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Creators of literary and artistic works routinely incorporate portions of preexisting copyrighted expression into their creations. For instance, the custom of borrowing the literary expression of another with attribution is so central to emphasizing a point that few would pause to consider whether it is lawful. Many people would therefore be surprised to learn that there is no explicit exemption within the United States copyright law that permits the socially accepted activity of quotation. Strictly speaking, under the present copyright statute and jurisprudence, quotation is infringing activity that may be excused by, what the Supreme Court has characterized as, the affirmative defense of fair use.¹

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech. . . .” But doesn’t a law that may prevent the expressive use of another’s speech abridge the freedom of speech? Might not referential use of other’s expression be necessary in order for speech to be robust and, in fact, free? Doesn’t any law that limits or curtails one’s means of expression necessarily result in something short of free speech, something more like cautious speech? Does copyright law create a conflict with the First Amendment?

These questions are not new and consideration of the conflict has a venerable history.² The prevailing view is that copyright does not abridge speech because, *inter alia*, internal copyright doctrines fulfill First Amendment concerns. Over time, some courts went so far as to conclude that copyright was categorically immune from First Amendment attack based on the existence of copyright’s internal free speech safeguards.³

In *Eldred v. Ashcroft*, however, the Supreme Court laid to rest the longstanding assumption that copyright is necessarily free from First Amendment scrutiny. But in denying that copyright is categorically immune from First Amendment challenge, the Court stated that unless Congress alters the “traditional contours of

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1. Harper & Row Publishers, Inc. v. The Nation Enters., 471 U.S. 539, 561 (1985).

2. See generally, M. Nimmer, *Copyright and the First Amendment*, 17 UCLA L. REV. 1180, 1193-96 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); and Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP (ASCAP) 43 (1971).

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

copyright law," independent First Amendment attacks are unwarranted.⁴

Although the Court did not identify the universe of features that define the traditional contours of copyright law, the Court highlighted two limiting doctrines within copyright law that accommodate First Amendment values: the idea/expression dichotomy and the fair use privilege.⁵ Whether these two limitations on the exclusive rights of copyright owners define the traditional contours of copyright or merely contribute to these contours is not yet certain.⁶ Yet, despite this uncertainty, the Court's emphasis on the central role of these two particular limiting doctrines is significant, because these doctrines were established by the courts rather than Congress, and because their development remains firmly rooted in common law adjudication.

This article first examines the nature of the "traditional contours" of copyright and how copyright's internal doctrines accommodate free speech concerns in theory and practice. It then illustrates a way in which Congress might have already altered the traditional contours of copyright by enacting the Digital Millennium Copyright Act. Next, assuming that a congressional act has altered the traditional contours, the article evaluates the options that would be available to the courts to preserve the traditional contours of copyright. Finally, the article explores the adequacy of the existing free speech safeguards in accommodating First Amendment interests and offers suggestions for improving the efficacy of these free speech safeguards in order to more fully promote First Amendment interests.

I. THE TRADITIONAL CONTOURS

After *Eldred*, some have alleged that recent congressional changes in copyright establishment, i.e., fixation rather than publication, and the elimination of claim-staking aspects of copyright, such as notice and renewal, have altered the traditional contours of copyright and undermined First Amendment values by preventing works from entering the public domain.⁷ This view implies that the First Amendment is principally served by enabling the unfettered use of the expression of others. In this view, only works unrestrained by copyright are fully capable of promoting First Amendment values, and anything that constricts the public domain necessarily impinges on the freedom of speech.

While it is true that copyright places some limits on speech, the view that

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

5. The Court's reliance on these doctrines as First Amendment safety valves is not new, and genesis of this reasoning may be traced back to a series of seminal articles on the question of conflict between copyright and the First Amendment. See generally M. Nimmer, *supra* note 2, at 1193-96; Paul Goldstein, *supra* note 2; and Lionel S. Sobel, *supra* note 2.

6. Arguably, other limitations on an exclusive right, such as the exhaustion of the copyright owner's distribution right in the case of a lawfully sold copy under First Sale Doctrine, could be examples of traditional contours of American copyright law, but this would not implicate free speech values, and Congress has limited the application of that doctrine with regard to particular copyrightable subject matter. 17 U.S.C. §109(b)(1)(A).

7. See, e.g., *Kahle v. Ashcroft*, 72 U.S.P.Q.2d (BNA) 1888 (N.D. Cal. 2004), *aff'd sub nom Kahle v. Gonzales*, 474 F.3d 665 (9th Cir. 2007).

copyright is intrinsically antagonistic to First Amendment values is contradicted by the Court's holding in *Eldred*. As the Court stated, "the Framers intended copyright itself to be the engine of free expression."⁸ American copyright's utilitarian formula is intended to promote First Amendment values not to interfere with them. As a former Register of Copyrights, David Ladd, explained:

The purpose of copyright is to reward authors as a matter of justice, yes; but only as a beginning. Copyright also is intended to support a system, a macrocosm, in which authors and publishers compete for the attentions and favor of the public, independent of the political will of the majority, the powerful, and above all the government, no matter how unorthodox, disturbing, or revolutionary their experience, views, or visions The marketplace of ideas which the First Amendment nurtures is, then, and must be more widely understood to be, essentially a *copyright* marketplace.⁹

While the Court appeared to agree that the changes in duration were fairly posed in regard to optimal copyright policy, the Court stated that "[t]he wisdom of Congress' action, however, is not within our province to second-guess."¹⁰

The Court's statements in *Eldred* are not an abdication of judicial oversight of free speech concerns, but rather an acknowledgement of the critical role copyright plays in promoting free speech and an explicit recognition of the judicially-created doctrines that, while perhaps falling short of harmonizing copyright law and the First Amendment in fact, at least internally address free speech considerations within the calculus of the copyright law itself. The idea/expression dichotomy and the fair use privilege enable the courts to accommodate free speech considerations on a case-by-case basis.¹¹

The Court's reliance on these judge-made doctrines as "copyright's built-in free speech safeguards" is instructive of the Court's view—the traditional contours of copyright law have been formed by judicial limits on the *scope* of copyright owner's exclusive rights, rather than by congressional determinations on durational limits, subject matter or formalities—and thus these latter theories raised in the *Kahle v. Gonzales* litigation were doomed to failure.¹² The Court's decision

8. *Eldred*, 537 U.S. at 219, quoting *Harper & Row Publishers, Inc. v. The Nation Enters., Inc.*, 471 U.S. 539, 558 (1985).

9. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 421, 427-8 (1983).

10. *Eldred*, 537 U.S. at 222.

11. See *Baker v. Selden*, 101 U.S. 99, 103 (1880) and *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841). While *Folsom* is generally cited as the American foundation of the doctrine of fair use, it is interesting to note that the case can be interpreted as an expansion of the copyright owner's rights rather than a limitation on those exclusive rights. See Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES* (Jane Ginsburg & Rochelle Dreyfuss eds., 2006). Similarly, while *Selden* specifically dealt with a limitation of the scope of a copyright owner's rights, later seminal cases by Judge Learned Hand, applying the abstractions test of the idea/expression dichotomy, also stood for the proposition that infringement could occur even though literal copying of the text did not. Thus, application of the idea/expression dichotomy also expanded protection to selection and arrangement of ideas that may not in and of themselves be copyrightable. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

12. *Kahle*, 72 U.S.P.Q.2d (BNA) 1888, *aff'd sub nom* 474 F.3d 665 (In *Kahle*, the plaintiff

implies that as long as the scope of the exclusive rights of copyright owners does not preclude the use of another's speech, it is unnecessary to preserve efficient mechanisms for injecting works into the public domain.¹³ As such, *Eldred* may be interpreted as diminishing the significance of the public domain as a necessary vehicle of First Amendment interests, while simultaneously increasing the significance of internal free speech safeguards throughout the term of copyright protection.

Alternatively, *Eldred* may be viewed as a conceptual revision, and expansion, of the meaning of the term "public domain" to include both the public's right to use unprotected elements (e.g., ideas, facts and expired copyrights) and the right to use relative amounts of the expression of protected works. If this view were correct, there would seem to be some basis for demanding an inverse ratio between the two parts—to the extent that the right to use unprotected elements constricts, the ability to use protected expression should expand.¹⁴

Based on the *Eldred* decision, First Amendment scrutiny may be avoided only if internal doctrines exist as free speech safeguards. Accordingly, while the Court in *Eldred* expressed the view that these common law doctrines enable the courts to satisfy free speech concerns as long as they remain intact, this assertion begs the question of whether this theoretical *capability* is enough. What if courts are not, in

claimed that a number of congressional changes to the Copyright Act altered the traditional contours of copyright. In particular, the plaintiff argued that the change from an affirmative act of publication with copyright notice as initiation of federal copyright protection to federal protection upon mere fixation of a work in tangible form caused enormous numbers of works to be protected by federal law that previously would have fallen outside of the federal scheme. Further, the plaintiff argued that by eliminating the requirement for renewal of a copyright beyond its initial term, Congress automatically extended protection to works without an affirmative act by the copyright owner. With these changes, works that might have fallen into the public domain were given federal protection without any indication from the creator that protection was desired.). While this author is sympathetic to these arguments, like those in the *Eldred* case itself, as a matter of policy, the Court's decision in *Eldred* has, at least for now, closed the door on such arguments as constitutional limits on congressional authority. This result, however, imposes enormous importance on copyright's internal safeguards to provide adequate breathing space within copyright.

13. Whether the Court's view is correct or not is debatable. As has been pointed out elsewhere, the broad statements within the *Eldred* opinion are at least superficial and perhaps even misleading. See, e.g., Neil Weinstock Netanel, *Copyright and the First Amendment; What Eldred Misses—and Portends*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL* (Jonathan Griffiths & Dr. Uma Suthersanen eds., 2005), available at SSRN: <http://ssrn.com/abstract=614642>. Melville Nimmer long ago questioned whether the absence of durational limits might conflict with the First Amendment and therefore that perpetual protection of common law copyright probably should be temporally limited. Melville R. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 *UCLA L. REV.* 1180, 1193-96 (1970). The 1976 Act mooted the question as to perpetual common law protection, and the Court in *Eldred* answered the question of whether the Copyright Clause provides congressional authority to extend existing copyrights. Nevertheless, while it is questionable whether duration alone would be capable of creating a First Amendment conflict so long as adequate limitations on scope were available, as a question of policy and efficiency, the extension of duration entails significant societal costs without strong arguments of increased creativity by authors or any other fair return to the public.

14. Or, perhaps, if only one dimension of unprotected expression diminishes, e.g., expiration due to lengthened duration, this constriction could be ameliorated by improving the efficacy of corollary doctrines, i.e., improving the functionality of the idea/expression dichotomy.

fact, sufficiently safeguarding free speech concerns in the application of these doctrines? What if courts are so focused on infringement, similarity, statutory factors, levels of abstraction, and potential market harm, that they are forgetting that copyright's limiting doctrines serve an essential constitutional purpose? In order to assess these questions, it is necessary to examine how copyright's internal free speech safeguards function.

II. THE FREE SPEECH SAFEGUARDS

The creation of the idea/expression dichotomy in *Baker v. Selden*, and the continued development of this doctrine by the courts, clarified that the public may freely extract and copy the ideas from the expression of others, so long as the same expression of the idea is not copied.¹⁵ With the idea contained within a work freely available for use, copyright does not impede the original expression by others that incorporates those ideas. By precluding the control of ideas, the idea/expression dichotomy encourages a multiplicity of expressions about an idea in a manner that fosters the advancement of knowledge.¹⁶ To be sure, copyright is capable of protecting more than the literal expression of an author. If this were not the case, "a plagiarist would escape by immaterial variations."¹⁷ While the existence of actionable non-literal copying necessarily complicates determining the line between unprotected ideas and protectible expression, the difficulty of the task does not eliminate the breathing space the idea/expression dichotomy provides. It does, however, present a practical obstacle to the use of this internal free speech safety valve.¹⁸ As Alfred Yen stated:

The idea/expression dichotomy sounds straightforward, but it is very difficult to apply because there is often no reliable way to distinguish between a work's ideas and the expression of those ideas. . . . The indeterminacy of the idea/expression dichotomy strongly affects the idea/expression dichotomy's ability to limit the scope of

15. The exception to this rule is the merger doctrine which allows the taking of the expression of an idea if there are a limited number of ways to express the idea.

16. There has been criticism of the idea/expression dichotomy's ability to foster non-literary expression. It has been said that the idea/expression dichotomy works fairly well with textual works, but is incompatible with other forms of expression, such as works of the visual arts or musical works. Yet, the problem with this view is underscored by the *Baker v. Selden* decision itself. A visual work of art can include principles, such as perspective, artistic style, scenes a faire, or subject matter; while protected in their particular combination within a work, these principles are not generally protectible themselves. Similarly, in music, rhythms, styles or techniques, e.g., a blues progression or an arpeggio, are not in and of themselves protectible; rather, only the particular expression of these ideas is protected.

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

18. It must be noted that not only does non-literal infringement complicate the analysis, but the test for infringement—the total concept and feel—introduced by the Ninth Circuit in *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) and *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) further blurred the line. For a detailed discussion of this development, see Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept And Feel,"* 38 EMORY L. J. 393 (1989).

copyright.¹⁹

As a result of the uncertainty regarding where the line between protectible expression and unprotectible idea lies, the use of anything similar to a copyrighted work, whether literal expression or non-literal “concept and feel,” may result in an infringement claim that can be difficult to disprove.

This uncertainty is significant, because while copyright may not categorically prevent free speech, due to the existence of the judicially-created free speech safeguard of the idea/expression dichotomy, speech may be chilled by the inability to establish a reliable safe harbor within the doctrine.²⁰ Indeed, the potential chilling effect on speech resulting from indecipherable uncertainty is not necessarily limited to risk-averse users of copyrighted works. The idea/expression dichotomy (and Judge Hand’s abstractions test) is, after all, one of the vaguest boundaries in copyright law, second only to, perhaps, its sister internal free speech safeguard, the fair use privilege. As Learned Hand explained, “[n]obody has ever been able to fix that boundary [between idea and expression], and nobody ever can.”²¹ Thus, it is important to consider the practical constraints that this free speech safeguard entails.²²

19. Alfred C. Yen, *Eldred, the First Amendment, and Aggressive Copyright Claims*, 40 HOUSTON L. REV. 673, 679-80 (2003).

20. See, e.g., Yen, *supra* note 18.

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

22. Some have argued that despite the fact that the idea/expression dichotomy is useful in relation to some textual works, it has very little value in the context of other types of works, such as works of visual art or musical works. See e.g., Siva Vaidyanathan, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2003). At least one court has dismissed the idea/expression dichotomy as an unnecessary complication in copyright infringement claims in the case of a photograph. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005). Judge Kaplan states:

But there is a difference between the sort of difficulty Judge Hand identified in *Nichols* and the one presented by the Kaplan rationale and the defendant’s argument about ideas in this case. . . . The latter difficulty, however, is not simply that it is not always clear where to draw the line; it is that the line itself is meaningless because the conceptual categories it purports to delineate are ill-suited to the subject matter. . . . The idea/expression distinction arose in the context of literary copyright. For the most part, the Supreme Court has not applied it outside that context. . . . In the visual arts, the distinction breaks down. . . . For all of these reasons, I think little is gained by attempting to distinguish an unprotectible “idea” from its protectible “expression” in a photograph or other work of visual art. *Id.*

Judge Kaplan’s conclusion is, at a minimum, an overstatement. There are many ways in which the idea/expression dichotomy might allow ideas, styles, or scenes a faire to be used in the visual arts. While Judge Kaplan may be correct that this consideration may be incorporated into the general infringement analysis, given the confusion as to the proper infringement analysis among the circuits that is evidenced in decisions, express recognition of idea/expression dichotomy in infringement actions is not always a worthless exercise. In fact, ignoring the dichotomy may lead to erroneous results.

The *Steinberg* case presents a reasonable example of the idea/expression dichotomy in a work of visual art. *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987). Saul Steinberg’s drawing of a parochial New Yorker’s view of the world was published on the cover of the *New Yorker* magazine. Steinberg sued Columbia Pictures and others for an advertisement of the movie *Moscow on the Hudson* that depicted the three main characters of the movie superimposed on a similar view of New York City and with Moscow on the horizon. The concept of perspective and the idea of a myopic view of a geographic location are not within the scope of protection of Steinberg’s work, yet

In many situations, standing alone, the idea/expression dichotomy is insufficient to accommodate free speech needs. In the case of parody, criticism or other types of referential expression, it is often an absolute necessity to use more than simply the idea of another to adequately accomplish the intended purpose of the speaker. In such cases, fair use allows the taking of other people's expression in a manner and amount that is reasonable under the circumstances.²³ This important safety valve is capable of accommodating First Amendment concerns as long as its application by the courts is sufficiently robust, and as long as the doctrine is not circumscribed by Congress. Judges may allow other people's speech to be used in an amount that is reasonable in relation to the purpose of the use even if, in appropriate cases, the entire work is used.²⁴

Yet, like the idea/expression dichotomy, fair use entails practical difficulties in its application. Analyzing the predictability of the four-factor analysis, David Nimmer wrote, "Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same."²⁵ The uncertainty of the fair use defense, at a

copying particular copyrightable features of the work or aspects of original selection and arrangement in the work that go beyond the general style or the standard city features may entail infringement. In musical works, copying standard rhythms or melodic progressions, arpeggios, harmonies, chord progressions or scales should often fall on the idea side of the continuum, just as no one has a claim on an overall style, such as the blues. How to apply the idea/expression dichotomy beyond the traditional literary manifestations may be challenging. While it appears true that courts have been more successful in applying the idea/expression dichotomy to literary works, including plays, novels, and even computer programs, the application of the idea/expression dichotomy to all copyrightable subject matter should be expanded in order to accommodate and promote broader forms of artistic speech. This is particularly true given the free speech implications that may ensue if courts are unwilling to apply it.

23. 17 U.S.C. § 107 (2000) states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

24. See *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2d Cir. 2006).

25. David Nimmer, "*Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 *LAW & CONTEMP. PROBS.* 263 (2003). Despite the rhetorical flourish of the opening footnote in that article, this author did agree with much of the article. Our differences related to the manner of resolving the problems identified, and, even in that regard, we privately agreed more than we disagreed—the fair use analysis needs to be better understood and more thoughtfully applied by courts. See also, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005* (working paper, forthcoming 156 *PENN. L. REV.* (2007)), available at: <http://www.bartonbeebe.com/> (analysis of the factors suggesting that leading cases are not necessarily being followed by the lower courts, but are generally leading to an expansion of fair use's scope, albeit in an unpredictable manner).

