BALANCING FREE SPEECH INTERESTS: THE TRADITIONAL CONTOURS OF COPYRIGHT PROTECTION AND THE VISUAL ARTISTS' RIGHTS ACT

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I. INTRODUCTION: THE TRADITIONAL CONTOURS OF COPYRIGHT PROTECTION SAFEGUARD THE FREE SPEECH RIGHTS OF AUTHORS, USERS, AND THE GENERAL PUBLIC

Since the 1970s, scholars have questioned the relationship between the First Amendment and the Copyright Act.[1] While some have asserted that copyright laws may violate the First Amendment,[2] others have articulated equally strong arguments for the premise that copyright laws are outside of the scope of the First Amendment.[3] However, the Supreme Court has prudently refused to side with either group.

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* J.D. Candidate 2006, American University Washington College of Law. I would like to thank Professor Robert Kasunic, Principal Legal Advisor, Office of General Counsel, United States Copyright Office for guiding me through this paper. I would also like to thank Professor Peter Jaszi for inspiring me, all of the lawyers at Smith & Metalitz for believing in me, and Pam DeWeese, Bob and Marty Williams, and Coriell Wright for all of their encouragement and support.

[1] *See, e.g.*, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, (1970); Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPR. SOC'Y 1 (1987); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001).

[2] *See, e.g.*, Michael Birnhack, *The Copyright Law and Free Speech: Making-Up and Breaking Up*, 43 IDEA 233, 234 (2004) (stating that there is a "prima facie conflict" between the expanded form of copyright law in existence in the United States today and the First Amendment); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 85 (2002); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 545-58 (2001); 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, 358 (1999).

[3] *See, e.g.*, David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 338 (2004) (arguing that "the First Amendment does not resolve conflicts among speakers").

Instead, the Court has consistently maintained that copyright laws and the First Amendment are complementary constitutional constructs that serve to protect the free speech rights of authors of original expression, individuals who wish to reproduce or comment upon the original expression of others (users), and the general public.[4]

The Court's most recent articulation of this premise was in *Eldred v. Ashcroft* in 1998.[5] There, the Court refused to apply heightened First Amendment scrutiny to the Copyright Term Extension Act (CTEA).[6] The Court stated that courts should not apply heightened scrutiny to copyright statutes that do not "alter[ ] the traditional contours of copyright protection."[7] Scholars, attorneys, and courts have struggled with the meaning of this phrase over the past seven years without reaching a satisfactory consensus.[8] This Comment analyzes the Court's *Eldred*

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[4] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 221 (2003); Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 554-556 (1985).

[5] *Eldred*, 537 U.S. at 186.

[6] Copyright Term Extension Act of 1998. Pub. L. No. 105-298, §102, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304).

[7] *Eldred*, 537 U.S. at 221.

[8] *See, e.g.*, Peter Jaszi, *The U.S. Supreme Court and the Law of (Perhaps) Unintended Consequences: The Emerging Legal Framework of Digital Copyright*, 765 PLI/Pat 491, 496 (2003) (wondering "When does legislation alter those "traditional contours?"). Some scholars have argued that the *Eldred* opinion made fair use a constitutional right. *See, e.g.*, Stephen M. McJohn, *Eldred's Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM.& TECH. L. REV. 95, 130 (2003) (stating that "fair use after *Eldred* assumes a position analogous to the doctrine of originality after the Supreme Court's 1992 decision in *Feist Publications, Inc. v. Rural Telephone Service*"). Several scholars have suggested that the Digital Millennium Copyright Act may alter the traditional contours of copyright protection by preventing people from lawfully exercising their fair use rights. *See, e.g.*, Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1292 & 1307-09 (2003) (suggesting that the *Eldred* Court, by holding that internal elements of Copyright law such as fair use eliminated the need for heightened First Amendment scrutiny, left open First Amendment challenges of laws that limit fair use such as the DMCA); McJohn, *supra* note 8, at 119-121 (2003) (proposing that the "anti-circumvention" provisions of the DMCA may cause the Court to apply First Amendment scrutiny in the future); Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1605-1606 (pointing to *Universal City Studios, Inc. v. Corley*, a Second Circuit case in which the court upheld the anti-circumvention provisions of the DMCA as an example of the kind of case in which the First Amendment may play a role in the future). Pre-*Eldred* courts have also weighed in on the constitutionality of the DMCA. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 442 (2d Cir. 2001), (finding that the DMCA anti-circumvention provisions are content neutral regulations of speech that survive intermediate scrutiny); Universal Studios v. Reimerdes, 111 F.Supp.2d 294, 328-33 (S.D.N.Y. 2000) (holding that the DMCA anti-trafficking provisions are valid content neutral regulations of speech). Lawrence Lessig and the lawyers from the Stanford Center for Internet and Society have argued that portions of the 1976 Copyright Act alter the traditional contours of copyright protection by eliminating formalities, but their arguments have been dismissed by a California District Court. *See* Appellant's Opening Brief, Kahle v. Ashcroft, No. 04-17434, 2005 WL 627346 (9th Cir. Feb. 1, 2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 500

opinion in order to describe the traditional contours of copyright protection. In addition, it offers an example of a statute that may in fact alter the traditional contours of copyright protection and thereby require heightened judicial review.

Part II briefly describes the First Amendment arguments presented by the Petitioners in *Eldred v. Ashcroft.* Part III analyzes the Court's response to those arguments and suggests that the Court intended to state that courts should only apply heightened scrutiny to copyright statutes that prevent either authors of original expression or users of that expression from making or choosing not to make "their own speeches." This part also describes how protecting these rights also protects the general public's right to access information. Part IV argues that the Visual Artists Rights Act of 1990[9] (VARA) altered the "traditional contours of copyright protection" by creating moral rights of attribution and integrity for visual artists that compel users of visual art to make the speeches of the visual artists, prevent the users of visual art from making their own speeches, and prevent the public from accessing the speeches of users. Part V concludes that courts should apply some form of heightened First Amendment scrutiny to the VARA in order to determine if Congress was justified in incorporating the honor and reputations of visual artists into the balancing of speech interests that are the traditional contours of copyright protection.

II. THE *ELDRED* ARGUMENT: DOESN'T EXTENDING COPYRIGHT DURATION WITHOUT DIRECTLY BENEFITING THE PUBLIC VIOLATE THE FIRST AMENDMENT?

Professor Lawrence Lessig represented Eric Eldred, an on-line database compiler of public domain literary works, in *Eldred v. Ashcroft.*[10] Lessig argued that the CTEA, which extended copyright durations for existing and future works by twenty years, was a content neutral regulation of speech[11] analogous to the cable must-carry provi-

(2004); *see also* Order Granting Motion to Dismiss, Kahle v. Ashcroft, No. C-04-1127 MMC, 2004 WL 2663157, at *17 (N.D. Cal. Nov. 19, 2004) (stating that unless statutes alter the scope of copyright protection they do not alter the traditional contours).

[9] Visual Artists Rights Act of 1990, Pub. L. No. 101-650 §§ 601-610, 1990 (codified in various sections of 17 U.S.C., including §106(A)).

[10] *See* Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF. March/April 2004, 57 (stating that Eldred posted literary works on-line alongside "pictures and explanatory text" in order to make the works more accessible to children who are accustomed to interactive electronic reading).

[11] *See* Petitioner's Brief at 37-40, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (arguing that, because copyright prevents speech by those who would like to reproduce copyrighted works in order to provide an economic incentive for authors to produce creative works without regard to the content of the material created, it is a content neutral regulation

sions considered in *Turner Broadcasting System, Inc. v. FCC*.[12] As such, Lessig argued that the Court should apply intermediate scrutiny to the CTEA.[13] Furthermore, he maintained that the CTEA could not survive intermediate review because it did not advance important government interests without burdening substantially more speech than necessary to further such interests.[14]

A. *The CTEA Withheld Works From the Public Domain*

The CTEA extended copyright terms by twenty years. It did so for pre-existing works as well as works not yet created. This ensured that no material copyrighted in 1997 would enter the public domain until 2019.

This news did not sit well with Eric Eldred or with advocates of the public domain, such as Lessig. The CTEA deprived Eldred's online public domain library of countless new material. In addition, it deprived the rest of us of easy and free access to these works. The works included the first comic to feature Mickey Mouse as a character.[15] Lessig and Eldred believed that the Constitutional mandate given to Congress in the Progress Clause did not grant Congress the power to deprive the public of access to and the use of pre-existing works. Thus, they took their argument to court.

B. *Lessig Argued That Preventing Users from Using Works is a Content Neutral Regulation of Speech*

Central to Lessig's argument was that copyright laws were content neutral regulations of speech. "Laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views

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of speech); *see also* Netanel, *supra* note 2, at 47-54 (suggesting that copyright statutes are content neutral regulations of speech). Lessig also argued the CTEA violated the Progress Clause of the Constitution because it did not "promote the Progress of Science." *See* Petitioner's Brief, at 10, *Eldred* (No. 01-618).

[12] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-46 (1994) (defining content based speech restrictions as those "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," and finding the portions of the Cable Television and Consumer Protection and Competition Act that required cable providers to carry broadcast stations to be content neutral).

[13] Intermediate scrutiny under *Turner* requires that a statute "[1] advances important government interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to further those interests." *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

[14] *See* Petitioner's Brief, at 40-41, *Eldred* (No. 01-618) (arguing that the CTEA did not serve an important government interest because it did not encourage creation by extending the duration of protection for works already in existence).

[15] *See* Lessig, *supra* note 1, at 1065 (stating that the CTEA was also called by some "the Mickey Mouse Protection Act").

expressed are content based."[16] The courts apply strict scrutiny to content based laws.[17] Content neutral laws "confer benefits or impose burdens on speech without reference to the ideas or views expressed. . . ."[18] The courts apply intermediate scrutiny to content neutral laws. Thus, the laws must serve important government interests without burdening substantially more speech than necessary to serve those interests.[19]

Lessig argued that copyright regulates speech by preventing the unauthorized use or dissemination of copyrighted works.[20] Copyright applies to all works, regardless of their particular viewpoints, in order to promote the creation of new expression that benefits the public. Thus, Lessig saw it as a clearly content neutral regulation.[21]

C. *Lessig Argued That Copyright is Analogous to Communications Regulations*

Lessig analogized copyright laws to communications regulations. In *Turner Broadcasting*, the Court found that the Cable Television Consumer Protection and Competition Act of 1992,[22] which required cable systems to carry local broadcast stations, was a content neutral regulation of speech.[23] The Petitioners argued that "like cable regulation (which restricts the free speech rights of cable operators in order to balance speech rights of viewers), . . . copyright regulation restricts the reach of the public domain in order to fuel an ?engine of free expression' by authors."[24] Lessig's reasoning was that, because both statutes restricted speech without regard to its content, they should both be reviewed under intermediate scrutiny as content neutral.

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[16] *Turner*, 512 U.S. at 643 (1994).

[17] "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *See* U.S. v. Playboy Entm't Group, Inc. 529 U.S. 803, 813 (2000).

[18] *Turner*, 512 U.S. at 643.

[19] *Id.* at 662.

[20] *See* Petitioner's Brief, at 37, *Eldred* (No. 01-618).

[21] *Id.* Others have argued that copyright laws are content based. *See, e.g.*, Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 5-12 (2002).

[22] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1462 (1992).

[23] *Turner*, 512 U.S. at 658-59.

[24] Petitioner's Brief, at 39, *Eldred* (No. 01-618) (citing Bartinicki v. Vopper, 532 U.S. 514, 536 (Breyer, J. dissenting)).

D. *Lessig Argued that the CTEA Did Not Satisfy Intermediate Review*

Lessig focused his argument on the premise that copyright laws generally satisfy intermediate scrutiny because they serve the important government interest of incentivizing the creation of new expression.[25] Because the retroactive portion of the CTEA did not encourage the creation of new expression by extending the copyright terms of pre-existing works, it did not serve this important government interest.

The Petitioners also objected to the government's argument that the CTEA served the important goal of harmonizing United States copyright terms with other nations with which the United States had treaties and trade agreements.[26] They argued that the CTEA did not harmonize terms because it merely made our terms equivalent to some partners while making them longer than some and shorter than others.

Finally, Lessig argued that even if the Court accepted that the CTEA furthered important government interests, the Act still failed intermediate scrutiny because it burdened substantially more speech than necessary.[27] He maintained that if international harmonization was the goal, only the terms of prospective works needed to be extended. The same argument applied if incentivizing new creation was the goal.

Thus, the Petitioners asked the Court to overturn the CTEA as an unconstitutional content neutral regulation of speech.[28]

III. Extending Copyright Duration Does Not Violate the First Amendment Because it Does Not Prevent Individuals from Making or Refusing to Make Their Own Speeches and Therefore Does Not Prevent the Public From Accessing Protected Speech

The Court rejected Lessig's arguments. It explained that copyright laws and the First Amendment work together to protect the speech rights of authors and users of original expression, while also benefiting the public. So long as copyright statutes preserve the "traditional contours of copyright protection," they do not disrupt this balance of protection and fall outside of normal First Amendment scrutiny.

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[25] *Id.* at 41-42.

[26] *Id.* at 43.

[27] *Id.* at 45-48.

[28] *Id.* at 50.

A. *The Copyright Clause and the First Amendment Were Born Together*

Justice Ginsburg, who authored the *Eldred* opinion, stressed the importance of the fact that the Progress Clause and the First Amendment were written close in time. "This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[29] If the Framers believed copyright to be inconsistent with free speech, they could have placed specific speech-based checks within the Copyright Clause. Furthermore, and more relevant to the context of *Eldred*, the Framers could have specified the terms of copyrights in years rather than including a vague requirement that terms be "limited."

Although the Court did not elaborate upon this point, it is important to understand the context in which the First Amendment and the Copyright Clause were written. The Framers were separating themselves and their newly formed nation from an English government that had used copyright policies to suppress religious and political dissent.[30] In addition, some of the nation's most famous founders had a deep-seated distaste for monopolies.[31] If they did not believe that copyright and the First Amendment would work together to protect speech, they most certainly would have included more specific limitations on the reach of copyright. George Washington himself clarified that copyright protected, rather than inhibited, free speech "by teaching the people themselves to know and value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority."[32] Copyright is not a tool of censorship that must be constantly checked by the First Amendment. It is, rather, a protector of free speech.

B. *Copyright Protects the Rights of Authors Not to Speak*

One way that the traditional contours of copyright protection protect free speech rights is by protecting the right of authors not to speak.

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[29] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[30] *See generally* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*,. 52 EMORY L.J. 909 (2003).

[31] *See Eldred*, 537 U.S. at 246 (Breyer, J. dissenting) (citing Letter from Thomas Jefferson to James Madison (July, 31, 1788), in Papers of Thomas Jefferson 443 (1791) J. Boyd ed. 1956).

[32] *See* Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283, 357 (1996) (quoting United States Copyright Office, Copyright in Congress 1789-1904, Copyright Office Bulletin No. 8, 115-16 (T. Solverg ed., 1905) (quoting U.S. Senate Journal, 1st Cong. 102-104)).

Copyright does so in two ways. First, it provides authors with a limited right of first publication. Second, it prevents unauthorized infringing reproduction of authors' works during the term of protection. The *Eldred* Court illuminated these two forms of protection by distinguishing the CTEA from communications regulations.

1. Copyright is Not Analogous to the Communications Regulations in *Turner*

In *Eldred*, the Petitioners analogized copyright regulations to the must-carry provisions of the Cable Television Consumer Protection Act of 1992. The Court rejected this analogy. Justice Ginsburg reasoned that the must-carry provisions at issue in *Turner* "implicated the heart of the first amendment" because they forced a speaker to communicate the ideas and beliefs of someone else.

The CTEA, in contrast, does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.[33]

In other words, copyright statutes do not "implicate the heart of the first amendment" because they do not prevent anyone from expressing their opinions and thereby providing others with information through protected speech. In addition, they do not force anyone to express the opinions of others or express any of their own opinions that they do not wish to express to others.[34] They only prevent the unauthorized reproduction of the opinions and expression of others for a limited time.

2. *Harper & Row* and the Right of First Publication

This reasoning recalls the Court's decision in *Harper & Row*. There, the Court considered whether the *Nation* infringed the copyright of President Ford's autobiography when it published excerpted quotes prior to the book's publication. The *Nation* argued that the quotes were a fair use and that they were protected by the First Amendment

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[33] *Eldred*, 537 U.S. at 221.

[34] This notion was also articulated by Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342, 345 (1841) (emphasis added), where he stated that when the letters of George Washington were used in a biography, "Washington [was] *made* mainly to tell the story of his own life."

right to print the news.[35] While holding that the use of the quotations by the *Nation* did not qualify as a fair use, the Court stated that there were First Amendment rights implicated for both sides in the case. While the *Nation* did have a legitimate First Amendment right to print the news, President Ford also had a First Amendment right not to publish his words if he so chose because "freedom of thought and expression includes both the right to speak freely and the right to refrain from speaking at all." This principle is at the core of the author's right of first publication.[36]

Thus, by protecting the ability of authors to refrain from speaking, copyright actually serves a First Amendment purpose. It is for this reason that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches."[37]

3. Infringing Reproduction

The second way that copyright protects an author's right not to speak is by preventing infringing reproductions of the author's expression. The *Eldred* Court's citation to *Harper &*

Row highlights this point as well. During its analysis of the four fair use factors, the *Harper & Row* Court cited to *Sony Corp. of Am. v. Universal City Studios, Inc.*[38] In *Sony*, the Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[39] By stacking the deck against unauthorized commercial exploitation of expression, the Court protects an author's right not to speak.

For example, a plethora of Johnny Cash songs have recently begun to decorate the background of all kinds of commercials. Johnny Cash songs are now selling everything from pick-up trucks to life insurance. This recent trend is undoubtedly due to the fact that Mr. Cash recently passed away. Before his death, copyright protected Johnny Cash's First Amendment right not to speak in favor of pick-up trucks or life insurance. By protecting his heirs' right to continue withholding Mr. Cash's endorsement, copyright protects the same rights. The fact that his heirs have chosen to be more liberal in their authorization of the use of the

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[35] *See* Brief for Respondents at 33, Harper & Row Publishers, Inc., v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632).

[36] *See Harper & Row*, 471 U.S. at 560.

[37] *Eldred*, 537 U.S. at 221.

[38] *See Harper & Row*, 471 U.S. at 561-562 (citing Sony Corp. of Am. v. Universal Studios Inc, 464 U.S. 417, 451 (1984)).

[39] *Sony*, 464 U.S. at 451.

songs does not take away from the protection of the author's right not to speak that copyright offers. This part of the traditional contours of copyright protection is every bit as important as the parts that protect the public's right to access information and the rights of users to make their own speeches.

C. *Copyright Creates Economic Incentives for the Creation of Free Speech and Thereby Protect the Public's Right to Access Information*

As the Petitioners in *Eldred* conceded, another way in which copyright encourages free speech is by encouraging authors to create new speech and to disseminate that speech to the public. The *Eldred* Court cited to *Harper & Row* for the principle that "the Framers intended copyright itself to be *the* engine of free expression."[40] By encouraging the creation and dissemination of new expression copyright promotes the public's First Amendment right to access information.[41]

Justice Ginsburg reasoned that the petitioners' argument that the CTEA did not promote the creation and dissemination of new speech was inadequate because they failed to dispose of all of Congress' goals. She stressed that by providing term extensions to preexisting works Congress was reassuring authors that their heirs would enjoy the benefits of any future extensions and that such reassurance could encourage the creation of new works.[42] She also highlighted the need for the Court to allow Congress to determine how to incentivize new creation.[43] Given that the Constitution specifically grants Congress the power to oversee copyright policy, the *Eldred* Court did not see fit to overrule Congress' determinations. Thus, so long as Congress legislates within the traditional contours of copyright protection it "remains inside the domain the Constitution assigns to the First Branch."[44]

However, the Court refrained from granting Congress plenary power over copyright. Justice Ginsburg inserted the traditional contours statement, as well as the closing statement about remaining "inside the domain the Constitution assigns to the First Branch" in order to remind Congress that copyright does serve First Amendment purposes and that the Constitution requires that those purposes continue to be served. She stated that although the Court would not overturn

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[40] *Eldred*, 537 U.S. at 219 (citing 471 U.S. at 558) (emphasis added).

[41] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, (1980) (finding that the first amendment protects the public's right to access information).

[42] *Eldred*, 537 U.S. at 204-06.

[43] *Id.* at 222

[44] *Id.*

statutes just because it saw them to be "very bad policy," the Court would step in if Congress upset the traditional balance in a way that affected free speech rights.[45]

Thus, if Congress expanded the scope of copyright in such a way that copyright infringed upon the public's right to access information, the Court would have to at least review the change in copyright law. The traditional contours of copyright protection serve free speech interests and if Congress altered them it would implicate First Amendment review. It is for this reason that the Court stressed the importance of copyright's internal safeguards, the idea/expression distinction and the fair use defense. It is these guards that balance the public's right to access information with the author's right not to speak by protecting the right users to make their own speeches.

D. *Copyright's Safeguards Protect the Rights of Users to Make Their Own Speeches and Thereby Protect the Public's Right to Access the Speeches of Users*

The third way that the traditional contours of copyright protection protect free speech rights is by ensuring that users of copyrighted material are able to "make their own speeches." The *Eldred* Court highlighted the rights of users by stressing the importance of copyright's "built-in First Amendment accommodations," the idea/expression distinction, the fact/expression distinction and the fair use defense.[46]

1. Idea/Expression and Fact/Expression

Section 102(b) of Title 17 codifies that: "In no case does copyright protection for an original work of authorship extend to any 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."[47] This provision protects the right of users of copyrighted expression to make their own speeches without infringing upon the rights of authors to abstain from speaking.

The seminal case of *Baker v. Selden* provides an example of how the idea/expression distinction allows users of copyrighted expression to make their own speeches.[48] In *Baker*, an author of a book on bookkeeping sued a second author for using the same bookkeeping plans of the original book, albeit with a different arrangement of columns

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[45] *Id.*
[46] *Id.* at 219.
[47] 17 U.S.C. §102(b).
[48] 101 U.S. 99 (1879).

marked by different headings. The Court found that, "Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way."[49] This holding clearly recognizes the right of users to extract the ideas from a copyrighted work and speak those ideas on their own.

Similarly, the more recent Supreme Court case of *Feist Publications v. Rural Telephone Services Co.* serves as an example of how users can extract facts from a copyrighted arrangement and reproduce them.[50] There, the Court held that when a defendant copied names, telephone numbers, and addresses from a competitor's telephone directory, there was no copyright infringement because the plaintiff could not own the facts contained within his directory.[51] This allows users to make their own speeches about factual information without infringing the copyrights of authors who compiled the data before them.[52] In this way the fact/expression distinction protects the rights of users to make their own speeches utilizing facts contained within the speeches of others and also protects the public's right to access the information contained within those speeches.

Another component of the idea/expression and fact/expression distinctions that also protects the speech rights of users and the public is the merger doctrine.[53] The merger doctrine provides that an expression may be reproduced when there are a very limited number of ways to express an idea or a fact, or when an idea or a fact cannot be separated from the copyrighted expression that contains it.[54] An example

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[49] *Id.* at 100-01.

[50] 499 U.S. 340 (1991).

[51] *See id.* at 345 (explaining that the underlying reasoning behind the fact/expression distinction is that the constitution requires originality for copyrighted works and facts do not display originality).

[52] For another fact/expression distinction case involving historical research see Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) (quoting Melville Nimmer). "The discoverer merely finds and records. He may not claim that the facts are 'original' with him although there may be originality and hence authorship in the manner of reporting, i.e., the 'expression,' of the facts." *Id.* at 1368-1369.

[53] *See* Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (defining the merger doctrine as the idea that "even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself").

[54] Melville Nimmer has suggested that the First Amendment demands that graphic works such as the Zapruder film of the Kennedy assassination, considered in *Time Inc. v. Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968), should be incorporated into the merger doctrine because their ideas are not severable from their expression. *See* Nimmer, *supra* note 1, at 1201-03.

> To the extent that a meaningful democratic dialogue depends upon access to graphic works generally . . . little is contributed by the idea divorced from its expression. . . . It

of this doctrine in action is *Matthews v. Freedman*.[55] There, the plaintiff copyrighted a t-shirt displaying the words, "Someone went to Boston and got me this t-shirt because they love me very much." The court held that the defendant, who produced a very similar t-shirt displaying the phrase, "Someone who loves me went to Boston and got me this shirt," did not infringe the copyright because allowing the plaintiff to enforce his copyright "would virtually give [him] a monopoly on the underlying idea if everyone else were forbidden from using a differently worded short sentence to express the same sentiment."[56]

The idea/expression and the fact/expression distinctions, along with their cousin the merger doctrine, protect the rights of users to make their own speeches by allowing them to extract and describe the ideas and facts contained within a copyrighted work. They also allow users to reproduce the expression of authors when it is not severable from the ideas and facts contained within it. By doing so, these limiting doctrines also protect the right of the public to access the users' speeches.

2. Fair Use

The fair use defense protects users who make unauthorized reproductions of copyrighted works for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[57] It also provides courts with four statutory factors to consider regardless of whether an unauthorized reproduction falls within one of the previously mentioned categories.[58] This

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would be intolerable, if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. Here I cannot but conclude that the speech interest outweighs the copyright interest.

Id. at 1197-1198. William Patry has disputed this point. He argues that the unique nature of the Zapruder film is not found in the fact that its ideas or facts cannot be separated from its expression, but rather that only one original of the film, which captured a moment of the utmost historical importance, existed. He argues that the film should not be reproduced under the idea/expression distinction and that any reproduction of the film should be analyzed under fair use. *See* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, 580-81 (2nd ed. 1995). For a recent case analyzing the relationship between works of visual art and the idea/expression distinction see *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

[55] 157 F.3d 25 (1st Cir. 1998).

[56] *Id.* at 28.

[57] 17 U.S.C. §107.

[58] The four factors 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.

defense allows users to reproduce portions of copyrighted works when doing so is necessary in order for them to make their own speeches. By providing users with a defense in situations in which the user needs to reproduce the original expression of an author in order to make their own speeches, fair use preserves the First Amendment rights of users and the public.

One case in which fair use protected the right of a user to make his own speeches is *Campbell v. Acuff-Rose Music, Inc.*[59] There, a musical group called 2 Live Crew parodied the Roy Orbison song *Oh Pretty Woman* by "juxtapos[ing] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."[60] The Court found that parodies of copyrighted works are protected by the fair use defense because they are examples of reproductions in which the user comments upon or criticizes the original author's work.[61] If a user needs to reproduce expression in order to make his own speech about that expression, he is generally protected by the fair use defense.[62]

However, if "the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly."[63] In other words, users may not reproduce copyrighted expression without commenting upon it[64] because allowing the user to do so would infringe upon the right of the author not to speak. When a user comments within the reproduction, the author's right not to speak is implicated to a lesser degree because the user is not merely offering the author's expression for the world to see, but critiquing expression that the author has already released to the world.[65]

Id.

[59] 510 U.S. 569 (1994).

[60] *Id.* at 583.

[61] *Id.* at 579-581. While doing so, the Court also explained that elevation of the statement regarding commercial uses from Sony Corp. of America v. Universal Studios Inc, 464 U.S. 417, 451 (1984), to a per se rule is improper.

[62] All fair use claims are subject to analysis under the four factors.

[63] *Campbell,* 510 U.S. at 580.

[64] This is, of course, not always the case. Archives, for example, have an exemption provided in §108 of Title 17. 17 U.S.C. §108.

[65] This is not to say that unpublished works could never be used in parodies. Congress passed an amendment to §107 in 1992, Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified at 17 U.S.C. §107), which clarified that fair use can be made of unpublished works so long as a court considers it within the context of the four statutory factors. *See* Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1 (1999).

By providing users with this ability to comment on the expression of others, the fair use defense protects the right of users to make their own speeches about the speech of authors.[66] It thereby benefits the public and protects the public's right to access the viewpoints of commenting users. However, it is a narrow enough defense that it does not infringe the right of authors to abstain from speaking. Thus, the incorporation of the fair use defense into the traditional contours of copyright protection preserves the free speech rights of authors, users, and the general public.

E. *The Traditional Contours of Copyright Protection Balance the Free Speech Rights of Authors and Users While Also Benefiting the Public, and the CTEA Did Not Alter the Traditional Contours of Copyright Protection*

As discussed above, the traditional contours of copyright protection are the ways in which copyright protects and balances the free speech rights of authors, users, and the general public. In *Eldred*, the Court found that Congress did not alter the traditional contours of copyright protection by extending copyright duration for existing and future works in the CTEA. This finding was based on the premise that extending the term of protection for original works of expression did not implicate any of the free speech rights protected by copyright's traditional contours.[67]

The Petitioners argued that by preventing works from entering the public domain, the CTEA violated the free speech rights of archivists of public domain material. However, in the oral arguments and in the opinion, the Court disagreed fundamentally with the Petitioners' premise.

In the oral arguments Lawrence Lessig stated that "the opportunity to build upon works within the public domain is a fundamental First Amendment interest."[68] A Justice then asked, "Well, but you want more than that. You want the right to copy verbatim other peo-

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[66] Fair use does not only apply to parodies. Wright v. Warner Books, Inc., 748 F. Supp 105, 107 (S.D.N.Y. 1990) (quotations for the purpose of scholarly writing), *aff'd* 953 F.2d 731 (2d Cir. 1991); Sony Corp. v. Universal Studios, 464 U.S. 417 (1984) (reproductions for personal use). A wide variety of other unauthorized reproductions have been held fair.

[67] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003). This begs the question of whether Congress could stop protecting copyrights without violating the first amendment. The Progress Clause grants Congress the power to protect copyrights, but it does not require Congress to do so. Thus, it seems that Congress could choose to stop protecting copyrights. Traditional first amendment doctrines might be ill suited to pick up the slack because they generally only apply to government regulation of speech.

[68] Oral Argument of Lawrence Lessig at 8, Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

ple's books, don't you?"[69] This question demonstrates that the Court understood Lessig's argument and decided that although there is in fact a right to "build upon" or comment upon the works of others, there is no First Amendment right to reproduce wholly the works of others. The fact that the Framers required that copyright terms be limited does not, in the Court's view, create a per se First Amendment right to publish other people's public domain works.[70] Justice Ginsburg clarified the point when she wrote that the, "First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[71]

It is unclear whether the Court completely excluded copyright duration from First Amendment review in *Eldred*. The Court did not explicitly state that duration never affects the traditional contours of copyright protection. Perhaps, if Congress created a perpetual term, this would implicate free speech rights. However, it seems much more plausible that the Court would overturn such a statute based on the Progress Clause rather than the First Amendment.

F. *Copyright Statutes that Fail to Properly Balance the Free Speech Rights of Authors and Users Must Satisfy Some Form of Heightened Scrutiny*

Justice Ginsburg's statement about the traditional contours of copyright protection was not only vague about what the traditional contours were, it was vague as to what form of First Amendment scrutiny should be applied to statutes that alter the traditional contours of copyright protection. Thus, it is unclear what level of scrutiny courts should apply should Congress ever start tweaking the contours. Although the Petitioners in *Eldred* asked the Court to apply intermediate scrutiny, others have suggested that copyright laws are content-based and therefore should be reviewed under strict scrutiny.[72]

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[69] *Id.* at 8-9.

[70] Nimmer disagreed with the court on this point. *See* Nimmer, *supra* note 1 at 1193. In addition to the idea/expression distinction and fair use, Nimmer argued that limited terms of duration also protected First Amendment rights.

> If I may own Blackacre in perpetuity, why not also Black Beauty? The answer lies in the First Amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright.

Id.

[71] *Eldred*, 537 U.S. at 221.

[72] *See, e.g.*, Rubenfeld, *supra* note 21.

Justice Breyer, in his dissenting opinion in *Eldred,* explained that he would apply a form of rational basis review to copyright statutes:

> I would find that a statute lacks the constitutionally necessary support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' 'choice is clearly wrong.'[73]

This type of review would be a good way to test the constitutional validity of copyright statutes that alter the traditional contours of copyright protection because it concentrates on the "expressive values" and speech protections that the Copyright Clause contains. As scholars have noted, copyright statutes do not fit nicely into traditional First Amendment tests because copyright statutes inevitably involve a balancing of the speech interests of authors, users, and the general public.[74] Thus, creating a standard of review unique to copyright would likely be the best way to examine future constitutional challenges to copyright statutes on First Amendment grounds.

IV. THE VARA ALTERS THE TRADITIONAL CONTOURS OF COPYRIGHT PROTECTION BY COMPELLING INDIVIDUALS TO MAKE OTHER PEOPLE'S SPEECHES, PREVENTING USERS FROM MAKING THEIR OWN SPEECHES, AND DEPRIVING THE PUBLIC OF ACCESS TO THE SPEECHES OF USERS

Although some scholars have maintained that American copyright law has always protected moral rights to some degree,[75] scholars and courts generally agree that the United States copyright law tradition was founded on economic incentives rather than moral property rights.[76] Nevertheless, after the United States signed on to the Berne

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[73] *Eldred*, 537 U.S. at 245 (Breyer, J. dissenting).

[74] *See generally* McGowan, *supra* note 3.

[75] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8D.02{A} at 8D-10 (1999) (stating that "stirrings of moral rights can be discerned in American judicial decisions and statutes").

[76] *See, e.g.*, Gilliam v. American Broadcasting Companies, 538 F.2d 14, 24 (2d Cir. 1976) (stating that American copyright law "seeks to vindicate the economic, rather than the personal rights of authors").

Convention in 1989,[77] Congress passed the Visual Artists Rights Act in 1990 (VARA).[78]

The VARA, codified in §106(A) of Title 17, grants to authors of works of visual art the moral rights of attribution and integrity.[79] Integrity rights refer to an author's ability to prevent the intentional distortion, mutilation, or modification, of her work.[80] Integrity rights also include the right to prevent the destruction of works of "recognized stature."[81] Attribution rights refer to the author's right to demand that her name be associated with her works and only her works, as well as to the author's right to object to her name being associated with a distorted version of her work.[82]

Congress chose to grant visual artists rights of attribution and integrity in order to protect the "honor and reputation" of visual artists. "The former ensures that artists are correctly identified with the works of art they create, and that they are not identified with works created by others. The latter allows artists to protect their works against modifi-

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[77] For the moral rights contents of the Berne Convention see Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, art. 6bis, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. For a history of the Berne Convention *see* Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967) ("The original version of the Berne Convention was signed by ten countries at a conference in Berne, Switzerland, On September 6, 1886"); *see also* MASOUYE, GUIDE TO THE BERNE CONVENTION (WIPO 1978). Moral rights were at the center of the national debate over whether to adhere to the Berne Convention. Congress opted not to explicitly implement moral rights generally, finding that a combination of federal and state laws adequately fulfilled U.S. responsibilities under Berne. *See The Senate Report on the Berne Convention Implementation Act of 1988*, S. REP. No. 101-681 (1988).

[78] Pub. L. No. 101-650 §§ 601-610, 1990 (codified in various sections of 17 U.S.C., including § 106(A)).

[79] §101 of title 17 defines a work of visual art as:

> (1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 106(A).

[80] *Id.*

[81] "A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti." *See* Carter v. Helmsley-Spear, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 71 F.3d 77 (1995), *cert. denied*, 517 U.S. 1208 (1996) (articulating a recognized stature test as "(1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact").

[82] 17 U.S.C. §106(A).

cations and destructions that are prejudicial to their honor or reputations."[83] Although Congress claimed that granting these new rights was consistent with the Progress Clause, it failed to consider the traditional balancing of free speech interests that the contours of copyright protection supply.[84] Rather than determining that the moral rights of visual artists needed protection in order to balance their speech rights with those of copyright owners, users, and the general public, Congress determined that visual artists deserved added protection. In the words of Rep. Robert Kastenmeier:

> Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.[85]

Although scholars have suggested that granting authors integrity rights may violate the First Amendment,[86] few have questioned the constitutionality of attribution rights. In the following section, I will argue that by granting authors attribution and integrity rights Congress altered the traditional contours of copyright protection. The VARA deserves First Amendment review because it compels users to make the speeches of artists by requiring them to attribute works and to continue to display works that they would prefer to destroy, prevents users from making their own speeches by forcing them to attribute works in circumstances in which they are attempting to make speeches that would require the absence of attribution and by preventing them from altering or destroying works in order to make a speech, and limits the rights of the public to access information. Thereby, the VARA upsets the balance between free speech rights traditionally protected by copyright laws in order to protect the honor and reputation of visual artists.

As discussed above, I do not suggest that the *Eldred* Court intended to call into question any deviation from the traditional structure and scope of copyright protection. Thus, I am not suggesting that

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[83] *See* H. R. REP. No. 101-514, at 6915 (1990) *reprinted in* 1990 U.S.C.C.A.N. 6915

[84] "The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation. Artists' rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: 'To promote the Progress of Science and useful Arts.'" *Id.*

[85] *Id.* at 6916.

[86] *See, e.g.*, Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE. L.J. 781 (2005); Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211 (1994); Eric E. Bensen, Note, *The Visual Artist' Rights Act of 1990: Why Moral Rights Cannot be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996).

granting authors moral rights despite a long history of not explicitly doing so alters the traditional contours of copyright protection per se. However, my premise is that the Court intended to remind Congress and lower courts that copyright law and the First Amendment both protect the free speech rights of authors, users, and the general public. In addition, the Court intended to call into question the constitutionality of statutes that infringed upon the free speech rights of any one of these three groups in order to grant additional protection to another group that free speech rights do not require.

A. *Attribution and Integrity Rights Compel Users to Make the Speeches of Authors*

As discussed above, the *Eldred* Court distinguished the CTEA from the must-carry provisions of cable television regulations by stating that the must-carry provisions "implicated 'the heart of the First Amendment,' namely, 'the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence," whereas the CTEA did not.[87] In contrast, the VARA is more similar to the must-carry provisions. While the CTEA merely prevented users from reproducing the speech of authors without authorization, the VARA requires users to tell the world that a particular artist painted the painting. The VARA also compels users to display the works of artists in some situations in which the user would prefer not to. By doing so, the VARA compels users to make the speeches of artists.

1. Attribution Rights Compel Users to Make the Speeches of Artists

If I buy an original painting, I can display it in a gallery.[88] However, the VARA requires me to inform viewers of the painting that a particular artist painted it. In this way it compels me to make the artist's speech for her in a way that traditional copyright laws never have.[89] This sort of compelled speech is arguably much worse than

[87] Eldred v. Ashcroft, 537 U.S. 186, 220 (2003).

[88] § 109(c) of the Copyright Act allows such displays. 17 U.S.C. § 109(c).

[89] There have been relatively few attribution claims filed in federal courts. I have only found one successful case. *See* Grauer v. Deutsch, No. 01 CIV. 8672, 2002 WL 31288937 (S.D.N.Y. Oct. 11, 2002) (holding that coauthor of photographs who displayed the pictures without attributing his coauthor was not protected by the waiver provision of the VARA in § 106(A)(e)(1)). The fact that my hypothetical has not yet arisen does not discount the fact that Congress recalculated the balance of rights protected by the traditional contours of copyright protection. My claim is not that the statute violates the first amendment facially, but rather that, given the appropriate set of circumstances, a court should find that the

compelling an author to speak by way of allowing fair use of his unpublished writings. As Judge Pierre Leval has reasoned, publishing portions of an author's unpublished writings arguably does not compel him to speak because the user merely publishes the words of the author himself.[90] If authors have a right to prevent users from compelling them to speak in circumstances in which it is their own words being reproduced, shouldn't the traditional contours of copyright protection also include the rights of users not to be compelled to make the speeches of artists?

2. Integrity Rights Compel Users to Make the Speeches of Artists

Integrity rights also compel users to make the speeches of artists in certain circumstances. In *Carter v. Helmsley-Spear*, artists relied on the VARA in order to prevent the owner of a commercial building from removing a sculpture from the lobby.[91] A district court in the Southern District of New York held that the owner of the building could not remove the sculpture because doing so would violate the protection against destruction of the work that the artists enjoyed under the VARA.[92] Although the district court's decision was overturned by the Second Circuit Court of Appeals, the Appellate court did so on the basis that the sculpture was a work-for-hire and therefore not protected by the VARA.[93] Had the court found, as the district court did, that the sculpture was not a work-for-hire, the owner of the building would

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VARA alters the traditional contours of copyright protection and thereby must satisfy some form of first amendment review, preferably one specifically tailored to the copyright context.

[90] *See* New Era Publications Intern. v. Henry Holt and Co., 695 F. Supp. 1493, 1528 (S.D.N.Y. 1988) (reasoning that when an author's unpublished writings are published without his consent it is not the case that the author is being compelled to speak), *aff'd* 873 F.2d 576 (2d Cir. 1989) *reh'g denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied sub nom*, Henry Holt and Co. v. New Era Publications Intern. 493 U.S. 1094 (1990). "These are not the words of others thrust upon [the author]. They are his words. He had the right not to speak but chose not to exercise it." *Id.*

[91] *See* Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303, 314 (S.D.N.Y. 1994), *aff'd in part and rev'd in part* , 71 F.3d 77 (1995), *cert. denied*, 517 U.S. 1208 (1996) (providing that the "art work in the Lobby consists of a number of sculptural elements including art work attached to the ceiling and the floor, interactive art, a vast mosaic covering the majority of the floor of the Lobby and portions of walls and several sculptural elements, and the interior of three elevators that open into the Lobby").

[92] *Carter*, 861 F. Supp. at 322-329 (holding that removing the sculpture, which was a work of stature, would damage the honor and reputation of the artists and thus enjoining its removal).

[93] *Carter*, 71 F.3d at 86-88.

have been required to continue displaying the sculpture until the artists agreed to its removal.[94]

By compelling the owner to continue displaying the sculpture, the VARA forces him to make the speech of the artists.[95] The owner may object to the statements that the sculpture makes, or may object generally to the notion of sculptures. Either way, continuing to display the sculpture forces the owner to provide recognition to the value of what the sculpture expresses.[96] Even if the owner were to put up a sign that criticized the sculpture or explained that he was forced to display it, the artist's speech would still be made at the expense of the owner who would prefer not to make it.

B. *The VARA Prevents Users From Making Their Own Speeches*

By requiring users to attribute works of art to their artists and compelling users to display works of art by preventing their destruction, the VARA compels users to make the speeches of artists. In addition, these same requirements prevent users from making their own speeches. The right of attribution prevents users from commenting on the notion of individualism and the right of integrity prevents users from expressing their disagreement with a work of art by destroying or altering it.

1. Attribution Rights Prevent Users From Making Their Own Speeches

Suppose I am of the persuasion that artists and authors are merely constructs of individualism and that telling viewers who painted something only distracts them from the import of the art by drawing their

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[94] *Id.* at 88 (affirming all portions of the district court opinion other than the ruling on whether the sculpture was a work made for hire).

[95] *See* Eric E. Bensen, *supra* note 86, at 1140 (arguing that that forcing the owner to display the sculpture violates the first amendment). I am not arguing that it per se violates the first amendment, but rather that it alters the traditional contours of copyright protection and thereby deserves heightened first amendment review. The defendant in Phillips v. Pembroke Real Estate, Inc., 288 F.Supp.2d 89 (D.Mass. 2003), actually raised this argument in defense of his right to remove a sculpture from his building. He claimed that "were [the] court to find that Defendant must keep Phillips' artwork on his property, such action would violate Defendant's First Amendment right to be free from compelled artistic expression." *Id.* at 103. However, the court found that the defendant's argument failed because, amongst other reasons, he himself contracted for the artwork to be created and failed to contract out of VARA claims and that this made it "compelled but invited artistic expression." *Id.* at 103-04. This case arose prior to the Supreme Court's decision in *Eldred* and it is unclear how the *Eldred* decision would affect a new court's consideration of the issue.

[96] The VARA does not require the public display of works of visual art when they can be replaced without damaging them. *See Phillips*, 288 F. Supp. 2d at 101.

focus to the ego of the artist.[97] I own an art gallery, and the copyright to a famous painting, and I wish to display it amongst other famous paintings without attribution in order to express the point that authors are not individuals. By requiring me to inform viewers who painted the paintings that I display, the VARA prevents me from making my own speech by compelling me to make the artist's speech for her. In this way, the VARA alters the traditional contours of copyright protection by upsetting the traditional balance between the free speech rights of authors, users, and the general public.

2. Integrity Rights Prevent Users From Making Their Own Speeches

Similarly, by preventing me from destroying or altering a work of art, the VARA prevents me from expressing displeasure with the message of the work. Courts have recognized the First Amendment value of destructive acts, such as flag or cross burning.[98] Setting a famous painting ablaze is a powerful statement. America has a history of expression through destruction.[99] By preventing me from making a speech about the message that a work of art conveys by altering or destroying it, the VARA prevents me from making my own speeches.[100]

C. *The VARA Prevents the Public From Accessing Information*

The traditional contours of copyright protection balance the speech interests of authors, users, and the general public. By encouraging creation, exempting facts and ideas from protection, and allowing fair uses of original expression, copyright protects the public's right to access information. The VARA disrupts the balance by depriving the public of the opportunity to access the information that would be conveyed to them by users who are prevented from making their own speeches. The public is deprived of hearing my gallery speech about

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[97] Peter Jaszi has written on the "constructed idea of authorship." *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992).

[98] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360 (2003) (recognizing the expressive value of cross burning); Texas v. Johnson, 491 U.S. 397, 406 (1989) (recognizing the expressive value of flag burning).

[99] *See* Strahilevitz, *supra* note 86, at 824 (citing the Boston Tea Party and draft card burning during the Viet Nam War as example of American expression through destruction).

[100] *See id.* at 828-830 (arguing that a "collectivists" view of the first amendment justifies the VARA's prevention of destroying art work because it preserves the speech of the artist and benefits the community).

the insignificance of individual artists. The public is deprived of hearing my displeasure with the commercialization of art by way of my burning a million dollar painting. I am not prevented from providing the public with information in order to prevent authors from being compelled to speak, as in the case of the right of first publication or unauthorized reproduction. In fact, I may even own the copyright to the works in question. Rather, users are prevented from conveying their speech to the public because Congress decided, in passing the VARA, that protecting the honor and reputations of artists was more important than allowing the allowing users to speak, or the public to hear the speech of users.

The traditional contours of copyright protection are not about protecting the honor and reputation of artists. We have libel laws, among others, for that. The traditional contours of copyright protection are about balancing the speech interests of authors (or copyright holders), users, and the public. The VARA seems to represent Congress' decision to start throwing the honor of artists into the mix of interests that copyright must balance. While this is a noble notion, and one that deserves much thought and consideration, it is not within the traditional contours of copyright protection that the Supreme Court described in *Eldred*.

Perhaps protecting the speech interests of artists by protecting their honor and reputation should be brought within the contours of copyright protection.[101] However, this has not traditionally been the case and therefore, based on the *Eldred* opinion, courts should apply First Amendment scrutiny to the VARA in order to determine if the First Amendment allows the incorporation of these interests into copyright's contours. The VARA may very well survive whatever form of scrutiny courts choose to apply, but it should be scrutinized nonetheless. In the following section, I explain why the fact that VARA rights are subject to fair use does not bring the VARA within the traditional contours of copyright protection.

D. *Fair Use Does Not Protect the Free Speech Rights of Users and the Public*

The moral rights granted to authors by section 106(A) are subject to the fair use provision of §107. Thus, one could argue that the VARA

[101] One could argue that the VARA protects the speech rights of visual artists by preventing them from being compelled to speak through their art in ways that they would prefer not to; however, the decision to begin protecting the rights of visual artists in this way would still alter the traditional contours of copyright protection, which did not factor the speech rights of visual artists, apart from their copyright interests, into the equation previously.

does not alter the traditional contours of copyright protection because it does not diminish the fair use defense, which the *Eldred* Court relied upon so heavily. However, as the legislative history of the VARA makes clear, it is very unlikely that a defendant would ever succeed under fair use against a VARA claim.[102]

1. A Defendant is Unlikely to Succeed Under An Attribution Claim

Although, in my gallery examples, I could argue under the preamble and the first factor that I was commenting on the work by refusing to display the artist's name, I am not exactly transforming the work, which is an important element under the first factor.[103] My gallery may even charge for entry, thereby making my use commercial.[104] In addition, the fact that such works receive more protection that any other works under copyright weighs heavily for the artist under the second factor.[105] I would be using the whole work, so factor three goes to the artist. Also, such an argument is unlikely to overcome the negative impact on the work's market value under the fourth factor.[106]

2. A Defendant is Unlikely to Succeed under an Integrity Claim

As for claiming fair use against a claim of infringement of a visual artist's integrity right, similar obstacles would stand in the way. However, the analysis would be somewhat different. Under factor one, the act of burning, destroying or altering a protected work could be transformative. In addition, it may not be commercial. Factor one may even favor the defendant. However, under factor two, the work once again is of the kind most protected by copyright. Moreover, because the VARA integrity rights do not apply to reproductions of the work, I

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[102] *See* H. R. REP. NO. 101-514, at 6932 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915. "The Committee does not want to preclude fair use claims in this context. However, it recognizes that it is unlikely that such claims will be appropriate given the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies." *Id.*

[103] *See* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 578-79 (1994).

[104] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (stressing the importance of the commercial nature of a work under the first factor).

[105] The second factor, the nature of the copyrighted work, "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586.

[106] The VARA was meant to protect the value of the works of visual artists. *See* H. R. REP. NO. 101-514, at 6932 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915.

could have altered or destroyed a reproduction instead of the original. This may alter the analysis of factors one and two. The nature of my use would undoubtedly be fairer if I destroyed a copy, thereby preserving the original for all to enjoy.[107] In addition, factor three favors the plaintiff again because I am using the whole work or altering a piece of the work that affects the whole. And finally, the fourth factor would likely go to the plaintiff as well because my alteration or destruction of her original work of art will probably reduce the exposure of the artist and affect her ability to market reproductions of the work. Thus, I am likely to fail under a fair use defense to an integrity claim.

E. *Asserting Fair Use as a Defense to Claims by an Artist Against a Copyright Holder Itself Demonstrates that the VARA Alters the Traditional Contours of Copyright Protection*

Some may argue that because one is unlikely to succeed under fair use defense does not mean that it is insignificant that the defense is still applicable. Still others may argue that because in some circumstances, before some judges, fair use may actually be found in VARA cases brings the VARA within the traditional contours of copyright protection. However, these arguments are inconsistent with a close reading of *Eldred*. Justice Ginsburg reasoned that the traditional contours of copyright protection adequately balance the speech interest of authors (or copyright holders), users, and the general public. However, under the VARA, I could be liable for infringement even if I own the copyright. The fact that I would even need to argue that I have a fair use defense under such circumstances exhibits that the VARA alters the traditional contours. Traditionally, transferring a copyright ended the rights of an artist in the work.[108] Although copyright is meant to prevent authors from being compelled to speak, the fact that an author has transferred the rights in their work to someone else indicates that the author is waiving the right not to speak in regards to that particular work.

By granting visual artists moral rights in their works that remain with them regardless of who owns the copyright to their works, Congress limited the speech rights of copyright holders, users, and the gen-

[107] *See* Kelly, *supra* note 86, at 243 (discussing the fact that the VARA does not apply to reproductions).

[108] This was not exactly the case under the 1909 Act. Original authors could regain their copyrights in their renewal term, despite transferring them for their original term. *See* Stewart v. Abend, 495 U.S. 207 (1990). In addition, artists can transfer some of their exclusive rights under §106 without transferring all of them. 17 U.S.C. §106. However, under §106(A)(e)(1), visual artists cannot transfer their moral rights and thus even if they transfer all of the other rights, their moral rights remain. 17. U.S.C. §106(A)(e)(1). Under the same provision, visual artists can waive their moral rights.

eral public based on a desire to protect the honor and reputations of visual artists. The decision to do so, although quite possibly a good one based on compelling reasoning, alters the traditional contours of copyright protection and should be reviewed under First Amendment scrutiny.

F. *The VARA Should Receive Heightened First Amendment Scrutiny*

The VARA attribution and integrity rights compel users, and even copyright owners, to make the speeches of artists, prevent users from making their own speeches, and deprive the public of access to the speeches of users. By doing so, the VARA alters the traditional contours of copyright protection. Thus, if presented with a proper challenge, courts should apply heightened first amendment scrutiny to the VARA attribution rights. As discussed above, it is unclear what level of review the *Eldred* Court intended for lower courts to apply.

Regardless of the appropriate standard of review, the VARA may survive First Amendment scrutiny. Congress had legitimate reasons for passing the VARA, including some of the same reasons that justified the passage of the CTEA, such as compliance with international norms. However, despite the fact that the VARA may be a justifiable act of Congress, it also serves as an example of how Congress can alter the traditional contours of copyright protection and thereby disrupt the protection of free speech rights that copyright law has so delicately balanced throughout its history.

V. Conclusion

The U.S. Supreme Court ruling that courts should apply heightened First Amendment scrutiny to statutes that alter the traditional contours of copyright protection sparked a debate over what those contours are. This Comment has demonstrated that the traditional contours of copyright protection include the ways in which copyright has balanced the free speech rights of authors, users, and the general public. In addition, this Comment has explained why the moral rights granted visual artists by Congress in the VARA in order to protect the honor and reputation of such artists alter the traditional contours of copyright protection by compelling users, and even copyright owners, to make the speeches of artists, preventing users from making their own speeches, and depriving the public of access to the speeches of users. When presented with the appropriate challenge, courts should therefore apply some form of heightened First Amendment scrutiny to the VARA.