ESSAY

ELDRED, THE FIRST AMENDMENT, AND AGGRESSIVE COPYRIGHT CLAIMS

*Alfred C. Yen**

TABLE OF CONTENTS

I. INTRODUCTION

In April of 1999, Zack Exley received a letter from a lawyer representing the Governor George W. Bush Presidential Exploratory Committee. Among other things, the letter expressed anger over Mr. Exley's Web site, which poked fun at Mr. Bush

* Professor of Law, Boston College Law School. The Author would like to thank the University of Houston Law Center for hosting the 2003 IPIL/Houston Santa Fe Conference, the Houston Law Review for publishing the manuscripts, and Craig Joyce for his effort in organizing the conference. Thanks are also owed to Joe Liu for comments on an earlier draft, and to Sheila Bautista and Daniel Scales for their research assistance.

and his campaign by mixing the general appearance of the Bush campaign's Web site with satirical stories about Mr. Bush. The letter acknowledged that Mr. Exley was participating in political debate, but it also stated that Mr. Exley's chosen form of political expression was illegal. The letter claimed that copyright law prevented Mr. Exley from using the Bush campaign's Web site as he had, and it threatened him with litigation unless he removed all material taken from the Bush campaign's Web site.[1]

The Bush campaign's copyright claim was unusual. Copyright exists to provide economic incentives for the production of creative works,[2] and copyright plaintiffs generally sue to keep the defendant from appropriating or destroying revenue streams the plaintiff would otherwise enjoy from the sale or other exploitation of the plaintiff's work. The Bush campaign, however, had no interest in protecting revenue associated with the sale of its copyrighted material. Instead, it wanted to use copyright law to silence one of the candidate's political critics.

If the Bush campaign had chosen to accuse Mr. Exley of libel, portrayal in false light, or intentional infliction of emotional distress, its chances of success would have been extremely poor.[3] Courts vigilantly apply the First Amendment to such claims in order to keep them from infringing free speech. Given the obvious relevance of Mr. Exley's speech to a presidential election, it is quite likely that a court would use the First Amendment to dismiss a suit against Mr. Exley. What then gave the Bush campaign any hope that a court would not do likewise to a copyright suit?[4] The answer may lie in the curious judicial practice of ignoring the First Amendment in copyright cases.

---

1. *W Says There Should Be Limits to Freedom*, Chilling Effects Clearing House, *at* http://www.chillingeffects.org/notice.cgi?NoticeID=265 (last visited Aug. 21, 2003) (reproducing letter accusing Mr. Exley of copyright infringement).

2. *See* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to pass copyright legislation for the purpose of promoting "the Progress of Science and useful Arts"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that copyright exists to encourage authors through provision of economic incentives); Mazer v. Stein, 347 U.S. 201, 219 (1954) (same).

3. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring libel plaintiffs who are public figures to show "actual malice" on the part of defendants); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (applying the actual malice standard to claims for intentional infliction of emotional distress brought by public figures); Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (applying the actual malice standard to claims for false light invasion of privacy).

4. Perhaps the Bush campaign had no hope of success for its claim and knew that to be the case. However, the letter sent to Mr. Exley said that Exley's behavior was "far outside" of fair use. *See W Says There Should Be Limits to Freedom*, *supra* note 1. This implies that the Bush campaign believed its case was strong.

As many commentators have pointed out, copyright has an uneasy relationship with the First Amendment.[5] The First Amendment guarantees individuals the right of free speech. Copyright, however, burdens this right by restricting the methods by which an individual can speak.

For example, the author and publisher of the book *The Seinfeld Aptitude Test* were speaking when they wrote and published a book that tested the reader's knowledge of trivia about the *Seinfeld* television series.[6] As such, the author's and publisher's behavior was entitled to full First Amendment protection, even if their book did not criticize a presidential candidate. Nevertheless, the Second Circuit found that the book infringed various copyrights in the *Seinfeld* series.[7] Accordingly, the author and publisher could not publish their book.[8] Similar restrictions on speech occur almost every time a court imposes a judgment of copyright infringement.

The tension between copyright and the First Amendment does not mean that copyright is unconstitutional. As Melville Nimmer pointed out in 1970, copyright also supports the First Amendment by providing economic incentives for the production of speech.[9] Copyright may cause the loss of speech defined as copyright infringement, but it more than makes up for that loss by encouraging the production of noninfringing speech. In short,

---

5. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); 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); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

6. *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 135 (2d Cir. 1998).

7. *Id*.

8. *See id.* at 145–46 (affirming the district court's finding of no fair use in part because the defendants' book did not criticize or parody the *Seinfeld* series, but only "substitute[d] for a derivative market" that the copyright owner "would in general develop").

9. Nimmer, *supra* note 5, at 1180–81.

copyright is constitutional because it encourages more speech than it destroys.

At the same time, however, it is important to understand that the general constitutionality of copyright does not make the First Amendment irrelevant in copyright cases. It is certainly still possible that particular applications of copyright violate free speech principles. Moreover, federal courts apply heightened scrutiny to regulations that directly burden speech, and copyright directly burdens speech. Courts should therefore carefully examine copyright to make sure that its burdens on speech are well-justified. A number of scholars have applied this insight to argue that courts should apply the First Amendment to limit the scope of copyright.[10]

This argument has not, however, proven convincing to courts. Judges almost always refuse to use the First Amendment when interpreting copyright law. According to conventional wisdom, copyright law already incorporates First Amendment values through the idea/expression dichotomy and the defense of fair use.[11] Courts may therefore safely disregard the First Amendment in copyright cases because copyright "naturally" steers clear of First Amendment problems.

Conventional wisdom about copyright and the First Amendment sounds elegant because it neatly solves a tricky problem in copyright. Unfortunately, conventional wisdom is also flawed. There is no particular reason to believe that copyright accommodates all First Amendment requirements, especially when the relevant doctrines do not even mention "free speech." To be sure, the idea/expression dichotomy and the fair use doctrine support the First Amendment by allowing individuals to make certain unauthorized uses of copyrighted works, but that does not guarantee sensitivity to the many concerns behind constitutional guarantees of free speech. Even if courts understood these doctrines as the embodiment of all First Amendment values, the most obvious source for finding those values would be the cases that explicitly consider the First

---

10. Baker, *supra* note 5; Benkler, *supra* note 5; Denicola, *supra* note 5; Lemley & Volokh, *supra* note 5; Netanel, *supra* note 5; Yen, *supra* note 5.

11. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555–60 (1985) (discussing the jurisprudence developed in the area of copyright versus First Amendment concerns); New Era Pub'ns Int'l, ApS v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989) ("[T]he fair use doctrine encompasses all claims of first amendment in the copyright field."); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) ("[T]he idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment.").

Amendment, and not copyright cases that purportedly establish the First Amendment's irrelevance.

The practice of ignoring the First Amendment in copyright cases has significantly affected the development of copyright. Among other things, the practice has made possible the problematic assertion of what I call "aggressive copyright claims." As the label implies, these claims aggressively test the boundaries of copyright by urging courts to adopt unconventional or novel readings of doctrine that would extend copyright well beyond its core of preventing individuals from reproducing the copyrighted works of others. Accordingly, aggressive copyright claims are often made against defendants who have done more than simply "parrot" a copyrighted work. These defendants have generally added meaningful work of their own, whether in the form of comment and criticism, significant reworking of the plaintiff's material, or new material unrelated to the copyrighted work. At their most extreme, aggressive copyright claims assert that almost any borrowing from a copyrighted work constitutes actionable infringement. Aggressive claims include claims like the ones made against Zach Exley and the authors of *The Seinfeld Aptitude Test*.[12]

Aggressive copyright claims are problematic because they exacerbate tension between copyright and the First Amendment. A defendant who combines his own original speech with material borrowed from a copyrighted source may commit infringement, but this does not mean that no free speech problems exist. Copyright judgments generally include injunctions that prevent the defendant from publishing or disseminating his infringing work. These injunctions impose larger losses of speech, as the proportion of new material in infringing works rises. Aggressive copyright claims cause a lot of trouble in this regard because they tend to be brought against defendants whose alleged infringements contain a significant amount of new speech.

The conventional wisdom about copyright and the First Amendment allows for the assertion of aggressive copyright claims by making courts insensitive to the free speech aspects of these cases. Claims like the one made by the Bush campaign are more likely to succeed if courts "forget" the First Amendment's

---

12. *See, e.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 92–93 (2d Cir. 1987) (addressing a claim of infringement by author and recluse J.D. Salinger against a biographer whose biography about Salinger paraphrased a number of Salinger's letters); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1157 (addressing a claim of infringement by children's television show producer against McDonald's for an advertising campaign that used characters with general similarities to characters from the children's television show).

concern for the preservation of political speech. Similarly, one has to wonder if *The Seinfeld Aptitude Test* would still be in print if courts consciously thought of copyright as a restraint of speech. Such insensitivity risks the inadvertent creation and maintenance of a copyright system that is incompatible with fundamental principles of free speech.

Recently, the Supreme Court added another chapter to the story of copyright and the First Amendment with its opinion in *Eldred v. Ashcroft*.[13] In *Eldred*, the Court considered a challenge to the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA),[14] which extended the duration of both existing and future copyrights by twenty years. The *Eldred* plaintiffs made their claim on two separate grounds. First, the plaintiffs argued that Article I of the Constitution did not give Congress the authority to extend the duration of copyright for works that already exist.[15] Second, the plaintiffs contended that the First Amendment required the application of heightened scrutiny to the CTEA, and that the CTEA could not survive such scrutiny.[16] An opinion in the plaintiffs' favor could have easily been written to emphasize the First Amendment's importance in copyright. However, the Supreme Court rejected the plaintiffs' constitutional claims and upheld the CTEA. In so doing, the Court deferred to Congress and applied a rational basis test. This led to the conclusion that the CTEA, although perhaps unwise, was constitutional.[17]

This Essay studies the effect of *Eldred* on the treatment of aggressive copyright claims. I suspect that *Eldred*'s deferential tone will lead many to the conclusion that the First Amendment remains largely irrelevant to copyright and that the analysis of aggressive copyright claims should not change. However, this Essay will argue that *Eldred* actually recognizes the First Amendment's importance in copyright. By doing so, the Court has given the lower courts the signal to treat aggressive

---

13. 123 S. Ct. 769 (2003).

14. Pub. L. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

15. *Eldred*, 123 S. Ct. at 775.

16. *Id*.

17. The Court wrote:

> Beneath the façade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.

Id. at 790.

copyright claims with more skepticism. To do this, the Essay proceeds in three parts. First, it discusses conventional wisdom about copyright and the First Amendment in the particular context of aggressive copyright claims. Second, it studies the *Eldred* opinion, paying particular attention to the Court's statements about copyright and the First Amendment. Third, the Essay shows how *Eldred* affects the treatment of aggressive copyright claims.

II. CONVENTIONAL WISDOM AND AGGRESSIVE COPYRIGHT

Aggressive copyright claims arise because it is hard to distinguish permissible borrowing from actionable infringement. Doctrinal limits on the reach of copyright exist, but those limits are frustratingly vague. It is therefore frequently easy for plaintiffs to assert plausible claims against defendants who justifiably believe that they have done nothing wrong.

For example, consider the idea/expression dichotomy, one of the principal doctrines responsible for limiting the scope of copyright. According to this doctrine, copyright does not protect a work's ideas.[18] Protection extends only to a work's expression of its ideas. This means that people are free to borrow a work's ideas, while borrowing a work's expression is infringement.[19]

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. In fact, parts of a work may sometimes appear to be both an idea and an expression. This can be seen by analyzing a well known movie like *E.T. the Extra-Terrestrial*. If a person were to copy the general outline of the movie and write a story about an alien who comes to earth, befriends some children, but dies,[20] would she have committed copyright infringement? Our hypothetical defendant would surely argue that no infringement had occurred because the movie's borrowed outline is an idea expressed by the movie itself. By contrast, the copyright holder would argue that the general outline of the movie is the expression of a still more abstract idea, like the possibility of friendship between strangers.[21]

---

18. *See* 17 U.S.C. § 102(b) (2000) (excluding, in express language, ideas from copyright protection).

19. *See, e.g.*, Baker v. Selden, 101 U.S. 99, 103–04 (1879); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

20. For those not familiar with *E.T. the Extra-Terrestrial*, the alien E.T. almost dies on earth, but survives to be reunited with his fellow aliens.

21. *See generally* Yen, *supra* note 5 (describing the indeterminacy of the

The indeterminacy of the idea/expression dichotomy strongly affects the idea/expression dichotomy's ability to limit the scope of copyright. Every time a defendant claims that she is entitled to borrow a work's ideas, the plaintiff can counter by arguing that the alleged idea borrowed by the defendant is actually the expression of another idea. This makes it possible to claim that practically any borrowing from a copyrighted work is infringement.

Similar problems beset the defense of fair use. A central issue in any fair use case is whether the defendant's borrowing significantly affects the market for the plaintiff's copyrighted work.[22] If the above *E.T.* hypothetical were to be litigated as a matter of fair use, the defendant would argue that her story does not affect the market for *E.T.* because her story's sad ending keeps it from competing directly with *E.T.* and its happy ending. By contrast, the plaintiff would argue that the defendant's story significantly affects the market for sad versions of *E.T.* The defendant's story therefore deprives the plaintiff of revenue that could be generated from licensing sad versions of *E.T.* In fact, most plaintiffs can similarly argue that a defendant's borrowing affects licensing revenues for some version of the work, and this weakens the fair use doctrine's ability to limit copyright.

The relationship between the ambiguity of copyright doctrine and the assertion of aggressive copyright claims creates a problem for copyright jurisprudence. Copyright's scope is supposed to be limited. But, if the doctrines embodying those limits are capable of practically infinite expansion, does it necessarily follow that copyright's scope should expand to the same degree? In my opinion, the answer to this question must be "no." If copyright gets expanded as far as the idea/expression dichotomy and fair use will allow, copyright's limits will become illusory. Given the lack of inherent limits to these doctrines, courts now have the challenge of finding a source of values that gives backbone to the idea/expression dichotomy and fair use.

A fairly obvious source for these values would be the First Amendment. If aggressive copyright burdens free speech, First Amendment jurisprudence should offer some method for determining when copyright has gone too far. However, as noted earlier, courts have consistently refused to use the First Amendment when interpreting copyright law on the ground that

---

idea/expression dichotomy and the simultaneous characterization of items as both idea and expression).

22. *See* 17 U.S.C. § 107(4).

the idea/expression dichotomy and fair use fully incorporate free speech concerns.[23]

Brief reflection reveals the problems associated with this refusal. Yes, the idea/expression dichotomy and fair use support First Amendment values by limiting the scope of copyright. Unfortunately, the limits are simply too vague to offer judges anything but the most general guidance. This vagueness has the effect of making the outcome of copyright cases heavily dependent on judicial policy making that specifically denies the importance of the First Amendment.

Ignoring the First Amendment may not be a significant problem when plaintiffs assert typical "garden variety" copyright claims. These claims are made against defendants who have engaged in exact or nearly exact duplication of the plaintiff's copyrighted work while adding little or no additional work of their own. The typical garden variety case would be one of simple piracy, perhaps one with a defendant who is reprinting copies of the plaintiff's book for sale to the public. Such cases raise few First Amendment problems. To be sure, a judgment against the defendant restricts the defendant's ability to print and sell books—an activity the First Amendment protects. However, curtailing the defendant's behavior does little harm to the marketplace of ideas because the defendant is simply reproducing the plaintiff's speech. As long as the plaintiff continues to print and sell her work, the public continues to have access to the very same speech the defendant was distributing. At the same time, failure to enforce the plaintiff's copyright claim would likely harm the marketplace of ideas because copyright gives authors like the plaintiff the incentive to write and publish books. If the defendant were allowed to undercut the plaintiff's sale of her works, the plaintiff might not bother writing her book and the public might lose access to the work. In other words, the benefits of copyright clearly outweigh the costs of copyright in garden variety cases, so courts need not be concerned about missing something by dispensing with First Amendment concerns in such cases.

The same conclusion cannot be reached, however, when plaintiffs assert aggressive copyright claims. These cases raise more serious First Amendment concerns because the defendant's behavior can no longer be dismissed as the mere repetition of speech that the plaintiff already makes available to the public.

---

23. Refer to note 11 *supra* and accompanying text (highlighting cases that held copyright law already incorporates First Amendment values through the idea/expression dichotomy or the fair use defense).

Enforcing copyright against those who add expression of their own to borrowed material means silencing newly created speech. These losses are much more serious than losses of borrowed speech because no equivalent existing speech takes the place of silenced new speech.

It is dangerous to put free speech at the mercy of the idea/expression dichotomy and fair use because those doctrines do not have enough substance to adequately protect something so important. Freedom of speech is an individual right guaranteed by the Constitution. Courts are not supposed to be wishy-washy when considering statutes—like copyright—that curtail free speech. Instead, judges must scrutinize such curtailments to make sure that they are well justified by "an important or substantial government interest."[24] Copyright decisions that favor plaintiffs—especially decisions in favor of aggressive claims—are therefore matters of constitutional significance that require special justification, while copyright decisions favoring defendants are not. Accordingly, it is important for courts to begin rejecting the conventional wisdom that the First Amendment can be safely ignored in copyright. Instead, courts should think explicitly about the First Amendment in copyright, at least when considering aggressive copyright claims. Of course, a significant obstacle to this shift is the well-entrenched position that conventional wisdom has in copyright cases. The change in judicial behavior suggested here is therefore unlikely to happen without a sign from the Supreme Court that existing practice needs to change. As the next section will discuss, the *Eldred* opinion should have the desired effect.

III. *ELDRED* AND THE FIRST AMENDMENT

Eldred has its roots in the legislative struggles over the CTEA. Prior to the CTEA's enactment, copyright typically lasted for fifty years after an author's death.[25] The CTEA extended all copyright terms by twenty years, including those of already existing works.[26] Not surprisingly, a number of copyright holders lobbied heavily in favor of the CTEA. They claimed that the extra twenty years of copyright would stimulate creation of new

24. According to the Supreme Court, a content-neutral regulation of speech will be sustained "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).

25. Eldred v. Ashcroft, 123 S. Ct. 769, 775 (2003).

26. *See id.* (citing 17 U.S.C. § 302(a)).

creative works, thereby advancing copyright's primary purpose of promoting the progress of the arts. These claims were disputed by others who argued that the existing terms of copyright were long enough to encourage the creation of new works and that the losses to the public domain would outweigh any marginal increase in incentives.[27]

As a matter of pure policy, those opposed to the CTEA had the upper hand. Lengthening the duration of copyright stimulates the production of new works by increasing the monetary rewards that authors expect to receive when they create. Under this logic, passing the CTEA would make sense if it meaningfully increased the expected monetary value of new works. The CTEA does not, however, have this effect. As an initial matter, relatively few authors make decisions about whether to create on the basis of revenue realized fifty years after they die. Moreover, authors who do care about this distant revenue stream will find that it is of practically no monetary value because time erodes the value of money. As Professor Joseph Liu has noted, it is not unreasonable to measure the present value of the CTEA extension to an individual author to be as low as $4.20.[28] It is simply hard to believe that an extra payment of such a small amount would spur any author to write. When that minimal incentive for creation is weighed against the fact that the CTEA acts as an immediate twenty year moratorium against additions to the public domain, it is hard to see how the CTEA's benefits outweigh its costs.

The strength of the policy argument against the CTEA significantly affected the First Amendment aspects of the *Eldred* case, particularly in the lower courts. Like the Supreme Court, the lower courts probably perceived the *Eldred* plaintiffs as disappointed participants in a legislative dispute about the shape of industrial policy. Courts have appropriately stayed out of such disputes since the *Lochner* era, and the lower courts surely wanted to defer to Congress on the question of copyright's duration as well. Congress had already lengthened the term of copyright many times in the past. Finding the CTEA unconstitutional would place all of those laws in constitutional doubt as well. Such a finding would also give courts the

---

27. For an excellent resource concerning the enactment of the CTEA, see generally Dennis S. Karjala, *Opposing Copyright Extension, Protecting the Public Domain, at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/ (last updated Aug. 8, 2003).

28. *See* Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 432–33 (2002) (analyzing the economic benefit to authors of the CTEA in light of the discounted value of money).

potentially impossible task of deciding how long copyright could constitutionally last.

Unfortunately for the courts, the plaintiffs' First Amendment claim made the issue of judicial deference a tricky one. Any extension of copyright's duration implies an extension of the burden copyright places on speech. Normally, courts subject legislation that burdens speech to some form of elevated scrutiny.[29] If such elevated scrutiny were to be applied to the CTEA, the CTEA would likely fail because the basic policy argument supporting the CTEA was so weak. It would therefore be much safer for the courts to apply a rational basis test to the CTEA if at all possible.

Not surprisingly, the courts found a way to use the rational basis test to justify judicial deference to Congress. The District Court simply denied the relevance of the First Amendment in two sentences.[30] The Court of Appeals offered a bit more, explaining that earlier cases had rendered copyright "categorically immune" from First Amendment scrutiny.[31] A rational basis test could therefore be safely applied.

For purposes of this Essay, it is important to understand that the opinions of the lower courts offer an extreme, but plausible, interpretation of then existing case law. The interpretation is extreme because the Constitution is "the supreme law of the land." It is therefore extreme to state that any form of legislation is "categorically immune" from First Amendment scrutiny. At the same time, however, the interpretation is plausible because—as has already been noted—courts almost never apply the First Amendment when considering copyright claims. Why then should a court pay attention to the First Amendment when considering a simple extension of copyright's duration, especially when the Supreme

29. *See, e.g.*, Virginia v. Black, 123 S. Ct. 1536, 1547 (2003) (noting that government may only regulate "'certain well-defined and narrowly limited classes of speech'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942))); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (observing that courts apply "the most exacting scrutiny" to content-based regulations of speech and "an intermediate level of scrutiny" to content-neutral regulations).

30. Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999) ("The Plaintiffs' first claim, that the CTEA violates the First Amendment, is not supported by relevant case law. The District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others." (citation omitted)), *aff'd*, 239 F.3d 372 (D.C.Cir. 2001), *aff'd sub nom*. Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

31. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom*. Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

Court has already noted that copyright supports the First Amendment?[32]

The foregoing provides the necessary backdrop against which to understand the First Amendment aspects of the *Eldred* opinion. The initial part of the Court's First Amendment analysis followed the pattern set by the lower courts. The Court rejected an invitation to scrutinize the CTEA under the First Amendment, opting instead to apply a rational basis test.[33] This predictably led to the conclusion that the CTEA does not violate the First Amendment. These similarities could easily lead someone to conclude that the Court endorsed the idea that the First Amendment is irrelevant to copyright. However, the *Eldred* opinion stands on the premise that courts will either scrutinize copyright under the First Amendment or construe copyright law with explicit regard for First Amendment concerns.

Consider how the Court declined the plaintiffs' invitation to apply heightened scrutiny to the CTEA:

> We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression.[34]

Note that the Court began this passage by excluding from First Amendment scrutiny only a scheme that "incorporates its own speech-protective purposes and safeguards." This language implied that the Court would have applied elevated scrutiny to copyright schemes without speech-protective purposes and safeguards. According to this passage, copyright cannot avoid First Amendment scrutiny unless its purpose is to promote the creation and publication of free expression. Moreover, the Framers thought that *limited* copyright monopolies were compatible with free speech principles. This implies that copyright without limits cannot be constitutional, even if such a scheme were intended to promote the creation and publication of free expression.

The Court's approach to copyright and the First Amendment puts a great deal of emphasis on copyright's doctrinal limits. A copyright scheme with appropriate limits largely escapes

---

32. Refer to note 11 *supra* and accompanying text (listing cases).

33. Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003).

34. *Id*.

constitutional scrutiny, while one without such limits is subject to constitutional doubt. The plaintiffs' challenge to the CTEA presented a clear choice. The Court could have applied elevated First Amendment scrutiny to the law on the ground that copyright does not contain the necessary speech-protective safeguards. However, the Court did not take this course of action, choosing instead to defer to Congress on the question of copyright's duration. This deference obviously means the Court was satisfied with whatever speech-protective safeguards that already existed within copyright. The opinion then went on to discuss these limits.

Not surprisingly, this discussion borrowed heavily from existing conventional wisdom about the First Amendment and copyright. First, the Court explained that the idea/expression dichotomy "strike[s] a definitional balance" between the First Amendment and copyright by leaving ideas, theories, and facts in the public domain, even if the work that expresses them is copyrighted.[35] Second, the Court noted that "[t]he fair use defense affords considerable 'latitude for scholarship and comment.'"[36]

The Court's invocation of the idea/expression dichotomy and the fair use defense could mean that the Court was not really serious about the First Amendment. After all, these doctrines are precisely the ones that courts have used to justify ignoring the First Amendment in copyright. However, the Court clearly did not endorse business as usual: "We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[37]

The second sentence of this passage is particularly noteworthy. The Court could have expressed its deference to Congress in much broader terms. For example, the Court might have repeated the idea that copyright supports the First Amendment because it encourages the production of speech. The Court could have then concluded that courts should defer to Congress in all cases as long as copyright remains rationally related to the production of speech. Such deference would give Congress great freedom to alter not just the duration of copyright, but also the nature and scope of the rights granted to

35. *Id*. at 788–89 (alteration in original) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).

36. *Id*. at 789 (quoting *Harper & Row*, 471 U.S. at 560).

37. *Id*. at 789–90 (citation omitted).

copyright holders.[38]

It is therefore highly significant for the Court to have stated that its deference depends on the "traditional contours of copyright." If Congress had expanded the substantive rights enjoyed by copyright holders, thereby altering the "traditional" balance between the rights of copyright holders and others, the Court would have taken a far dimmer view of extending copyright's duration. Indeed, the Court's language suggests that such a change would have been constitutionally suspect. This implication means that Congress does not have complete freedom to pass whatever copyright legislation it thinks best. The Court will defer on issues of copyright's duration, but legislation that expands copyright in other ways will be subject to heightened First Amendment scrutiny.

To put it slightly differently, the copyright system we have now has already been scrutinized and has passed constitutional muster. Congress can therefore lengthen copyright's duration with relative impunity. However, a copyright system that gives copyright holders more rights than they presently enjoy would have no such presumption of constitutionality. Indeed, the application of heightened First Amendment scrutiny might well result in a finding of unconstitutionality.

The Court's attitude toward First Amendment scrutiny of the CTEA also affects how judges ought to interpret copyright law. Conventional wisdom allows judges to ignore the First Amendment in copyright cases because the idea/expression dichotomy and the fair use doctrine "naturally" implement all necessary First Amendment considerations. As was pointed out earlier, this practice is highly suspect because there is no guarantee that the idea/expression dichotomy or the fair use doctrine respond to First Amendment concerns. A particular interpretation of a doctrine might seem "right" from a copyright perspective, but questionable from a First Amendment perspective.[39] In situations like this, courts following the conventional wisdom have simply gone with what seems "right" as a matter of copyright and ignored the First Amendment.

---

38. For example, Congress might eliminate the fair use doctrine, deciding that reserving all rights to a copyright holder would encourage the development of markets for what would previously have been fair uses. In that scenario, Congress would perhaps believe that such development would increase the incentives provided by copyright.

39. For example, it might seem "right" to enjoin publication of infringing material as a matter of copyright, but it also may be questionable to do so as a matter of First Amendment principles. *See* Lemley & Volokh, *supra* note 5, at 199–210 (advocating that preliminary injunctions in copyright cases should be constructed as unlawful prior restraints under First Amendment jurisprudence).

The *Eldred* opinion, however, signals an end to this practice. According to the Court, the CTEA escaped First Amendment scrutiny because Congress did not change the "general contours" of copyright. The logic of this deference is clear. Doctrines like the idea/expression dichotomy and fair use keep copyright sufficiently narrow to give Congress room to extend copyright's duration. However, if Congress were to broaden copyright, perhaps by altering one of these doctrines, the new copyright scheme would be subject to constitutional doubt. By this logic, courts must also be careful about expanding copyright through interpretation of the idea/expression dichotomy or the fair use doctrine because it does not matter whether a constitutional offense arises from legislation or judicial interpretation. If a litigant proposes an expansive reading of copyright, a court cannot adopt it simply as a matter of internal copyright logic. Instead, the court must evaluate the proposed reading as it would any legislation that expands the traditional shape of copyright. This means applying heightened scrutiny under the First Amendment, and it explains why the Court wrote—albeit in a footnote—that "it is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns."[40] In short, courts may be able to ignore the First Amendment in garden variety copyright cases, such as those involving the unauthorized printing and sale of a copyright holder's book. However, courts can no longer do so when copyright cases turn controversial, especially when the plaintiff asks the court to approve an aggressive copyright claim.

IV. THE FIRST AMENDMENT AND THE ANALYSIS OF AGGRESSIVE COPYRIGHT CLAIMS

The First Amendment requires courts to scrutinize aggressive copyright claims in two separate, but related, ways. First, courts must ensure that aggressive claims genuinely further copyright's purpose of encouraging speech, and that the value of the speech encouraged outweighs the value of the speech suppressed. Second, courts must take due regard for copyright's ability to chill the exercise of protected speech.

Ensuring that aggressive copyright claims appropriately encourage speech is similar to the application of intermediate First Amendment scrutiny to legislation. Courts generally apply a two-tier approach to the review of laws that restrict speech. Under this approach, the constitutionality of legislation depends

40. *Eldred*, 123 S. Ct. at 790 n.24.

on whether the law is "content-based" or "content-neutral." Content-based regulations identify speech for restriction on the basis of its viewpoint or subject matter, while content-neutral regulations apply to all speech, regardless of viewpoint or subject matter. Content-based regulations carry the risk of government censorship. Courts therefore subject content-based regulations to strict scrutiny, which amounts to a strong presumption of unconstitutionality. By contrast, content-neutral regulations are less likely to represent censorship because they apply evenly to all speech. Courts therefore apply an intermediate level of scrutiny to content-neutral regulations.[41]

The intermediate First Amendment scrutiny of a law restricting speech amounts to a moderately demanding test of the law's proffered justification. According to the leading case of *United States v. O'Brien*,[42] a content-neutral regulation is constitutional "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[43] Courts deciding aggressive copyright claims can therefore avoid First Amendment problems in copyright by treating those claims like new legislation.[44]

This analysis would begin by asking whether recognition of the plaintiff's claim would promote the creation of copyrightable speech. Every plaintiff would of course answer this question affirmatively, but intermediate scrutiny means not accepting the claim's justification at face value. Courts must realize that the

---

41. *See* Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 89–90 (2002) ("In countless First Amendment cases, involving many different types of speech issues, the Court has invoked the content-based/content-neutral distinction as the basis for its decisions.").

42. 391 U.S. 367 (1968).

43. *Id.* at 377.

44. The Essay proceeds on the assumption that copyright is a content-neutral regulation of speech. There is some disagreement over this point within the academic community. *Compare* Lemley & Volokh, *supra* note 5, at 186 (arguing that copyright is a content-based restriction because liability for infringement depends on the content of what is published), *with* Chemerinsky, *supra* note 41, at 93–94, *and* Netanel, *supra* note 5, at 54–59 (contending that copyright is content-neutral because its target is the impact of speech on copyright's economic incentives, and not the viewpoint, subject matter, or communicative impact of such speech). It is not my purpose here to settle this debate. I suspect that copyright may be content-neutral in some situations and content-based in others. At the very least, Professors Lemley, Volokh, Netanel, and Chemerinsky are right in their agreement that copyright requires *at least* intermediate scrutiny under the First Amendment. The Essay therefore makes the conservative assumption that the First Amendment requires only intermediate scrutiny of copyright.

majority of copyright's incentive effects come from protection against garden-variety infringement. Authors understandably write books on the assurance that others will not be able to sell copies of the book. However, I find it hard to believe that authors count on stopping others from writing about their books or creating new works that bear passing resemblance to their books. Accordingly, courts will often discover that aggressive copyright claims do little to promote the creation of speech because most works would be created with or without the recognition of aggressive claims. To the extent that courts identify a relationship between aggressive copyright claims and the creation of new works, courts must then decide whether the value of new works encouraged outweighs the value of creativity that will be suppressed by the aggressive claim.

The analysis suggested above will sometimes be enough to settle clearly the First Amendment aspects of an aggressive claim. In some cases, there will be a strong correlation between such claims and copyright's incentives. In others, the connection will be nonexistent. In still others, however, there will be doubt. Courts confronted by such doubt may wonder about how to proceed. Is it better to err on the side of creating new incentives for creation, or to err on the side of allowing speech?

The First Amendment requires courts to err on the side of allowing speech. To be sure, it is possible to claim that erring on the side of incentives promotes speech and that such promotion removes First Amendment problems. However, the First Amendment is not neutral about the choice between encouraging a speaker and silencing a speaker. The language "Congress shall make no law . . . abridging the freedom of speech"[45] is a prohibition against preventing people from speaking. Encouraging speech through copyright may be consistent with the First Amendment, but there is no constitutional right to copyright protection. There is, however, a constitutional right to speak. Courts should therefore resolve doubts in close cases involving copyright and the First Amendment in favor of defendants.

The First Amendment law of libel provides a good example of the relevant insight. Like copyright, libel provides individuals with a right of action against others who engage in speech. Moreover, the justification for permitting the suppression of libelous speech is similar to the justification for allowing copyright. To the extent that the free marketplace of ideas is concerned with truth, false statements add relatively little. The

45. U.S. CONST. amend. I.

state's interest in protecting the reputation of individuals is therefore sufficient to outweigh the loss of false statements in libel actions.

The explanation of libel's constitutionality suggests that the government can make any false and defamatory statement actionable. The Supreme Court, however, has not seen it this way. In a line of cases extending from *New York Times Co. v. Sullivan*, the Court has applied the First Amendment to prohibit libel actions without "fault."[46] In short, the First Amendment protects those who take reasonable care from libel actions, even if they mistakenly libel someone.

The application of the First Amendment to libel is instructive because it recognizes the importance of resolving ambiguities in favor of free speech. Like copyright, the interpretation of libel law implies a cost-benefit analysis. Aggressive maintenance of libel actions brings the gain of protected reputations, but at the cost of speech. Restricting the scope of libel increases speech, but at the cost of more injured reputations. In the absence of the First Amendment, courts might resolve this cost-benefit analysis in favor of maintaining libel actions. Indeed, this was the law before *New York Times Co. v. Sullivan*.[47] However, application of the First Amendment requires the opposite.

As the Supreme Court has noted, ambiguity clouds libel cases. Potential speakers may believe that they speak the truth, but they cannot be certain. Even if speakers have a high degree of confidence in the truth of their speech, they cannot be sure that courts will agree at a trial. These doubts mean that risk-averse individuals will sometimes refuse to speak for fear of libel actions, even when they would otherwise speak the truth.[48]

According to the Court, the chilling effect of libel raises significant First Amendment problems. The distinction between false speech and true speech may justify libel's existence, but straightforward application of that distinction frightens some people into not exercising their rights of free speech. The First Amendment therefore requires the construction of libel law in a manner that gives additional breathing room to those who speak the truth, even if that means allowing a certain number of

46. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (establishing that states may not impose liability without fault).

47. *N.Y. Times*, 362 U.S. at 267 ("Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars.").

48. *Id.* at 300–01.

otherwise legitimate libel claims to go unredressed.[49] Courts have done this by imposing requirements of actual malice and fault in libel cases. By sending the message that doubts in those cases will be resolved in favor of defendants, these requirements have had the effect of curbing aggressive libel claims.

The First Amendment should have a similar effect in copyright. Like libel, copyright operates on a division between actionable speech and protected speech. Potential speakers must assess whether any borrowing from a copyrighted work will subject them to legal action because of their speech. As in libel cases, these speakers must confront ambiguities. They may believe that they are borrowing only ideas, or that their borrowing constitutes fair use. However, that belief is no guarantee that a court will agree. A certain number of future authors will therefore refuse to create for fear of copyright litigation, even though they have a constitutionally guaranteed right to do so. The loss of this speech is comparably serious to the loss of speech in libel. Accordingly, courts should construct copyright to give potential speakers breathing room from the fear of copyright litigation, even if this means allowing some otherwise legitimate copyright claims to go unredressed. This can be accomplished, at least in part, by resolving doubts in aggressive copyright claims in favor of defendants.

V. APPLYING THE FIRST AMENDMENT TO AN AGGRESSIVE COPYRIGHT CLAIM

It is now appropriate to illustrate the effect of the suggestions made here by applying the First Amendment to an actual case that involved aggressive copyright. To do this, this Essay will again consider the case of *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, which found that *The Seinfeld Aptitude Test* trivia book infringed the *Seinfeld* television series. This case is a good example of an aggressive copyright claim because the defendant did not simply repeat the plaintiff's expression. Instead, the defendant wrote a book about the plaintiff's television series that tested the reader's knowledge of various *Seinfeld* trivia. As such, it was not at all clear that the defendant's behavior constituted infringement. The court acknowledged as much by opening its opinion with the

49. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) ("[E]ven though falsehoods have little value in and of themselves, they are 'nevertheless inevitable in free debate,' and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value." (citation omitted)).

statement, "This case presents two interesting and somewhat novel issues of copyright law."[50] Nevertheless, the court found against the defendant.

Castle Rock follows conventional wisdom about copyright and the First Amendment. The court knew that the case raised speech concerns, but chose to ignore them, writing that "free speech and public interest considerations are of little relevance in this case."[51] The court's unanimous decision therefore stands entirely on internal copyright considerations. The court found that the defendant copied sufficient material from the *Seinfeld* shows to constitute infringement.[52] The court then rejected the defense of fair use by finding that the defendant did little to criticize or transform the *Seinfeld* shows, and by noting that the defendant's behavior harmed the plaintiff's ability to exploit the market for *Seinfeld* trivia books.[53]

In my view, the *Castle Rock* opinion demonstrates how the conventional wisdom about copyright and the First Amendment compromises the quality of copyright jurisprudence. As a doctrinal matter, the case could have come out either way. For example, a court could have held that the defendant did not commit infringement because *The Seinfeld Aptitude Test* borrowed only ideas from the copyrighted original. Alternatively, a court could have held that the defendant's borrowing was fair use because the borrowed trivia comprised only a small part of the *Seinfeld* shows and because trivia books have little impact on the market for original shows. This shows that *Castle Rock* cannot be characterized as a case whose outcome was preordained by doctrine.

Castle Rock's copyright analysis is weak because it accepts an aggressive copyright claim without a satisfactory explanation. The court understands the policy matters,[54] but it does not explain why recognizing the aggressive copyright claim encourages more speech than it suppresses. The decision effectively outlaws the writing of trivia books about copyrighted works. This is a First Amendment loss worth worrying about, but the court sweeps this problem aside with the broom of

---

50. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 135 (2d Cir. 1998).

51. *Id.* at 146.

52. *Id.* at 137–39.

53. *Id.* at 141–46 (addressing several elements of the fair use defense).

54. The court wrote that "[t]he ultimate test of fair use, therefore, is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts,' would be better served by allowing the use than by preventing it." *Id.* at 141 (second alteration in original) (citations omitted).

conventional wisdom.

By contrast, consider what would have happened if the *Castle Rock* court had applied the First Amendment as suggested above. To start, it would have seriously studied the relationship between protecting copyright holders from unauthorized trivia books and the willingness of future authors to create new works. Personally, I doubt if there are any authors (including television producers) who would not create because people might someday write unauthorized trivia books about their works.[55] However, if the court somehow believed that protecting the market for trivia books would lead to increased authorship, it would still have looked carefully at whether that marginal increase in authorship outweighed the losses represented by unauthorized trivia books that would no longer be written. If the court concluded that a judgment for the plaintiff was still warranted, the court would then have considered how its decision would chill future authors of noninfringing trivia books.[56] To the extent that those authors might choose not to write for fear of copyright litigation, the court would interpret the idea/expression dichotomy or fair use doctrine to avoid the loss of those books, even if it meant allowing the plaintiff's claim to go unredressed.

The revised analysis of *Castle Rock* provided here is superior to the one actually provided in the opinion. Aggressive copyright claims are controversial for good reason. Courts should therefore think hard before accepting them. Explicit reference to the First Amendment in copyright cases forces courts to think hard by reminding courts that aggressive copyright raises genuine problems of free speech. Unfortunately, the *Castle Rock* court did not sufficiently scrutinize the First Amendment aspects of an aggressive copyright claim and wound up accepting such a claim

---

55. In fact, common sense suggests that authors ought to be pleased if such trivia books get written because the writing of such books would occur only after the authors' works have reached a high enough level of prominence to make them the subject of new writing.

56. The chilling effect of decisions like *Castle Rock* cannot be easily dismissed. There are at least two other cases holding that books about popular television shows were infringing. *See* Paramount Pictures Corp. v. Carol Publ'g Group, Inc., Nos. 98-7826, 98-7918, 1999 U.S. App. LEXIS 9218, at *2 (2d Cir. May 13, 1999) (affirming a preliminary injunction against book *The Joy of Trek*, while admitting that the alleged infringement is "different in degree" from that of *Castle Rock*); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993) (finding that a book about the television series *Twin Peaks* was infringing). If an author were contemplating a book about a television series, she would have to consider the possibility of being sued. Moreover, the author could not count on defeating the suit, nor could she easily determine what to do in order to escape liability. Given that individual authors frequently do not have the financial resources to support litigation, it is easy to imagine that a nontrivial number of otherwise noninfringing books will never be written.

without sufficient justification. I happen to think that explicit reference to the First Amendment would have led the *Castle Rock* court to a decision in favor of the defendants. Of course, I could be wrong. Even if I am wrong, however, the court would still have been forced to answer the questions raised by a First Amendment analysis of the case. Answering these questions would, at the very least, have improved the court's opinion because those answers would have provided good reasons for the approval of an aggressive copyright claim.

VI. CONCLUSION

This Essay has identified the problem of aggressive copyright claims, particularly the effect of those claims on free speech. The Essay has also described the conventional wisdom about copyright and the First Amendment, and how conventional wisdom allows courts to ignore the free speech problems raised by aggressive copyright claims. Finally, the Essay has shown that the Supreme Court's opinion in *Eldred* signals an end to the practice of ignoring the First Amendment in copyright, and it has shown how proper recognition of the First Amendment improves judicial evaluation of aggressive copyright claims. Hopefully, future courts will follow *Eldred* and give the First Amendment its appropriate place in copyright jurisprudence. By doing so, those courts will preserve copyright's incentives while ensuring rights of free speech.