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Is There Hope? Incorporating the First Amendment into a Fair Use Analysis

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Cover Page Footnote

I would like to thank Professor Tracy Reilly for encouraging me to take on this topic and for providing me with advice and guidance throughout the entire writing process. I would also like to thank my family for their continued support throughout my entire law school experience.

IS THERE HOPE? INCORPORATING THE FIRST AMENDMENT INTO A FAIR USE ANALYSIS

Alison C. Gaughenbaugh*

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I. INTRODUCTION

During the 2008 Presidential election, President Barack Obama used a variety of campaign tactics. The most well-known of these campaign materials was the image created by Shepard Fairey of President Barack Obama looking upward with a pensive expression on his face, depicted in the colors of red, white, and blue, and captioned “HOPE.”¹ The image was made popular by blogs and internet sites, as individual supporters downloaded the image to use at campaign events.² Moreover, throughout the campaign, this particular image was reproduced on websites and paraphernalia such as buttons and posters.³

The success of the image has been widespread and long-lasting.⁴ At

* Publication Editor 2010-2011, Staff Writer 2009-2010, University of Dayton Law Review; J.D. expected May 2011, University of Dayton School of Law; B.A. in History, *summa cum laude*, 2008, Wittenberg University. I would like to thank Professor Tracy Reilly for encouraging me to take on this topic and for providing me with advice and guidance throughout the entire writing process. I would also like to thank my family for their continued support throughout my entire law school experience.

¹ Hillel Italie, *AP Alleges Copyright Infringement of Obama Image*, BREITBART (Feb. 4, 2009, 06:56 p.m.), http://www.breitbart.com/article.php?id=D9652OD01&show_article=1&catnum=8.

² *Id.*

³ *Id.*

⁴ *Id.*

the close of the campaign, Fairey distributed approximately 250,000 to 300,000 posters.⁵ In February of 2009, Fairey's work was featured in a retrospective at the Institute of Contemporary Art in Boston.⁶ In addition, a new work of Fairey's, a collage based on the HOPE poster, was placed in the permanent collection of the Smithsonian Institution's National Portrait Gallery in Washington.⁷

Shepard Fairey's success, however, has also been short lived. Due to the success of the image, people began questioning Fairey's source of inspiration. Fairey consistently stated that he was inspired by an image found on the Internet.⁸ The photo that Fairey used as a reference for the HOPE poster was taken by an Associated Press (A.P.) photographer, Mannie Garcia, in 2006, at a Darfur event; the photo pictures both President Barack Obama and George Clooney.⁹ Consequently, the A.P. now contests Fairey's use of the image in his HOPE poster.¹⁰ Ironically, the actual ownership rights in this photo were initially under scrutiny, as Garcia argued he owned the rights to the photo, not the A.P., because he never granted the A.P. any rights to his photographs.¹¹

The A.P. brought a suit against Fairey for copyright infringement, based on its perceived ownership rights in the original, copyrighted photograph.¹² Fairey, on the other hand, contends that his use of the photograph is protected by the doctrine of fair use, which is an affirmative defense to copyright infringement.¹³ This Comment will explore the fair use doctrine and its relation to the First Amendment, particularly examining whether an original image should be afforded less protection when the fair

⁵ Seven McDonald, *Yosi Sergeant and the Art of Change: The Publicist Behind Shepard Fairey's Obama Hope Posters*, L.A. WKLY. (Sept. 11, 2008), <http://www.laweekly.com/2008-09-11/columns/yosi-sergant-and-the-art-of-change-the-publicist-behind-shepard-fairey-39-s-obama-hope-posters/>; see also Complaint for Declaratory Judgment and Injunctive Relief at 22, *Fairey v. The Associated Press*, No. 09 Civ. 01123 (S.D.N.Y. Feb. 9, 2009). Fairey reinvested the money the HOPE poster earned into a media campaign and the image was available to download for free, so it is difficult to say just how frequently Fairey's image was used. McDonald, *supra*.

⁶ Randy Kennedy, *Artist Sues the A.P. Over Obama Image*, N.Y. TIMES, Feb. 10, 2009, at C1.

⁷ *Id.* In addition, the image was included in a New York Times book on the election and served as a cover for an economic manifesto. Italie, *supra* note 1. Fairey created a similar work for the inaugural committee. *Id.*

⁸ Kennedy, *supra* note 6.

⁹ *Id.*

¹⁰ Jonathan Melber, *The AP Has No Case Against Shepard Fairey*, THE HUFFINGTON POST (Feb. 8, 2009, 10:36 p.m.), http://www.huffingtonpost.com/jonathan-melber/the-ap-hase-no-case-again_b_165068.html.

¹¹ *Id.*; Memorandum of Law in Support of Intervenor Mannie Garcia's Motion to Intervene, *Fairey v. The Associated Press*, No. 09 Civ 01123 (S.D.N.Y. July 8, 2009). In August 2010, Garcia withdrew from the lawsuit against the A.P., citing both personal and professional reasons. Randy Kennedy, *Photographer Withdraws Lawsuit in Shepard Fairey Case*, N.Y. TIMES (Aug. 23, 2010, 5:59 PM), <http://artsbeat.blogs.nytimes.com/2010/08/23/photographer-withdraws-lawsuit-in-shepard-fairey-case/>. Fairey was actually encouraged to make the image by the Obama campaign, and campaign officials have remarked that they knew the image's source was questionable. Italie, *supra* note 1.

¹² *Obama Poster Artist Seeks Declaration of Rights Against AP*, 21 No. 2 ANDREWS ENT. INDUSTRY LITIG. REP. 7 (2009).

¹³ *Id.*; see also 17 U.S.C. § 107 (2006).

use defense is raised and the subject matter is a public official. Under the current system of copyright protection, the First Amendment is not a defense, leaving the relationship between copyright law and the First Amendment in ambiguity. This Comment will argue that in order to harmonize copyright law and the First Amendment, a limiting doctrine found in First Amendment law (the distinction between public officials and private individuals in defamation law) should be applied to a limiting doctrine in copyright law (the fair use defense).

Thus, if this case is analyzed under the copyright system as it currently exists, the major focus will be on Fairey's work and the subtle differences between it and the A.P. photograph,¹⁴ as it is not the actual depiction that matters in an infringement suit, but rather the fact that a second author took the work of the original author.¹⁵ Consequently, President Obama's presence, while certainly a factor, will likely not be determinative. If Fairey had taken the image of George Clooney from that same A.P. photograph and made a new work, the analysis would be the same. Regardless of what image was taken, Fairey took an image without permission from the original author and created his own work. Despite this emphasis, perhaps President Obama's presence in the image should be analyzed in instances such as these.

Section II of this Comment examines the nature of copyright protection, as codified in the United States Code. The underlying purpose and driving force of copyright law, the requirements for copyright protection, and what rights are given to a copyright owner will be discussed. Furthermore, this section will provide a brief examination of the purpose or justifications for the fair use doctrine, which is an affirmative defense to copyright infringement that is used when a defendant claims his unlawful use is fair through the use of statutory factors.

Section III of this Comment will examine the purpose behind the First Amendment, particularly looking at the freedom of speech. This section will also provide a brief overview of defamation law and its relationship to the freedom of speech. Finally, this section will discuss the differences between public officials, public figures, and private individuals, and the level of protection each class of people receives under the First Amendment.

Lastly, Section IV of this Comment will argue that a limiting doctrine of the First Amendment—the status distinction found in defamation law—should be applied to the limiting copyright doctrine of fair use. First, this section briefly analyzes the current relationship between copyright law

¹⁴ Some of these changes included simplifying the image, straightening some of the lines, changing the color scheme, and adding a campaign logo and banner. Melber, *supra* note 10.

¹⁵ See 17 U.S.C. § 107.

and the First Amendment. Many have argued there are certain areas that already incorporate First Amendment concerns, such as the idea/expression dichotomy and the fair use defense. The fair use doctrine and the limiting doctrine of actual malice serve essentially the same purposes: comment and criticism. Thus, a logical conclusion follows that a second author who claims fair use should be allowed more leeway when his subject matter is a public official. Therefore, this section will conclude that the status of copyrightable subject matter should be a factor in determining if an alleged infringer is entitled to successfully defend copyright infringement with fair use. The scope of this analysis will be limited to images of a public official which are taken by a second author to create a new work.

II. BACKGROUND ON COPYRIGHT LAW

Although copyright law originated in England, the United States has since become a major player in the overall regulation of copyright protection.¹⁶ The U.S copyright system now draws its power from the Constitution and the Copyright Act of 1976 (the “Act”).¹⁷ Since its inception, copyright law has evolved, adapting to advancing technology and globalization.¹⁸ Thus, these changes allow copyright law to “confront[] the realities of the continuously evolving modern networked world.”¹⁹

A. Basic Framework of Copyright Protection

Without a system of copyright protection, the public goods problem would exist. The public goods problem encompasses the idea that while the

¹⁶ Copyright protection initially began in England as a tool for government censorship and press control. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 19 (2d ed. 2006). England also provided the first statutory authority for copyright protection with the Statute of Anne, enacted in 1710, “which granted an assignable right to authors to control the publication of their writings.” *Id.* at 20. This statute was meant to facilitate progress and provided an author protection for a limited duration. *Id.* at 21. Drawing on these principles, the first federally-enacted U.S. statute was passed in 1790, through a directive from the Constitution. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS* § OV-1 (2009). A narrow category of works was given protection in this statute, and an author only received protection for twenty-eight years. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547, 563 (2009). A subsequent act was passed in 1909, which was replaced with the current 1976 Act. NIMMER, *supra*.

¹⁷ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 101–1332.

¹⁸ See, e.g., COHEN ET AL., *supra* note 16, at 605-06 (discussing very briefly three technological advances in the motion picture industry, home electronics industry, and computer software); Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001) (providing a brief overview of the relationship between international law and copyright law, as well as proposing changes to fill the gaps in this relationship).

¹⁹ COHEN ET AL., *supra* note 16, at 3. As one scholar has pointed out, “where Congress fails to act, courts fill the void,” and this has allowed copyright law to deal with new technology. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 401-02 (2005). Through the use of legislative history, this scholar argued that Congress was aware of how copyright law was disrupted by past technologies and knew it was not in a position to account for every change to come. *Id.* at 402. The changes to a dynamic copyright law in 1976 marked Congress’s understanding that “any new copyright law would have to be broadly expressed to allow it to respond dynamically to unforeseen events.” *Id.*

cost of creating a copyrightable work is high, the cost of reproducing that work is low.²⁰ Because of this low reproduction cost, that work can be recreated or used by anyone.²¹ While there are a variety of reasons for the existence of copyright law, one justification for its existence is that it solves the public goods problem, and this is the system that is used in the United States.²² This theory of protection is exclusionary in nature.²³

Because of this purpose—to solve the public goods problem—copyright law serves a utilitarian, or economic, function.²⁴ This function is determined by the U.S. Constitution and the laws Congress enacts, as the Constitution gives Congress the power to create intellectual property laws. Known as the “Intellectual Property Clause,” Article I, Section 8, Clause 8, states that Congress has the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁵ In essence, the Constitution, through the laws enacted by Congress, allows a copyright owner to have a limited monopoly over his or her work. Thus, the overall purpose of U.S. copyright law is to provide a limited monopoly to an author (which serves as an incentive to create), while still allowing incentives for progress in knowledge.²⁶ This allows the public to access and benefit from those works. Congress (and the courts) must play a balancing act between rewarding the author (by providing control and money) and facilitating access to creativity by the public (by allowing access and re-use of material).²⁷

Not every country follows this economically-driven system of copyright protection. A notable contrasting theory of protection is the theory of *droit moral*, or moral rights theory.²⁸ This theory recognizes the

²⁰ COHEN ET AL., *supra* note 16, at 6.

²¹ *Id.* For example, it is conceivable that the amount of time, energy, and cost it takes a musician to write and record a song or a painter like Picasso to create one of his paintings is quite high. Reproducing these works, however, is quite low. Someone can purchase a blank compact disc anywhere and make a copy at home or make a photocopy of a painting at little or no cost to them. This is unlike real property, where an owner can exclude others from using his property and by its very nature cannot be reproduced.

²² *Id.* at 7.

²³ *Id.*

²⁴ Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1015 (1990).

²⁵ U.S. CONST. art. I, § 8, cl. 8. The Framers of the Constitution recognized the national interest in the progress of knowledge and that this progress was accomplished through new creative works. Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U. at 12 (1999). Although Congress receives its directive from the Constitution, many do not recognize this directive, viewing copyright law merely as a form of trade regulation, and many textbooks do not even discuss the Intellectual Property Clause. *Id.* at 13.

²⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); COHEN ET AL., *supra* note 16, at 7.

²⁷ *Sony*, 464 U.S. at 429.

²⁸ See generally Ginsburg, *supra* note 24 (discussing the historical and modern perceptions of the *droit moral* system and a comparison between the U.S. economic system and France’s *droit moral* system).

personal rights of an author,²⁹ which “inure to the artist as creator and which protect the artistic integrity of the artist’s creation and require recognition of the artist as author/creator.”³⁰ Thus, some of these personal rights can include the right to be known as the author (and preventing others from naming her as the author for a work she did not create), the right to prevent others from changing her work, and the right to control the dissemination of a work.³¹ Except in limited, narrow circumstances, U.S. law does not recognize moral rights in its copyright laws.³²

Because the United States does not follow this moral rights theory, copyright law is based on the Constitution’s economic-based system. The current legislation, the Copyright Act of 1976, is codified in Title 17 of the United States Code, Section 101 *et seq.*³³ Congress is given broad discretion to determine the breadth of copyright law (as the only directive is the Intellectual Property Clause in the Constitution), and courts are reluctant to extend protection too far without guidance from Congress.³⁴ Under the current structure, an author receives copyright protection for the life of the author plus seventy years.³⁵ Encompassed in this time period are an author’s exclusive rights, which are granted in section 106 of the Act.³⁶

²⁹ NIMMER, *supra* note 16, at § 8D.01.

³⁰ Geri J. Yonover, *The “Dissing” of Da Vinci: The Imaginary Case of Leonardo v. Duchamp*, 29 VAL. U. L. REV. 935, 947 (1995).

³¹ *Id.*

³² For instance, under the Visual Artists Rights Act (VARA), an artist receives very limited moral rights. See 17 U.S.C. § 106A (2006). Protection under VARA is given to certain visual works of art, and two primary moral rights are given: the right of integrity and the right of attribution. *Id.*; Rikki Sapolich, *When Less Isn’t More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 INTELL. PROP. L. J. 453, 478-79 (2007). What does and does not qualify as a visual work of art is defined in section 101 of the Act. 17 U.S.C. § 101. Under VARA, an artist can claim authorship of his work, prevent others from using his name in connection with a work, prevent distortion or mutilation to a work that would harm his reputation, and prevent destruction of works with recognized stature. *Id.* § 106A. For a more thorough discussion of moral rights and VARA and its shortcomings, see Sapolich, *supra*, at 475-82. See also Rebecca Stuart, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645 (2007) (discussing VARA, its problems, and proposed amendments to harmonize American moral rights law with international law). For the courts’ perception of VARA, see *Carter v. Helmsey-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (discussing the application of VARA and the exclusion of protection to works made for hire to a sculpture located inside a commercial building); *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (discussing VARA’s stature requirement and application to a sculpture). In addition to a visual artist receiving moral rights under section 106A of the Act, an author may be able to receive moral rights under contract principles or the Lanham Act’s unfair competition cause of action. See, e.g., *Gilliam v. Am. Broad. Co.*, 538 F.2d 14 (2d Cir. 1976) (holding Monty Python’s copyrighted work had been infringed by defendant’s editing of the material for broadcast in the United States on both contract and Lanham Act claims). Finally, the attempts of some American authors to claim moral rights abroad in countries where those rights are recognized have been quite difficult. See, e.g., Paul Edward Geller, *French High Court Remands Huston Colorization Case*, 39 J. COPYRIGHT SOC’Y U.S.A. 252 (1992) (discussing the attempt of Anjelica Huston to receive moral rights protection for her father’s movie *The Asphalt Jungle* in France).

³³ 17 U.S.C. §§ 101–1332.

³⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). This reluctance likely stems from the overall goal of copyright law to create a balance between providing incentives to an author and incentives to the public.

³⁵ 17 U.S.C. § 302(a).

³⁶ *Id.* § 106.

These rights include the right to reproduce and distribute the work, the right to create derivative works, the right to display the work, and the right to perform the work.³⁷ If copyright law is compared to real property law, these rights serve as the fence that keeps others out of the “copyright house,” or they define what level of protection a copyright owner will receive. This “so-called bundle of rights . . . may overlap in some cases.”³⁸ The copyright owner can either exercise these rights personally or authorize others to exercise them on his or her behalf.³⁹

If the bundle of rights granted to an author is the fence, then there are three “front door” issues a work must meet before an author can enter the copyright house and receive protection. In order to receive protection, a work must be 1) an “original work[] of authorship,” 2) “fixed in any tangible medium of expression,” and 3) must be a non-idea.⁴⁰

The first requirement, originality, only requires that the work be original to the author.⁴¹ Although “work of authorship” is not defined in section 101 of the Act, it has been defined by the Supreme Court as “he to whom anything owes its origin”⁴² Furthermore, some guidance is also provided in section 102 of the Act. Under section 102, a variety of works of authorship are protected, including: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architectural works.⁴³ This list, however, is nonexhaustive.⁴⁴ Originality is also not defined in the statute,⁴⁵ but it is well settled that originality does “not include requirements of novelty, ingenuity, or esthetic merit”⁴⁶ The definition of originality is meant to be broad, and the law is not intended to exclude new technologies simply because they are new.⁴⁷

Courts have since taken this broad perception of originality and held it to a very low standard, requiring only that the “work [be] independently

³⁷ *Id.*

³⁸ H.R. REP. NO. 94-1476, at 61 (1976).

³⁹ 17 U.S.C. § 106.

⁴⁰ *Id.* § 102.

⁴¹ *Id.* § 102(a); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

⁴² *See* 17 U.S.C. § 101; *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884).

⁴³ 17 U.S.C. § 102. Only four of these categories are defined in section 101. *Id.* § 101. When enacting the statute, Congress presumed that the three undefined categories have well-settled meanings. H.R. REP. NO. 94-1476, at 53 (1976).

⁴⁴ Congress did not intend to limit the ways in which an author can express himself, nor did Congress intend to “freeze the scope of copyrightable subject matter . . . or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.” H.R. REP. NO. 94-1476, at 51.

⁴⁵ *See* 17 U.S.C. § 101.

⁴⁶ H.R. REP. NO. 94-1476. These characteristics are the subject matter of a patent. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103-04 (2d Cir. 1951). For the statutory authority for patents, see 35 U.S.C. §§ 1-376 (2006).

⁴⁷ *See Burrow-Giles*, 111 U.S. at 58.

created by the author . . . and that it possesses at least some minimal degree of creativity.”⁴⁸ Furthermore, a work can be original “even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”⁴⁹ A court will not judge originality or the medium in which a work is portrayed, as that would allow judges to make their own decisions based on the merits of the work, rather than acting objectively.⁵⁰ As long as this low standard for originality is met, a work will receive copyright protection.⁵¹

If an author takes elements from the public domain (i.e. unprotectable elements) and adds something to those elements (i.e. his own creative elements) to make it different or a distinguishable variation, then he will receive copyright protection for that new work.⁵² Under the required standard of originality, two people could create the same work and both of them would receive protection, providing both establish independent creation.⁵³

The second requirement for copyright protection, that a work be fixed in a tangible medium of expression,⁵⁴ is defined in section 101 of the statute as something that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵⁵ Furthermore, “it makes no difference what the

⁴⁸ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).

⁴⁹ *Id.* In essence, all that is required is “little more than . . . copying.” *Alfred Bell*, 191 F.2d at 103.

⁵⁰ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-51 (1903).

⁵¹ Certain categories of protected works may require a more focused analysis. When a photograph is the copyrighted work, for instance, the originality requirement may be different than an originality analysis for work such as a sculpture, song, or novel. Photographs were first extended copyright protection in 1884, where a court recognized a photographer can choose the setting, arrangement, lighting, etc. *Burrow-Giles*, 111 U.S. at 60. Currently, there are three different ways a photograph can meet the requisite originality standard. First, an author can meet the originality requirement by choosing the angle of the photo, the lighting and shading, and the exposure, or originality in the rendition, as the “copyright protects not *what* is depicted, but rather *how* it is depicted.” *Mannion v. Coors Brewing Co.* 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005). Second, a photograph may be original because of the timing; this is simply a case of being in the right place at the right time as the underlying subject matter is not within an author’s copyright. *Id.* at 453. Finally, a photo may be original in the creation of the subject, where the photo is original to the “extent that the photographer created ‘the scene or subject to be photographed.’” *Id.* If an artist meets this originality standard he may prevent others from taking that exact photo and recreating it in another medium because in essence the copyright extends to the subject of that photo. *Id.* at 454. For a discussion on the impact technology has on the copyrightability of photographs, see John Gastineau, Note, *Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images*, 67 IND. L.J. 95 (1991).

⁵² *Alfred Bell*, 191 F.2d at 104-05.

⁵³ Independent creation is always a defense to a copyright infringement claim. COHEN ET AL., *supra* note 16, at 323-24.

⁵⁴ 17 U.S.C. § 102(a) (2006).

⁵⁵ *Id.* § 101. In essence, as soon as an author puts his novel on paper or an artist paints a bowl of fruit, for example, this requirement is satisfied, as the work in question can be perceived in a tangible form. Even the audiovisual aspects of a video game have been found to meet the fixation requirement. *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982). For instance, in *Williams Electronics, Inc.*, the defendant challenged plaintiff’s copyright, claiming the video game creates new images every time the game is played and the player has a role in the creation of individual games so as to become the “co-author of what appears on the screen,” barring the plaintiff from receiving copyright protection. *Id.* at 873-74. The court rejected these arguments, holding that while the images are “new”

form, manner, or medium of fixation may be . . . whether it is capable of perception directly or by means of any machine or device ‘now known or later developed.’”⁵⁶

The final requirement, that the work cannot be an idea, is not a positive requirement like originality and fixation, but rather a negative requirement.⁵⁷ Thus, in order for a work to receive protection, it cannot be an “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁵⁸ One of these limitations, the idea/expression dichotomy, states that copyright law does not protect ideas themselves, only manifestations of those ideas.⁵⁹ In essence, there must be a distinction between the copyrighted work and the underlying art it is intended to illustrate.⁶⁰

For example, in the prominent case of *Baker v. Selden*, the copyrightability of a book describing a new accounting system (which contained a diagram of this system) was in question.⁶¹ The court held that a copyright in the book would only extend to the description of that system; the ledger itself was not protectable.⁶² Thus, when it comes to copyright protection, there must be a distinction between the book and the art the book intended to illustrate (i.e. copyright law would protect the book but not the art explained in that book).⁶³

The idea/expression dichotomy is not the only subject matter doctrine that limits copyright protection.⁶⁴ For instance, facts are not copyrightable, as “facts do not owe their origin to an act of authorship.”⁶⁵

each time the game is played, the original images do repeat themselves over and over and the images are permanently embodied in the machine and memory itself. *Id.* at 874.

⁵⁶ H.R. REP. NO. 94-1476, at 52 (1976). The requirement for fixation is particularly helpful in an infringement analysis because it gives an author proof that he created the work in question.

⁵⁷ See 17 U.S.C. § 102(b).

⁵⁸ *Id.*

⁵⁹ COHEN ET AL., *supra* note 16, at 72.

⁶⁰ See *Baker v. Selden*, 101 U.S. 99, 102 (1879).

⁶¹ See *id.* at 100-01.

⁶² *Id.* at 107. This diagram would be the subject of a patent. *Id.* at 105. To award the author of the book a copyright in the ledger itself would prevent anyone else from using the ledger, thus tilting the balance too far in the copyright owner’s favor. See *id.* at 107. The author would have received protection for not only patentable subject matter, but also protection for the overall “idea” of a ledger, which would extend his monopoly too far. Thus, the line between ideas and expression can be quite finite and difficult to determine in some cases.

⁶³ See *id.* at 107. Thus, there are two purposes to section 102(b): finding the line between what is protectable and what is in the public domain, and finding the line between copyrightable and patentable works. COHEN ET AL., *supra* note 16, at 72.

⁶⁴ There are also limitations to a copyright owner’s exclusive rights. For instance, everything in section 106 is “‘subject to sections 107 through 118,’ and must be read in conjunction with those provisions.” H.R. REP. NO. 94-1476, at 61 (1976). These statutory exceptions include the fair use defense, use by libraries, certain types of performances, secondary broadcast transmissions, and ephemeral recordings, among others. 17 U.S.C. §§ 107-118 (2006).

⁶⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 347 (1991). There is a distinction between creation and discovery because the first person to find a fact has not himself created that fact,

This holds true whether the facts are phone numbers⁶⁶ or a work detailing historical events.⁶⁷ Although the facts themselves are not copyrightable, a compilation of facts is protectable.⁶⁸ This protection is in the underlying expression only; others can copy the facts, just not the precise expression used by the author.⁶⁹ This is known as a “thin” copyright.⁷⁰ Thus, even if a work meets the requisite standards of originality and fixation, facts and ideas themselves are not copyrightable, and other limiting subject matter doctrines must be looked at in order to determine protectability.⁷¹ This is the final hurdle an owner must overcome in order to receive copyright protection.

B. The Fair Use Doctrine

As with general copyright protection, the doctrine of fair use began as a common law affirmative defense to copyright infringement in the eighteenth century with the Statute of Anne.⁷² This doctrine was adopted by Congress in the 1976 Copyright Act.⁷³

1. Definition, Purpose, and Justifications for Fair Use

Fair use can be raised by a defendant as an affirmative defense in a copyright infringement suit.⁷⁴ Initially a common law doctrine, a court first

only discovered its existence. *Id.* “The most fundamental axiom of copyright law is that [n]o author may copyright his ideas or the facts he narrates.” *Id.* at 344-45.

⁶⁶ *See id.* at 361.

⁶⁷ “To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots.” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980). The court takes this limitation a step further, stating research is not copyrightable. *See id.* at 979.

⁶⁸ *Feist*, 499 U.S. at 345. A compilation meets the requisite originality standard because of the choices an author can make in creating a compilation. *Id.* at 348. Compilations are not copyrightable per se, however, and there are three distinct elements that give a compilation copyright protection: “(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an ‘original’ work of authorship.” *Id.* at 357.

⁶⁹ *Id.* at 348.

⁷⁰ *See id.* at 359.

⁷¹ One of the other limiting doctrines is the merger doctrine, which states that if there are only so many ways to create a work, the idea and expression merge and that work is not copyrightable. *But see, e.g., CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 2004) (holding defendant’s use of the plaintiff’s red book data was not excused by the merger doctrine). A second limiting doctrine is *scenes à faire*, which is used for literary works and states certain plot elements, characters, or settings are unprotectable because they are indispensable to the topic. *See, e.g., Hoehling*, 618 F.2d at 979 (holding plaintiff could not receive protection for certain elements of his book because they were standard to his work on the history of the Hindenburg). A final common limiting doctrine is the useful articles doctrine, which states articles that are useful do not receive copyright protection if the design elements cannot be severed from the useful elements. *But see, e.g., Mazer v. Stein*, 347 U.S. 201 (1954) (upholding plaintiff’s copyright in a statuette because the useful element, a light bulb, could be removed from the statuette).

⁷² 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:1.50 (2009).

⁷³ *Id.*

⁷⁴ *See* 17 U.S.C. § 107 (2006). Once a prima facie case for infringement can be shown, the burden shifts to the defendant to successfully raise a fair use defense. Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1099 (2010).

recognized fair use in 1841, in *Folsom v. Marsh*.⁷⁵ In *Folsom*, the court stated a second author could use material from a copyrighted work as long as the portions used were for fair and reasonable criticism; if he used the work in a way that superseded the original, his use was considered infringement and therefore a violation of copyright law.⁷⁶ When Congress enacted the 1976 Act, it codified the doctrine in section 107, with the intention to simply adopt the common law doctrine as is.⁷⁷ Thus, the statute's preamble states that works receive protection "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research . . ."⁷⁸

Although fair use has been recognized since the late nineteenth century, no concrete definition has ever been given.⁷⁹ This has not been a hindrance, however, because it requires a case-by-case determination of whether a use is fair.⁸⁰ The definition consistently given for fair use is that it is a privilege given to people other than the copyright owner to use his material, disregarding the monopoly given to the owner in that work.⁸¹ Thus, it limits the monopoly given to the original author and allows a second author to legally use aspects of someone else's work. Fair use allows courts to avoid rigidly applying copyright laws to a work when application of those laws would stifle creativity.⁸²

The purpose or justification for granting this privilege to someone other than the owner ties directly to the Intellectual Property Clause of the Constitution; allowing this use tilts the balance in favor of the public, thus promoting the progress of the useful arts.⁸³ For fair use to function, a balance needs to be achieved that serves the public interest, and judges should not be constrained too much by the statutory language.⁸⁴ In order to serve this purpose, courts "must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."⁸⁵

⁷⁵ See *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841).

⁷⁶ *Id.*

⁷⁷ 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

⁷⁸ 17 U.S.C. § 107.

⁷⁹ H.R. REP. NO. 94-1476, at 65 (1976).

⁸⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

⁸¹ *Id.*; *Rosemont Enters. v. Random House, Inc.* 366 F.2d 303, 306 (2d Cir. 1966).

⁸² *Campbell*, 510 U.S. at 577. Because of this flexibility, new ways of analyzing claims of fair use have been proposed. One solution analyzes fair use with an emphasis on the facts, categorizing the case within one of six broad interactive paradigms. Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach*, 9 U. MIAMI ENT. & SPORTS L. REV. 121, 141 (1992). These paradigms are to serve as a guide to a fair use claim and emphasize how to fit the facts into a particular element of fair use so as to argue a stronger case. *Id.*

⁸³ *Rosemont Enters.*, 366 F.2d at 307.

⁸⁴ PATRY, *supra* note 72.

⁸⁵ *Rosemont Enters.*, 366 F.2d at 307.

2. The Statutory Factors

When Congress codified the fair use defense in the 1976 Act, four factors were adopted to determine if a work would receive fair use protection. The four factors include the purpose and character of use, the nature of the copyrighted work, the amount and substantiality taken, and the effect on the potential market.⁸⁶ The four factors must be considered in the totality of the circumstances and looked at and weighed together; they may not be treated in isolation.⁸⁷

a. Purpose and Character of the Use

The first factor goes to “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁸⁸ This factor relates to the common law principle of looking to the “nature and objects of the selections made.”⁸⁹ The preamble of section 107 is closely tied to this factor, and this factor asks whether the use was necessary for criticism or whether the purpose for the use would have been served by using unprotectable elements such as facts and ideas.⁹⁰ It requires a court to look at both the justification for a defendant’s work as a whole as well as the justification for each individual use within that work.⁹¹ The court should examine whether the new work supersedes the original or adds something new, thus making it transformative.⁹²

There is a strong presumption that every commercial use of copyrighted material is an unfair exploitation of an owner’s rights.⁹³ The commercial or nonprofit character of a work should be weighed against the other factors, however, as a determination of the commercial nature of a work should not be conclusive.⁹⁴ The crux of this commercial versus nonprofit distinction is not monetary gain but “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁹⁵ In addition to examining the commercial aspect of a work, a court must also examine the purpose and character of the use.⁹⁶ Relevant to the determination of the character of the use is “the propriety of the defendant’s conduct.”⁹⁷

⁸⁶ 17 U.S.C. § 107 (2006).

⁸⁷ *Campbell*, 510 U.S. at 578.

⁸⁸ 17 U.S.C. § 107(1).

⁸⁹ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

⁹⁰ PATRY, *supra* note 72, § 10:13.

⁹¹ *Id.*

⁹² *Id.* § 10:21.

⁹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

⁹⁴ H.R. REP. NO. 94-1476, at 76 (1976).

⁹⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

⁹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

⁹⁷ *Harper & Row*, 471 U.S. at 562. One category of use that derives commercial benefit but is still considered fair under section 107 is parody because its primary purpose is comment and criticism and

b. Nature of the Copyrighted Work

The second factor looks to the nature of the copyrighted work,⁹⁸ and usually receives little attention.⁹⁹ At common law, this factor examined the “value of the materials used.”¹⁰⁰ This factor is closely tied to the limiting subject matter doctrines, as it “calls for recognition that some works are closer to the core of intended copyright protection than others.”¹⁰¹ There is a greater need to disseminate works of a factual nature, ideas, or works limited by one of the previously mentioned subject matter doctrines.¹⁰² Conversely, it is more difficult to establish fair use when the original work is closer to the core of intended copyright protection.¹⁰³ For example, in *Harper & Row v. Nation Enterprises*, the fair use defense was not applicable because the underlying work was unpublished.¹⁰⁴ Thus, the extent to which copying will be permitted varies on a case-by-case basis.¹⁰⁵

c. Amount and Substantiality Taken

The third factor examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁰⁶ Under the common law doctrine, this factor dealt with the “quantity and value of the materials used.”¹⁰⁷ The focus for this factor is on the persuasiveness of a potential infringer’s justification for using a pre-existing work, as well as the

has transformative value. *Campbell*, 510 U.S. at 579. For example, in *Mattel, Inc. v. Walking Mountain Productions*, the defendant, a photographer, created a series of works “entitled ‘Food Chain Barbie,’ in which he depicted Barbie in various absurd and often sexualized positions.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003). These images depicted Barbie dolls with vintage kitchen appliances, and the defendant actually used the word “Barbie” in some of his titles as well. *Id.* The plaintiff, Mattel, filed an infringement action against the defendant, yet the defendant was able to successfully defend his use by using the fair use doctrine. *Id.* at 797, 806. In regards to the defendant’s purpose and character of use, the court held the transformative nature and parodic quality rebutted any commercial aspect of the work, thus weighing in favor of the defendant. *Id.* at 803.

⁹⁸ 17 U.S.C. § 107(2) (2006).

⁹⁹ PATRY, *supra* note 72, § 10:138. This is evidenced by the little attention given to this factor in legislative history and cases. *Id.* It has been suggested this lack of attention exists simply because the significance of the factor is simple: whether or not the second use is transformative. *See id.* Despite this lack of attention, this factor is important, as a determination of fair use for works that are transformative requires a comparison between the copyrighted work and the infringing work. *Id.*

¹⁰⁰ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

¹⁰¹ *Campbell*, 510 U.S. at 586.

¹⁰² *Harper & Row*, 471 U.S. at 563; *see also supra* note 71.

¹⁰³ *Campbell*, 510 U.S. at 586.

¹⁰⁴ *Harper & Row*, 471 U.S. at 564, 569. In *Harper & Row*, President Gerald R. Ford wrote a memoir to be published by the plaintiff, who in turn granted *Time Magazine* the rights to provide an excerpt from the book before it was published. *Id.* at 542-43. Before *Time* could publish the story, however, the defendant published its own article, and *Time* subsequently cancelled its own article. *Id.* at 543. The plaintiff then brought a suit for copyright infringement. *Id.* Although important, the unpublished nature of a work is not determinative. *See, e.g., New Era Publ’ns Intl’ v. Henry Holt & Co., Inc.*, 695 F. Supp. 1493, 1502, 1523 (S.D.N.Y. 1988) (holding the unpublished nature of copyrighted material does not preclude the fair use defense).

¹⁰⁵ *Harper & Row*, 471 U.S. at 563.

¹⁰⁶ 17 U.S.C. § 107(3) (2006).

¹⁰⁷ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

quantity, quality, and importance of the materials used.¹⁰⁸ Taking the heart of a work is not acceptable, yet taking an insubstantial amount is not excused simply because it is insubstantial, as the original author's rights would still be infringed by a second author's copying.¹⁰⁹

d. Effect on the Potential Market

The final factor looks to "the effect of the use upon the potential market for or value of the copyrighted work."¹¹⁰ As with the previous three factors, this factor was also considered under common law.¹¹¹ Courts consider this factor to be the "single most important element of fair use" because it demonstrates just how much the original work will be affected by the defendant's work.¹¹² Under this factor, the market harm caused by the actions of the alleged infringer and the impact on the potential derivative market for the original must also be considered.¹¹³ In essence, courts become concerned when the alleged infringer's use serves as a market substitution and could completely replace the original work.¹¹⁴

Once the copyright holder is able to establish a slight causal connection between the infringement and a loss of revenue, the burden shifts to the alleged infringer to show that damage would have been done regardless of his use of the work.¹¹⁵ Furthermore, this factor should not be construed too literally; if it were, almost every use would weigh against fair use because, in theory, there is always the chance the copyright owner will license in that particular market.¹¹⁶

¹⁰⁸ *Campbell*, 510 U.S. at 586-87.

¹⁰⁹ *See Harper & Row*, 471 U.S. at 565. In essence, this factor requires a balancing of interests. For example, in *Mattel, Inc. v. Walking Mountain Productions*, even though the defendant used a large portion of the plaintiff's copyrighted work, his use of the Barbie doll was not a verbatim copy, as parts of the doll are not displayed in his photographs. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803-04 (9th Cir. 2003). Furthermore, while he did substantially make use of the dolls, he added new elements the make the work his own. *Id.* at 804.

¹¹⁰ 17 U.S.C. § 107(4).

¹¹¹ *See Folsom*, 9 F. Cas. at 349.

¹¹² *Harper & Row*, 471 U.S. at 566.

¹¹³ *Campbell*, 510 U.S. at 590; *Harper & Row*, 471 U.S. at 568.

¹¹⁴ *Campbell*, 510 U.S. at 591.

¹¹⁵ *Harper & Row*, 471 U.S. at 567. It is important to note that a case of copyright infringement with easy, clear-cut evidence of actual damage is very rare. *Id.* A defendant will very rarely outright say, "yes, I copied the plaintiff's work and should be punished." If a defendant ever admits to copying it is usually because he is raising an affirmative defense such as fair use or attempting to rebut the validity of the plaintiff's copyright.

¹¹⁶ PATRY, *supra* note 72, § 10:151. If the language of this factor were to be read literally, any subsequent use by another author would be illegal, as the literal language of this factor would suppose the original author has the right to all markets because there is the remote chance that this would happen. It is possible that construing the language in this way would tilt the balance too far in the original author's favor by giving him more of a monopoly over his work and taking away future incentives to create. Thus, in looking at this factor, courts must walk a fine line, as they do not want to restrict the creation of future works but still want to allow an original author the opportunity to expand into future markets.

III. BACKGROUND ON THE FIRST AMENDMENT

Under the First Amendment of the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹¹⁷ Thus, the Framers of the Constitution sought to insure an individual’s freedom of speech, protecting man’s need to express his opinions and the social need of the attainment of truth.¹¹⁸ Initially, this Constitutional guarantee was simply to provide protection from prior restraints,¹¹⁹ but the modern First Amendment doctrine goes much farther, protecting both speech and expression.¹²⁰

Because it is hard to determine the original intent of what the Framers meant by “freedom of speech,”¹²¹ several free speech theories developed to answer the “why” question of the First Amendment, yet there is no single or universal theory.¹²² The three most recognized theories are the market place of ideas theory, the human dignity and self-fulfillment theory, and the democratic self-government theory.¹²³

The first theory, the market place of ideas theory, argues that protecting someone’s freedom of speech is essential for the discovery of truth and creates an open market with competing ideas.¹²⁴ Truth will emerge from this competition of ideas; as Justice Oliver Wendell Holmes wrote, “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their

¹¹⁷ U.S. CONST. amend. I.

¹¹⁸ ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 33 (6th ed. 1941).

¹¹⁹ Norvell, *supra* note 16, at 551. The First Amendment was “a reaction against the suppression of speech and of the press that existed in English society,” as until 1694 only works with a government-granted license were authorized for publication. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1205 (3d ed. 2009). The second widely-accepted reason for enacting the First Amendment was the framers’ reaction to the law of seditious libel in England “that made criticizing the government a crime;” it was believed that the King was above public criticism. *Id.* Unfortunately, truth was not a defense to this crime and may have made things worse because it would damage the image and reputation of the government. *Id.* at 1206. Ironically, shortly after the Constitution was ratified, Congress, along with many of the drafters of the Constitution, voted to pass the Alien and Sedition Acts of 1798, which “prohibited malicious publication of defamatory material against the government, the Congress, or the President.” Norvell, *supra* note 16, at 552.

¹²⁰ Norvell, *supra* note 16, at 553. Ultimately, however, deciding what qualifies as protected speech is up to the courts, and the Supreme Court has never followed the absolutist view that all government regulation of speech should be prohibited. CHERMERINSKY, *supra* note 119, at 1207. As one notable scholar has pointed out, “[l]ine drawing is inevitable as to what speech will be protected under the First Amendment and what can be proscribed or limited.” *Id.*

¹²¹ 1 RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH* § 1:2 (2003). For instance, the passage of the Alien and Sedition Acts probably adds to this confusion, as the First Amendment was a reaction to the harsh seditious law in England. CHERMERINSKY, *supra* note 119, at 1206.

¹²² SMOLLA, *supra* note 121, § 2:3.

¹²³ *Id.*

¹²⁴ *Id.* § 2:4.

wishes safely can be carried out.”¹²⁵

The second theory, the human dignity and self-fulfillment theory, focuses on the importance of free speech to a human being.¹²⁶ This theory advocates that it is important to protect someone’s equality and autonomy when protecting a constitutional right such as the freedom of speech.¹²⁷

Finally, the third theory, the democratic self-government theory, proposes freedom of speech exists because it is essential to democracy.¹²⁸ This sort of open discussion is essential for people to make informed decisions in elections and gives people the option to express their views and opinions on public policy.¹²⁹ In other words, the freedom of speech exists to serve as a check on the government.¹³⁰ It has been argued that political speech fits perfectly into this First Amendment protection.¹³¹

Regardless of why freedom of speech is seen as a fundamental right, early scholars recognized that the First Amendment was “not intended to give immunity for every possible use of language.”¹³² One such limitation is provided by the common law doctrine of defamation, which has a particular

¹²⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This theory has been strongly criticized, as some argue there is no guarantee that truth will prevail. *See, e.g.*, Harry Wellington, *On Freedom of Expression*, 88 *Yale L.J.* 1105, 1129-30 (1979). In response to the criticisms raised by others, supporters argue that the alternative, allowing the government or some other smaller group to determine what is true, is much worse. MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.02(B), 1-12 (1984).

¹²⁶ SMOLLA, *supra* note 121, § 2:5.

¹²⁷ *See* C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-51 (1989).

¹²⁸ SMOLLA, *supra* note 121, § 2:6.

¹²⁹ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 255-56 (1961).

¹³⁰ *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 523 (discussing the various ways the First Amendment serves as a check on the government).

¹³¹ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26-27 (1971). Scholars disagree on whether political speech should be the only type of speech protected by the First Amendment. Arguments for this limited protection claim speech regarding how we are governed, rather than scientific, educational, commercial or literary speech should be protected. *Id.* at 28. It is claimed this approach will free the courts from stifling obligations. *Id.* at 28-29. However, arguments against limited protection conclude it would be almost impossible to define political speech, and it would lead to a world where any speech not concerning the government would not be protected. SMOLLA, *supra* note 121, § 2:6.

¹³² CHAFFEE, *supra* note 118, at 15 (quoting Justice Oliver Wendell Holmes). Two other First Amendment principles that are influential on the freedom of speech are the free speech method, which organizes the approaches to free speech jurisprudence and attempts to resolve free speech problems, and the free speech doctrine, which incorporates the tests and formulations that govern the freedom of speech. SMOLLA, *supra* note 121, §§ 2:9, 2:13. A complete discussion of all of these tests is beyond the scope of this comment, but can include subject matters such as obscenity (see *Miller v. California*, 413 U.S. 15 (1973) for the modern obscenity standard), commercial speech (see *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557 (1980) for the often-cited test for when the government can regulate commercial speech), and conduct that communicates (see *U.S. v. O’Brien*, 391 U.S. 367 (1968) for a test regarding when the government can regulate this type of speech). For an overview of the various facets of the modern First Amendment doctrine, see Norvell, *supra* note 16.

relationship to the First Amendment.¹³³ Generally speaking, a claim for defamation requires a plaintiff to show his or her reputation was injured because of a false statement made by the defendant.¹³⁴ This speech is essentially false speech, and until 1964, courts left the First Amendment out of defamation analyses because of this categorization.¹³⁵

In 1964, however, the Supreme Court constitutionally limited the law of defamation with *New York Times v. Sullivan*.¹³⁶ In this pivotal case, the Court required a higher standard of proof when a defamatory statement was about a public official.¹³⁷ When a defendant makes an alleged defamatory statement, his privilege only extends to opinions based on facts.¹³⁸ The Court recognized that this concept is related to the First Amendment freedom of speech (particularly when dealing with public officials), and this constitutional safeguard is permitted to facilitate ideas, views, and comments about changes desired by the people.¹³⁹ In essence, some sort of breathing space is needed when it comes to free speech in the political atmosphere.

Based on this framework, the Constitution requires a higher standard of proof when a statement is made about a public official: actual malice is required.¹⁴⁰ Actual malice is defined by the court as “knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁴¹ This higher standard of proof was extended in *Curtis Publishing Co. v. Butts* to include public figures.¹⁴² This standard does not, however, extend to defamatory statements concerning private individuals.¹⁴³

¹³³ JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, UNDERSTANDING TORTS 369 (3d ed. 2007).

¹³⁴ *Id.* at 370.

¹³⁵ *Id.* at 379.

¹³⁶ *Id.*

¹³⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The defendant in this case created an advertisement that claimed the plaintiff, a city commissioner, was involved in actions against Civil Rights leaders. *Id.* at 256-58. Because of this new standard, however, the plaintiff was not successful. *Id.* at 285-86.

¹³⁸ *Id.* at 267.

¹³⁹ *Id.* at 269.

¹⁴⁰ *Id.* at 279-80.

¹⁴¹ *Id.* at 280. The requirement of actual malice does not create an absolute privilege to defame public officials; rather, it only creates a qualified privilege. DIAMOND ET AL., *supra* note 133, at 381.

¹⁴² See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154 (1967). Public figures are generally people who have a role of special prominence in society, have positions of power or influence, and sometimes can become a public figure through no fault of their own. *Gertz v. Welch*, 418 U.S. 323, 345 (1974). In *Curtis v. Butts*, for instance, the defendant published an article accusing the plaintiff, a football coach, of conspiring to fix the result of a football game. *Curtis*, 388 U.S. at 135-36. Although the Court found the plaintiff to be a public figure, the plaintiff had sufficiently proven actual malice to succeed on his defamation claim. *Id.* at 154, 156-58.

¹⁴³ *Gertz*, 418 U.S. at 348. This is because public figures and public officials have more access to communicative channels and have a more realistic opportunity to rebut false statements. Private individuals, on the other hand, are not provided that same opportunity and are more vulnerable to injury, so the interest in protecting those individuals is greater. *Id.* at 344. In *Gertz*, the defendant accused the plaintiff, an attorney, of having a criminal record and labeled him as a Communist, among other things.

IV. ANALYSIS

Although a copyrighted work is essentially the “speech” of an author, the underlying goals of the First Amendment and copyright law are quite different. Many have argued a relationship between the two should be formed (or have argued that it is also incorporated in copyright law in certain areas), especially when a closer look reveals that the purposes of the First Amendment and copyright law appear to be exact opposites.¹⁴⁴ Regardless, there must be some sort of balance to reconcile these two competing interests.

Despite the competing interests between the two doctrines, both have principles that limit the scope of protection awarded, or principles that are exceptions to the general rule. In the free speech context, this limitation comes through the common law defamation principle of actual malice. In the copyright context, this limitation is the defense of fair use. Due to the underlying similarities in these limiting doctrines, the limiting doctrine found in the freedom of speech could be applied to fair use so as to reconcile these two contradictory principles.

A. The Relationship Between Copyright Law and the First Amendment

In the words of Benjamin Cardozo, “[t]he reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of the law.”¹⁴⁵ This holds true for the relationship between the First Amendment and copyright law, as the underlying purposes behind these two legal schemes are quite different. Copyright law, for instance, was initially enacted to encourage censorship, prevent unlawful copying, and provide tools for the government’s control.¹⁴⁶ Unlike copyright law, the First Amendment seeks to maintain freedom and

Id. at 325-26. Because the plaintiff was found to be a private person, no higher standard of proof was required, and the court found proof of defamation in his favor. *Id.* at 352.

¹⁴⁴ Some of these authors include Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007) (discussing the First Amendment limits on copyright); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (discussing how copyright monopolies conflict with the First Amendment and proposing two solutions through copyright infringement to reconcile this conflict); Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571 (1987) (arguing a principled formulation should be created to the disjointed current approach to copyright law and the First Amendment); Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001) (reviewing the history of this relationship and arguing for a balance approach); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (discussing the presence of the First Amendment in the fair use defense); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (arguing the relationship originates from the idea/expression dichotomy). Some of the more notable approaches, as well as some of the more unconventional approaches, are discussed within this section. These two doctrines can be considered opposites because the fundamental purpose of copyright law serves to protect an author’s rights in his work, or “speech,” and to provide a monopoly over certain information, while the First Amendment seeks to disseminate as much speech as possible.

¹⁴⁵ Nimmer, *supra* note 144, at 1180.

¹⁴⁶ COHEN ET AL., *supra* note 16, at 19.

dissemination of speech.¹⁴⁷ Thus, the question becomes how these two constitutional doctrines can be reconciled and coexist together.

Commentators and courts have addressed this question in a variety of ways, and there are five generally accepted views on how to reconcile copyright law and the First Amendment.¹⁴⁸ First, it has been advocated that because Congress has the power to enact copyright law from the Intellectual Property Clause, how could those laws be unconstitutional when the power to enact them comes from the Constitution itself?¹⁴⁹ The second theory is that the First Amendment is built into the principle of the idea/expression dichotomy, as copyright law only protects the expression (rather than the ideas) of an author.¹⁵⁰ Third, it has been argued that the idea of freedom of speech is built into the fair use defense, as it allows others to use the expression of a copyrighted work.¹⁵¹ Fourth, it has been argued that the economic incentive to create copyrightable works “maximize[s] overall production of valuable speech.”¹⁵² Finally, the fifth theory relies on principles of property law, and under this theory it has been argued that copyrighted works are private property and “there is no First Amendment right to steal.”¹⁵³

The Supreme Court has addressed the conflicting doctrines of copyright law and the freedom of speech with the conclusion that one is interrelated and connected to the other. For instance, in the Court’s eyes, because the Intellectual Property Clause and the First Amendment were adopted at roughly the same time, the Framers conceived that the limited monopoly granted to a copyright owner was compatible with free speech

¹⁴⁷ Nimmer, *supra* note 144, at 1188.

¹⁴⁸ Many of the somewhat unconventional views also stem from these general areas, expanding, critiquing, or narrowing the principles and ideas developed in the general areas.

¹⁴⁹ Jed Rubinfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 12 (2002). As the author points out, this theory is rarely advocated because it confuses the relationship between powers and rights, as the power to create these rights would still be subject to the First Amendment. *See id.* at 12-13.

¹⁵⁰ *Id.* at 12. This principle insures there is no restriction on the freedom of speech because only the physical expression of someone’s idea is protected rather than the idea itself. *Id.* at 13-14. Others have the freedom to copy an idea, they simply cannot copy the physical manifestation of that idea. *Id.* This approach, while logical, is on its face quite vague and leaves questions open as to how it can be implemented. Sometimes it can be a very difficult, open-ended question on how to determine what is the idea and what is the expression of the author.

¹⁵¹ *Id.* at 16. This argument has been criticized, as, “[f]air speech is not free speech.” *Id.* at 18. Furthermore, as many commentators have pointed out, there are a variety of ways to use this theory to harmonize fair use and the First Amendment. *See, e.g., supra* note 144. Further clarification is needed for this approach to be effective.

¹⁵² Rubinfeld, *supra* note 149, at 21. Despite the limited monopoly granted to a copyright author, this theory argues that this limited monopoly is necessary to get the incentive to create, which leads to an increase in the freedom of speech. *Id.* While this theory rationally makes sense, it could be argued that it creates the same problems of trying to reconcile the differences in copyright law and the First Amendment, as it relies on the underlying principles of copyright monopolies.

¹⁵³ *Id.* at 24. This theory supposes that because there is a natural property claim to a copyrighted work and property laws are enforceable without any influence from the First Amendment, copyright law should be enforceable without any influence from the First Amendment. *Id.* at 25. On the surface, this theory ignores the tangible differences between real property and intellectual property.

principles.¹⁵⁴ After all, both the First Amendment and the Intellectual Property Clause are in a single document, the Constitution, and the Court has pointed out the similar objectives between the two doctrines: the creation and dissemination of information.¹⁵⁵ As such, copyright law is the “engine of free expression,” as it encourages people to continue to create new forms of expression in any way possible.¹⁵⁶ The Court has also acknowledged what it sees as copyright law’s built-in First Amendment accommodations, such as the idea/expression dichotomy and the fair use defense.¹⁵⁷

The question of how to reconcile the constitutional doctrines of copyright law and the First Amendment has been addressed by many commentators and scholars through the years. Two leading copyright scholars have adapted and argued two of the most generally accepted propositions reconciling the First Amendment and copyright law: the idea/expression dichotomy theory and the fair use defense theory. Melville Nimmer, for instance, has addressed this relationship, arguing that the Intellectual Property Clause cannot be read independent of, and uncontrolled by, the First Amendment.¹⁵⁸ He advocates that some sort of balance needs to be struck, or one needs to find a line where speech that is protected by the First Amendment coincides with speech that may be prohibited by copyright law.¹⁵⁹ To Nimmer, this balance can be reached through the idea/expression dichotomy.¹⁶⁰ He cautions, however, in distinguishing fair use from the First Amendment because these two principles are quite different in nature—the First Amendment can be used even when the marketability of a work has been affected, yet fair use considers the commercial effect a copy has on an original work.¹⁶¹

Conversely, Neil Netanel, another leading scholar, has argued that the key to reconciling the First Amendment and copyright law can be found by modifying the fair use doctrine.¹⁶² This view stems from his conclusion that copyright law is a type of content-neutral regulation that is dealt with through First Amendment principles.¹⁶³ The modifications proposed by Netanel are substantive in nature, involve the burden of proof, and focus on remedies.¹⁶⁴ He first argues that more weight should be given to the

¹⁵⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹⁵⁵ *Id.* at 243–44 (Breyer, J., dissenting).

¹⁵⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1989).

¹⁵⁷ *Eldred*, 537 U.S. at 219 (majority opinion).

¹⁵⁸ Nimmer, *supra* note 144, at 1182.

¹⁵⁹ *Id.* at 1185.

¹⁶⁰ *Id.* at 1192. Consistent with the generally accepted approach to this theory, ideas would fall on the side of free speech while the expression of that idea would fall on the side of copyright law. *Id.* at 1190.

¹⁶¹ *Id.* at 1200–01, 1203–04.

¹⁶² Netanel, *supra* note 144, at 83.

¹⁶³ *See id.* at 54–69.

¹⁶⁴ *Id.* at 83.

defendant's "critical expression and purpose," and then he argues that the burden of proof should shift to the plaintiff to show both that the defendant copied more than necessary and that this copying could harm the copyright-holder's market.¹⁶⁵ Finally, he proposes a new system for remedies given to injured plaintiffs, arguing that when defendants cannot successfully defend on fair use, courts should award a licensing fee to the plaintiff rather than enjoining the use.¹⁶⁶

There have also been a variety of other arguments—some more unconventional than others—set forth to reconcile the two doctrines of copyright law and the First Amendment.¹⁶⁷ One author, for instance, argues the actual malice standard developed in *New York Times v. Sullivan* should be applied to a fair use defense when moral rights are implicated in the copyrighted work.¹⁶⁸ In essence, the actual malice standard would allow an artist (plaintiff) to recover under a moral rights theory if the defendant's fair use was knowingly false or done with reckless disregard for the truth.¹⁶⁹ This author argues that the actual malice standard is appropriate because it is used under the First Amendment when a public figure is involved, and an artist is like a public figure in that she opens herself to criticism and acknowledges the reputation that an artist can obtain in her community.¹⁷⁰ Arguably, this application of the actual malice standard is applicable under the fair use defense because both the actual malice and the fair use defense promote public discourse and preclude the dissemination of false information.¹⁷¹ Thus, under this approach, the defendant must disprove that the plaintiff is a public figure, and then the burden shifts back to the plaintiff to show fair use was committed with actual malice to determine if an artist's moral rights trump another author's fair use of the work.¹⁷²

A second rather unconventional approach to the relationship

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 84.

¹⁶⁷ For an example of a more "conventional" argument, see Bohannon, *supra* note 74 (advocating the need for a harm requirement in copyright law—the same harm requirement as other speech-regulating laws—so that all uses of copyrighted material are protected, except where there would be harm to copyright's statutory and constitutional purpose).

¹⁶⁸ In the United States, this situation would arise when an artist has created a work that would receive protection under VARA. See *supra* note 32.

¹⁶⁹ Mark A. Petrolis, Comment, *An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence when Fair Use Battles with Actual Malice*, 8 J. MARSHALL REV. INTELL. PROP. L. 190, 214 (2008).

¹⁷⁰ *Id.* at 212. Under this approach, a plaintiff is automatically presumed to be a public figure, so a defendant must first disprove this fact, because if the plaintiff is not a public figure actual malice would not apply and fair use would overcome a claim of moral rights. *Id.* This approach will allow recovery under an actual malice/moral rights theory without destroying the fair use defense. *Id.* This argument is plausible, it is argued, because moral rights (for which protection is provided under VARA for authors of visual art) are designed in part to protect an artist's reputation. *Id.*

¹⁷¹ *Id.* To see some of the concerns raised by this application, see *id.* at 212-13. This approach construes the overall structure and purpose of copyright law too closely related to moral rights, which is not protected in the United States as a universal right. Caution should be used when applying this approach because of its closeness to this non-U.S. theory of protection.

¹⁷² *Id.* at 214-15.

between fair use and the First Amendment again uses the actual malice standard, noticing the similarities between copyright law and the approach taken in *New York Times v. Sullivan*. In this approach, a more difficult standard of proof could be required for plaintiffs when the infringing work contributes to important First Amendment values (similar to the way defamatory speech could when it concerns public officials and public figures).¹⁷³ Through this approach, the substantial similarity requirement found in an infringement analysis would be a constitutionally implied, more rigorous standard.¹⁷⁴ This approach is particularly advocated when thin copyrights are at issue, as a heightened similarity requirement is already implied in those cases.¹⁷⁵ This First Amendment “thin” analysis could open up more First Amendment protection for certain authors who wish to use an already copyrighted work, even when such use is non-transformative, a requirement found under the fair use doctrine.¹⁷⁶ Under this approach, when a work contains speech on “matters of public concern,” it is considered highly protected First Amendment speech that will trigger the thin analysis inspired by the actual malice doctrine.¹⁷⁷

B. Moving Towards a More Fair Standard

In order to reconcile the two competing doctrines of copyright law and the First Amendment, a new application of the principles developed in *New York Times v. Sullivan* may be necessary. While the theories that have been advocated by prior commentators are logical, more focus should be provided on how to apply this constitutional standard. Both copyright law and the First Amendment are quite expansive legal principles, so a very narrow focus is required to efficiently implement a theory. Under the

¹⁷³ Matthew Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 295 (2009).

¹⁷⁴ *Id.* This standard would require a higher degree of similarity between the two works when the second author is using the underlying work as protected speech and would also apply to works that were not verbatim copies. *Id.* at 296. While this argument has the potential for success, it would likely increase the already difficult copyright infringement case, which may have the adverse effect of tilting that ever important balance too far in a certain direction.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 296-97.

¹⁷⁷ *Id.* at 298-99. Other scholars have examined the relationship between the First Amendment and copyright law by using transformative uses. For instance, one scholar looked at the role of the Press Clause in transformative uses in arguing a change should be made to copyright law. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 941 (2002). If the Press Clause exists to protect “the process of providing independent and diverse sources of information and vision,” then some sort of privilege for transformative uses is needed. *Id.* at 942. This privilege should allow diverse, dissenting, or non-mainstream expression to be heard, rather than stifle or censor it (the example the author provides is someone taking the character Harry Potter and creating a tale such as “Harry Potter: The Axe Murderer”). *Id.* at 941-42. A somewhat different approach to this type of copyrighted work looks at appropriation art. Appropriation art is defined as a type of art where artists take previously created photographs or other forms of visual media and create their own interpretation and social commentary with those images, while still allowing the original work to be recognizable. Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1565 (1984). It has been argued that this type of art should be protected under the First Amendment as a political statement or protecting it under the marketplace of ideas theory. *Id.* at 1577-81.

standard developed in the aforementioned case, there is a higher standard of proof required for a plaintiff to be successful on a claim of defamation. If a plaintiff is a public figure or a public official, then proof of actual malice (knowledge or reckless disregard to the truth) is required, as freedom of speech allows people to comment or criticize public figures or officials.¹⁷⁸ Arguably, the fair use defense found in copyright law serves the same purpose, as it allows a second author to legally copy someone else's work for the purposes of comment and criticism.

Perhaps applying the higher burden of proof found under actual malice to instances where the fair use defense is raised will harmonize copyright law and the First Amendment. To achieve this end, it is probably not necessary to amend section 107 of the Act. Instead, this approach would require a court, judge, attorney, or anyone else analyzing a fair use claim to consider First Amendment principles in the totality of the circumstances, which is often used in a fair use balancing. This will serve as a limiting function and should be taken into account when analyzing the first two factors: the purpose and character of the use and the nature of the copyrighted work.¹⁷⁹

This application should be very narrow, so as not to disrupt the necessary balance in copyright law, applying only to instances where an image of a public official is used. Thus, the application proposed applies only in instances where the alleged infringing work depicts an image of a public official.¹⁸⁰ In essence, when an image of a public official is used, a heightened analysis favoring the defendant is necessary.¹⁸¹ The analytical process would become overwhelming if the category of protected works was not limited—if there was no limit where would the line be drawn? The potential infinite protection given to a copyright author if no line is drawn

¹⁷⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 283 (1964).

¹⁷⁹ There are other proposals that have taken a similar approach to modifying fair use without amending the Act. See, e.g., Tara M. Warrington, *Harry Potter and the Doctrine of Fair Use: Conjuring a New Copyright Complaint*, 10 FLA. COASTAL L. REV. 621 (2009) (arguing a change in the complaint-drafting process which requires the plaintiff alleging facts that the infringing use is not fair can reconcile the First Amendment with copyright law). After all, other factors, such as the published or unpublished status of a work or a work's parodic nature, are considered in a fair use analysis.

¹⁸⁰ It should be noted that in instances such as these, the public official or figure is usually bringing the claim against the unlawful user of her image. Known as the right of publicity, each person has the right to "control and profit from the publicity values which he has created or purchased." Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954). In the Obama HOPE poster issue, for instance, the usual application of the actual malice doctrine would occur if President Obama himself brought a claim against Shepard Fairey for his use of his image, rather than the Associated Press bringing a claim for appropriation of their copyright in a photograph. For an example of a celebrity asserting such rights, see *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (discussing professional golfer Tiger Woods' case against a sports artist for his use of Tiger's image in a painting commemorating the 1997 Masters Tournament).

¹⁸¹ This does not mean that the specific actual malice test should be applied, but rather that the underlying purpose and principles behind that standard should be applied in these situations.

would severely upset the delicate balance copyright law must meet.¹⁸²

By limiting the analysis to images of a public official, more protection is given to a secondary author who uses the image for purposes of comment or criticism, which are two principles of fair use. Fair use is particularly suited for this application because the defense itself is not a bright line test and already allows for flexibility in the way the four factors are applied to each situation where the defense is raised. This analysis will be particularly important in the first two factors of fair use: the purpose and character of the use and the nature of the copyrighted work. After all, if courts can consider the unpublished nature of a work so as to grant more protection to the copyright author, it is plausible that the scale can be swung in the other direction to protect a defendant in a copyright suit if his use is particularly suited to First Amendment principles of comment, criticism, and the dissemination of information.

A number of justifications for applying this limiting First Amendment principle to the limiting doctrine of fair use can be provided. First, the approach taken in *New York Times v. Sullivan* asks a court to go through a balancing test in determining if potentially defamatory speech is allowed.¹⁸³ A court is to ask first whether the plaintiff is a public official, and then to ask whether the defendant made his allegedly defamatory statement with actual malice. This determination of actual malice can be seen as a balancing approach to help determine which speech would be protected by the First Amendment and which speech would not be protected speech, the former being speech that passes the actual malice test. Similarly, the fair use defense is a balancing test to determine whether unauthorized use of copyrighted material is allowed, and if the material “passes” the factors found in fair use, the defendant would be allowed to legally use the copyrighted work. Clearly, these two tests are quite similar, so an application of the principles found in the actual malice could logically be applied to the fair use defense.

A second justification involves the purpose of each doctrine. The purpose of the actual malice doctrine in First Amendment law serves a limiting function: it protects the freedom of speech by limiting a plaintiff’s ability to stop potentially defamatory speech. Likewise, the fair use defense limits a copyright owner’s monopoly over his copyrighted material. By applying the actual malice doctrine to copyright law in limited instances, where the copyright in question is an image of a public official, copyright law and the First Amendment can be harmonized. This harmonization is

¹⁸² If this approach is not limited to a narrow category of works, any second user could claim fair use through the First Amendment. Without limits, every second user could be successful with this defense, severely weakening the rightful author’s limited monopoly. This could discourage future authors, which would then slowly erode the delicate balance the Intellectual Property Clause establishes.

¹⁸³ See *Sullivan*, 376 U.S. at 281.

justified because both doctrines have similar purposes.

The purpose behind the actual malice doctrine can also play another role in justifying the application of those principles to copyright law. As stated in *New York Times v. Sullivan*, there is a need to allow for more political speech.¹⁸⁴ The democratic system encourages this political speech and wishes to allow criticism of public officials to further these goals. Because a copyrighted work is a type of speech, the conclusion follows that copyrighted works can be used to make a political statement. A political statement could include an artistic depiction of a public official. Similarly, the purpose of the fair use defense is to allow for comment and criticism, the same goals that were stated by the Supreme Court in regards to the First Amendment. Thus, it logically follows that these First Amendment principles could be applied to the fair use doctrine when the copyrighted material at issue depicts a public official and could be perceived as a form of political speech. The fair use defense could be used in this way to constitutionally allow First Amendment protection under copyright law.

A final justification that could be given for this approach centers on existing scholarship. As many scholars point out, it is a generally accepted principle that fair use is one way in which the First Amendment and copyright law can be reconciled.¹⁸⁵ Extending (or in a way narrowing) this idea to only include copyrighted works containing images of public officials is not as “off-base” because this link is already widely accepted. By limiting this application to one, narrow category of use, the balance of copyright law and the freedom of speech is not upset. It is possible that this approach may be an even closer way to harmonize two constitutional doctrines.

An example of how this approach could be effective is seen in the issues surrounding the Obama HOPE campaign posters created by Shepard Fairey. In this instance, Fairey took an image owned by the A.P. of President Barack Obama and created his own interpretation: a drawing of the President in a similar pose using only three colors with the word “HOPE” inscribed on the poster.¹⁸⁶ The legality of Fairey’s use is in question, and while Fairey could claim fair use as a defense, there is still a chance his use could be found infringing on the A.P.’s copyright, particularly because he pulled the image from the internet after performing an image search using Google.¹⁸⁷

Fairey’s particular form of speech, however, could be seen as something political in nature with the underlying purposes of comment and

¹⁸⁴ *Id.* at 268-69.

¹⁸⁵ *See supra* Part IV.A.

¹⁸⁶ *Italie, supra* note 1.

¹⁸⁷ *Id.*

criticism. Applying the fair use doctrine as is, this important aspect of the HOPE poster may be lost. It is likely a court could find that Fairey took a significant portion of the copyrighted work and affected the potential market of the copyrighted work because of the commercial nature of the distribution of the poster and the number of posters sold. Each of these facts could lead a court to find that Fairey's use was not protected by fair use.

If the First Amendment were applied through the copyright context in this case as proposed above, however, the result may be different. Fairey took an image of a public official and used it to create a political comment on the presidential election. Because Fairey is using his work for comment and criticism, his secondary work should receive more protection and not be seen as infringement. This type of speech is the very thing the Supreme Court wanted to protect when they decided *New York Times v. Sullivan*. By applying First Amendment principles to this case through the fair use defense, Fairey, and other artists like him, could receive protection for his work while still allowing original copyright authors the chance to maintain the monopoly over their works.

V. CONCLUSION

By adding the First Amendment to the fair use balancing approach, more bona fide uses could be protected, furthering the overall goal of both copyright law and the First Amendment. There are, of course, some negative implications in this approach. For instance, how far is too far? As one scholar argued, there are "those who note that while our system of [more] protection has produced Britney Spears and Madonna, the Framers' system of non-protection produced Beethoven, and that maybe, therefore, the Framers were on to something"¹⁸⁸ Some may also argue that the balance between copyright law and the First Amendment is already sufficient and there is no need to tweak the scales. Furthermore, no matter which way the argument is framed, copyright infringement and the argument of fair use are still based upon the unlawful taking of an original author's work. In a pure black and white world, the second author has done something wrong. Thus, this proposed analysis may provide protection to a second author who acted in bad faith or with an improper purpose.

While these concerns have merit, they are the very reason why limiting this analysis to images of public officials and incorporating it into the balancing approach is advocated. This analysis must be limited to a very narrow category to address these concerns, and the application must be limited to people who actually used an original work in good faith. By applying a limiting First Amendment principle to the limiting copyright principle of fair use, copyright law and the First Amendment can be

¹⁸⁸ Lessig, *supra* note 144, at 1064.

reconciled.

Under the current standard of fair use, Shepard Fairey might not receive protection, even though his HOPE poster is quite different from the original A.P. photograph. At the time of this writing, a trial date has been set for March 2011, to resolve the case between Fairey and the A.P.¹⁸⁹ Despite its unresolved status, other scholars have also recognized the importance of this case.¹⁹⁰ Perhaps, therefore, this is the perfect case to make a change to copyright law and harmonize the relationship between copyright law and the First Amendment.

¹⁸⁹ Larry Neumeister, *Trial Date Set in AP-Artist Dispute in NYC*, ASSOCIATED PRESS, Aug. 24, 2010, available at 8/24/10 APWORLD 01:44:06. Unfortunately for the merits of the case, Fairey's original counsel, Stanford's Fair Use Project, withdrew from the case in late 2009 due to misconduct by Fairey: he deleted electronic files that related to which photograph he used to create the HOPE poster. Anthony Falzone, *FUP Withdraws From Fairey Case; Hope Remains*, THE CTR. FOR INTERNET AND SOC'Y (Nov. 13, 2009, 1:21 PM), <http://cyberlaw.stanford.edu/node/6353>. Moreover, Fairey created new files to replace the deleted ones to make it look like a different photograph was used. *Id.* Fortunately, there may still be hope for a fair use argument to prevail. In August of 2010, the judge refused to impose sanctions against Fairey for this misconduct. Tom Ramstack, *Judge Refuses to Sanction Artist Suing AP in Copyright Dispute*, ALL HEADLINE NEWS (Aug. 9, 2010, 5:32 PM), <http://www.allheadlinenews.com/articles/7019539227?Judge%20Refuses%20to%20Sanction%20Artist%20Suing%20AP%20in%20Copy%20right%20Dispute>. Finally, in an ironic twist, it has been reported that Fairey "is losing hope in President Obama" and, in his opinion, the President's "failure to keep campaign promises." "*Hope*" Artist Disappointed in President, BOSTON HERALD, Sept. 25, 2010, at 10.

¹⁹⁰ See, e.g., Jo-Na Williams, *The New Symbol of "Hope" for Fair Use: Shepard Fairey v. The Associated Press*, 2 NO. 1 LANDSLIDE 55, 60 (2009). In fact, one notable scholar has gone so far as to say Fairey's use was clearly fair and the case will be decided as such because the use was transformative and clearly made a powerful political statement. PATRY, *supra* note 72, § 10:132.60.

