands as parties license copyrighted material to avoid litigation and then courts use evidence of licensing to establish market harm); Van Houwelling, *supra* note 58, at 1565–66 (discussing courts’ refusal to accept fair use defenses absent market failure); David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 267 n.25 (2003) (contending that the fourth fair use factor is the only one that counts); see also Wendy J. Gordon, *Fair*

might otherwise predict. Despite compelling critiques of the sufficiency of these built-in doctrines, courts continue to conclude that copyright law adequately protects First Amendment interests.<sup>100</sup>

### C. Copyright as the “Engine of Free Expression”

The final reason that the First Amendment has failed to limit copyright law (and perhaps the most damning for users) is that the copyright system is considered to further First Amendment goals.<sup>101</sup> Put another way, the incentive rationale that for many stands at the heart of the constitutional basis for copyright protection serves the First Amendment’s interest of promoting speech. If the copyright regime is viewed as promoting speech interests by providing incentives to create, then there is little room for First Amendment scrutiny. As the Supreme Court has articulated, copyright is the “engine of free expression” and accordingly the First Amendment is no obstacle to the enforcement of copyrights.<sup>102</sup> Even scholars who contend that there should be greater First Amendment scrutiny have embraced the notion that copyright serves First Amendment values.<sup>103</sup>

Putting aside both long-standing and recent challenges to the legitimacy and scope of the incentive rationale,<sup>104</sup> if one accepts, as the courts and most scholars have done, that copyright protection generates more speech, then one must engage in balancing these two speech interests (*generating* new speech versus *allowing* speech using preexisting works). When doing this evaluation, courts and scholars usually adopt a utilitarian approach in which the result that leads to the most speech overall is the best one. All trespasses to another’s copyrighted work risk reducing speech in the future either by limiting

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*Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 *passim* (1982) (suggesting that fair use should only apply when there is market failure); *infra* Part VI.

<sup>100</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see also *supra* notes 59 & 64 and accompanying text.

<sup>101</sup> See *Eldred*, 537 U.S. at 219; Goldstein, *supra* note 58, at 990, 998, 1001; Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 *passim* (2000).

<sup>102</sup> See *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558).

<sup>103</sup> See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341, 346–51 (1996) (endorsing the view that copyright is a speech-producing machine fundamental to the democratic society); see also NETANEL, *supra* note 17, at 10 (accepting that copyright is the “engine of free expression” but suggesting that copyright laws that do not encourage more speech, such as copyright-term extensions, should be limited).

<sup>104</sup> See, e.g., Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 *passim* (2008); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 *passim* (2006). For an earlier critique of the incentive rationale, see then-Professor Stephen Breyer’s article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photographs, and Computer Programs*, 84 HARV. L. REV. 281 *passim* (1970).

the speech of the copyright holder or by damaging the overall incentive structure of the copyright regime. Courts therefore engage in broad utilitarian calculations of the overall speech markets rather than considering the legitimacy of individual users' speech claims.<sup>105</sup>

This type of calculation makes the First Amendment of very limited value in copyright cases. Moreover, speech that uses or incorporates prior works is not valued as much as works viewed as wholly novel (to the extent that such works exist)<sup>106</sup> because such derivative works do not add (as much) to the "marketplace of ideas."<sup>107</sup> Interestingly, the Supreme Court generally has not given merit to such arguments outside the copyright context.<sup>108</sup> One reason for this disparity is that many courts and scholars have dismissed the importance of the speech of the individual defendant in copyright cases in a way they have not elsewhere. It is to this shortcoming that I now turn.

## II

### LIMITS OF THE DOMINANT FIRST AMENDMENT THEORY

The free speech approach has largely failed to place limits on copyright law; however, even if it were more successful, its dominant articulation would provide little assistance to individuals wishing to use copyrighted works for personal reasons. This is true in large part because most courts and copyright scholars have rejected autonomy-based or individual-focused justifications for the First Amendment in the context of copyright law. Melville Nimmer, for example, thought that "free speech as a function of self-fulfillment does not come into play [in copyright cases]. One who pirates the expression of another is not engaging in *self*-expression in any meaningful sense."<sup>109</sup> Professor Nimmer was not alone in his views—many other scholars and courts have viewed those who use another's expression as either lazy

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<sup>105</sup> See, e.g., Goldstein, *supra* note 58, at 988; Nimmer, *supra* note 58, at 1184. I note that Edwin Baker criticizes this approach—while recognizing its ubiquity. See Baker, *supra* note 23, at 894–98.

<sup>106</sup> For useful discussions of the virtual impossibility of originality, see Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550–51, 601–19, 637–38 (2006); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968–69, 1000–12, 1023 (1990).

<sup>107</sup> The marketplace-of-ideas approach to the First Amendment is of course only one view—one that has been rejected by a number of scholars and courts—but as I will discuss in Part II, the marketplace-of-ideas and democratic-society approaches to the First Amendment have largely dominated the copyright jurisprudence.

<sup>108</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48–50 & n.55 (1976) (rejecting the argument in the campaign-spending context that the government can limit the speech of some to promote the speech of others).

<sup>109</sup> Nimmer, *supra* note 58, at 1192.

or pirates or both, rather than as individuals referring to a very real part of their world.<sup>110</sup>

Instead of situating their First Amendment analysis in autonomy-based interests, copyright scholars have most often situated their First Amendment analysis in a narrow version of the democratic-society approach.<sup>111</sup> A number of First Amendment scholars have noted the importance of having fully developed, self-realized individuals as part of the democratic project or more broadly under the rubric of free expression or liberty.<sup>112</sup> Copyright scholars, however, have by and large been more myopic, embracing implicitly, if not explicitly, the narrower views of Alexander Meiklejohn and Judge Robert Bork who would apply the First Amendment to protect only speech directly pertaining to political issues and political decision making.<sup>113</sup> In this more traditional democratic-society view, individuals are of secondary concern and their role is primarily relevant only when in service to broader societal goals other than autonomy (or self-realization or self-fulfillment). As Meiklejohn said: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."<sup>114</sup>

Courts have generally embraced the democratic-society focus and been dismissive of the value of self-expression when analyzing copyright cases. The Supreme Court's opinion in *Eldred*—and its conclusion that one does not have a First Amendment "right to make other people's speeches"—exemplifies the prevalence of the democratic-so-

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<sup>110</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (dismissing any "right to make other people's speeches"); Denicola, *supra* note 58, at 285–88 (rejecting the relevance of the individual-development theory of the First Amendment in the copyright context).

<sup>111</sup> See, e.g., Nimmer, *supra* note 58, at 1191–92; see also Waldron, *supra* note 18, at 857–58 ("[F]ree speech is almost always seen as a social good in copyright and trademark law. Its value is that it sustains our democratic process, or it contributes to the dissemination of information.").

<sup>112</sup> Such justifications have sometimes been termed autonomy-based, but also as promoting self-realization, self-fulfillment, self-expression, or liberty. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 3–5, 47–69 (1989) (presenting a liberty-based theory of the First Amendment); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (listing "assuring individual self-fulfillment" as one of the four primary values of the First Amendment); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 *passim* (1982) (positing "self-realization" as the primary value served by free speech and observing that it is fundamental even within the democratic-society approach); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . ."). In the copyright context, see Baker, *supra* note 23, *passim* (focusing on the self-expression justifications for the First Amendment).

<sup>113</sup> See MEIKLEJOHN, *supra* note 72, at 25–27, 37–41, 57–64; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21–35 (1971). Even Meiklejohn backed away from this position in later years, suggesting that creative works should also be protected as part of the democratic project. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57.

<sup>114</sup> MEIKLEJOHN, *supra* note 72, at 25.

ciety approach.<sup>115</sup> Because of the dominance of this approach, I focus in this Part on the democratic-society vision of the First Amendment and how it feeds into the rejection of values supporting individual uses of copyrighted works. I will note in this discussion, however, that even scholars who support a broader self-expression-based view of the First Amendment nevertheless sometimes adopt restrictive views of permissible uses in ways similar to that of the more constrained democratic-society approach.

The primacy of the democratic-society perspective and the more muted advocacy of autonomy interests has led to a particular vision of what sort of uses of copyrighted works should be constitutionally protected and when—favoring uses that are transformative and contribute to broad public debate. In this Part, I question this preference for political rather than personal uses, ideas rather than expression, and for transformative rather than straightforward uses of copyrighted works.

#### A. The Personal Is Not Political

Copyright scholars have favored uses that constitute public dialogue on political issues rather than private uses or uses that involve cultural or artistic matters. Melville Nimmer, for example, thought the First Amendment should only limit copyright protection when the use at issue furthered the “*democratic dialogue*” about an issue of great public import.<sup>116</sup> Paul Goldstein similarly contended that copyright infringement should only be excused, without regard to market effect, when the “infringed material is relevant to the *public interest* and the appropriator’s use of the material independently advances the *public interest*.”<sup>117</sup> Uses that further an *individual’s* interests are simply not matters for the First Amendment. Many courts, largely influenced by Professors Nimmer and Goldstein, have agreed.<sup>118</sup>

Even scholars who have expressed a broader view of what types of uses should be viewed as meriting First Amendment protections have favored uses that contribute broadly to a public and cultural dialogue. Neil Netanel, for example, expressly places copyright in a “democratic

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<sup>115</sup> *Eldred*, 537 U.S. at 221.

<sup>116</sup> Nimmer, *supra* note 58, at 1196–1200 (emphasis added).

<sup>117</sup> Goldstein, *supra* note 58, at 988 (emphasis added).

<sup>118</sup> See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263–65 (11th Cir. 2001) (citing Nimmer to support the conclusion that the use of ideas and facts and the fair use doctrine generally satisfy First Amendment interests); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (citing Nimmer, among others, for the proposition that the First Amendment and copyright law have a “definitional balance” in part because “[n]o author may copyright his ideas or the facts he narrates”); cf. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (citing district court cases relying on Nimmer’s scholarship as a basis for rejecting First Amendment defenses in copyright cases).

paradigm” and defines copyright as “in essence a state measure that uses market institutions to enhance the *democratic character* of civil society.”<sup>119</sup> Although Professor Netanel observes that speech has a role in promoting “individual autonomy,”<sup>120</sup> his analysis favors uses that are transformative and that contribute new material to the broader culture and democratic dialogue.<sup>121</sup> Netanel focuses his concerns on “public education, self-reliant authorship, and robust debate”<sup>122</sup> rather than on individual users. His focus is on the boundaries of copyright law writ large, not on personal uses.<sup>123</sup> Netanel’s latest book suggests that he thinks some personal uses may be justified by the First Amendment value of self-expression.<sup>124</sup> His analysis, however, does not focus on developing the values supporting such uses, and most of his examples focus on criticism, and political or cultural commentary, rather than on the types of identity-based uses that thus far have lacked adequate support.<sup>125</sup> Even scholars such as Molly Van Houweling, who have sought to expand the rights of copyright users, have focused on broad public policy, such as distributive values, rather than individual rights to justify uses of others’ copyrighted works.<sup>126</sup>

I agree with these scholars’ concerns about public dialogue and matters of broad public concern. In fact, I think that most of the uses of copyrighted works they pinpoint are deserving of protection; however, identity-based and personal uses are also valuable and need their own basis for protection. Neither the democratic-society approach nor broad claims of entitlement to free speech for self-expressive purposes provide sufficient theoretical or constitutional support for most personal uses.

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<sup>119</sup> Netanel, *supra* note 103, at 288 (emphasis added).

<sup>120</sup> Netanel, *supra* note 58, at 62.

<sup>121</sup> See, e.g., *id.* at 16–19 & n.61.

<sup>122</sup> Netanel, *supra* note 103, at 291, 341–46 (laying out his “theoretical framework that seeks to articulate . . . the ways in which copyright supports a democratic civil society”).

<sup>123</sup> Netanel briefly addresses personal uses but focuses on the potential market harm that may arise from them. See *id.* at 373–76.

<sup>124</sup> See NETANEL, *supra* note 17, at 13, 38–42, 72–75, 104–07. Netanel also clarifies in his book his agnosticism about First Amendment approaches. *Id.* at 32–33. His view that copyright is a key component of the democratic society and his embrace of the view that copyright is an engine of free expression, however, feed a narrower, more instrumentalist analysis of copyright uses. See, e.g., *id.* at 90–92, 96.

<sup>125</sup> See, e.g., *id.* at 18–19 (describing the Free Republic Web site, which is partially devoted to visitors’ criticism of mainstream-media coverage of news events and politics); *id.* at 14 (describing Alan Cranston’s unauthorized translation and commentary of *Mein Kampf*); *id.* at 19 (describing the Air Pirates, a group of underground cartoonists, who parodied Disney cartoon characters by depicting them using drugs and engaging in sex acts, as an example of “the humorous denigration of a cultural icon”).

<sup>126</sup> See, e.g., Van Houweling, *supra* note 58, at 1575.

## B. The Discounting of Expression

Most copyright scholars who have explicitly or implicitly adopted the democratic-society approach view the ideas underlying expression as generally sufficient for any user's purposes.<sup>127</sup> In Nimmer's view, there is "no first amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression."<sup>128</sup> Nimmer concluded that the only situations that merit First Amendment protection for uses of expression are graphic works related to the news because otherwise the ideas and facts are adequate.<sup>129</sup> Nimmer imagined that such an exception would be quite rare.<sup>130</sup> Robert Denicola similarly contended that the First Amendment primarily comes into play in the context of a visual record of historical events.<sup>131</sup> The courts have frequently agreed with these scholars.<sup>132</sup>

Interestingly, in First Amendment cases outside of copyright law, the Supreme Court has not differentiated between expression and ideas or facts. As Jed Rubenfeld, among others, has noted, the Supreme Court did not protect the right of Paul Cohen to express *the idea or fact* contained in his statement "Fuck the Draft," but instead protected his right to that exact *expression*.<sup>133</sup> The need to use expression is particularly true in the context of more personal, identity-based uses. If only the broad principles of self-government and the public interest in democratic dialogue mattered, then there would be many alternatives to "Fuck the Draft"; but, if one's ability to express one's exact sentiments matters, then nothing else comes close.

<sup>127</sup> See, e.g., Nimmer, *supra* note 58, at 1189–93, 1202–04.

<sup>128</sup> *Id.* at 1203.

<sup>129</sup> *Id.* at 1197–1204.

<sup>130</sup> See *id.* at 1197. Nimmer gave two primary examples of when the First Amendment should protect the use of expression: The first is the famous photograph of the My Lai massacre during the Vietnam War. The second is the film footage of the assassination of President John F. Kennedy. In each case, Nimmer viewed the works as essential to the democratic dialogue on a matter of great public importance in circumstances when only the expression itself could adequately convey the message. See *id.* at 1197–1204.

<sup>131</sup> Denicola, *supra* note 58, at 299–315.

<sup>132</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (concluding that free speech is less relevant when using "other people's speeches"); see also *supra* notes 59 & 64 and accompanying text.

<sup>133</sup> See Rubenfeld, *supra* note 23, at 14–15; see also *Cohen v. California*, 403 U.S. 15, 26 (1971); Tushnet, *supra* note 101, at 8–11 (pointing to the anomaly of copyright law in treating expression differently from the way the Supreme Court has treated speech in other cases).

Ironically, Melville Nimmer argued on behalf of Paul Cohen despite his arguments in the copyright context that ideas are adequate substitutes for expression. See *Cohen*, 403 U.S. at 15 (naming Melville B. Nimmer as counsel for the appellant).

### C. The Favoring of Transformative Uses and a Narrow Conception of Transformativeness

Scholars have also favored transformative uses when applying the First Amendment because those uses supposedly add more to the democratic dialogue.<sup>134</sup> Netanel, for example, deems nontransformative uses “slavish copying” and contends that such copying should fall outside of both First Amendment and fair use protection.<sup>135</sup> Even the few scholars who have suggested a nondemocratic-society approach to the First Amendment in the copyright context have mostly favored transformative uses. Professor Rubinfeld, for example, contrasts imaginative uses with “piracy.”<sup>136</sup> Professor Van Houweling focuses her proposed expansion of fair use on “creative” uses.<sup>137</sup>

What Netanel, Rubinfeld, and Van Houweling mean by transformative, imaginative, and creative uses may be broad enough to encompass some of the personal uses that I will discuss. Their understanding of transformative uses, however, is not necessarily in harmony with the courts’ definition of the term. Courts appear to have a narrower vision of transformativeness. The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* developed the concept of transformativeness as part of the fair use analysis.<sup>138</sup> The Court situated consideration of transformativeness in the first fair use factor—the purpose and character of the use. The relevant inquiry is the degree to which a use transforms the underlying work. The more transformative the use, the more latitude that should be given for that use.<sup>139</sup> The Court described a transformative use as one that “adds something new, with a further purpose or different character [from the original work], altering the first with new expression, meaning, or message.”<sup>140</sup> The Court held that parodies are transformative and suggested that most criticism and commentary will also be transformative in nature.<sup>141</sup> The Court did not, however, consider the relative transformativeness of more personal uses not directed at commenting on or criticizing the original, nor at creating a new work.

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<sup>134</sup> See, e.g., Netanel, *supra* note 103, at 362–63 (“[A] democratic copyright would limit copyright owner control over transformative uses . . .”).

<sup>135</sup> See Netanel, *supra* note 58, at 47; see also NETANEL, *supra* note 17, at 191 (giving “renewed weight in fair use analysis to the defendant’s transformative expression and purpose”).

<sup>136</sup> See Rubinfeld, *supra* note 23, at 48. *But see generally* Tushnet, *supra* note 53 (defending First Amendment value of non-transformative copying).

<sup>137</sup> See Van Houweling, *supra* note 58, at 1567–78 (favoring uses that are “creative” in nature, while noting that there may be some autonomy-based justifications for permitting noncreative uses).

<sup>138</sup> 510 U.S. 569, 578–94 (1994).

<sup>139</sup> See *id.* at 578–85.

<sup>140</sup> *Id.* at 578–79 (citing Leval, *supra* note 98, at 1111).

<sup>141</sup> *Id.* at 578–79.

Under a broad reading of *Campbell*, many of the identity-based uses that I describe could be considered transformative because they use the original work in a new context and for a new and generally different purpose.<sup>142</sup> Nevertheless, courts have often dismissed similar uses either as not transformative or not sufficiently transformative to merit fair use. These conclusions are based on assessments that the uses do not significantly alter the original, do not criticize or comment on the original, or because the uses do not produce new creative works for public dissemination.<sup>143</sup> When no changes are made to the underlying copyrighted work, courts reject arguments that the copying is transformative.<sup>144</sup> In *Worldwide Church of God v. Philadelphia Church of God*,<sup>145</sup> a case I will revisit in Part IV, the Ninth Circuit held that the copying of a religious text for worship was not transformative because it was used for the same purpose as the underlying work—religious worship. This is an example where the use is a personal one, as I will discuss, but is not transformative.

Even when the use is for a different purpose than the original, if a complete or even partial copy is made of the original work, courts often dismiss any argument that the use is transformative.<sup>146</sup> The Second Circuit in *American Geophysical Union v. Texaco Inc.*, for example, concluded that the copying of articles for the personal use of scientists conducting research was not transformative:

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<sup>142</sup> See, e.g., Leval, *supra* note 98, at 1111 (“[A transformative use] must employ the quoted matter in a different manner or for a different purpose from the original.”).

<sup>143</sup> Cf. Litman, *supra* note 10, at 1899 n.160 (noting that the transformativeness inquiry under fair use provides little aid to those engaged in most personal uses).

<sup>144</sup> See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (holding that the transmission of work to a new medium was not transformative); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117–18 (9th Cir. 2000) (concluding that the copying of a religious text for worship by a splinter religious group was nontransformative); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 993–94 (9th Cir. 1998) (holding that the use of copyrighted footage in a news story was not transformative because it was edited and aired without additional commentary); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 78–80 (2d Cir. 1997) (holding that the use of a copyrighted poster in the background of a television show was not a transformative use because it was used for the same decorative purpose for which the original was created).

<sup>145</sup> 227 F.3d 1110 (9th Cir. 2000).

<sup>146</sup> See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922–24 (2d Cir. 1994) (holding that copying articles for scientists’ use in research was only modestly, if at all, transformative); *United States v. Am. Soc’y of Composers, Authors and Publishers*, 599 F. Supp. 2d 415, 424–29 (S.D.N.Y. 2009) (concluding that samples of ringtones were not transformative). *But see* *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639–40 (4th Cir. 2009) (describing the copying of works for the purpose of evaluating plagiarism as a transformative use); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608–12 (2d Cir. 2006) (holding that the use of copyrighted photographs in a biography of the Grateful Dead was transformative); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–21 (9th Cir. 2003) (holding that the copying of thumbnail sketches for the purpose of a search engine index was transformative).

To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.<sup>147</sup>

Even when changes are made to the underlying work, if the changes are few in number, then courts will often conclude that the use is not transformative.<sup>148</sup> Other courts have suggested that even if significant changes are made to an underlying work, if the use is not commenting critically on the original, then the use is not transformative.<sup>149</sup> These understandings of transformativeness leave most personal uses disfavored as nontransformative or minimally transformative because personal uses often do not create new works for public consumption, rarely contain critical commentary, and sometimes involve wholesale duplication.<sup>150</sup>

Rebecca Tushnet is one of the few scholars to suggest that straightforward copying actually serves First Amendment values.<sup>151</sup> I wholeheartedly agree with her on this point. In many instances, non-transformative uses do serve First Amendment and, as I will discuss, substantive due process values. Professor Tushnet focuses on broad values of self-expression, persuasion, and affirmation, rather than on personally significant uses.<sup>152</sup> She particularly identifies uses that “persuade others” and that facilitate the “participat[ion] in cultural,

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<sup>147</sup> *Am. Geophysical Union*, 60 F.3d at 923.

<sup>148</sup> *See, e.g., McNamara v. Universal Commercial Servs., Inc.*, No. 07-6079-TC, 2008 WL 4367831, at \*2 (D. Or. Sept. 16, 2008) (rejecting the argument that a use was transformative because there were only minor edits to the copyrighted text).

<sup>149</sup> *See, e.g., Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 628–29 (9th Cir. 2003) (affirming the district court’s holding that the use of some clips of Elvis’s films and performances in a videography about Elvis was not transformative because voice-over did not directly comment on those clips); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 198–200 (3d Cir. 2003) (holding that two-minute previews of copyright holder’s films were not transformative because there was no critical commentary nor any new material added); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 142–43 (2d Cir. 1998) (declaring any transformative component of a book of trivia based on the *Seinfeld* television series as “slight to non-existent”); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1375–76 (2d Cir. 1993) (concluding that a book synthesizing *Twin Peaks* episodes was not transformative because there was little commentary); *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1187–88 (C.D. Cal. 1998) (holding that visual references to the movie *Men in Black* in advertisements for a Michael Moore documentary were not transformative because they were not commenting on the original movie).

<sup>150</sup> *See* discussion *infra* Part IV.

<sup>151</sup> *See* Tushnet, *supra* note 53, at 537, 566–81.

<sup>152</sup> *See id.* at 562–86.

religious, and political institutions.”<sup>153</sup> She suggests that nontransformative copying should be permitted, but that it could be limited to that which is private, “noncommercial,” and perhaps small in scale.<sup>154</sup> Like many copyright scholars, Tushnet continues to pin her hopes on the First Amendment and free speech to reign in copyright law.

Until we look outside the free speech paradigm, particularly a democratic-society-based one, users’ claims will likely continue to take a backseat to those of copyright holders.

### III

#### THE SUBSTANTIVE DUE PROCESS AND LIBERTY TURN

I will now take the first steps toward thinking beyond free speech and consider what insights a substantive due process, liberty-based approach adds to our understanding of uses of copyrighted works. My point here is not only that courts should consider substantive due process defenses in addition to First Amendment ones, but also that there is significant theoretical value in this conceptual shift. A liberty analysis, derived from our understanding of substantive due process, as well as from the self-expression and self-definition (rather than the marketplace-of-ideas or democratic-society) justifications for the First Amendment, provides a different lens for looking at uses of copyrighted works.

One could contend that this “liberty approach” is still a First Amendment analysis, but an autonomy-based one. Or one could say that I have adopted a Meiklejohnian approach of putting the self-expressive aspects of free speech into the “liberty” provision of the Fifth Amendment.<sup>155</sup> I do not seek to resolve here debates about the true purposes of the First Amendment or its interplay with the Due Process Clause. Nor do I seek to situate use rights narrowly in a particular constitutional section, many of which overlap.<sup>156</sup>

The proposed liberty paradigm moves beyond a broad-based right to speak and generalized rights of self-expression. I support

<sup>153</sup> *Id.* at 562.

<sup>154</sup> *Id.* at 587. As discussed, I criticize limiting privileged personal uses to those that are noncommercial. See *supra* notes 45–53 and accompanying text; see also discussion *infra* Part V.

<sup>155</sup> See MEIKLEJOHN, *supra* note 72, at 37–41, 57–64; Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 281–316 (2005); cf. *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”).

<sup>156</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (suggesting that a concurrence of several different constitutional provisions may protect the right to privacy); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 652–66 (1980) (noting that the right of intimate association may be located in a variety of constitutional provisions, including the First, Fifth, and Fourteenth Amendments).

such principles, but use rights must have more specific grounding and a basis for differentiation in order to overcome the competing interests of authors, copyright holders, and the overall public interest in supporting the copyright system. The liberty paradigm considers ways to ascertain when uses of copyrighted works are more or less constitutive of an individual's identity. The liberty lens shifts the focus in copyright cases from the freedom of speech to the freedom of a person—*why* a copyrighted work is being used and by whom is much more important than *what* is being said. The liberty turn asks us to consider the impact of copyright law on individuals rather than more broadly on the public interest, the democratic society, the market, or the political process. This liberty-based approach therefore provides a much-needed focus on individuals in the context of copyright law.<sup>157</sup>

A liberty-based approach connects up with another developed body of constitutional law besides First Amendment law—one that resonates strongly with very personal, identity-based uses of copyrighted works. Because fundamental rights are impacted when identity-based uses are at issue, the application of copyright law in such contexts deserves heightened scrutiny.<sup>158</sup> Before I flesh out what I mean by iden-

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<sup>157</sup> As discussed, most copyright scholarship has overlooked users' interests. See *supra* notes 18–22, 29 and accompanying text. Most copyright scholars who have focused on autonomy interests have focused on authors' rights. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–65 (1988) (discussing the Hegelian justification for IP law and suggesting that such a justification may have more applicability as a basis for original protection than as a way to evaluate permissible uses by noncreators); Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 4, 14–26 (2001) (developing a narrative to support greater rights for authors); see also Liu, *supra* note 29, at 397–98 ("Copyright law has a rather well-developed theory of the author. . . . Surprisingly, far less attention has been paid to consumers of copyrighted works."); Waldron, *supra* note 18, at 845.

<sup>158</sup> *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (observing the long-standing principle that fundamental rights are subject to "heightened scrutiny"). It has sometimes been said that restrictions of fundamental liberties must meet a "strict scrutiny" test to be valid. See *Washington v. Glucksberg*, 521 U.S. 702, 762 (1997) (Souter, J., concurring) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). The decision in *Lawrence* suggests an attempt to move away from the rigidity of the rational basis and strict scrutiny frameworks. Cf. *Lawrence*, 539 U.S. at 558–79 (avoiding an explicit application of either the rational basis or strict scrutiny framework); see also *id.* at 586 (Scalia, J., dissenting) (decrying the majority's failure to explicitly apply either test). Accordingly, I do not rigidly apply rational basis or strict scrutiny analyses here, but instead suggest that identity-based uses are akin to fundamental rights deserving of heightened scrutiny.

I note that although content-based restrictions on free speech also generally warrant heightened or strict scrutiny, at least some scholars have claimed that copyright law involves content-neutral speech restrictions and therefore lesser scrutiny should apply. Netanel, for example, suggests that intermediate scrutiny akin to that applied in media cases should apply in copyright cases. See, e.g., Netanel, *supra* note 58, at 47–59, 69–81; see also *Golan v. Holder*, 611 F. Supp. 2d 1165, 1172–77 (D. Colo. 2009) (applying intermediate scrutiny in a copyright case).

tity-based uses, I want to elaborate on what I mean by the liberty paradigm and how substantive due process comes to bear.

Although there are many different definitions of liberty from a political science and jurisprudential perspective,<sup>159</sup> I use “liberty” in the sense it is used in the Fifth and Fourteenth Amendments of the U.S. Constitution. In *Lawrence v. Texas*,<sup>160</sup> the Supreme Court posited liberty as the principle that individuals should be as free as possible from “unwarranted government intrusions.”<sup>161</sup> Before the government can restrain an individual, physically or otherwise, the government must establish a reasonable basis for doing so, and when a *fundamental* liberty is at stake, only rarely will any government interest justify encroaching on an individual’s freedom.<sup>162</sup>

The zones of rights considered fundamental in a substantive due process analysis center on issues of identity and personhood.<sup>163</sup> Although broader readings of the First Amendment have also encompassed concern for personhood and identity,<sup>164</sup> discussions of the First Amendment in the context of copyright law have been much more constrained. Moreover, doctrinal divisions in the bodies of law have left many insights of the substantive due process clause jurisprudence unexamined in the context of copyright law. By focusing on the theoretical undergirdings of the Constitution’s protection of liberty, as well as the doctrinal approach of substantive due process, I do not intend to exaggerate the conceptual divide between the First Amendment’s protections of free speech and the Fifth and Fourteenth Amendments’ protection of liberty. The concepts behind these amendments overlap and can be read in harmony to promote individual autonomy, personhood, and identity formation.

Substantive due process has sometimes been situated in an understanding of the right to privacy.<sup>165</sup> A liberty-based approach, how-

<sup>159</sup> See John Gray, *On Liberty, Liberalism and Essential Contestability*, 8 BRIT. J. POL. SCI. 385, 385–88 (1978) (describing “liberty” as a contested term).

<sup>160</sup> 539 U.S. 558 (2003).

<sup>161</sup> *Id.* at 562 (“Freedom extends beyond spatial bounds. . . . The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”); see also *id.* at 564–66, 572–74 (tracing the Court’s protection of liberty rights under the Due Process Clause); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (plurality opinion) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 719 (1938) (describing the evolution of the constitutional term “liberty” from meaning freedom from physical restraint to meaning freedom from state interference more broadly).

<sup>162</sup> See sources cited *supra* note 158.

<sup>163</sup> See *Lawrence*, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); see also discussion *infra* Part III.B.

<sup>164</sup> See *supra* notes 112, 155–56 and accompanying text.

<sup>165</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

ever, is not the same as a privacy-based one—although there are some overlaps. For example, one justification for the right to privacy is its promotion of the development of personhood.<sup>166</sup> Nevertheless, it makes the most sense to situate use rights in the broader and more rooted liberty framework. Liberty is expressly provided for in the Constitution, in contrast to the right to privacy, which is located in penumbras emanating from various constitutional provisions.<sup>167</sup> Liberty also does not carry with it the baggage that privacy does in terms of signaling spatial limits on the scope of one's rights. Liberty stands for the principle that there should be limits on when a government can restrain an individual regardless of whether that individual is in public or in private. The Supreme Court's decision in *Lawrence* also suggests a return to the historically and textually rooted term "liberty" and a backing away from the more controversial privacy rubric that has dominated substantive due process analysis in recent decades.<sup>168</sup> I will therefore use liberty as a jumping-off point for developing an identity-based model through which I will explore why and when uses of copyrighted works rise to the level of fundamental, constitutionally protected liberty interests.

#### A. The Constitutive Function of Copyrighted Works

Identity at its heart revolves around our sense of self and our ability to define and situate ourselves in the world around us—it includes our understanding of ourselves both individually and in the context of the broader sociocultural groups to which we belong.<sup>169</sup> At a mini-

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<sup>166</sup> See, e.g., Cohen, *supra* note 32, *passim* (contending that "informational privacy" is necessary to provide breathing room for individual development); Julie E. Cohen, *Information Rights and Intellectual Freedom*, in ETHICS AND THE INTERNET 11, 11–32 (Anton Vedder ed., 2001) [hereinafter Cohen, *Information Rights*] (same); see also Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 393–407 (2008) (describing how privacy laws further First Amendment values).

I note that in the context of her work on informational privacy, Cohen has suggested that some of her analysis has "points of commonality" with the substantive due process cases associated with "decisional autonomy." Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 582 (2003). Cohen has not explored substantive due process, however, as a basis for evaluating uses of copyrighted works and in fact distinguishes her privacy-based approach from a liberty-based or substantive due process one. *Id.*

<sup>167</sup> See *Griswold*, 381 U.S. at 479.

<sup>168</sup> See *Lawrence*, 539 U.S. at 558 (referring to liberty throughout, but barely mentioning privacy); see also Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1456026> (concluding that the Supreme Court has now shifted from the problematic privacy rubric to a more textually grounded liberty analysis).

<sup>169</sup> See, e.g., DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 10 (2003) (defining identity as "the sense of who one is and where one belongs"); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993) ("[I]dentity is a multilayered concept. . . . It encompasses explanation and representation of the self."); Amartya Sen, *Goals, Commitment, and Identity*, 1 J.L. ECON. & ORG. 341, 348 (1985) ("[Identity is] how [a] person sees

num, our identity is composed of our life history, important life-changing or psychologically altering experiences, and our beliefs and values.<sup>170</sup> Each person's life, both past and present, is not only intertwined with copyrighted materials but *constructed* with these copyrighted works.

Discussions of identity in legal scholarship have largely revolved around group-based or social identities, and in particular identity politics.<sup>171</sup> A convincing case has been made that our identities, in particular our race, gender, and sexual orientation are largely socially constructed.<sup>172</sup> Our experiences help shape our race and gender identities, and our interactions with other people shape our sense of self more broadly.<sup>173</sup> As Nan Hunter has said: "Identity is not a predis-

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himself or herself. We all have many identities, and being 'just me' is not the only way we see ourselves. Community, nationality, class, race, sex, union membership . . . and so on, all provide identities that can be, depending on the context, crucial to our view of ourselves . . .").

<sup>170</sup> Producing a complete definition of identity is challenging. Identity has been used in the social sciences and humanities to mean many different things. See, e.g., TED C. LEWELLEN, *THE ANTHROPOLOGY OF GLOBALIZATION: CULTURAL ANTHROPOLOGY ENTERS THE 21ST CENTURY* 92 (2002) ("Part of the problem with defining 'identity' is that the term applies to at least three completely different concepts: first, how the individual perceives himself; second, how the person is popularly perceived; and third, how the individual is perceived by the social scientist."); Rogers Brubaker & Frederick Cooper, *Beyond "Identity"*, 29 *THEORY & SOC'Y* 1, 1 (2000) (contending that identity means many different things or nothing at all). My goal here is not to provide an all-encompassing definition of identity but instead simply to provide some minimum components of an individual's identity that must be recognized and protected.

<sup>171</sup> For a useful definition of identity politics, see Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 *OR. L. REV.* 647, 648 (1996), in which Professor Minow defines identity politics as the "mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members."

<sup>172</sup> See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 33 (1999) [hereinafter BUTLER, *GENDER TROUBLE*] (arguing that gender is largely socially constructed); JUDITH BUTLER, *UNDOING GENDER* 40–56 (2004) (same); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 *VA. L. REV.* 1721, 1725–26 (1993) (contending that sexual orientation is socially and legally constructed); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *YALE L.J.* 333, 336 (1992) (book review) (same); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 3 (1994) (analyzing the role society plays in constructing race); see also Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1759 (2003) (book review) (describing critical race theory's contention that race is socially constructed);

<sup>173</sup> See, e.g., Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263, 287 (1995) (referring to G.H. Mead's theory of the human conscience as a "generalized other" that "learns, largely from interactions with others, how the world works and how we ought to think and feel about it, and ultimately who we are").

cursive, biological given.”<sup>174</sup> Instead, “[i]deas shape identity, and culture creates the self, at least as much as the reverse.”<sup>175</sup>

Although identity-based scholarship has primarily focused on *social* rather than *personal* identities,<sup>176</sup> it provides a useful perspective on understanding how copyrighted works can be integral to our identities. Like race, gender, and sexual orientation, copyrighted works and their related social scripts form building blocks of identity. Judith Butler has described identity formation as a “semiotic” activity.<sup>177</sup> Our identities are composed of a “symbolic universe” and our identity is ultimately shaped, formed, and composed of these symbols,<sup>178</sup> including intellectual property. As Ralph Waldo Emerson wrote: “We are symbols and inhabit symbols . . . .”<sup>179</sup> Our memories, life experiences, and cultural and religious ties are often bound up with copyrighted works.

Each of us interacts with and “inhabits” copyrighted works. Sometimes a story that we read is affecting, sometimes it is not, and sometimes that story becomes so interwoven with our own lives that it is difficult to describe or engage with our own lives without reference to that story. In the latter instance, the copyrighted work has entered an individual’s life to such an extent that a liberty interest protects some uses of that work. Wendy Gordon aptly describes the profound impact copyrighted works can have on individuals: “Some poems, some ideas, some works of art, become ‘part of me’ in such a way that *if I cannot use them, I feel I am cut off from part of myself*. I would prefer never to have been exposed to them rather than to experience that sort of alienation.”<sup>180</sup> When copyrighted works enter an individual’s world they sometimes become so intertwined with that person’s identity that to deny the use of that work would seriously impair that person’s ability to control her own “destiny.”<sup>181</sup>

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<sup>174</sup> Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 9 (2000).

<sup>175</sup> *Id.*

<sup>176</sup> Personal identity in contrast to one’s social identity is often “associated with close personal relationships and idiosyncratic attributes of self.” Michael A. Hogg, *Social Identity*, in HANDBOOK OF SELF AND IDENTITY 462, 463 (Mark R. Leary & June Price Tangney eds., 2003). Or put another way, the “person[al] identity is the set of meanings that are tied to and sustain the self as an individual.” Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCHOL. Q. 224, 229 (2000).

<sup>177</sup> BUTLER, GENDER TROUBLE, *supra* note 172, at 101–16.

<sup>178</sup> See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 95–104 (Anchor Books 1967) (describing how individuals construct their own reality and that our understanding of reality is a constructed symbolic universe).

<sup>179</sup> Ralph Waldo Emerson, *The Poet* (1844), in *THE PORTABLE EMERSON* 241, 251 (Carl Bode ed., 1981).

<sup>180</sup> Gordon, *supra* note 25, at 1569 (citation omitted).

<sup>181</sup> *C.f.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in the judgment in part and dissenting in part) (noting the Supreme Court’s

In the context of real and personal property, Margaret Jane Radin has told a compelling story of how property can become integral to our personhood—whether we “own” it or not.<sup>182</sup> Her analysis relies heavily, although not exclusively, on the philosophy of Georg Wilhelm Friedrich Hegel.<sup>183</sup> Hegel’s theory of property, in which property functions as an “*embodiment* of personality,” suggests that it is only through our intermediation with property that we become ourselves.<sup>184</sup> Professor Radin’s theory of property uses the degree of personal entanglement with property as a basis for determining and distinguishing the legal treatment of different forms of property.<sup>185</sup>

Despite Radin’s work in the area of tangible property, there has been surprisingly little consideration of the role copyrighted works play in the personhood of IP users.<sup>186</sup> Although there are important differences between tangible and intangible property, Radin’s discussion of renters and their personhood interests in property owned by others has a strong parallel in the copyright context. Radin suggested that the legal movement for tenants’ rights is shored up by the per-

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established “principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government”). Even strong proponents of private property rights, such as John Locke, have recognized that the most fundamental principle of property ownership is that “every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (1698).

<sup>182</sup> See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 965, 1013–15 (1982) (developing a theory of understanding property based on its relationship to an individual’s personhood). Radin focused on personhood rather than liberty or autonomy because she claimed that autonomy and liberty do not capture the breadth of the right she claims. See *id.* at 960–61. I agree with some of her critique of liberty, but nevertheless embrace the term because it is explicitly protected by the Constitution and gives me the opportunity to connect with preexisting constitutional theory and doctrine—a framework that provides more insight than limits.

<sup>183</sup> See *id.* at 958–59 & n.3, 971–78.

<sup>184</sup> GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* ¶ 51, at 45, ¶ 57, at 47–48 (T.M. Knox trans., Oxford Univ. Press 1967) (1821) (“It is only through the development of [man’s] own body and mind . . . that he takes possession of himself and becomes his own property and no one else’s.”); see also Peter G. Stillman, *Person, Property, and Civil Society in the Philosophy of Right, in HEGEL’S SOCIAL AND POLITICAL THOUGHT: THE PHILOSOPHY OF OBJECTIVE SPIRIT* 103, 104–05 (Donald Phillip Verene ed., 1980) (characterizing Hegel’s political philosophy as developing the means whereby individuals gain possession of property in themselves); Peter G. Stillman, *Property, Freedom, and Individuality in Hegel’s and Marx’s Political Thought, in NOMOS XXII: PROPERTY* 130, 132–42 (J. Roland Pennock & John W. Chapman eds., 1980) (noting that Hegel derives an individual’s rights to life and liberty from his right to property).

<sup>185</sup> See Radin, *supra* note 182, at 958 (explaining how the personhood theory of property can and has settled disputes between rival claimants).

<sup>186</sup> I note that even though Madhavi Sunder’s 2006 article “IP<sup>3</sup>” begins with Radin’s work, it ultimately focuses on a cultural critique of IP law rather than an autonomy or personhood-based one. See Madhavi Sunder, *IP<sup>3</sup>*, 59 *STAN. L. REV.* 257, 312–32 (2006).

sonhood theory.<sup>187</sup> Similarly, I contend that copyright users' rights are like tenants' or renters' rights. We pay for access to copyrighted works or are freely granted such access. Accordingly, there must be some limits placed on when we can be evicted from these copyrighted works.

Copyrighted works play a crucial constitutive role in constructing our identities, and the degree of our personal entanglements with such works should determine how much latitude we should have to use those works. Once creators permit their copyrighted works to enter the information stream, the law must recognize and appreciate the enormous impact of such works on individuals. One must value the ability of individuals to "determin[e] . . . the shape and character of [their lives]."<sup>188</sup> The ability to use copyrighted works is essential to such shaping and self-definition. As Joseph Raz has written: "The autonomous person is part author of his life."<sup>189</sup> Given the pervasiveness of copyrighted works and the importance of particular works to many individuals, one cannot author one's own life without some latitude to use copyrighted works. Identity is not fixed, but rather fluid, and being able to engage with one's past and present experiences is a fundamental aspect of our identity formation and development.<sup>190</sup> I will further elaborate the ways that copyrighted works play this constitutive function in Part IV. But first, I want to locate this general principle—that copyright plays a constitutive role in our identity formation—in our understanding of substantive due process.

## B. Identity-Based Values in Substantive Due Process

The analysis in cases involving fundamental substantive due process rights overlaps in important ways with how we should analyze uses of copyrighted works that are integral to a person's identity. The promotion of "identity,"<sup>191</sup> "personhood,"<sup>192</sup> and "autonomy of self"<sup>193</sup> have long been recognized as constitutional interests protected by the "liberty" of the substantive due process clause. As Justice Brandeis eloquently stated: "The makers of our Constitution undertook to secure

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<sup>187</sup> See Radin, *supra* note 182, at 993–96 (suggesting that courts and legislatures have increasingly and implicitly viewed rights in leased property as more closely related to the personhood of the tenant rather than to that of the landlord).

<sup>188</sup> Waldron, *supra* note 18, at 876.

<sup>189</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 370 (1986).

<sup>190</sup> Cf. ELINOR OCHS & LISA CAPPS, *LIVING NARRATIVE: CREATING LIVES IN EVERYDAY STORYTELLING* 2–4, 54–56, 288–90 (2001) (analyzing how "the activity of narrating" our memories is crucial for constructing our identity, our ability to make sense of our experiences and the world around us, and forming connections with others).

<sup>191</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in the judgment in part and dissenting in part).

<sup>192</sup> *Id.* at 851 (plurality opinion).

<sup>193</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things."<sup>194</sup> Justice Blackmun similarly emphasized this concept in his partial concurrence in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, stating that the Constitution puts decisions affecting "bodily integrity, *identity*, and destiny . . . largely beyond the reach of government."<sup>195</sup> The plurality in *Casey* also observed that "choices central to personal dignity and autonomy [ ] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>196</sup>

What a person reads has long been considered a fundamental piece of who that person is. As Justice Marshall said, "[W]hat [a person] eats, or wears, or reads" sits "close to the heart of the individual."<sup>197</sup> Without some ability to use copyrighted works—without permission (and without payment)—a person cannot be said truly to be in "possession and control of his own person."<sup>198</sup> As discussed in the previous subpart, copyrighted works in certain circumstances make up a significant part of the "meaning," "existence," "feelings," and thoughts of individuals and accordingly can form components of our "personhood" and "identity."<sup>199</sup>

In the context of social identities, substantive due process has already been read to extend liberty-based protection for choices about how to educate one's children and issues involving language and religion.<sup>200</sup> It also extends more broadly to one's personal identity. A number of scholars have suggested the importance of the law providing room for individuals to self-define and self-determine their identities whether through group identifications or more individually.<sup>201</sup>

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<sup>194</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>195</sup> *Casey*, 505 U.S. at 927 (Blackmun, J., concurring in the judgment in part and dissenting in part) (emphasis added).

<sup>196</sup> *Id.* at 851 (plurality opinion).

<sup>197</sup> See *Kelley v. Johnson*, 425 U.S. 238, 252–53 (1976) (Marshall, J., dissenting) (emphasis omitted) (quoting *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958)).

<sup>198</sup> See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>199</sup> See *supra* Part III.A.

<sup>200</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents' choice to educate their children at private schools is protected by the Due Process Clause); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the state could not prohibit foreign language study); see also Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 314 n.55, 339–40, 356 n.330 (1986) (noting the Supreme Court's trend to acknowledge and reinforce the freedom of individuals to make their own choices about cultural identification).

<sup>201</sup> See, e.g., Karst, *supra* note 173, at 267, 328, 366; Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 169–72 (2002); Minow, *supra* note 171, at 683–87.

One of the main goals of substantive due process is to provide such space for individuals to construct their own identities; for example, substantive due process protects an individual's choices about when and how to become a parent,<sup>202</sup> childrearing,<sup>203</sup> bodily integrity,<sup>204</sup> whom to marry,<sup>205</sup> whom to live with and designate as family,<sup>206</sup> and with whom to form intimate or sexual relationships.<sup>207</sup> Substantive due process rights also extend to more mundane rights such as the "right of the individual to contract, to engage in any of the common occupations of life, [or] to acquire useful knowledge."<sup>208</sup>

Although I contend that substantive due process stands for the principle that there is a general interest in being free from government intrusion, including enforcement of copyright laws, such interests must be balanced with competing interests.<sup>209</sup> Usually, the interests of copyright holders, authors, and the state in preserving the copyright system will prevail over the broad, undifferentiated liberty interest of users. But I contend that there are instances in which a user's liberty interest is particularly great and should outweigh the interests of authors and copyright holders.

The substantive due process cases in which individual liberties prevailed over competing government or other interests provide an illuminating avenue for conceptualizing when uses of copyrighted works should be considered more or less fundamental to an individual. Restricting successful substantive due process challenges to those involving identity-based uses provides a useful and appropriate limit. As uses move away from identity-based uses, they will increasingly be less compelling when compared against the competing interests of

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<sup>202</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>203</sup> See *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

<sup>204</sup> See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (assuming that an individual has the right to reject forced administration of lifesaving medical treatment); *Rochin v. California*, 342 U.S. 165, 173 (1952) (holding that forced stomach pumping violated the substantive due process rights of defendant). The abortion and contraceptives cases can also be read as protecting an individual's bodily integrity from invasion by an unwanted fetus. See *Washington v. Glucksberg*, 521 U.S. 702, 778 (1997) (Souter, J., concurring).

<sup>205</sup> See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding an antimiscegenation statute unconstitutional on both due process and equal protection grounds).

<sup>206</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–506 (1977) (striking down on substantive due process grounds a housing ordinance that limited dwelling occupancy to a narrow set of individuals).

<sup>207</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down sodomy ban); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (describing as central to the concept of liberty the protection of intimate relationships from unwarranted state intrusion).

<sup>208</sup> See, e.g., *Meyer*, 262 U.S. at 399.

<sup>209</sup> Such balancing is a routine feature in substantive due process cases. See *infra* Parts III.C.2, III.C.6.

copyright holders, creators, and broader calculations of the public interest. Evaluating the degree to which a person's identity is intertwined with a copyrighted work will help make "moral distinctions"<sup>210</sup> in copyright disputes and assist in evaluating both the current law and potential expansions to it.

This discussion has provided some broad strokes of how substantive due process's focus on protecting identity connects up with the constitutive effect of copyrighted works. In Part IV, I will develop the categories of uses that are intertwined with an individual's identity to such a degree that they should merit greater constitutional protection under a liberty-based analysis. In that Part, I will also flesh out how various strands of substantive due process law connect up with these categories. Before embarking on that analysis, I will first address some possible concerns with bringing substantive due process to bear in the context of copyright law.

### C. Potential Objections to a Substantive Due Process Approach to Copyright

A number of jurists and scholars hold substantive due process in disdain.<sup>211</sup> For these individuals, the liberty-based approach probably will not hold much appeal. Nevertheless, substantive due process exists, is well established, and is in no danger of being eliminated.<sup>212</sup> Nor is my proposed application of substantive due process as extreme or controversial as a call to strike down congressional legislation.<sup>213</sup> Instead, the substantive due process analysis that I advocate here serves as a guide for interpreting and limiting existing copyright law rather than challenging copyright law in its entirety.

Taking substantive due process as a given, I will now consider several potential objections to its application in the context of copyright

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<sup>210</sup> Radin, *supra* note 182, at 957.

<sup>211</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990) (referring to substantive due process as a "momentous sham"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (referring to substantive due process as a "contradiction in terms—sort of like 'green pastel redness'"); cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979–85 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (describing a very narrow view of substantive due process strictly limited to explicitly accepted rights at the time of the ratification of the Constitution).

<sup>212</sup> See, e.g., Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836–37 (2003) (calling attention to the acceptance of substantive due process rights by conservative members of the Supreme Court, while noting that the doctrine remains controversial). See generally James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 *passim* (1999) (contending that the due process clause has long been substantive in nature).

<sup>213</sup> See Rubin, *supra* note 212, at 837 (noting that one of the most controversial features of substantive due process is its use to invalidate legislation).

law. I note at the outset of this discussion that although I think substantive due process could apply independently in copyright cases, even if it ultimately is not so applied, there is still tremendous value in analogizing personal uses of copyrighted works to categories of recognized fundamental rights under substantive due process doctrine.<sup>214</sup>

### 1. *The Rooted-in-Tradition Hurdle*

Those with a narrow view of substantive due process will point to language in some substantive due process cases suggesting that due process rights must be specifically rooted in history and tradition.<sup>215</sup> I note that uses of copyrighted works are arguably rooted in tradition since, at the time of the drafting of the Constitution and the passage of the Bill of Rights, many uses of copyrighted works were permissible.<sup>216</sup> But even if one could not prove the rooting in tradition of specific uses of copyrighted works, the Supreme Court in *Lawrence v. Texas* rejected the narrowly articulated test from *Washington v. Glucksberg* that restricted substantive due process rights only to those that are specifically rooted in history and tradition.<sup>217</sup> *Lawrence* made clear that the historical and traditional grounding of the *specific* right, e.g., homosexual sodomy, is less important than the theoretical grounding of those specific rights in the broader context of historically embraced *principles* such as intimate association or personal autonomy.<sup>218</sup> Just as investigating whether there was historically a right to homosexual sodomy asks the wrong question, asking whether individuals historically had a right to use copyrighted works is also the wrong question. The proper question is whether such uses are rooted in our broader understanding of liberty and its protection of personhood and autonomy of self.<sup>219</sup>

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<sup>214</sup> Paul Goldstein has described such an approach as the “non-constitutional function of constitutional doctrine.” Goldstein, *supra* note 58, at 1001.

<sup>215</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . .” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

<sup>216</sup> See *supra* notes 41–42, 77–79 and accompanying text.

<sup>217</sup> See *Lawrence v. Texas*, 539 U.S. 558, 566–74 (2003) (noting that the *Bowers* majority “misapprehended” the liberty interest at stake); see also *id.* at 588, 593 & n.3 (Scalia, J., dissenting) (citing *Glucksberg*, 521 U.S. at 721, to make the argument that the majority was departing from precedent).

<sup>218</sup> *Lawrence*, 539 U.S. at 566–74.

<sup>219</sup> Although I use the term “autonomy” in certain places, I recognize that it can be difficult to ever be purely autonomous given cultural and psychological constraints. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY passim* (2004); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 *passim* (1992). Nevertheless, providing individuals with greater freedom is a step toward greater, if not complete, autonomy. Moreover, I think of autonomy more in relation to government regulation and less in the sense of autonomy from others. In fact, relational autonomy is crucial to one’s individual development, identity, and freedom.

## 2. *A Hierarchical View of Substantive Due Process Rights*

Even those who support substantive due process and reject a narrow rooted-in-tradition reading of it might still object to the proposed paradigm, claiming that uses of copyrighted works are not nearly as important as the rights at issue in the canonical substantive due process cases. I disagree with this narrow understanding of substantive due process. As discussed, the underlying principle of liberty applies not to specific categories but instead more broadly to provide space for individuals to develop and act free from government intrusion. Moreover, we should be careful when prioritizing certain liberty rights over others. Just as First Amendment analysis generally disfavors judgments about which speech is more valuable<sup>220</sup>—Shakespeare or Playboy magazine, for example—substantive due process analysis has disfavored such subjective and morals-based judgments.<sup>221</sup> The liberty protected by the Fifth and Fourteenth Amendments is not about protecting individuals from government intrusion only when the state decides that what those individuals are doing is valuable. As I have argued elsewhere, *Lawrence v. Texas* should be read to stand for the proposition that the government cannot penalize adult consensual sexual relations even if the sex at issue is between strangers or those not seeking any long-term marriage-like relationship.<sup>222</sup>

Nor is anyone forced to choose between fundamental rights. Substantive due process does not create a value-based scale in which we rank the relative importance of marriage, contraception, or uses of copyrighted works to individuals. (Some people might put marriage at the top of their list, while others might put it far below using particularly meaningful copyrighted works.) Instead, the substantive due process cases stand not as exceptions to an otherwise highly limited world of individual freedom, but as emblems of individuals' broader right to develop their own identities with a minimum of government intrusion.

The fact that value judgments should be avoided in constitutional adjudication does not mean that the rights at issue should not be evaluated for their importance to the individual. This is true not because

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<sup>220</sup> See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 593–594 (1991) (White, J., dissenting) (contending that it is a long-standing principle that courts should not assess “artistic merits” and should leave “matters of taste and style” to individuals (quoting in part *Cohen v. California*, 403 U.S. 15, 25 (1971))); *Cohen*, 403 U.S. at 16, 25 (stating that “Fuck the Draft” merits equal protection to poems by Keats or sermons by Donne).

<sup>221</sup> *Lawrence*, 539 U.S. at 571 (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion))); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 *passim* (2004).

<sup>222</sup> Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. (forthcoming 2010) (manuscript on file with author).

such values determine whether a liberty right is at stake, but because one person's interests often butt up against another person's interests or those of the state. When such conflicts occur, the resolution of the conflict requires a weighing of those interests. As the Supreme Court explained in *Cruzan v. Director, Missouri Department of Health*: "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by *balancing* his liberty interests against the relevant state interests.'"<sup>223</sup> Recent abortion-rights jurisprudence highlights this approach. In *Gonzales v. Carhart*, the majority emphasized that although a woman has a right to an abortion there is a competing government interest in "preserving and promoting fetal life."<sup>224</sup> The Court balanced a woman's fundamental right to an abortion with this government interest (arguably a purported fetal interest) and held constitutional the Partial-Birth Abortion Ban Act.<sup>225</sup> *Carhart* is one of the most recent cases to highlight the constant balancing that takes place in evaluating competing interests even in substantive due process cases involving fundamental rights.<sup>226</sup> In the copyright context, we are not comparing uses of copyrighted works to marriage rights or the right to contraceptives, but instead to the interests of copyright holders, authors, and the state in preserving the copyright system. The question then is whose interest should prevail and when. In this first step toward reconceptualizing the way we think about uses of copyright, I seek to identify categories of uses that I think should weigh heavily against enforcement of copyright law despite the interests of copyright holders, authors, and the overall interest in shoring up the copyright system.

### 3. A More Specific Constitutional Provision

Given the existence of the First Amendment, another possible objection could be that no further constitutional review is doctrinally possible because a more specific constitutional provision should

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<sup>223</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (emphasis added) (footnote omitted) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). It is well established that an individual's liberty interests must be balanced with state interests and other individuals' competing interests. See, e.g., *Youngberg*, 457 U.S. at 320–21; *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977).

<sup>224</sup> *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. 833 ).

<sup>225</sup> *Carhart*, 550 U.S. at 167–68. It is outside the scope of this discussion to get into a more detailed discussion of *Carhart*, a decision that some, including myself, have found particularly troubling because of its demeaning rhetoric about women. See *id.* at 182–86 (Ginsburg, J., dissenting).

<sup>226</sup> See also *Michael H. v. Gerald D.*, 491 U.S. 110, 123–30 (1989) (rejecting the argument that a biological father should have parental rights in large part because of the competing rights of the married couple raising his biological daughter).

trump a more general one.<sup>227</sup> A number of courts and scholars, however, have suggested otherwise, especially in the context of the First Amendment and substantive due process.<sup>228</sup> Accordingly, it is justifiable as a doctrinal matter to contend that both First Amendment and substantive due process review are merited. Moreover, the claims that I am interested in relate to identity-based due process rights rather than more broad-based claims of self-expression. Although there is an intersection between the two, my focus is not on what an individual has to say, but on the fact that the copyrighted work forms a constitutive part of that person's identity. Because the claims are different, there is less power to the arguments that the due process claims should be subsumed within First Amendment review.

#### 4. *The Requirement of State Action*

Although there is disagreement about whether the private enforcement of federal laws counts as state action, the general consensus in copyright cases is that it does.<sup>229</sup> Under such an understanding, the private enforcement of copyright laws constitutes state action because the laws are authorized by the U.S. Constitution and passed by Congress.<sup>230</sup> The state creates and determines the scope of copyright.

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<sup>227</sup> With regard to the Fourth Amendment, one common understanding, although the matter is far from settled, is that a more specific constitutional provision precludes consideration of a less specific one. See *Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”); see also Rubín, *supra* note 212, at 834 (noting the Court’s rule that when a more specific constitutional provision applies, substantive due process may not be invoked).

<sup>228</sup> See *Albright*, 510 U.S. at 286–87 (Souter, J., concurring) (contending that more than one constitutional provision can apply even if a specific constitutional provision is on point); see also *United States v. Martignon*, 492 F.3d 140, 152 n.7 (2d Cir. 2007) (suggesting that a criminal law penalizing the recording of musical performances might run afoul of both the First Amendment and the Due Process Clause); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1221–22 (D. Colo. 2004) (permitting both substantive due process and First Amendment arguments to proceed in a challenge to copyright restoration), *aff’d on other grounds sub nom.* *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007); Karst, *supra* note 156, *passim* (noting that the right of intimate association may be located in a variety of constitutional provisions, including the First Amendment and the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments); cf. *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (suggesting that the right to privacy may be protected by a concurrence of several different constitutional provisions).

<sup>229</sup> See *infra* note 231. A full development of the complexities of the state action doctrine is outside the scope of this Article. For those interested in a more developed discussion of state action, see Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985) (describing the morass that is the state action doctrine and calling for protecting fundamental rights even against private actors).

<sup>230</sup> See U.S. CONST. art. I, § 8. Accordingly, one need not rely on the oft-criticized *Shelley v. Kraemer* decision to find state action here. 334 U.S. 1, 12–18 (1948) (holding that state court enforcement of racially restrictive covenants constituted state action). Al-

Private copyright holders then act like private attorneys general enforcing these federal laws. Accordingly, there has been little dispute among copyright scholars that there is state action.<sup>231</sup> Even though the First Amendment has had little success as a defense in copyright cases, no court has suggested that the First Amendment does not apply because there is a state action problem.<sup>232</sup> The state action analysis should not be substantially different in the substantive due process context since the key question is whether state action is involved in the first place, not what defense or constitutional provision is asserted.<sup>233</sup>

### 5. *The Why-Is-Liberty-So-Much-Better Challenge*

The liberty-based paradigm might not overcome all of the impediments to First Amendment review; however, reconceptualizing the way we view certain uses will put a heavier thumb on the scale in favor of users. Whether this happens through independent substantive due

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though a number of scholars have limited *Shelley* to its facts, it is still good law for the principle that state court adjudication of disputes between private parties can constitute state action. See Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT 733, 763–64 (2007). I note that there would of course not be any state action problem when copyright laws are enforced through the criminal justice system.

<sup>231</sup> See COOMBE, *supra* note 58, at 260 (concluding that privately enforced copyright law constitutes state action); Gordon, *supra* note 25, at 1607 n. 400 (“Enforcement of property rights [in the context of copyright law] should be acknowledged as state action.”); Lemley & Volokh, *supra* note 58, at 185 n.179 (“There’s no doubt that a court’s enforcement of copyright law to restrict private speech constitutes state action.”); Tushnet, *supra* note 53, at 538 (dismissing the argument that the private enforcement of copyright law is not state action); see also Weinberg, *supra* note 230, at 764 (“[I]t is reasonably clear that the ‘governmental action’ requirement of constitutional review is satisfied even if government merely enables private acts that, if public acts, would violate the Constitution.”). For extended discussions of the state-action issue with regard to the enforcement of copyrights, DRM, and patents, see Cohen, *A Right to Read*, *supra* note 10, at 1019–25 (concluding that digital-rights management and antitampering laws implicate state action); John R. Thomas, *Liberty and Property in the Patent Law*, 39 HOUS. L. REV. 569, 592–606 (2002) (concluding that enforcement of patent laws constitutes state action).

<sup>232</sup> The First Amendment is routinely applied as a defense in private actions in copyright cases, as well as in tort cases. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (rejecting a First Amendment challenge in a copyright case, but not questioning the state-action basis for asserting a First Amendment defense); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting a First Amendment challenge in a right-of-publicity claim against a television news station without questioning that the enforcement of publicity laws involved state action); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (limiting the application of libel laws on First Amendment grounds without questioning the presence of state action).

<sup>233</sup> See, e.g., *Golan*, 310 F. Supp. 2d at 1220–21. The Supreme Court’s decision in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), does not suggest otherwise. Although the Court in *San Francisco Arts* rejected a substantive due process challenge while considering a First Amendment one, the substantive due process challenge required a conclusion that the U.S. Olympic Committee was a state actor. The Court did not consider a substantive due process challenge to the relevant federal statute or that statute’s application to the defendant. See *id.* at 542–47.

process review, changes to the Copyright Act, a new understanding of what constitutes facts,<sup>234</sup> or a new perspective on fair use,<sup>235</sup> is less important than that it happens. Shifting the way we think about uses of copyrighted works from a free speech model to a liberty-based one could break us out of the box in which we currently find ourselves and provide greater assistance for at least the narrow subset of uses I identify.

As discussed, analyzing uses of copyrighted works in a free speech paradigm leaves copyright holders with the upper hand and users mostly out in the cold.<sup>236</sup> For a variety of reasons, these obstacles are less pronounced under the liberty paradigm. First, and perhaps most significantly, the liberty-based approach escapes the First Amendment's challenge of copyright being viewed as the "engine of free expression." The loss of individual speech in copyright cases is tolerated because a conclusion is made that society will be better off with *more* speech in the aggregate.<sup>237</sup> Additionally, a comparison is made between the copyright owner's speech and the user's speech. The copyright holder's speech is then assessed as more valuable. The owner's speech is assumed to be more original, more self-expressive, and a greater contribution to the marketplace of ideas. This is especially true when the use at issue is deemed nontransformative and not relevant to the public interest writ large.<sup>238</sup>

The liberty approach avoids the problem of copyright law being a speech-producing engine. Under a liberty approach, we do not compare speech with speech and then ask which speech is more valuable or which speech is more likely to generate the most speech overall. Even though it is true that users' liberty interests must be balanced with the liberty interests of others—in particular, copyright holders and authors—this balancing process will be more favorable to users than the free speech rubric. One cannot argue, as one can in the speech context, that copyright is the engine of *liberty*; nor, as I will discuss in the next section, are the burdens on copyright holders' and creators' liberty interests as severe as those on users engaged in identity-based uses.

Second, in contrast to the First Amendment there are no categorical exceptions to substantive due process or the liberty protected by the Fifth and Fourteenth Amendments.<sup>239</sup> So copyright would not be

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<sup>234</sup> Cf. Gordon, *supra* note 92, *passim* (calling for permitting uses of copyrighted works when the copyrighted works function as facts).

<sup>235</sup> In Part VI, I will discuss how the liberty approach interacts with the current fair use doctrine.

<sup>236</sup> See *supra* Parts I, II.

<sup>237</sup> See *supra* Part I.C.

<sup>238</sup> See *supra* Parts I.C, II.

<sup>239</sup> See *supra* Part I.A.

read as an exception to substantive due process protections. The real tension in substantive due process analysis is whether the application of copyright law to individuals engaged in identity-based uses merits heightened scrutiny. Once such a determination is made there is no category of excepted conduct.

Third, the argument that built-in limits on copyright provide adequate protection for liberty interests is not as compelling as the argument that such doctrines adequately protect speech. This is true in part because the built-in limits are largely directed toward broader matters of public interest rather than toward personal uses. The expression of copyrighted works is more important for personal uses than the underlying facts or ideas that might be sufficient under a democratic-society approach to the First Amendment.<sup>240</sup>

One could contend that fair use should provide adequate protection for personal uses, and therefore, like First Amendment analysis, substantive due process analysis should be subsumed within fair use. The fair use doctrine, at least in its current incarnation, however, is woefully inadequate to protect personal uses.<sup>241</sup> Fair use has often been categorized as being about the public interest writ large. As the Second Circuit has described: “The [fair use] doctrine offers a means of balancing the exclusive right of a copyright holder with the public’s interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry.”<sup>242</sup> The express fair use provision in section 107 of the Copyright Act emphasizes these *public* justifications for uses by enumerating in its preamble “criticism, comment, news reporting, teaching . . . [.] scholarship [and] research.”<sup>243</sup> Section 107 does not, however, engage in any explicit way with more liberty-based and individual justifications for uses. As Jeremy Waldron has observed, fair use has little to offer “plain folks trying to live their lives and exercise their liberty in a world that surrounds and purports to entertain them with stories, programs and ideas.”<sup>244</sup>

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<sup>240</sup> See *supra* Part II.B.

<sup>241</sup> It also inadequately protects more public-oriented uses. See *supra* Part II.B.

<sup>242</sup> *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977); see also *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (describing fair use as a doctrine that permits subordination of “the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry” (quoting *Berlin v. E. C. Publ’ns, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964))).

<sup>243</sup> See 17 U.S.C. § 107 (2006); see also *New Era Publ’ns Int’l, ApS v. Carol Publ’g Group*, 904 F.2d 152, 157 (2d Cir. 1990) (“[A]s long as a book can be classified as a work of criticism, scholarship or research, . . . [the first fair use factor] cuts in favor of the book’s publisher . . . .” (quoting *New Era Publ’ns Int’l, ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576, 583 (2d Cir. 1989))).

<sup>244</sup> Waldron, *supra* note 18, at 862.

Even if a substantive due process approach faces hurdles similar to independent First Amendment review, the liberty-based approach will have value in fomenting the reconceptualization of these internal doctrines to suffuse them with substantive due process values.

6. *Concern Over Copyright Holders' and Authors' Interests*

One could contend that the interests of copyright holders and authors should prevail over users' liberty interests; one person's liberty interest cannot run roughshod over another's. The distinction between positive and negative liberty interests, however, suggests why a comparison of liberty interests should nevertheless favor users over creators in some instances. The federal government has no obligation to grant affirmative liberty rights to creators, but it does have an obligation to protect negative liberty interests of individuals by not enforcing federal copyright law when those individuals use others' copyrighted works for reasons fundamental to their identity and personhood. When comparing the liberty interests of users—when the privileged categories I identify are at stake—with those of copyright holders, the harm to copyright holders is minimal. Copyright holders' fundamental rights are not jeopardized by some limits on the scope of their copyrights. Copyright protection often rests in publishers and not creators, and therefore the competing interests weigh more heavily on the side of the individual user because the creator has already given up his or her liberty interest in the work. The non-creator-copyright-holder's interest is of an economic nature and therefore less related to protecting and developing one's identity.

Creators' liberty interests also do not outweigh users' interests when the uses are within the privileged personal-use categories. Because the creators have made their original works public, they have voluntarily given up some of their liberty interests in the works. Creators knowingly release their works (and copyrights) to publishers, producers, and distributors and are aware that members of the public will then interpret their work as they please, often incorporating the works into their lives. In fact, many creators hope that people will do just that. Creators cannot have it both ways, relinquishing their rights and then trying to regain them to prevent others from exercising their own liberty. By putting the work into the public eye, the creator and copyright holder lose some of their control over what is subsequently done with the work and the associations and meanings that the work's audience constructs.<sup>245</sup>

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<sup>245</sup> Cf. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). For a relevant discussion of the role audiences

Moreover, even if a liberty approach creates some obligations to authors, such obligations are more likely to be in the form of requiring attribution or integrity (for single-copy works) rather than in the form of prohibiting uses.<sup>246</sup> Permitting personal uses of copyrighted works without permission or payment does not interfere with an author's freedom.<sup>247</sup> Users would not gain any rights in the copyrighted work but rather would simply escape a Hohfeldian duty not to copy or use the work.<sup>248</sup> In other words, the user would not be able to transport this limited ability to use a copyrighted work into other contexts or be able to commercialize the underlying work (without independent creation in a new context).

Even if a user's interest trumps the liberty interests of copyright holders and creators in the circumstances that I identify, one might still object that permitting such uses allows users' liberty interests to overtake copyright holders' economic and property interests. The interplay between liberty interests and property rights is a vast topic that I cannot fully explore here, but I will briefly note some reasons why users' liberty interests might prevail over copyright holders' property interests.

As an initial matter, when comparing a copyright holder's property interest with a user's liberty interest, one must consider the nature of the property right at stake. Copyright is a government-created privilege, not a common law property right.<sup>249</sup> By contrast, protection of liberty rights, at least negative ones, is granted by the Constitution

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play in constructing meaning, see TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 107–08, 120–22, 134–50 (1983); HEGEL, *supra* note 184, ¶ 46, at 42; see also Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 677–84 (2004); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *TEX. L. REV.* 1853, 1864–77 (1991). *But see* Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 *TEX. L. REV.* 923 *passim* (1999) (contending that meanings of cultural objects are fixed and such meanings should be protected).

<sup>246</sup> See Rothman, *supra* note 90, at 1971, 1975 (concluding that attribution customs are more worthy of consideration in IP cases than many other customs). A liberty-based paradigm for copyright law could give more credence to moral-rights advocates as well as greater latitude to creators to reclaim their works from copyright holders under certain limited circumstances. The implications of such a result are beyond the scope of this Article, but nothing in such an expansion would alter my conclusion that a shifted focus to liberty interests would shore up users' interests.

<sup>247</sup> Waldron, *supra* note 18, at 872–75.

<sup>248</sup> *Id.*; see also WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 65–74 (Walter Wheeler Cook ed., The Lawbook Exchange, Ltd. 2000) (1919).

<sup>249</sup> There has been scholarly debate on this point since the inception of copyright law and it continues today; however, the Supreme Court has settled the issue. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (holding that whatever its origins, federal copyright is a creature of statutory privilege); *cf.* *Donaldson v. Beckett*, 1 Eng. Rep. 837, 843–44 (H.L. 1774) (holding that statutory copyright law—under the Statute of Anne—eliminated any common law protection for copyrights that might have existed prior to the statute's passage).

and generally thought of as an expression of an a priori natural right. Accordingly, the liberty to describe and engage with one's own reality should be favored over a broader right to property or to recoup potential profits from a government-granted monopoly.

Moreover, when comparing property and liberty interests in the context of copyright law, one must recognize the differences between tangible and intangible property and between land and copyrighted works. The arguments for preferring liberty rights over property rights in the context of intangible property are particularly strong. Because of the intangible and nonrivalrous nature of copyrighted works, the use of copyrighted works does not stop copyright holders from using or selling their works. Accordingly, in contrast to real property, there is minimal interference with copyright holders' ability to use their property. Even if there is some market harm in the form of loss of sales to a copyright holder because of an identity-based personal use, the competing liberty interests of users should outweigh this loss of profits.

Having addressed in broad strokes why a substantive due process, liberty-based approach is warranted in the context of uses of copyrighted works and why it may fare better in certain cases than the free speech approach, I now will develop a schema for determining when uses of copyrighted works fall within the substantive due process rubric and thus deserve a privileged status.

#### IV

##### PRIVILEGED USES UNDER A LIBERTY-BASED THEORY

Copyright law should be limited when it interferes with the sacred space constitutionally reserved for individuals to define and construct themselves. In this Part, I will develop categories of uses of copyrighted works that implicate liberty rights in heightened ways. In such instances, an individual user's liberty interest will most often outweigh countervailing public-policy justifications for protecting copyrighted works as well as the interests of individual copyright holders and creators. Copyrighted works are fundamental to an individual's liberty when their use is integral to the construction of a person's identity. In particular, uses that are necessary for mental integrity, communication, the development and sustenance of emotionally intimate relations, or the practice of one's religion are all at the core of one's identity. Most of the uses that I enumerate are likely infringing under the current system, but they should not be because of their integral relationship to defining and constructing "one's own concept of exis-

tence.”<sup>250</sup> My claim here is not that copyrighted works are always fundamental to an individual’s identity, but that when they are, courts and the copyright system should give greater latitude for such uses.<sup>251</sup>

### A. Descriptive Uses and the Right to Mental Integrity

Just as substantive due process has long protected “bodily integrity,”<sup>252</sup> it also protects *mental integrity*.<sup>253</sup> As the Supreme Court has suggested: “Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>254</sup> Even cases that ostensibly involve bodily integrity, such as the abortion-rights cases, are in large part about mental integrity and permitting individuals to make choices based on their own emotions, thoughts, and beliefs.<sup>255</sup>

A key component of mental integrity is being free to refer to one’s own life experiences and the realities of the external world. Often, doing so requires explicit reference to and use of copyrighted works. Copyrighted works are integrated into our lives, our daily experiences, our memories, and our thoughts—each of which adds to our identity formation.<sup>256</sup> Accordingly, a right to mental integrity requires that we have some latitude to use copyrighted works to describe our experiences and the world itself.

<sup>250</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

<sup>251</sup> Undoubtedly there are some individuals who may not perceive copyrighted works as integral to their identity, but for others, copyrighted works form the heart of their identity. Copyrighted works play a significant role in constructing personal and cultural identities even when individuals are unaware of the role those works play in that construction. I am therefore doubtful that anyone can avoid the constitutive effect of copyrighted works. That conclusion, however, is a different matter than when individuals should be able to use copyrighted works without permission. In such instances a more conscious need should be documented.

<sup>252</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin v. California*, 342 U.S. 165 (1952)).

<sup>253</sup> Cf. *United States v. Weber*, 451 F.3d 552, 570–71 (9th Cir. 2006) (Noonan, J., concurring) (referring to violation of a prisoner’s “mental integrity” as well as “bodily integrity”).

<sup>254</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding unconstitutional a conviction for the mere possession of obscene matter in a private home). I note that this language was quoted with approval in *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part). Although *Stanley* was ostensibly a First Amendment case, it fits more easily into either a Fourth Amendment or substantive due process framework. See *Stanley*, 394 U.S. at 569–72 (Stewart, J., concurring); see also *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 124–30 (1973) (limiting *Stanley* to the home and the Fourth Amendment context and suggesting that there is no right to access obscene materials).

<sup>255</sup> See *Casey*, 505 U.S. at 852 (“The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”).

<sup>256</sup> See OCHS & CAPPS, *supra* note 190, at 2–4, 54–56; Radin, *supra* 182, at 967–68 (describing the importance of memory for personhood); see also *infra* note 263 and accompanying text.

Consider, even generally, the role copyrighted music plays in our lives; it is almost unavoidable to hear music playing in the background of our day, whether at sporting events, in the car, or in an office building. Music is truly the soundtrack of our lives. When particular songs are playing at particularly memorable moments in our lives, the songs become permanently etched in our minds. To limit our ability to reference, replay, reuse, and share such songs asks each of us either to erase our memory banks (currently an impossibility) or alternatively to censor our own reality.

The recent National Public Radio (NPR) series, *Summer Songs*, provides a compelling example of the role music plays in our memories. The series asked musicians and listeners to identify summer songs that were intertwined with particular summer memories. Listener Alice Schechter recalled being on the beach in 1962 when she was fourteen years old. She vividly remembered that “every blanket had a transistor radio, and every radio was playing ‘Sherry Baby.’ It just had that soaring summer sound. It felt like the whole beach was just pulsing with that song.”<sup>257</sup> The NPR series played the Four Seasons’ song “Sherry” throughout her first-person account. The memory simply could not have been fully evoked without use of the actual song—reading the text of her story absent the music is a world apart from the experience of hearing the story with the actual song. No doubt her experience of the memory is different depending on whether she is listening to the song. Similarly, songwriter Maia Sharp recounted her memory of being the only girl on her little league team and winning the baseball game for her team. After the win, Paul Simon’s song “Kodachrome” was playing in the car. For her, the song means “[t]riumph—you know, the coming through in the clutch, the celebration, the kind of, ‘I showed them.’” For Sharp, the song *is* the memory: “It’s amazing what a song can do. It’s like a smell—it brings back everything.”<sup>258</sup> Not only is the song crucial to her own recollection, but it also is crucial to her ability to share her memory and emotions with others. Her words alone pack little emotional punch, but the NPR piece with “Kodachrome” playing as she describes her memory is moving.<sup>259</sup> My point in raising the NPR series is not to interrogate the legality of these uses, but instead to demonstrate the impact that music can have on our memories and our identities.<sup>260</sup>

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<sup>257</sup> *Listeners’ Summer Songs: ‘Big Man,’ ‘Sherry’* (NPR radio broadcast Aug. 27, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=112296819>.

<sup>258</sup> *Summer Song Favorites: ‘Kodachrome’* (NPR radio broadcast, July 9, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=106433631&ps=rs>.

<sup>259</sup> See *id.*

<sup>260</sup> Research on musical tastes suggests that our identity is intertwined with our experiences with music. Rob Walker, *The Song Decoders*, N.Y. TIMES MAG. 47, 52–53 (Oct. 18, 2009).

Another example of a use of music that is fundamental to mental integrity is the scenario presented in the Introduction involving a woman who plays Journey's "Don't Stop Believin'" on a loop on her publicly accessible blog (her online diary). The Journey song had been playing on the radio in the car in which she was assaulted. Her blog entry describing her traumatic experience and the playing of the music in conjunction with the text is part of her coping process. Many psychologists and others have found this process of reclaiming memories and speaking out about one's traumatic experiences vital to the recovery process.<sup>261</sup> Suppose the band objected to her public performance, copying (to a digital format), and preparation of a derivative work of its copyrighted composition, lyrics, and performance. Under current copyright law, she would be liable for copyright infringement with little chance of mounting a successful First Amendment defense and a very uncertain fair use defense.<sup>262</sup> The proposed liberty framework, however, would protect the blogger's use—she is describing and engaging with her own lived experiences, experiences that incorporate copyrighted works. To prevent such documentation would seriously disrupt her mental integrity.

Nor should the blogger be limited only to sharing her blog entry with close friends or those previously known to her. Mental integrity is not simply about keeping the contents of one's mind free from state intrusion; it also requires the ability to express the content of one's mind to others. One's identity and personality develop in context and in relation to others. Without the ability to externalize one's experiences, one cannot develop into one's own person nor establish meaningful relations with others.<sup>263</sup> Publications of one's memories and experiences are often dismissed as unimportant or, worse, narcissistic. But such public expressions are important pieces of self-realization and development. As Professor Seana Shiffrin has noted: "If what makes one a distinctive individual is largely a matter of the contents of one's mind, to be known by others requires the ability to transmit the contents of one's mind to others."<sup>264</sup> Our identity formation depends in large part on our interaction with others and their "reactions and

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<sup>261</sup> See, e.g., JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 175–78 (1997).

<sup>262</sup> See *supra* note 4.

<sup>263</sup> See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 2, 25 (1997); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 70 (2006) ("So long as there is a *right to be* a particular kind of person, . . . it logically and morally follows that there is a *right to say what one is*."); Hunter, *supra* note 174, at 9 ("Expression is the crucible in which identity is formed."); Katyal, *supra* note 201, at 109 (asserting that in the context of sexual orientation the expression of one's gay identity is a "component of the very identity itself"); see also *supra* note 190 and accompanying text.

<sup>264</sup> Seana Shiffrin, *A Thinker-Based Approach to Freedom of Speech* 6 (2009) (unpublished manuscript, on file with author).

evaluative responses to our beliefs.”<sup>265</sup> Accordingly, public dissemination of such uses of copyrighted works should be protected by the constitutional right to liberty. Moreover, these public uses should not be limited only to a small subset of friends or even to those previously known to the user. I will further discuss the importance of such connections in the next subpart when I focus on uses of copyrighted works that promote intimate associations.<sup>266</sup>

Substantive due process cases provide support for this broader, public reading of liberty—freedom means much more than the freedom to do what one wants in private. Cases involving marital relations and contraceptives are not solely about sex behind closed doors but are also about state recognition of relationships, the public sale and purchase of contraceptives, sex education, and interactions with the community at large as a social unit.<sup>267</sup> Similarly, cases involving parents choosing where and how to educate their children are about the public interface of parental decisions with public schools and communities.<sup>268</sup>

Many copyrighted works other than musical ones become intertwined with our lives. Consider the use of personal letters. Copyright law has often been asserted to prevent the publication of personal letters in biographical works, even when the recipient of the letter has given permission for the letter’s publication or the recipient herself is the author.<sup>269</sup> In *Sinkler v. Goldsmith*,<sup>270</sup> Lorraine Sinkler sought a declaratory judgment that she could publish letters that she had received from Joel Goldsmith. At the time of the lawsuit, Goldsmith was dead and his wife sought to stop the publication of the letters he had sent to Sinkler. Goldsmith had founded a nontraditional spiritual/religious movement, *The Infinite Way*. Sinkler had joined the movement and developed an extensive correspondence and relationship with Goldsmith. In fact, Sinkler began ghostwriting monthly letters and other works for Goldsmith that were sent to and purchased by his followers. A federal district court rejected Sinkler’s First Amendment

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<sup>265</sup> *Id.* at 7; see also OCHS & CAPPS, *supra* note 190, *passim*.

<sup>266</sup> See *infra* Part IV.B.

<sup>267</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>268</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>269</sup> See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (rejecting a fair use defense by a biographer who paraphrased some of J.D. Salinger’s letters); *Meeropol v. Nizer*, 560 F.2d 1061, 1068–71 (2d Cir. 1977) (rejecting a fair use defense when the defendant included letters written by Ethel and Julius Rosenberg in a biography about the famous couple). Notably, Samuel Warren and Louis Brandeis’s original argument for privacy law was based in part on common law copyright protection for unpublished letters. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–206 (1890).

<sup>270</sup> 623 F. Supp. 727 (D. Ariz. 1985).

argument that she had a right to publish the letters that she had received from Goldsmith. The court also rejected her fair use argument in large part because the letters were unpublished.<sup>271</sup> A liberty approach, by contrast, would allow Sinkler to publish the letters that she had received as part of her personal telling of her life story—a life that included not just the fact of those letters but also their content.

Consider also the diaries of Anaïs Nin that contain extensive passages from letters written to her, including some from the prominent author Henry Miller.<sup>272</sup> Suppose that Miller (or his estate) had sought to enjoin the publication of Nin's diaries because of the inclusion of his copyrighted letters. Current copyright law would likely have prevented Nin from going forward without Miller's permission.<sup>273</sup> Under the liberty framework, Nin would be insulated from a copyright-infringement claim because the letters that Miller wrote to her became part of her identity and history; accordingly, the use of the letters could not be restricted when Nin's motivation in publishing them was to document or explore her own experiences.

The dominant First Amendment approach to cases like *Sinkler* and Anaïs Nin's diaries treats the copyright holder's interests as primary and considers use rights only in the context of evaluating the general public interest in the underlying material—an interest that might be satisfied by synopsisizing the underlying ideas and facts of the letters. The liberty approach analyzes the situation quite differently. Recipients of letters have their own independent liberty right to quote from and reprint letters, in their entirety, that were sent to and received by them. For the lawful recipients of letters, the letters have become a part of their reality and identity. Accordingly, copyright law should not prevent an individual from publishing such letters. Such uses would not, however, defeat the author's copyright in the letters. The recipient's right does not extend to a third-party author, although it would extend to a publisher putting out the recipient's work. The letters must also be lawfully accessed in the first place. One cannot break into someone's house, discover an unmailed letter or unsent e-mail, and then make it public. A user's liberty interest does not extend to a right or privilege of first access. Separate from copyright concerns, there are legitimate privacy concerns about pub-

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<sup>271</sup> See *id.* at 732. The fair use defense is usually rejected when a work is unpublished. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551–52 (1985) (rejecting a fair use argument when a magazine published excerpts of an unpublished memoir).

<sup>272</sup> See, e.g., 1 NIN, DIARY, *supra* note 5, at 100, 135, 156–57, 173.

<sup>273</sup> See, e.g., *Sinkler*, 623 F. Supp. at 730–31 (holding that an author's acknowledgement that the letter recipient may someday publish the letter did not constitute an express license to publish); see also *supra* note 269 and accompanying text. Miller explicitly granted Nin the copyright in his letters to her. See 6 NIN, DIARY, *supra* note 5, at 307.

lishing personal letters. The letters' author might have her own liberty interest in the content of the letter. Ultimately, however, if one wants letters to remain private, one should not send them.

## B. Intimacy-Promoting Uses and the Freedom of Intimate Association

When we want to get to know people and become more intimate with them we often do so by sharing our memories and life experiences. In fact, it is frequently these “common experiences” that bring individuals and communities together.<sup>274</sup> When copyright law limits our ability to convey our memories to others and to rework our experiences outside the confinement of our minds, our ability to develop ourselves and our relationships is severely constrained. When the use of copyrighted material is motivated by intimacy promotion, copyright law should give great latitude to users.

This sensibility is already implicit in some aspects of existing copyright law—in particular, the definition of *public* performance of works as something outside one's circle of family and friends,<sup>275</sup> and also the “home-style exception” for small businesses.<sup>276</sup> No doubt building on these existing exceptions in copyright law, the personal-use literature has favored uses among close family and friends.<sup>277</sup> It has done so, however, without expressly adopting an intimacy-based model. It is vital for protecting such categories of uses to make explicit the underlying theoretical and constitutional basis for them—*intimacy promotion* and the right to *intimate association*.

The dominant close-circle-of-friends-and-family approach also leads to vexing questions of how close is close and how many friends can one truly have. This question has come up repeatedly in the peer-to-peer context: are people really sharing with a “close” circle of one thousand people, many of whom they have never met face to face? Are two hundred (or six hundred) Facebook friends part of your circle of friends? A focus on intimacy promotion would lead to very dif-

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<sup>274</sup> Minow, *supra* note 171, at 674; *see also* OCHS & CAPPS, *supra* note 190, at 2–4, 54–56, 288–90 (discussing the importance of telling one's life stories in order to form relationships with others); Karst, *supra* note 200, at 320 (describing how shared experiences can transform a group of diverse individuals “into one people”).

<sup>275</sup> *See* 17 U.S.C. § 101 (2006) (defining a “public[ ]” performance as one in which the work is “perform[ed] or display[ed] . . . at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”).

<sup>276</sup> *See id.* § 110(5) (recognizing an exemption for a public transmission or display in small businesses so long as the receiving apparatus is similar to that of the home); *cf. id.* § 110(3)–(4) (providing exemptions for, among other things, performances of nondramatic literary and musical works in the context of religious worship and some noncommercial public performances).

<sup>277</sup> *See, e.g.,* Litman, *supra* note 10, at 1894, 1911.

ferent questions and avoid thorny inquiries about who is a friend and who is part of one's family. Such an approach would consider whether the use of the copyrighted work was driven by an effort to promote intimacy. By intimacy I refer not only to relationships with romantic partners but to all emotional connections—whether familial, romantic or platonic, or any combination thereof. Efforts to seek out intimacy need not be face-to-face nor even between individuals with whom one has had prior face-to-face contact. Just as one should be able to define without unreasonable limitations who qualifies as one's family and with whom one wishes to live,<sup>278</sup> one should be able to choose with whom one wants to become more intimate.

Such intimacy-promoting uses fit squarely within the principles of substantive due process. The Supreme Court has struck down numerous attempts to regulate family relations and other intimate associations.<sup>279</sup> The Bill of Rights "secure[s] individual liberty . . . [and] must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."<sup>280</sup> As the Supreme Court emphasized in *Casey*, the Due Process Clause protects certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . [Each involves] the most *intimate* and personal choices a person may make in a lifetime."<sup>281</sup> Family relationships are privileged not because of the magic word "family" but because of the "emotional attachments that derive from the intimacy of daily association."<sup>282</sup> Heightened scrutiny should apply to the regulation or restriction of any intimate relations that are integral to one's "'way of life.'"<sup>283</sup>

Because copyrighted works are intertwined with our memories and experiences, they are often integral to the development and

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<sup>278</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494, 505–06 (1977) (striking down a restriction on who can live in a single-family dwelling); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a ban on interracial marriage).

<sup>279</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003) (striking down a ban on homosexual sodomy); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844–45 (1977) (discussing protection for nonblood relationships such as foster care households, often inappropriately categorized by the state as merely a group of strangers) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)); *Moore*, 431 U.S. at 499–506 (striking down a housing ordinance that narrowly restricted individuals who could live together); *Loving*, 388 U.S. at 12. See generally Karst, *supra* note 156 (examining several Supreme Court cases to describe the principle of freedom of intimate association).

<sup>280</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>281</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion) (emphasis added).

<sup>282</sup> *Smith*, 431 U.S. at 844.

<sup>283</sup> *Id.* (quoting *Yoder*, 406 U.S. at 232).

maintenance of intimacy.<sup>284</sup> Accordingly, there is a strong constitutional argument for protecting a zone of uses of copyrighted works when such uses revolve around facilitating or shoring up intimate relations. Just as the Supreme Court's decisions in *Lawrence v. Texas* and *Loving v. Virginia* suggest that the state must give an individual great latitude in picking her marital and sexual partners,<sup>285</sup> the liberty interest must give latitude to individuals to forge important emotional connections using copyrighted works. As the Supreme Court has noted, the development of "deep attachments and commitments" to others depends on being able to share one's "thoughts, experiences, and beliefs [and other] distinctively personal aspects of one's life."<sup>286</sup> Undoubtedly there are individuals and uses of copyrighted works that are more intimate than others,<sup>287</sup> but the proposition that intimacy-promoting or intimacy-based uses should be preferred should be uncontroversial.

Let me provide some concrete examples of intimacy-based uses of copyrighted works. Many of us have made a mix tape, CD, or MP3 playlist for a friend or romantic partner. These mixes allow us to share songs that have been important to us throughout the years or that mark a particular time, memory, or emotion—whether it be remembering a first kiss or celebrating the life of a loved one who has died. Such sharing often brings people closer together and, in some instances, may be essential.<sup>288</sup> A copyright owner should not be able to prevent anyone from sharing such memories with others. This is true even if, as suggested, the use is made in public and to a larger group rather than to just a single friend or partner.<sup>289</sup>

Consider Samantha Ronson's posting to her MySpace page of the photograph of her and her girlfriend kissing at a party.<sup>290</sup> Ronson violated the photographer's copyright by posting the picture to her

<sup>284</sup> Cf. Stillman, *supra* note 184, at 104 (describing Hegel's position that things are the fundamental medium through which relationships develop).

<sup>285</sup> See *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>286</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

<sup>287</sup> Cf. *id.* at 620 (concluding that between a large group of business acquaintances and one's spouse "lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. . . . [There is] a spectrum from the most intimate to the most attenuated of personal attachments").

<sup>288</sup> See *supra* note 263 and accompanying text. I suspect that the prevalence of age discrimination in romantic relationships, see Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1310, 1369 & n.287 (2009), is at least in part driven by the lack of common cultural (often copyrighted) referents between individuals of different generations.

<sup>289</sup> See discussion *supra* Parts III.A., IV.A., and note 263; cf. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Associations*, 99 NW. U. L. REV. 839, 865–68 (2005) (describing the importance of associations and social connections in forming "ideas," "character," and "identit[y]").

<sup>290</sup> See *supra* notes 7–9 and accompanying text.

MySpace page if she did so without permission.<sup>291</sup> Neither the fair use doctrine nor the First Amendment provides Ronson a dependable defense, but a liberty-interest approach establishes Ronson's right to post a picture documenting her own life on her own webpage even if she was not the one who took the photograph. This is true in part for the reasons set forth in Part IV.A—Ronson's mental integrity demands her ability to accurately describe her experiences (in this case both that she was at the event and that a photograph was taken of her, a fact that she might wish to comment on for its intrusiveness into a personal moment). The photograph is also intimacy promoting—she may have posted it to show her then-girlfriend Lindsey Lohan how important she was to Ronson, how important the moment itself was, or perhaps to share her affection for Lohan with her friends. Such intimacy-driven uses of copyrighted works deserve robust constitutional protection from infringement actions.

Even the blogger using the Journey song could contend that the use was an intimacy-promoting one, as she sought to become close to other rape survivors and closer to her existing circle of friends and relations.<sup>292</sup> Her blog is a way for her to connect with others—previously unknown to her—who have had similar experiences. Such feedback will not only help form and develop the blogger's identity, but it also will provide her with a valuable form of community that she would not otherwise have been able to access in the same meaningful way without use of the copyrighted work. As Christopher Hitchens powerfully describes, such uses of the Internet hold the possibility of the "abolition of loneliness."<sup>293</sup>

### C. Cultural and Linguistic Uses

A person's identity is also dependent on being able to use language and certain cultural tropes.<sup>294</sup> When copyrighted works take on a secondary meaning and become a cultural artifact, they often become integral to communication with others.<sup>295</sup> Language itself

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<sup>291</sup> A photographer for *Celebrity Vibe* appears to have taken the photograph. See *Celebrity Vibe*, *supra* note 7. Ronson likely posted the photograph on her MySpace page without permission.

<sup>292</sup> See *supra* notes 263 & 274 and accompanying text.

<sup>293</sup> Christopher Hitchens, *Sons and Lovers*, *ATLANTIC MONTHLY*, Sept. 2009, at 93, 94 (describing the vital role connections with previously unknown people over the Internet played in Elizabeth Edwards's coping with her son's death and her battle with cancer).

<sup>294</sup> See JÜRGEN HABERMAS, *Historical Materialism and the Development of Normative Structures*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 95, 100 (Thomas McCarthy trans., Beacon Press 1979) (1976).

<sup>295</sup> For a useful discussion of the role that art and culture play in the construction of cultural identities, see Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 *J. GENDER RACE & JUST.* 69 *passim* (2000); cf. Minow, *supra* note 171, at 664 (describ-

creates, shapes, and defines a person's identity.<sup>296</sup> The Supreme Court recognized as much in *Meyer v. Nebraska*<sup>297</sup> when it held unconstitutional (on substantive due process grounds) a state law prohibiting the teaching of any language other than English.<sup>298</sup> Although the Court focused on the parents' right to make choices about their children's education, the Court also recognized the fundamental role language plays in forming individual identities and shaping how we think.<sup>299</sup>

Our culture itself is formed in large part by our collective embrace of certain beliefs, myths, and symbols, including copyrighted works. Copyrighted works therefore can be crucial for communicating with one's intimate circle as well as for connecting up more broadly with social and cultural groups.<sup>300</sup> As Wendy Gordon has observed: "Communication depends on a common language and common experience."<sup>301</sup> Julie Cohen has similarly described copyrighted works as sometimes forming the "basic building blocks of communication and 'meaning-making' within society."<sup>302</sup> Providing constitutional space to make such connections is not only vital to individuals but also to societal cohesion more broadly.<sup>303</sup> The impact on language may be more dramatic if uses of trademarks are limited than if uses of copyrighted works are limited—for example a person might

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ing the importance of common experiences in determining an individual's ties to specific identity groups).

<sup>296</sup> See, e.g., Robin Conley, "At the Time She Was a Man": *The Temporal Dimension of Identity Construction*, 31 POL. & LEGAL ANTHROPOLOGY REV. 28, 30 (2008) (describing the role of language in "constructing and mediating gendered identities in legal contexts").

<sup>297</sup> 262 U.S. 390 (1923).

<sup>298</sup> See *id.* at 402–03.

<sup>299</sup> *Id.* at 398–403; see also *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927) (reaffirming the principle that liberty protects the right of parents to have their children educated in foreign languages); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1239–41 (9th Cir. 1994) (striking down on First Amendment grounds a requirement that public employees speak only English), *vacated on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

<sup>300</sup> See *Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983) ("[I]t is to be expected that phrases and other fragments of expression in a highly successful copyrighted work will become part of the language."). In *Warner Bros.*, the Second Circuit held that the makers of a spoof television show about a superhero, *The Greatest American Hero*, had some latitude to reference lines and fragments of the *Superman* comic books, television series, and motion pictures because portions of *Superman* had entered the lexicon.

<sup>301</sup> Gordon, *supra* note 25, at 1556.

<sup>302</sup> Cohen, *Information Rights*, *supra* note 166, at 17. Cohen has suggested that any "user-centered approach" would reconsider what we mean by the public domain, and "would observe that copyrighted cultural goods, and especially mass commercial culture, comprise an increasingly large fraction of the public experience of culture." Cohen, *supra* note 29, at 368.

<sup>303</sup> See Karst, *supra* note 200, at 365–77 (discussing ideology and behavior as cultural components that hold American society together).

want to refer to a Mickey Mouse course, a McJob, or a Superhero,<sup>304</sup> but there are instances in which copyrighted works also are crucial to communication.

Most of these communicative uses have not warranted concern by copyright holders and are likely not infringing under current law. Nevertheless, as technology changes and copyright expands, the outer boundaries of copyright law are worth considering. Just as one might not have predicted thirty years ago that copyright would be enforced against individuals for exchanging songs over the Internet, we might find ourselves surprised down the road with what copyright and technology have in store for us. In fact, the proliferation of iPhones and the Shazam application, which can identify music playing in the background,<sup>305</sup> may herald an era in which copyright monitoring is more ubiquitous. I would therefore be remiss if I did not emphasize the importance of using copyrighted works for communicative purposes in the context of fleshing out the liberty paradigm.

Imagine a world in which you could not sing “Happy Birthday to You” to your child in a public space (like a restaurant) without paying a licensing fee up front or risking an infringement action.<sup>306</sup> This would be problematic under the liberty-based paradigm given the significant individual and cultural meaning of the song. Likely at every birthday celebration throughout your life “Happy Birthday to You” has been sung to you or your intimates. Over time the song forms part of your personal and cultural identity. Therefore, given its cultural and personal meaning, great latitude must be given for its use. There simply are no substitutes for the emotional resonance of the “Happy Birthday” song.

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<sup>304</sup> “Mickey Mouse,” “Mc,” and “Super Heroes” are all claimed trademarks by the Walt Disney Company, McDonald’s Corporation, and D.C. Comics Inc./Marvel Comics Group, respectively. See U.S. Trademark Serial No. 73223973 (filed July 19, 1979) (registering “Mickey Mouse”); U.S. Trademark Serial No. 74192851 (filed Aug. 8, 1991) (registering “Mc”); U.S. Trademark Serial No. 73011796 (filed Jan. 24, 1974), U.S. Trademark Serial No. 73222079 (filed July 3, 1979), U.S. Trademark Serial No. 78356610 (filed Jan. 23, 2004) (registering “Super Heroes”). I note that the noncommercial use of such terms is not likely to violate trademark law and even commercial uses are not likely to be infringing absent evidence of consumer confusion regarding source, sponsorship, or affiliation.

<sup>305</sup> Shazam Home page, <http://www.shazam.com/music/web/pages/iphone.html> (last visited Jan. 26, 2010).

<sup>306</sup> Such public performances of nondramatic musical and literary works are currently protected under section 110(4) of the Copyright Act. This scenario requires us to imagine for a moment that powerful lobbying by copyright holders would lead to the dismantling of the section 110 exception in an effort to maximize licensing fees. It also envisions technological advancements such that one’s singing and talking in public could be monitored with a sophisticated system that recognizes uses of copyrighted works.

I note that the song “Happy Birthday to You” should soon be in the public domain barring another copyright term extension. The song was first published in 1893 and copyrighted in 1935, and it should enter the public domain in 2010. See GOLDSTEIN, *supra* note 10, at 23; *Profitable “Happy Birthday”*, TIMES (LONDON), Aug. 5, 2000, at 6.

Similarly, many groups of friends develop rituals surrounding copyrighted works. Teenagers often watch favorite movies over and over again, learning and reciting the lines. Imagine a world in which friends who perform the lines of such films in public spaces, such as schools or restaurants, could be held liable for copyright infringement. Even if it were technologically possible to do so, the copyright system should not allow the extraction of fees if in the midst of a crisis you want to yell “we’re gonna need a bigger boat;”<sup>307</sup> or if you want to sing “One of These Things (Is Not Like the Others)”<sup>308</sup> from *Sesame Street* when feeling out of place; or if, in a particularly unresponsive class, you as a professor want to dryly say “Bueller? . . . Bueller?”<sup>309</sup> Consider also a possible infringement action for the plaque that the author Armistead Maupin paid to have installed on a bench in a public park in San Francisco to honor his friend, a gay man who had moved to the city from his fundamentalist upbringing in Kansas. The plaque quoted a line from *The Wizard of Oz*: “I HAVE A FEELING WE’RE NOT IN KANSAS ANYMORE.”<sup>310</sup>

Even though detection of such uses is unlikely even with future technological advances, in cities like Los Angeles where litigious Disney executives lurk and birthday party clowns are warned against making Mickey Mouse-shaped balloons,<sup>311</sup> the outer boundaries of copyright law are worth pondering. Although many of these uses (even if detected) might not be held infringing by courts, it is nevertheless unwise to take that conclusion for granted, especially since courts have frequently rejected the *de minimis* defense in copyright cases.<sup>312</sup> There is no question what direction copyright law is heading.

<sup>307</sup> This is a reference to the line, “You’re gonna need a bigger boat” from the 1975 classic film *Jaws*. *JAWS* (Universal Pictures 1975).

<sup>308</sup> See 1 *SESAME STREET OLD SCHOOL: 1969–1974* (Sesame Workshop 2006), for the song composed by Joe Raposo and Jeffrey Mon for the television series. The song was used in a number of episodes during a game in which viewers were asked to identify an item that was different from the other items.

<sup>309</sup> This is a reference to the scene in the movie *Ferris Bueller’s Day Off* in which Ferris’s teacher calls on him and he is absent. See *FERRIS BUELLER’S DAY OFF* (Paramount Pictures 1986).

<sup>310</sup> FRANCES FITZGERALD, *CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY AMERICAN CULTURES* 46–47 (1986). Having just arrived in Oz, Dorothy remarks to her dog, “Toto, I have a feeling we’re not in Kansas anymore.” *THE WIZARD OF OZ* (Metro Goldwyn Mayer 1939).

<sup>311</sup> See *WILLFUL INFRINGEMENT* (Fiat Lucre LLC 2003) (documenting copyright enforcement and including a story about birthday clowns warned by Disney to stop making Disney character balloons); see also Balloonhq.com, *The Twisting Business*, [http://www.balloonhq.com/faq/twister\\_business.html](http://www.balloonhq.com/faq/twister_business.html) (providing advice to aspiring birthday party balloon artists including the admonishment not to “do[ ] Disney characters for love nor money”).

<sup>312</sup> See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798–805 (6th Cir. 2005) (holding that a sampling of a song—no matter how little is used—is never *de minimis* because of the actual copying and ability to collect licensing fees); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 76–82 (2d Cir. 1997) (holding that the use of a

As Jessica Litman has observed: “Copyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship . . . .”<sup>313</sup> Accordingly, as technology makes more and more uses of copyrighted works both monetizable and detectable,<sup>314</sup> and publishing companies and film studios license even minor quotes and references to copyrighted works,<sup>315</sup> Paul Goldstein’s “celestial jukebox” may be closer than we think.<sup>316</sup>

#### D. Religious Practice and Identity-Based Uses of Religious Texts

The final category of uses that I contend should be privileged are those involving religious practice. Copyrighted works are often integral to an individual’s religious identity. Using the actual expression of the underlying copyrighted works is crucial for religious practice.<sup>317</sup> Although the Koran and Judeo-Christian bibles are generally thought to be free of copyright protections, various editions of those texts with editors’ commentary and new translations are not.<sup>318</sup> Moreover, copyright law still protects most religious texts for more recently developed religions.<sup>319</sup> Numerous religious groups have used copyright laws to wield power over their members as well as against dissenters and splinter groups from mainline churches. The First Amendment and internal limits on copyright law have often been of little avail in such

poster in the background of a television sitcom for less than thirty seconds of screen time was neither de minimis nor a fair use); *see also* *Newton v. Diamond*, 388 F.3d 1189, 1192–97 (9th Cir. 2004) (holding that the use of a three-note sample was de minimis but suggesting that to be de minimis a use must be so minimal that no one would recognize that any appropriation had occurred).

<sup>313</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 14 (2001).

<sup>314</sup> Julie E. Cohen, *supra* note 15, *passim* (criticizing the movement toward full properization of copyrights through DRM).

<sup>315</sup> *See* Rothman, *supra* note 90, at 1903, 1911–16; *see also* Tushnet, *supra* note 53, at 583–85.

<sup>316</sup> GOLDSTEIN, *supra* note 10, at 188–216.

<sup>317</sup> *See* *United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 829 F.2d 1152, 1163 (D.C. Cir. 1987) (“Words, of course, stand for religious positions of vast significance in the lives of thousands of believers.” (quoting *For the Relief of Clayton Bion Craig*, Arthur P. Wuth, Mrs. Lenore D. Hanks, David E. Sleeper, and DeWitt John: *Hearings on S. 1866 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 8–9 (1971))).

<sup>318</sup> *See* *United Christian Scientists*, 829 F.2d at 1159 (noting that copyright laws often protect religious texts); *see, e.g.*, THE HOLY KORAN: AN INTERPRETATIVE TRANSLATION FROM CLASSICAL ARABIC INTO CONTEMPORARY ENGLISH (Mohamed K. Jasser trans., 2008); THE NEW OXFORD ANNOTATED BIBLE (Michael D. Coogan ed., 3d ed. 2001).

<sup>319</sup> *See, e.g.*, A COURSE IN MIRACLES (3d ed. 2007); L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (1950). I note that although the new edition of A COURSE IN MIRACLES appears to be copyrighted, an earlier edition of the book lost its copyright for failure to comply with copyright formalities. *See* *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 Civ. 4126(RWS), 2004 WL 906301, at \*1 (S.D.N.Y. Apr. 27, 2004). Absent the publication without a copyright notice, use of the book by a religious group in its worship might well have been found infringing. *See* *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 288 F. Supp. 2d 544, 554–58 (S.D.N.Y. 2003).

instances.<sup>320</sup> When an individual's free exercise of religion is implicated, the use of copyrighted works unquestionably implicates a liberty interest because one's religious faith and beliefs are fundamental aspects of one's identity. One could of course analyze this situation solely under the First Amendment's Free Exercise Clause. Such free exercise challenges, however, have largely failed because they are thrown into the First Amendment and copyright bucket in which users are disfavored. I do not endorse such conclusions, but simply note that the substantive due process approach may remind courts of the fundamental rights at stake.

Substantive due process cases, like free-exercise cases, have stood for the principle that wide latitude must be given to religious practice. In *Wisconsin v. Yoder*,<sup>321</sup> for example, the Supreme Court held that Amish parents could choose to remove their children from public schools at the age of sixteen for religious reasons.<sup>322</sup> Similarly, in *Pierce v. Society of Sisters*,<sup>323</sup> the Court held that parents could choose to send their children to a private, religious school rather than public school.<sup>324</sup> The state cannot stand as an obstacle to religious practice either directly (by interfering with religious choices of parents or individuals) or indirectly (by passing and enforcing laws, such as copyright law, that substantially interfere with religious practice).<sup>325</sup>

Consider the Ninth Circuit case *Worldwide Church of God v. Philadelphia Church of God, Inc.*<sup>326</sup> Herbert Armstrong formed the Worldwide Church of God (WCG), a religious organization, and wrote its primary religious text, the *Mystery of the Ages (Mystery)*. Two years after Armstrong's death, the WCG, which held the copyright to *Mystery*, decided to stop publishing and distributing *Mystery*, in large part because the church doctrine had changed. The new church leaders thought *Mystery* was outdated and culturally insensitive. In particular, its leaders viewed *Mystery* as racist and out of step with the church's current support of divorce and its rejection of Armstrong's belief in divine healing. A splinter group of the church formed as the Philadelphia

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<sup>320</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1249, 1258 (N.D. Cal. 1995) (rejecting fair use and First Amendment defenses of an ex-Scientologist who posted copyrighted Scientology texts on his website); see also *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 634–36 (S.D. Cal. 1993) (enforcing copyright law against defendant and rejecting both her fair use and First Amendment arguments that she needed to use Scientology texts to practice her religion).

<sup>321</sup> 406 U.S. 205 (1972). *Yoder* rested on both First Amendment and Fourteenth Amendment principles, focusing on both free exercise and the parents' liberty rights to direct the religious upbringing of their children.

<sup>322</sup> See *id.* at 214–22, 232–36.

<sup>323</sup> 268 U.S. 510 (1925).

<sup>324</sup> See *id.* at 534–35.

<sup>325</sup> For a discussion of why the enforcement of copyright law is state action, see *supra* Part III.C.4.

<sup>326</sup> 227 F.3d 1110 (9th Cir. 2000).

Church of God (PCG) and began using copies of the original *Mystery* for its services, with members using the book for personal religious observance. This splinter group wanted to continue to practice the religion as originally set forth by Armstrong. Accordingly, PCG copied portions of *Mystery* and distributed them free of charge to its adherents. WCG sued to stop PCG from copying and distributing *Mystery*. The Ninth Circuit rejected First Amendment and fair use defenses in the case.<sup>327</sup> The court focused on the lack of transformativeness in the copying—a common problem in the First Amendment and fair use approach.<sup>328</sup> A liberty approach would result in a different analysis because the use by PCG congregants was a highly personal one, fundamental to each member's religious and personal identity.

In sum, uses of copyrighted works that preserve mental integrity, promote intimacy, are required for linguistic or cultural communication, or are necessary for religious practice should be given a privileged status. As such, copyright owners' interests should rarely trump those of the individual when such uses are at stake. Substantive due process rights, however, are not without limits, and it is to these limits on the liberty-based paradigm that I now turn.

## V

### SCOPE AND LIMITATIONS OF PRIVILEGED USES

When uses are privileged under a liberty-based analysis, no injunctions, criminal charges, or other penalties should apply. Although several IP scholars have suggested that injunctive relief should be eliminated or at least limited in copyright cases,<sup>329</sup> and others have observed that statutory damages should be reduced to more reasonable rates,<sup>330</sup> few scholars to date have suggested that users of copyrighted works should not pay for such uses—whether through determinations of damages, compulsory licensing regimes, or assessments of reasonable royalties.<sup>331</sup> The modern law-and-economics

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<sup>327</sup> See *id.* at 1115–21.

<sup>328</sup> See discussion *supra* Part II.C.

<sup>329</sup> See, e.g., Gordon, *supra* note 25, at 1539; Lemley & Volokh, *supra* note 58, *passim*.

<sup>330</sup> See, e.g., Samuelson, *supra* note 98, at 2568 (arguing that defendants should only have to pay actual damages rather than a large statutory damages award).

<sup>331</sup> See, e.g., Nimmer, *supra* note 58, at 1199–1200 (discussing one compulsory license approach). A number of scholars have expressed concerns about compulsory licensing regimes and instead prefer market determinations of pricing. See, e.g., Goldstein, *supra* note 58, at 1032–34 (arguing against the use of a statutorily-fixed fee in a compulsory licensing regime); Gordon, *supra* note 25, at 1573–76 (explaining that although alternatives like a compulsory licensing regime and a reasonable royalty scheme exist, markets are less expensive to administer, more sensitive to varying preferences, and more conducive to incentives than are governmental substitutes).

The few scholars who have suggested circumstances in which no payment is warranted have suggested problematic limitations to their exceptions to copyright enforcement. See, e.g., Baker, *supra* note 23, at 951 (recommending that only expressive, noncommercial uses

movement has no doubt exacerbated this trend in copyright scholarship leading to a presumption that payment is always warranted. This trend is out of step with long-standing principles of copyright law that have always accepted that some uses do not require payment. Fair uses have never been *fared* uses—if a use is a fair one, one need not ask permission to use the copyrighted work nor pay for that use.

The liberty-based approach challenges the market-focused myopia that dominates most copyright analysis and provides a robust theory for why, under certain limited circumstances, users should be able to use works without payment or permission.<sup>332</sup> Copyright holders cannot own reality and should not be able to prevent individuals from documenting, contextualizing, or reframing their own experiences, nor charge them for doing so. Nevertheless, placing a liberty lens over uses of copyrighted works will not give carte blanche to use works without permission and payment. Although there may be a general liberty interest in doing what one pleases with copyrighted works, such interests will only outweigh competing interests of copyright holders, creators, and the public more broadly when the individual impact is significant. There is a continuum or spectrum upon which uses are more or less related to one's identity and more or less related to the enumerated categories.<sup>333</sup> To fall within the liberty defense, the use must be descriptive, intimacy-promoting, linguistically or culturally communicative, or religious. As uses become more attenuated from these privileged categories, the value of protecting the copyright system is greater and the interests of the copyright holder will predominate.<sup>334</sup> To the extent that there is some market harm in the context of identity-based uses of copyrighted works, the liberty-based interests will usually trump the property interests of copyright holders.<sup>335</sup> Nevertheless, if a use is substitutionary or otherwise likely to completely obliterate the market for the original work, the scales may tip back in favor of copyright holders and the copyright system.

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should be exempted from copyright enforcement); Litman, *supra* note 37, at 33–36, 38–39 (calling for an exemption from copyright law for private, noncommercial uses); Litman, *supra* note 10, at 1878–79, 1913–18; (suggesting that a personal use exemption should exist, but that it should favor private, noncommercial uses). As I have discussed, I do not think it is appropriate to use for-profit status or public dissemination as bright-line rules dividing lawful from unlawful uses.

<sup>332</sup> Although I contend that no permission or payment should be required for privileged identity-based uses, the liberty-based approach could nevertheless provide support for those who prefer tariffed alternatives to injunctive relief, such as compulsory licensing or reasonable royalties.

<sup>333</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (“[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum . . . .” (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting))).

<sup>334</sup> See discussion *supra* Part III.C.6.

<sup>335</sup> See discussion *supra* Part III.C.6.

Courts will need to carefully evaluate the facts of a specific case to confirm that a defendant is not pretending to attach some important personal meaning when there is none. Such determinations of motive are made elsewhere in IP cases and throughout the law, and there is no reason to think they will be any more difficult to make in the context of copyright cases.<sup>336</sup> Most P2P file sharing, for example, is not identity-based. Passing along entire music libraries exceeds the scope of the liberty interest. Even sending a single song to a friend is not an identity-based use if one is simply documenting a song one heard earlier in the day while running errands, because the sharing is done without explanation of the song's relevance, and the song itself has little personal meaning.

Similarly, if the primary motive of a use is to profit from using a copyrighted work, then the use will fall outside of the privileged zone. Consider the artist Gregg Gillis, known as Girl Talk, who makes samples of Top 40 radio songs to create new musical compositions, which he then puts into albums that he sells and performs at nightclubs. Although he could claim that he is simply describing what he heard (a mental integrity-based identity claim), it is a weak claim. Interestingly, contrary to the conventional analysis, transformativeness weighs against allowing his use here; the fact that he significantly transforms the works suggests that his purpose is not to document his experiences or to share them for intimacy-promotion purposes. Gillis has admitted as much in interviews suggesting that his main motivations are his love of music, a desire "to entertain" his audience, and his interest in making money.<sup>337</sup> Even though Gillis could claim that his love of music and interest in creatively using preexisting music is fundamental to his identity, his identity-based claim is too attenuated to overcome a copyright holder's countervailing liberty and property rights.

Despite dismissing uses primarily driven by profit motives, I disagree with those who have suggested that exemptions for personal uses should be limited only to noncommercial and nonprofit uses.<sup>338</sup> The key should be analyzing the speaker's motivation and the substitution-

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<sup>336</sup> See, e.g., *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F. Supp. 279, 285–86 (S.D.N.Y. 1997) (finding that despite the defendant's claim that the title of his book was inspired by an assignment given by a childhood teacher, the timing of the book's publication suggested that it was a copycat work based on the plaintiff's bestseller); see also Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(1)(A)(i) (2006) (attaching civil liability if one has "a bad faith intent to profit" from the use of another's trademark in a domain name); *E. & J. Gallo Winery v. Spider Webs Ltd.*, 286 F.3d 270, 275–77 (5th Cir. 2002) (applying the bad-faith factors from the Anticybersquatting Consumer Protection Act and finding trademark infringement).

<sup>337</sup> See Ryan Dombal, *Girl Talk*, PITCHFORK, Aug. 30, 2006, <http://pitchfork.com/features/interviews/6415-girl-talk/>.

<sup>338</sup> See *supra* notes 45–53 and accompanying text.

ary effect, if any, rather than simply whether money is made and whether there is any market effect, no matter how minimal. Take, for example, the context of selling an autobiography that contains letters written by someone else but sent to the writer. The autobiographer should be able to sell her work for a profit unless the autobiography is told entirely or predominantly by another's copyrighted words. In the latter instance, the motive of the use should be questioned. Moreover, there may need to be some compensation or profit sharing with a copyright holder if a work is largely composed of someone else's copyrighted material. Profit sharing, however, is a far cry from criminal penalties, statutory and other monetary damages, or even a compulsory licensing or royalty system.

In addition to evaluating motive, courts must also consider the way a work is used to confirm that the scope of the use is consistent with the identity-based motivation. For example, the blogger who uses the Journey song may need to use the entire song on a loop to document, process, and share her experience, but she does not need to make downloads of the song available to fulfill her identity-based goals. She may even have some obligation to design her blog to prevent such downloads.

Thus far my examples of identity-based uses have primarily been rooted in nonfiction. This is intentional because I think the scope of the liberty interest is at its most robust in these circumstances and the impact of denying permission to use a work or charging for its use most severe. When fiction is involved, it is not so much that the user or author has no liberty interest, but instead that the interest may be less compelling. Consider the previously discussed scenario in which a woman posts the Journey song "Don't Stop Believin'" to her blog. What if she decides instead to fictionalize her story in a semi-autobiographical webisode (or movie)? She still has a liberty-based interest in being able to describe reality, even in fiction, but the specificity of the Journey song may be less important. The rape scene in her webisode is no longer about her life but about her character's life. In the context of the webisode, the song is more likely to be *fungible*—it likely does not matter as much that the song is by Journey rather than another band—although there may be certain songs that are more appropriate than others given the themes and period of the work and the lyrics and popularity of the song.

When real events are referenced, however, there should be an ability to use the relevant copyrighted work without permission, even in fiction. For example, in Tom Stoppard's most recent play *Rock 'n'*

*Roll*, there are numerous references to rock-and-roll bands.<sup>339</sup> Many of these uses are not fungible; for example, the Rolling Stones' concert in Prague in 1990 was a turning point in Czech history and is a fundamental aspect of the play. The Rolling Stones, therefore, should not be able to prevent the playing of some of its music for illustrative effect. Similarly, Plastic People of the Universe was an important band in Prague involved in political dissidence during the time period of the play.<sup>340</sup> The use of this band and some excerpts of its music is therefore similarly nonfungible. I leave for another day a more detailed analysis of the implications of the liberty-based approach for fiction, but because such uses have moved out from the heartland of identity-based uses there should be greater accommodation of the copyright holder's interests when evaluating fiction. In the world of fiction, the best way to accommodate these competing interests may indeed be a compulsory licensing regime or a profit-sharing approach.

The exact contours of the liberty-based approach will need to develop over time and I cannot possibly do them justice in this first step toward a new approach for conceptualizing copyright uses. Nevertheless, as the Supreme Court has said: "Liberty must not be extinguished for want of a line that is clear."<sup>341</sup>

## VI

### RECONCEPTUALIZING FAIR USE?

The liberty interest that I identify could not simply be incorporated or subsumed into the fair use analysis—at least not fair use as we currently understand it. As discussed, the examples of privileged uses that I have provided are not likely to receive protection from fair use. This is not surprising given that the fair use factors do a better job of protecting public rather than individual interests.<sup>342</sup> As Jeremy Waldron has aptly described, fair use has been "hijacked by utilitarian considerations."<sup>343</sup> The first fair use factor, for example, evaluates the character and purpose of the use and favors critical uses (whether of a scholarly or creative/parodic nature) and transformative ones. The

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<sup>339</sup> See TOM STOPPARD, *ROCK 'N' ROLL* 16–18 (2006) (referencing numerous bands whose music is played, including the Beach Boys, The Velvet Underground, Cream, the Kinks, and the Rolling Stones).

<sup>340</sup> Dan Bilefsky, *Czechs' Velvet Revolution Paved by Plastic People*, N.Y. TIMES, Nov. 16, 2009, at A10.

<sup>341</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion).

<sup>342</sup> See *supra* notes 240–44 and accompanying text. I am not alone in so concluding. See, e.g., Litman, *supra* note 10, at 1873, 1898–1903. Although the fair use factors are not meant to be exclusive, courts rarely consider factors other than the four enumerated in section 107 of the Copyright Act. See Beebe, *supra* note 59, at 584–86, 616–17.

<sup>343</sup> Waldron, *supra* note 18, at 858.

fourth fair use factor—the effect on the market for the work—also favors critical uses because they are viewed as not interfering with a natural market of the underlying work since a creator will generally not sell or market works critical of his original work.

For many scholars and courts, this final factor is the be all and end all of fair use.<sup>344</sup> Fair use has increasingly focused on market effects. Paul Goldstein, Wendy Gordon, and others have long categorized fair use as simply a device to remedy market failure.<sup>345</sup> Accordingly, fair use has little to offer when money could conceivably be collected. As technology has developed such that almost every use, including private ones, can be licensed or compensated, some scholars like Professor Goldstein have concluded that there is no reason for any use to be a free one.<sup>346</sup> Goldstein's vision of the future leaves fair use in jeopardy and may spell its demise if no counterbalance is offered. Moreover, fair use is often thought of (I contend erroneously)<sup>347</sup> as an author-focused doctrine—asking what is fair to an author rather than what is appropriate taking into consideration the interests of audiences and users.

Fair use, at least in its current incarnation, is therefore not up to the task of protecting personal or identity-based uses with any reliability. Accordingly, an alternative normative frame is required. Empowering courts, litigants, and others to infuse the fair use analysis with consideration of not just the public, but also the *individual* and his or her liberty interests would be a tremendous step forward; one way of doing this would be through the purpose-and-character-of-the-use factor, another would be through a broader understanding of transformativeness.

Furthermore, if copyright reform is in our future, as some have recently posited,<sup>348</sup> then newly drafted fair use factors or a preamble to the Copyright Act could take into consideration individual liberty-based uses. New exemptions could also be added to section 110 of the Copyright Act. My main goal here, however, is not narrowly aimed at revitalizing fair use, but instead at developing a broader alternative, independent constitutional theory for evaluating the legitimacy of uses not adequately protected by current fair use doctrine.

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<sup>344</sup> See Beebe, *supra* note 59, at 598–603; *supra* note 99 and accompanying text; see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (concluding that commercial uses are presumptively unfair); discussion *supra* Part I.B.

<sup>345</sup> GOLDSTEIN, *supra* note 10, at 139 (“Fair use is a hard-edged economic instrument that will excuse an unauthorized use of a copyrighted work as being a fair one any time it is too costly for the parties to negotiate a license.”); Gordon, *supra* note 99, *passim*.

<sup>346</sup> See, e.g., GOLDSTEIN, *supra* note 10, at 199–216.

<sup>347</sup> See Rothman, *supra* note 90, at 1943–44.

<sup>348</sup> See Litman, *supra* note 37, *passim*.

## CONCLUSION

As copyright law continues to expand (both statutorily and technologically), there needs to be a theoretical and constitutional basis for limiting its reach. The proposed liberty framework provides a promising avenue for limiting the dominance of copyright over very personal—even if public—uses of copyrighted works. Even when personal uses are not political, private, or nonprofit, they are still often fundamental to our personhood and our constitutional right to liberty. I do not contend that a liberty-based approach is sufficient to safeguard all uses of others' copyrighted works that might be deserving of protection. There are instances in which the public interest does require, on a First Amendment basis, some dissemination of works. I have therefore not challenged the position of scholars to date that the First Amendment should play a larger role in protecting uses of copyrighted works than it currently does. Instead, I have posited that the liberty-based approach provides a compelling alternative basis for protecting some uses. Such an alternative is vital given the fact that even advocates of greater First Amendment scrutiny often overlook personal uses.

Although a liberty-based approach will primarily have application in as-applied challenges, it may also call into question some specific provisions of copyright and related laws, for example, the anticircumvention provisions of the DMCA. Individuals who have a liberty interest in using a copyrighted work must have a way to do so; otherwise the law is analogous to giving individuals the right to use contraceptives but passing laws that prohibit the sale of all birth control products. The liberty-based paradigm may also influence the scope of future changes to copyright law and shore up arguments to invalidate consumer contracts that expand the scope of copyright beyond even its current statutory breadth.

The specific impact of a shift to the liberty paradigm will take time to develop, but this new lens provides a powerful basis for recalibrating copyright law and gives shape and heft to the personal-use movement. This is a crucial time not only to admit that users have liberty rights, but to demand that any copyright scheme consider and yield to these interests when the harm to individual liberties is great. Thinking beyond the free speech paradigm in IP law is not limited to copyright law; the proposed liberty lens also provides many insights for how we think about the scope of patent, trademark, and right of publicity law.