
Caught in the Copyright Rye: Freeing First
Amendment Interests from the Constraints of the
Traditional View

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ABSTRACT

Courts traditionally have taken the position that there is no need to make any special allowance for the First Amendment interests of defendants in copyright infringement cases because the distinction in copyright law between ideas and expression and the fair use doctrine supposedly act as suitable built-in safeguards of free speech. However, the distinction between ideas and expression does not amount to a meaningful First Amendment protector, and the fair use doctrine is only partially satisfactory in that regard. Using as a starting point the recent litigation involving J.D. Salinger and an author whose novel commented on Salinger and the famous writer's best-known work (*The Catcher in the Rye*), we explore broader questions associated with the uneasy relationship between copyright law and the First Amendment. We offer factor-by-factor recommendations for making the fair use analysis more protective of First Amendment interests, so that the fair use doctrine can become the free speech safeguard that courts' traditional view has long represented it to be. In addition, we provide free-speech-sensitive recommendations regarding remedies issues that arise when a copyright infringement defendant's fair use defense is plausible but not sufficient to prevent liability.

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I. INTRODUCTION

Perhaps Fredrik Colting should have known better. Did he underestimate the likelihood that J.D. Salinger, the reclusive author of *The Catcher in the Rye*,¹ would sue him for copyright infringement after he wrote a novel that drew upon *Catcher* through heavy use of Salinger's iconic Holden Caulfield character?² Given Salinger's previously

¹ J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

² *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

demonstrated inclination to initiate infringement litigation,³ Colting was naïve if he thought a lawsuit would not result. On the other hand, perhaps Colting expected litigation but considered it a chance for notoriety and an opportunity for vindication of his intended defense: fair use.⁴

Either way—naïvely, or opportunistically—Colting became a defendant.⁵ In asserting the fair use defense, Colting no doubt learned what copyright infringement defendants frequently find out: hinging one's fate on the fair use defense involves considerable difficulty and uncertainty. Courts' fair use determinations require a painstaking factor-based analysis whose outcome proves difficult to predict.⁶ Little about the fair use doctrine is black and white; it exists largely in shades of gray.

In *60 Years Later: Coming Through the Rye*,⁷ Colting borrowed the Caulfield character but made him six decades older than *Catcher's* teenaged Holden.⁸ Salinger sought a preliminary injunction to prevent publication and distribution of Colting's novel.⁹ A federal district court obliged, rejecting the defendant's fair use argument.¹⁰ The U.S. Court of Appeals for the Second Circuit upheld the district court's resolution of the fair use issues.¹¹ However, the Second Circuit vacated the preliminary injunction and remanded for further proceedings because the district court had not taken into account injunctive relief standards contemplated in a Supreme Court decision that the Second Circuit deemed applicable.¹² The factual context of *Salinger v. Colting* and the conclusions of the district court and the Second Circuit make the case a useful starting point for examination of broader questions concerning the fair use defense and the role First

³ See *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (holding that biographer who borrowed from Salinger's unpublished letters engaged in copyright infringement).

⁴ *Salinger*, 641 F. Supp. 2d at 254–55. See 17 U.S.C. § 107 (2006).

⁵ *Salinger*, 641 F. Supp. 2d at 253–54. The firms slated to publish and distribute Colting's novel were also sued. *Id.*

⁶ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (noting case-by-case, factor-based nature of fair use analysis). See also 17 U.S.C. § 107 (listing fair use factors courts must apply).

⁷ JOHN DAVID CALIFORNIA, *60 YEARS LATER: COMING THROUGH THE RYE* (2009) [hereinafter *60 YEARS*]. Fredrik Colting is the author's given name. He used John David California as a pen name. *Salinger*, 641 F. Supp. 2d at 253.

⁸ See *Salinger*, 641 F. Supp. 2d at 258.

⁹ *Id.* at 254.

¹⁰ *Id.* at 268–69. The sweeping preliminary injunction barred the defendants from “manufacturing, publishing, distributing, shipping, advertising, promoting, selling, or otherwise disseminating any copy of *60 Years* or any portion thereof, in or to the United States.” *Id.* at 269.

¹¹ *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010).

¹² *Id.* at 77–83. The Supreme Court decision was a patent case. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

Amendment considerations should play in copyright infringement litigation. This article focuses on those broader questions.

Section II introduces basic copyright principles and provides background on the fair use defense. Section III summarizes the district court and Second Circuit decisions in *Salinger v. Colting*. Besides analyzing the decisions, Section IV considers broader questions stemming from *Salinger* and other cases presenting fair use issues. As later analysis will show, it is necessary to reassess the Supreme Court's view that the distinction between ideas and expression and the fair use doctrine adequately address First Amendment concerns in copyright cases.¹³ This need is especially pronounced because of the vast duration of copyrights, thanks to lengthy extensions enacted by Congress.¹⁴ We contend in Section IV that given how First Amendment principles are applied outside the copyright setting, the traditional view of the relationship between the fair use doctrine and the First Amendment sometimes provides an empty promise of free speech protection.

Section V proposes specific modifications of the four-factor fair use analysis in an effort to enable the fair use doctrine to realize its potential for safeguarding First Amendment interests. We call for altering current handling of profit-motivated uses of others' copyrighted works,¹⁵ so that certain such uses are evaluated more consistently with First Amendment principles as applied outside the copyright context. We then offer recommendations for making the second and third fair use factors (nature of the copyrighted work and amount and substantiality of what the user borrowed¹⁶) more sensitive to First Amendment concerns.

Regarding the effect on potential markets for the copyrighted work,¹⁷ Section V stresses the importance of remembering that fair use is a case-by-case, fact-specific inquiry. When courts attempt to balance copyright owners' economic interests against the expressive interests of copyrighted works' users, resorting too quickly to general assumptions regarding potential market effect poses a danger that defendants' free speech interests will not be adequately addressed. A hard look at the facts is especially important in cases such as *Salinger*, where the copyright owner has no intention of licensing his work¹⁸ and is inappropriately seeking moral rights

¹³ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003).

¹⁴ See 17 U.S.C. §§ 302, 304 (2006).

¹⁵ See *Campbell*, 510 U.S. at 584–85 (1994). We also urge the elimination of a *Campbell*-suggested distinction between parody and satire. See *id.* at 579–83.

¹⁶ 17 U.S.C. § 107 (2006).

¹⁷ *Id.*

¹⁸ See *Salinger*, 641 F. Supp. 2d at 268.

over it.¹⁹

Finally, Section V considers free speech interests that may be present even when fair use arguments fail and the court concludes that copyright infringement occurred or is likely to have occurred. Because remedies issues may trigger First Amendment concerns, we advocate careful judicial attention to whether injunctive relief (preliminary or permanent) is necessary in the case at hand, instead of resorting to an injunction as a matter of course.²⁰ We also offer suggestions regarding damages determinations in cases in which free speech interests are significant but do not prevent the imposition of infringement liability.

II. COPYRIGHT PROTECTION, INFRINGEMENT, AND FAIR USE: AN OVERVIEW

A. *Copyright Protection Basics*

Congressional authority to enact copyright laws resides in Article I, § 8 of the United States Constitution, which states that Congress “shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²¹ The purpose of this limited property right is to “motivate the creative activity of authors” in order to benefit the public with creative works.²² The limited scope and duration of the copyright holder’s entitlement “reflect[] a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”²³

A work that demonstrates a modicum of originality and is fixed in a “tangible medium of expression”²⁴ gains protection for its expression of an idea but not for the idea itself nor for any factual material contained within the work.²⁵ Fictional characters may also be separately protected by

¹⁹ See *id.* Moral rights apply only as to a narrow range of works of visual art, not to copyrighted works generally. See 17 U.S.C. §§ 101, 106A (2006).

²⁰ In that portion of Section V, we express agreement with the injunctive relief approach taken by the Second Circuit in *Salinger*, 607 F.3d at 79–82, even though we disagree with that court’s—and the district court’s—resolution of the fair use issues. *Id.* at 83; 641 F. Supp. 2d at 256–68.

²¹ U.S. CONST. art. I, § 8, cl. 8.

²² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

²³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

²⁴ 17 U.S.C. § 102(a) (2006); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²⁵ 17 U.S.C. § 102(b) (2006); *Feist*, 499 U.S. at 344–45, 363.

copyright if they satisfy certain legal tests.²⁶ There is little doubt that both *Catcher in the Rye* and the character of Holden Caulfield are protectable under copyright law.²⁷ But that fact does not end the inquiry. Proper consideration of fair use and First Amendment principles leads to the conclusion that copyright owners' otherwise legitimate rights over their creations must sometimes give way to the rights of users and of the public.²⁸

B. Copyright Infringement and the Fair Use Defense

As a general rule, a copyright owner has the exclusive right to reproduce her work, prepare derivative works based on it, distribute copies of it, display it, and perform it publicly.²⁹ Copyright protection exists at the moment a work is created and fixed in a tangible medium.³⁰ For works created on or after January 1, 1978, the copyright generally endures for the life of the author plus 70 years after her death.³¹ For still-copyrighted works created before January 1, 1978, the copyright term endures for 95 years from the date copyright was originally secured.³²

Violation of any of the exclusive rights of a copyright owner infringes the author's copyright.³³ Not all uses of a copyright owner's work are unlawful infringements, however. The fair use defense places limitations on the exclusive rights of copyright owners.³⁴ This defense emerged to "permit[] courts to avoid rigid application of the copyright statute when, on

²⁶ Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 925–26, 927, 930–31 (2009). See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (setting forth *distinct delineation* test); *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 948–50 (9th Cir. 1954) (setting forth *story being told* test).

²⁷ The fully developed Caulfield character is central to *Catcher* and thus likely merits protection under the tests identified in note 26. See *Salinger*, 641 F. Supp. 2d at 254, 259–60, 261–62, 263–64. Of course, even if the character were not entitled to copyright protection in its own right, it would still be part of the protected expression in *Catcher*. See 17 U.S.C. §§ 102(a),(b) (2006).

²⁸ See *infra* text accompanying notes 171–235.

²⁹ 17 U.S.C. § 106 (2006). The display and performance rights apply only in regard to certain copyrighted works. See *id.*

³⁰ *Id.* §§ 102, 201, 302.

³¹ *Id.* § 302(a). A different duration rule applies to works made for hire, see *id.* § 302(c), but that rule is not germane to the issues addressed here.

³² *Id.* § 304. Copyrights run until the end of the calendar year in which they otherwise would expire. *Id.* § 305.

³³ § 501. In order to establish that infringement occurred, the copyright owner must prove that the defendant's actions involved copying and improper appropriation—elements addressed alongside the question whether the copyright[] owner's exclusive rights were violated. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468, 473 (2d Cir. 1946).

³⁴ See 17 U.S.C. § 107 (2006).

occasion, it would stifle the very creativity which that law is designed to foster.”³⁵ The relevant statutory provision singles out uses reflecting “purposes such as criticism, comment, news reporting, [and] teaching . . . , scholarship, or research” as potentially strong candidates for fair use treatment.³⁶ Yet such a purpose does not guarantee fair use status, as Congress has provided that “[i]n determining whether the use made of a work in any particular case is a fair use,” certain factors must be considered.³⁷ Those 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.³⁸

*Campbell v. Acuff-Rose Music, Inc.*³⁹ provides a useful illustration of what may constitute fair use and of how the fair use factors operate. In that case, members of the musical group 2 Live Crew had written and recorded a parody of the rock ballad “Oh, Pretty Woman.” Acuff-Rose, the song’s copyright owner, sued the group for recording the parody version and selling it despite Acuff-Rose’s denial of permission to borrow from “Oh, Pretty Woman.”⁴⁰

The Supreme Court concluded in *Campbell* that parody may qualify for fair use treatment because parody, “[l]ike less ostensibly humorous forms of criticism, . . . can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁴¹ However, the Court emphasized that a parodic purpose does not make the use “presumptively

³⁵ *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted). “The ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998) (internal quotation marks and citation omitted).

³⁶ 17 U.S.C. § 107 (2006).

³⁷ *Id.*

³⁸ *Id.* Congress included this statement after the list of factors: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” *Id.*

³⁹ 510 U.S. 569 (1994). We discuss *Campbell* here to furnish a foundation for later analysis of the decision, both as it relates to *Salinger* and as it pertains to the broader questions examined in later sections.

⁴⁰ *Id.* at 572–73.

⁴¹ *Id.* at 579.

fair.”⁴² The true test is whether the parodist has taken so much, and altered the content of the original so little, that the new work supersedes the original.⁴³

In reviewing the U.S. Court of Appeals for the Sixth Circuit’s rejection of 2 Live Crew’s fair use defense, the Supreme Court emphasized the lower court’s error in giving essentially conclusive effect to the fact that the defendants had profited financially.⁴⁴ The Court stated that the first fair use factor, the purpose and character of the use,⁴⁵ focuses on determining “whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.”⁴⁶ The Court noted that the more transformative the use, the less important other considerations such as commercialism will be.⁴⁷ Accordingly, the Court’s first factor analysis indicated that the commercial nature of an alleged infringer’s action is simply a “fact to be weighed along with others in fair use decisions.”⁴⁸

The Court observed that parody may merit fair use treatment because, as commentary, it fits within a category singled out by Congress.⁴⁹ However, the Court cautioned that if “the commentary has no critical bearing on the substance or style of the original composition, . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”⁵⁰ The Court was thus emphasizing that to be eligible for fair use treatment, the parody must comment on the underlying copyrighted work.⁵¹

⁴² *Id.* at 581. Rather, “parody, like any other use, has to work its way through the [four fair use] factors, and be judged case by case.” *Id.*

⁴³ *Id.* See *id.* at 583 n.16.

⁴⁴ *Id.* at 575, 583–85.

⁴⁵ 17 U.S.C. § 107 (2006).

⁴⁶ *Campbell*, 510 U.S. at 579 (internal quotation marks and citation omitted). Parody, the Court observed, will often have a strong claim to being transformative. *Id.*

⁴⁷ *Id.* The Court emphasized that whether a use was commercial is only a part of the inquiry under factor one, which contemplates that the significance of a defendant’s profit-making motivation will vary from case to case. *Id.* at 572, 584.

⁴⁸ *Id.* at 585 (internal quotation marks and citation omitted).

⁴⁹ *Id.* at 579. See 17 U.S.C. § 107 (2006).

⁵⁰ *Campbell*, 510 U.S. at 580.

⁵¹ See *id.* The parody in *Campbell* met that threshold requirement. *Id.* at 582–83. In the same discussion, the Court suggested a distinction between parody, which it regarded as a potentially strong candidate for fair use protection, and satire, which it appeared to classify as a weaker fair use candidate. See *id.* at 580–81.

In applying the second fair use factor, the nature of the copyrighted work,⁵² the Court noted that creative expression is “closer to the core of intended copyright protection” than factual works are. The Court therefore observed that it may be more difficult to establish a fair use defense when fictional works are copied.⁵³ However, the Court emphasized that the highly creative nature of copyrighted fictional works may not “help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”⁵⁴

The Court stated that the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole,⁵⁵ requires consideration of not only the quantity of the original work used but also the qualitative importance of the borrowed material.⁵⁶ Noting the interplay between this factor and the fourth factor, the Court observed that “a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.”⁵⁷ The Court acknowledged that a parodist must be permitted to “conjure up” enough of the original work to enable her audience to recognize the parody’s target, but asserted that how much more can reasonably be taken depends on “the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, . . . serve as a market substitute for [it].”⁵⁸

Applying these principles to the case, the Court disapproved of the Sixth Circuit’s conclusion that the defendants had borrowed unreasonably from “Oh, Pretty Woman.”⁵⁹ Their copying of its “characteristic opening bass riff” and some of its lyrics may have invoked the “heart” of the song,⁶⁰ but “the heart is also what most readily conjures up the [copyrighted work] for parody, and it is the heart at which parody takes aim.”⁶¹ Continuing to emphasize how the third factor may be applied differently in parody cases than in non-parody cases, the Court stated that “[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character

⁵² 17 U.S.C. § 107 (2006).

⁵³ *Campbell*, 510 U.S. at 586.

⁵⁴ *Id.*

⁵⁵ 17 U.S.C. § 107 (2006).

⁵⁶ *Campbell*, 510 U.S. at 587.

⁵⁷ *Id.* at 587–88.

⁵⁸ *Id.* at 588.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

would have come through.”⁶² The Court also stressed that the defendants had not simply copied from “Oh, Pretty Woman.” Besides borrowing expression from the original, they contributed considerable musical and lyrical expression of their own creation.⁶³

Next, the Court commented further on the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work.⁶⁴ This inquiry requires courts to consider not only the potential market harm from the alleged infringer’s actions, but also whether widespread similar conduct would negatively affect the copyright owner’s ability to market the work.⁶⁵ Noting the Sixth Circuit’s error in presuming future harm because of the parody’s commercial nature, the Court stated that where the new work is transformative, market substitution is less likely and therefore cannot be inferred.⁶⁶

The fourth factor also contemplates consideration of whether the defendant’s actions would be likely to harm logical markets for derivative works.⁶⁷ The relevant derivative markets include “only those [uses] that creators of original works would in general develop or license others to develop.”⁶⁸ As the *Campbell* Court noted, “there is no protectible derivative market for criticism [because] the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”⁶⁹ The defendants could not be treated as having harmed a potential market for “Oh, Pretty Woman” parodies because no such market would be logical for

⁶² *Id.* at 588–89. The Court’s references to the “heart” of a work were an attempt to distinguish *Campbell*’s parody scenario from the non-parody use in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). See *Campbell*, 510 U.S. at 587–89. In *Harper & Row*, the defendant’s borrowing of the supposed heart of the unpublished memoirs of President Ford was among the reasons why the Court held that the defendant did not merit fair use protection. *Harper & Row*, 471 U.S. at 564–66.

⁶³ *Campbell*, 510 U.S. at 589.

⁶⁴ 17 U.S.C. § 107 (2006).

⁶⁵ *Campbell*, 510 U.S. at 590.

⁶⁶ *Id.* at 591. The Court indicated that in view of the “different market functions” served by the original copyrighted work and the parody version, it is “likely that the [parody] will not affect the market for the original in a way cognizable under [the fourth fair use] factor.” *Id.*

⁶⁷ *Id.* at 590, 592–93.

⁶⁸ *Id.* at 592.

⁶⁹ *Id.* The Court also stressed that if harm to the copyrighted work’s economic value stems from the force and effectiveness of the defendant’s parody or other commentary, that harm does not count against the defendant in the fair use analysis. The Court stated that “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.” *Id.* The task for courts is to “distinguish between biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.” *Id.* (internal quotation marks and citation omitted).

fourth factor purposes.⁷⁰

C. Copyright and the First Amendment?

Courts tend not to address First Amendment concerns in any meaningful depth in copyright cases, reasoning that copyright law itself adequately protects free speech interests.⁷¹ The Supreme Court explained the rationale for this tendency in *Eldred v. Ashcroft*,⁷² in which the Court rejected a claim that the Copyright Term Extension Act of 1998 violates the First Amendment.⁷³ The Court reasoned that copyright law contains free speech safeguards because it protects only an author's expression and allows others to make unrestricted use of ideas, facts, and theories.⁷⁴ It also labeled the fair use defense as a further speech safeguard because it permits use of the author's copyrighted expression in certain circumstances.⁷⁵ Finally, the Court noted that the primary goal of the First Amendment is to protect one's freedom to make her own speech and that it "bears less heavily when speakers assert the right to make other people's speeches."⁷⁶

With this understanding of the relationship between copyright and the First Amendment, we now examine *Salinger v. Colting*.⁷⁷ In the following section, we discuss the district court's decision and the decision rendered on appeal.

⁷⁰ *Id.* Yet there was a relevant potential market that 2 Live Crew could have impaired: the market for rap versions of "Oh, Pretty Woman." Because the evidentiary record did not provide a basis for making such a determination, the Court remanded for further consideration of that issue. *Id.* at 592–94.

⁷¹ See, e.g., *Eldred*, 537 U.S. at 218–21 (2003). See also *Suntrust Bank*, 268 F.3d at 1264–65 (recognizing this tendency but noting that fair use analysis must be conducted with awareness of First Amendment interests).

⁷² 537 U.S. 186.

⁷³ *Id.* at 218–21.

⁷⁴ *Eldred*, 537 U.S. at 219. A 1970 article by Professor Nimmer was influential in establishing the notion that the expression versus ideas distinction serves as a First Amendment safeguard. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180–81, 1190–92 (1970). See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 8, 11–12 (2001) (noting influential nature of Nimmer article).

⁷⁵ *Eldred*, 537 U.S. at 219–20. Courts regularly make such an observation about the fair use doctrine. Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 548 (2004). The relevant assumption is that the fair use doctrine serves the same sorts of interests underlying the First Amendment. Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 297 (1979).

⁷⁶ *Eldred*, 537 U.S. at 221. Later, we examine *Eldred's* handling of the First Amendment arguments made in the case. See *infra* text accompanying notes 156–159.

⁷⁷ 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

III. SALINGER V. COLTING: THE DISTRICT COURT AND SECOND CIRCUIT DECISIONS

A. The District Court Decision

J.D. Salinger, author of the classic novel *The Catcher in the Rye*,⁷⁸ brought suit in the U.S. District Court for the Southern District of New York against Fredrik Colting and companies slated to be involved in publication and distribution of a novel written by Colting.⁷⁹ Salinger alleged that Colting's novel, *60 Years Later: Coming Through the Rye*⁸⁰ (hereinafter, *60 Years*), was an unauthorized derivative work of *Catcher* and that the use of Mr. C, the main character in *60 Years*, infringed Salinger's copyrights in *Catcher* and the Holden Caulfield character because Colting simply aged Caulfield sixty years and gave him a new name.⁸¹ Salinger sought a preliminary injunction barring the defendants from publishing, advertising, or disseminating *60 Years* in the United States.⁸²

The district court determined that Salinger was likely to succeed on the merits of his infringement claim.⁸³ It then addressed Colting's contention that *60 Years* and the Mr. C character constituted fair use of Salinger's copyrighted material. The court explained the first fair use factor (purpose and character of the use) as "whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"⁸⁴ Next, the court considered whether *60 Years* was a parody, since "parody has an obvious claim to transformative value."⁸⁵ According to Colting, *60 Years* was a parody that commented directly on both *Catcher* and Salinger.⁸⁶ However, the court noted that for a parody to be eligible for fair use treatment, its "parodic character [must]

⁷⁸ SALINGER, *supra* note 1.

⁷⁹ *Salinger*, 641 F. Supp. 2d at 253. Except where the context requires reference to the defendants in the plural, we will use "Colting" to refer collectively to the defendants.

⁸⁰ 60 YEARS, *supra* note 7.

⁸¹ *Salinger*, 641 F. Supp. 2d at 253–54, 262.

⁸² *Id.* at 254. As will be seen, the district court granted the preliminary injunction. *Id.* at 268–69. However, the Second Circuit vacated the preliminary injunction and remanded the case because the preliminary injunction standard applied by the district court had not taken into account a relevant Supreme Court decision. 607 F.3d at 77–80, 83–84. For further discussion of the Second Circuit's decision, see *infra* text accompanying notes 119–138.

⁸³ *Salinger*, 641 F. Supp. 2d at 254.

⁸⁴ *Id.* at 256 (quoting *Campbell*, 510 U.S. at 579). See 17 U.S.C. § 107 (2006).

⁸⁵ *Salinger*, 641 F. Supp. 2d at 256 (quoting *Campbell*, 510 U.S. at 579).

⁸⁶ *Id.* at 257.

reasonably be perceived.”⁸⁷ It then concluded that for fair use purposes, a parody’s only relevant aspects are those that comment on the original work itself, as opposed to the work’s author.⁸⁸

Rejecting Colting’s contention that *60 Years* commented meaningfully on *Catcher* and the Holden Caulfield character, the court concluded that *60 Years* included the same observations and reflections communicated by Caulfield in Salinger’s work—except that they were now communicated by an older Caulfield.⁸⁹ The court observed that the “key themes” were “already apparent” in *Catcher* and that “[i]t is hardly parodic to repeat th[e] same exercise in contrast, just because society and the characters have aged.”⁹⁰ In concluding that *60 Years* could not reasonably be perceived as a parody directed at *Catcher* or Caulfield,⁹¹ the court opined that the true purpose of *60 Years* was to satisfy Salinger’s readers’ appetite for the Caulfield character.⁹²

Colting asserted that he engaged in commentary on Salinger by making Salinger himself a character in *60 Years*.⁹³ The court rejected this argument because parody is confined to new works that comment directly on the original work and noted that using Salinger as a character was simply a vehicle for Colting to comment on Salinger rather than on *Catcher* or the Caulfield character.⁹⁴

⁸⁷ *Id.* (quoting *Campbell*, 510 U.S. at 582).

⁸⁸ *Id.* In reaching this conclusion, the court relied on *Campbell* and noted *Campbell*’s suggested distinction, for fair use purposes, between parody and satire. *Id.* at 256–57. See *Campbell*, 510 U.S. at 580–81.

⁸⁹ *Salinger*, 641 F. Supp. 2d at 258.

⁹⁰ *Id.* at 259. The court’s reference to “key themes of *Catcher*,” *id.* and a later reference to Colting’s having borrowed “one of the critical extant themes of *Catcher*,” *id.* at 260, may indicate that the court was overextending Salinger’s copyright protection. A work’s themes would ordinarily be treated as ideas for purposes of copyright law’s distinction between protected expression and unprotected ideas. See 17 U.S.C. § 102(b) (2006). The court’s focus on theme-borrowing thus suggests that the court was penalizing Colting in the fair use analysis even though themes are unprotected matter that he should have been free to utilize without having to rely on the fair use defense. For further discussion of the expression versus ideas distinction, see *infra* text accompanying notes 141–168.

⁹¹ *Id.* at 258, 260. Colting’s contentions were, in the court’s assessment, “post-hoc rationalizations employed through vague generalizations about the alleged naivete of the original, rather than reasonably perceivable parody.” *Id.* at 258. In addition, the court doubted Colting’s credibility. It noted that not until Salinger filed his lawsuit did Colting call *60 Years* a parody of *Catcher* or the Caulfield character. For the court, it was significant that the original book jacket for *60 Years* called it a “sequel to one of our most beloved classics” and that in pre-litigation interviews, Colting referred to his novel as a “tribute” to *Catcher* and its author. *Id.* at 260 n.3.

⁹² *Id.* at 260 (quoting *Castle Rock Entm’t, Inc.*, 150 F.3d at 143).

⁹³ *Id.* at 260–63.

⁹⁴ *Id.* at 260–61. The court conceded that using Salinger as a character was “indeed novel,”

After concluding that *60 Years* was not eligible for fair use protection as a parody, the court considered whether Colting's novel was otherwise a transformative use of *Catcher* and Caulfield. The court again noted that in aging Caulfield sixty years and simply accentuating Caulfield's unique characteristics, *60 Years* does not "'add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'"⁹⁵ The court conceded that Colting's use of Salinger as a character in order to criticize the famous author's behavior and reclusive nature was somewhat transformative.⁹⁶ However, it doubted the credibility of Colting's assertions that the primary purpose of *60 Years* was to criticize Salinger, given Colting's previous statements that *60 Years* was to be a *Catcher* sequel.⁹⁷ In addition, the court pointed out that the transformative value of using Salinger as a character was diminished for two key reasons: the Salinger character appeared on only forty pages of the nearly 300-page novel, and the ratio of what was borrowed from *Catcher* to what was new in *60 Years* was quite high.⁹⁸

Concluding its application of the first fair use factor, the court stated that the commercial nature of Colting's novel further weighed against a finding of fair use.⁹⁹ The court confined its discussion of the commercial purpose issue to two sentences that said very little.¹⁰⁰ The absence of discussion in those two sentences, coupled with the earlier discussion of what was transformative about Colting's novel, suggested a conclusion by the court that the novel's transformative aspects were so insignificant that they did not offset Colting's profit motive.

Turning to the second fair use factor (the nature of the copyrighted work), the court noted the importance of determining whether the copyrighted work is a work of fact or fiction because of the greater room for

but emphasized that it was "unconvinced by [Colting's] attempts to shoehorn [the] commentary and criticism of Salinger into the parodic framework of *Campbell*, which requires critique or commentary of the [copyrighted] work." *Id.* at 261. *See Campbell*, 510 U.S. at 580–81. The court identified commentary on Salinger's "reclusive nature" and other "supposed idiosyncracies," including Salinger's "alleged desire to exercise 'iron-clad control over his intellectual property, refusing to allow others to adapt any of his characters or stories.'" *Salinger*, 641 F. Supp. 2d at 261. But the court reasoned that "just because an author and his work are intimately associated does not mean that a critique of one will necessarily equate to a critique of both." *Id.* at 261 n.4.

⁹⁵ 641 F. Supp. 2d at 261 (quoting *Campbell*, 510 U.S. at 579). *See id.* at 261–62.

⁹⁶ *Id.* at 262. *See id.* at 261.

⁹⁷ *Id.* at 262. *See id.* at 260 n.3.

⁹⁸ *Id.* at 262.

⁹⁹ *Id.* at 263.

¹⁰⁰ *See id.* at 263.

a claim of fair use where the original work is largely factual.¹⁰¹ The court concluded that this factor weighed against a finding of fair use, since *Catcher* is a “creative expression [that] falls within the core of the copyright’s protective purposes.”¹⁰²

Next, the court examined the third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole. It asserted that the third factor inquiry focuses on whether the extent of copying was greater than necessary to promote the purpose of the use.¹⁰³ The court found that Colting took more from *Catcher* than was necessary for the alleged purpose of criticizing Salinger—especially in using the Caulfield-like character as the main character in *60 Years*.¹⁰⁴ The court said that significant use of Caulfield’s character traits might have been necessary for a parody of *Catcher*, but that the use was unnecessary for the purpose of criticizing Salinger.¹⁰⁵ In addition, the court recognized that *60 Years* utilized “nearly identical supporting characters, settings, tone, and plot devices to create a narrative that largely mirrors that of *Catcher*.”¹⁰⁶ The court also addressed Colting’s adoption of a writing style similar to Salinger’s and observed that it had “the effect of emphasizing the similarities between [the two works], rather than casting a new, contrary light upon [*Catcher*].”¹⁰⁷ All of the above considerations led the court to conclude that the third factor cut strongly against fair use.¹⁰⁸

In applying the fourth fair use factor (the effect of the use upon the potential markets for or value of the copyrighted work), the court stated that the inquiry encompasses not only potential harm to the market for the original, but also potential harm to the markets for derivative works.¹⁰⁹ The court explained that relevant derivative works are those that the author of an original work would develop herself or license others to develop, and that *60 Years*, which it regarded as simply a continuation of the *Catcher* story,

¹⁰¹ *Id. See* 17 U.S.C. § 107 (2006).

¹⁰² *Salinger*, 641 F. Supp. 2d at 263 (quoting *Campbell*, 510 U.S. at 586).

¹⁰³ *Id. See* 17 U.S.C. § 107 (2006).

¹⁰⁴ *Salinger*, 641 F. Supp. 2d at 263–65.

¹⁰⁵ *Id.* at 264. Of course, the court had already concluded that *60 Years* was not a parody of *Catcher*. *See id.* at 256–60.

¹⁰⁶ *Id.* at 264.

¹⁰⁷ *Id.* at 267. Unlike the expression in a copyrighted work, a writer’s general style would not normally be part of what the copyright on a work protects. *See* 17 U.S.C. § 102(b) (2006). The court appeared to acknowledge this, but asserted that coupled with the similarities in expression it had noted, the similarity in style was a further indication that Colting had borrowed too much for purposes of the third fair use factor. *See Salinger*, 641 F. Supp. 2d at 266–67.

¹⁰⁸ *Salinger*, 641 F. Supp. 2d at 267.

¹⁰⁹ *Id. See* 17 U.S.C. § 107 (2006).

was such a work.¹¹⁰ The court then addressed the potential harm to these markets if the publication of works such as *60 Years* became widespread. According to the court, this practice “could substantially harm the market for a *Catcher* sequel or other derivative works, whether through confusion as to which is the true sequel or companion to *Catcher*, or simply because of reduced novelty or press coverage.”¹¹¹

The court acknowledged that Salinger had disavowed any intention to create, or license others to create, derivative works.¹¹² It regarded that fact as irrelevant, however, given that an original work’s author is entitled to preserve his or her opportunity to create derivative works.¹¹³ This approach, the court observed, may provide an author an incentive to create if that author’s “artistic vision includes leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently.”¹¹⁴ The court concluded its application of the fourth fair use factor by determining that it weighed, “albeit only slightly,” against a finding of fair use.¹¹⁵

The court concluded that all four fair use factors cut against Colting, making him unlikely to succeed with the fair use defense.¹¹⁶ Because Salinger had already established a prima facie case of copyright infringement, the court turned to the irreparable harm prong of the preliminary injunction standard. Following Second Circuit precedent, the court concluded that Salinger’s showing of likelihood of success on the

¹¹⁰ See *Salinger*, 641 F. Supp. 2d at 267.

¹¹¹ *Id.* at 267–68. The court thought it unlikely that *60 Years* would harm the market for *Catcher* itself, however. *Id.* at 267.

¹¹² *Id.* at 268.

¹¹³ *Id.* The court noted that the copyright owner who initially refuses to create or license derivative works is entitled to change his or her mind. *Id.* Salinger died while Colting’s appeal was pending. *Salinger*, 607 F.3d 68, 70 n.1. Although his estate may take the same view he did regarding possible derivative works, it is of course possible that the estate will view the matter differently.

¹¹⁴ *Salinger*, 641 F. Supp. 2d at 268. The “author’s artistic vision” language has a moral rights ring to it. See Visual Artists Rights Act, 17 U.S.C. § 106A (2006). See also *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 47–48, 49 (1st Cir. 2010) (noting that Visual Artists Rights Act (VARA) provides moral rights and discussing right of integrity established by VARA). Novels, whether classics such as *Catcher* or ones of lesser renown, do not qualify for VARA’s moral rights protections. See 17 U.S.C. §§ 101, 106A (2006). The court’s use of the “artistic vision” language suggests, therefore, that the court may have been more accommodating of Salinger’s concerns than existing law warrants. For further discussion of such issues, see *infra* text accompanying notes 234–235, 267–275, 340–342.

¹¹⁵ *Salinger*, 641 F. Supp. 2d at 268.

¹¹⁶ *Id.*

merits gave rise to a presumption of irreparable harm.¹¹⁷ The court therefore issued a preliminary injunction, prohibiting the defendants from “manufacturing, publishing, distributing, shipping, advertising, promoting, selling, or otherwise disseminating any copy of *60 Years* or any portion thereof, in or to the United States.”¹¹⁸

B. The Second Circuit Decision

Colting appealed the preliminary injunction.¹¹⁹ The Second Circuit upheld the district court’s resolution of the fair use issues, though with minimal analysis.¹²⁰ Nevertheless, the appellate court vacated the preliminary injunction and remanded the case for reconsideration under a new preliminary injunction standard.¹²¹

Relying on the Supreme Court’s decisions in *eBay, Inc. v. MercExchange, L.L.C.*¹²² and *Winter v. Natural Resources Defense Council*,¹²³ the Second Circuit outlined a new four-part test for whether a preliminary injunction should be granted in a copyright case.¹²⁴ First, the copyright owner must have demonstrated either likely success on the merits

¹¹⁷ *Id.* at 268–69.

¹¹⁸ *Id.* at 269.

¹¹⁹ *Salinger*, 607 F.3d. While the case remained pending in the U.S. Court of Appeals for the Second Circuit, J.D. Salinger died. Colleen and Matthew Salinger, trustees of the J.D. Salinger Literary Trust, were substituted as parties. *Id.* at 70 n.1. In our discussion of the Second Circuit’s decision and in later analysis, we will refer to Colleen and Matthew Salinger collectively as “Salinger.”

¹²⁰ Because the matter of likelihood of success on the merits was relevant to the preliminary injunction standard announced in the decision, *id.* at 75, 78–83, the Second Circuit commented briefly on the lower court’s fair use analysis. The Second Circuit noted that the district court had focused mainly on the first fair use factor and on a finding that Colting lacked credibility in his assertions about the purposes of his novel—a finding that was “not clear error.” *Id.* at 83. Then, without commenting meaningfully on the other three fair use factors, the appellate court noted its agreement with the district court’s conclusion that the fair use defense was unlikely to protect Colting against liability. *Id.*

¹²¹ *Id.* at 77–80, 83–84.

¹²² 547 U.S. 388 (2006).

¹²³ 129 S. Ct. 365 (2008).

¹²⁴ *Salinger*, 607 F.3d at 79–83. The Second Circuit concluded that *eBay* controlled even though it was a patent case and involved a request for a permanent injunction. *Id.* at 77–78. See *eBay*, 547 U.S. at 391–95. According to the Second Circuit, *eBay*’s “central lesson” was a prohibition on presuming any aspect of the relevant injunction test, *Salinger*, 607 F.3d at 78 n.7, along with a clear indication that injunctions should not be seen as automatic remedies once liability has been established. *Id.* at 78. See *eBay*, 547 U.S. at 392–93. *Winter* was also relevant because there, the Supreme Court applied that standard to the preliminary injunction setting. *Winter*, 129 S. Ct. at 375–76. See *Salinger*, 607 F.3d at 79.

or serious merits-related questions and a balance of hardships tipping clearly in the plaintiff's favor. Second, the plaintiff must have demonstrated that irreparable injury will result if the preliminary injunction is not issued, with neither a presumption of irreparable harm nor general rules in that regard being employed.¹²⁵ Third, courts must assess the balance of hardships between the parties and issue the preliminary injunction only if that balance favors the plaintiff. Fourth, courts "must ensure that the 'public interest would not be disserved' by the issuance of a preliminary injunction."¹²⁶ Because the *Salinger* district court had considered only the first part of the new test and had presumed the existence of irreparable harm, the Second Circuit concluded that a remand was necessary.¹²⁷

After outlining the new test, the court added related comments. Concerning the likelihood-of-success-on-the-merits prong, the Second Circuit emphasized that courts "should be particularly cognizant of the difficulty of predicting the merits of a copyright infringement claim at a preliminary injunction hearing," and added that "[t]his difficulty is compounded significantly when a defendant raises a colorable fair use defense."¹²⁸ These comments suggest that courts should not be too quick to find that the plaintiff would likely succeed on the merits.¹²⁹

Regarding the test's irreparable harm and balance of hardships prongs, the court noted the related nature of the two, re-emphasized the impermissibility of utilizing irreparable harm presumptions, and underscored the test's requirement of actual consideration of the relative harms.¹³⁰ Highlighting the types of interests at stake when copyright owners seek injunctive relief, the Second Circuit observed that the copyright owner has a strong property interest—as does the defendant concerning his work

¹²⁵ *Salinger*, 607 F.3d at 79–80. In applying this part of the test, the court "must actually consider the injury the plaintiff will suffer" if he loses at the preliminary injunction stage but wins on the merits. *Id.* at 80. Special attention is to be paid to whether an award of money damages would be adequate or, instead, inadequate to compensate for the harm caused. *Id.* The Second Circuit's enunciation of this part of the test reveals a bit of inconsistency as to whether the plaintiff must show that irreparable harm *will* result or, instead, that irreparable harm is *likely*. The court initially said that the second prong of the test requires the plaintiff to "demonstrate[] 'that he is likely to suffer irreparable injury in the absence of an injunction.'" *Id.* (quoting *Winter*, 129 S. Ct. at 374). In immediately following elaboration and in later comments, however, the Second Circuit spoke in terms of harm that the plaintiff "will suffer" in the absence of a preliminary injunction, *id.* at 80–81, and harm that non-issuance of an injunction "would actually cause." *Id.* at 82.

¹²⁶ *Id.* at 80 (quoting *eBay*, 547 U.S. at 391).

¹²⁷ *Id.* at 83. The Second Circuit saw "no reason to disturb" the district court's finding that *Salinger* was likely to succeed on the merits. *Id.* See *supra* note 119.

¹²⁸ *Salinger*, 607 F.3d at 80–81.

¹²⁹ See *id.*

¹³⁰ *Id.* at 81–82.

“to the extent that [it] does not infringe the plaintiff’s copyright.”¹³¹ The court also commented briefly on speech issues even though it did not invoke the First Amendment as a basis for its decision to vacate the preliminary injunction. It noted that the copyright owner has a First Amendment right not to speak, but that the defendant also “has a core First Amendment interest in the freedom to express him- or herself, so long as that expression does not infringe the plaintiff’s copyright.”¹³² These property and speech interests must receive due consideration at the preliminary injunction stage, with a focus on whether they “cannot be remedied after a final adjudication, whether by damages or a permanent injunction.”¹³³

In its final comments on the new standard, the Second Circuit turned to the fourth prong’s requirement that the public interest be considered. After observing that the Copyright Act seeks to promote the store of knowledge to which the public has access, the court stated that by providing authors incentives to create and thereby add to the store of knowledge, the law helps account for the public interest.¹³⁴ The court cautioned, however, that “[t]he public’s interest in free expression is significant and is distinct from the parties’ speech interests.”¹³⁵

Noting that the First Amendment safeguards the public’s interest in receiving information, the Second Circuit pointed out that “[e]very injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment.”¹³⁶ But the court added that “[s]ome uses . . . will so patently infringe another’s copyright, without giving rise to an even colorable fair use defense, that the likely First Amendment value in the use is virtually nonexistent.”¹³⁷ The Second Circuit appeared to suggest that a “colorable” fair use defense—which it thought was not present in *Salinger*—may trigger a need for First Amendment scrutiny as part of the public interest prong of the preliminary injunction standard.¹³⁸ If so, the Second Circuit may have begun contemplating a tentative step away from the usual judicial tendency not to give special consideration to First Amendment interests in copyright infringement cases. In the following section, we consider that tendency and explore its

¹³¹ *Id.* at 81.

¹³² *Id.* See *id.* at 76, 82–83.

¹³³ *Id.* at 81.

¹³⁴ *Id.* at 82.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 82–83.

¹³⁸ See *id.* at 81, 82–83. As will be seen, we regard Colting’s fair use defense as stronger than the *Salinger* courts did. See *infra* text accompanying notes 170–235.

inadequacy. Along the way, we assess *Salinger* and offer our criticisms of Supreme Court copyright decisions in which First Amendment interests have not been satisfactorily addressed.

IV. COPYRIGHT AND THE FIRST AMENDMENT: INADEQUACIES OF THE TRADITIONAL VIEW

As noted earlier, courts consistently adhere to what we call the traditional view of the relationship between copyright and the First Amendment.¹³⁹ Under that view, copyright law has built-in free speech safeguards: the distinction between ideas and expression, and the fair use doctrine. Users of copyrighted works do not need a First Amendment defense, the argument goes, because the same interests underlying the First Amendment will be adequately accounted for by users' ability to borrow ideas and other unprotected matter from copyrighted works and by users' potential entitlement to the fair use defense.¹⁴⁰

Of course, the doctrines that constitute the traditional view do help to safeguard First Amendment interests. Do those doctrines extend far enough, however, to serve as sufficiently reliable substitutes for direct consideration of the First Amendment? To answer that question, we subject the distinction between ideas and expression to closer analysis. Then we do the same with the fair use defense.

A. The Distinction Between Ideas and Expression: Limited Value as First Amendment Safeguard

A rule that infringement liability attaches if the defendant engaged in *any* borrowing—whether of expression, ideas, or facts—from a copyrighted work would obviously threaten free speech interests. Accordingly, the far less onerous rule that infringement occurs only when the defendant borrowed expression seems at first glance sufficiently in accord with the First Amendment. If a user clearly lifted only ideas, facts, or other unprotected matter from a copyrighted work, her free speech interests are not compromised because she is not at risk of being held liable.¹⁴¹

More commonly, the fine line between expression and ideas or facts means that the copyright owner's infringement claim raises difficult

¹³⁹ See *supra* text accompanying notes 13–14, 71–75.

¹⁴⁰ See, e.g., *Eldred*, 537 U.S. at 219–20; *Harper & Row, Publishers, Inc.*, 471 U.S. at 556, 560.

¹⁴¹ See, e.g., *Eldred*, 537 U.S. at 219. See 17 U.S.C. § 102(b) (2006). Indeed, if the case is as clear-cut as the hypothetical posed here, it is likely that no lawsuit would even have been filed.

questions about whether the user borrowed expression or unprotected matter.¹⁴² If the court concludes that the borrowing was limited to unprotected matter, no liability attaches and the user's speech interests are vindicated without any need to resort to the First Amendment. However, if the court determines that protected expression was taken, the defendant faces liability unless the fair use doctrine or the First Amendment comes to the rescue. The fair use defense may be held meritorious in some instances, but a court that adheres to the traditional view will not apply the First Amendment if the fair use defense fails.¹⁴³ Yet the defendant may have borrowed expression while engaging in creative activity that involved speech—speech entitled to receive substantial First Amendment protection if the context had not been that of copyright.¹⁴⁴

In assuming that the distinction between ideas and expression suitably protects First Amendment interests because users of copyrighted works may freely borrow ideas, facts, and other unprotected matter, the traditional view fails to accommodate the need speakers may have to borrow expression. Users' speech may sometimes be far more striking and effective if it can utilize phrasing or other expression from copyrighted works.¹⁴⁵ By flatly prohibiting such borrowing, however, the distinction between ideas and expression falls well short of meaningfully safeguarding free speech interests. In the end, it offers First Amendment-like protection only when that protection is not really needed because there is no risk of liability when only ideas or facts are borrowed. If a First Amendment-based shield becomes desirable because the defendant borrowed expression while engaging in speech, the distinction between ideas and expression loses all

¹⁴² See Jeb Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 14–15 (2002). The expression vs. ideas distinction is not an adequate First Amendment protector, in part because “[d]istinguishing ideas from expression is notoriously tricky.” *Id.* at 14. See Symposium, *Constitutional Challenges to Copyright: Copyright and Freedom of Expression*, 30 COLUM. J.L. & ARTS 319, 324 (hereinafter *Constitutional Challenges*) (remarks of Joseph Liu) (noting “notoriously vague” line between expression and ideas).

¹⁴³ See, e.g., *Harper & Row*, 471 U.S. at 556–57, 560, 569.

¹⁴⁴ See *Constitutional Challenges*, *supra* note 142, at 325 (remarks of Joseph Liu). Political speech, of course, receives extensive First Amendment protection. See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 892 (2010). Speech of a literary or artistic nature is also fully protected noncommercial speech. The same is true of expression on social, economic, or scientific issues, as well as speech on a wide range of other matters of public interest and concern. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). The Supreme Court has recognized that full First Amendment protection should be accorded to “expression about philosophical, social, artistic, economic, literary, [and] ethical matters—to take a non-exhaustive list of labels.” *Id.*

¹⁴⁵ Netanel, *supra* note 74, at 14; Denicola, *supra* note 75, at 293; Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1069–70 (2000).

effectiveness as a free-speech-protection device.¹⁴⁶

*Harper & Row, Publishers, Inc. v. Nation Enterprises*¹⁴⁷ reveals the inadequacy of the distinction between ideas and expression as a protector of First Amendment interests. There, the magazine known as *The Nation* used 300 to 400 words from the unpublished manuscript of former President Ford's book in an article that revealed portions of the book's content and addressed its discussion of the pardon issued to former President Nixon.¹⁴⁸ The *Harper & Row* Court espoused the traditional view in declining to consider a possible First Amendment privilege for the defendant. As the Court observed, the distinction between ideas and expression and the fair use doctrine adequately accommodated First Amendment interests.¹⁴⁹

It is clear that if *The Nation* had borrowed only general ideas and facts from the Ford manuscript, the magazine would not have been held liable. The ability to use general ideas and facts should not have been seen as eliminating a need for further consideration of the First Amendment, however. Without the selective use of actual language from the Ford memoirs, *The Nation's* article would not have had the same force and enlightening effect. Yet the Court's decision effectively took away that editorial freedom even though the defendants' article constituted political speech—a type of speech ordinarily very highly valued under the First Amendment.¹⁵⁰ *Harper & Row* thus contributed to a regrettable tendency we continue to see: courts' uncritical citation of the distinction between ideas and expression as a reason for not confronting First Amendment issues head-on.¹⁵¹

In discussing the relationship between copyright and the First Amendment, the *Harper & Row* Court observed that the framers of the Constitution regarded copyright as “the engine of free expression.”¹⁵² The Court went on to stress that “[b]y establishing a marketable right to the use of one's expression,” copyright law furnishes incentives to create.¹⁵³ The

¹⁴⁶ See Netanel, *supra* note 74, at 14–20; Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 284 (2009).

¹⁴⁷ 471 U.S. 539 (1985).

¹⁴⁸ *Id.* at 541–45, 548–49.

¹⁴⁹ *Id.* at 556–57, 560.

¹⁵⁰ See *supra* note 144.

¹⁵¹ See, e.g., *Eldred*, 537 U.S. at 219. Although key considerations helping to shape the *Harper & Row* decision included the unpublished nature of the Ford manuscript and the mysterious circumstances under which *The Nation* acquired a copy, the Court presumably would have come to the same conclusion even absent those considerations. 471 U.S. at 543, 551–55, 562–69.

¹⁵² 471 U.S. at 558.

¹⁵³ *Id.*

“engine of free expression” has operated undeniably well in that regard, but copyright law also contemplates enhancing creativity by allowing, in appropriate instances, room for others to borrow otherwise protected matter from copyrighted works.¹⁵⁴ Courts, as in *Harper & Row*, neglect that part of the “engine” when they invoke the distinction between ideas and expression as a justification for not applying First Amendment scrutiny despite the presence of significant speech interests.¹⁵⁵

Nearly two decades after *Harper & Row*, the Supreme Court decided *Eldred v. Ashcroft* and again cited the distinction between ideas and expression as a reason for not conducting an extensive First Amendment-based inquiry.¹⁵⁶ In *Eldred*, the Court upheld the Sonny Bono Copyright Term Extension Act of 1998 (CTEA)¹⁵⁷ against a constitutional challenge based on the Copyright Clause and the First Amendment.¹⁵⁸ As in *Harper & Row*, *Eldred* gave the distinction between ideas and expression greater weight than it should have received. Eric Eldred, who challenged the CTEA, could not have achieved his expressive purposes by using only unprotected ideas and facts that appeared in copyrighted works. Instead, he needed to use those works’ expression—something he would have been free to do very soon if not for the CTEA because the relevant copyrights had been set to expire.¹⁵⁹ Allowing Eldred to appropriate the ideas and facts thus did not lead to a meaningful consideration of the First Amendment argument.

The facts in *Salinger v. Colting*¹⁶⁰ provide a further example of the idea versus expression distinction’s inability to furnish meaningful protection for First Amendment interests. Of course, in his novel, Colting could have decided to feature an elderly protagonist who still has some of the same characteristics he had as a teenager and still possesses some of the same attitudes he displayed six decades earlier. Had Colting done only that, he would not have been at risk of copyright infringement liability because the court would have concluded that he merely borrowed unprotected ideas and

¹⁵⁴ *Campbell*, 510 U.S. at 574–75, 577; *Stewart*, 495 U.S. at 236.

¹⁵⁵ See Bunker, *supra* note 146, at 286 (noting that “invoking the idea/expression dichotomy is frequently a sort of ceremonial throat-clearing—a ritual incantation to ward off deep thought that allows the court to acknowledge free speech interests in the abstract and then move on to the business of protecting the copyright holder”). See also *supra* note 144 (discussing speech highly valued under First Amendment).

¹⁵⁶ 537 U.S. at 219.

¹⁵⁷ 17 U.S.C. §§ 302, 304 (2006).

¹⁵⁸ 537 U.S. at 218, 221–22.

¹⁵⁹ See *id.* at 193. One needs to account for the extremely long duration of copyrights when considering how to accommodate First Amendment interests. See *infra* text accompanying notes 236–244.

¹⁶⁰ 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

themes. Colting, however, did not stop there. In *60 Years*, he utilized Salinger's protected expression by drawing upon the Holden Caulfield character, by employing *Catcher*-like dialogue and descriptions, and by referring to plot details from the classic novel.¹⁶¹ But if Colting had not borrowed expression from *Catcher*, the premise of his novel, the commentary he sought to provide, and the insights he hoped to offer would all have suffered.

A cynic might say that *60 Years* did not match *Catcher*'s quality and that society would be no worse off if the Coltings of the world could not borrow from well-known works of literature in the manner that Colting did. The literary quality, or lack of quality, of a defendant's work is irrelevant, however.¹⁶² The marketplace can sort out the quality issue. What is important is the creative effort and the resulting creative work. Copyright law is designed to enhance creativity, usually through granting authors significant rights over their works but sometimes through allowing others to borrow from those works.¹⁶³ Whether well-done or poorly written, *60 Years* is speech—and a type of speech normally very securely protected under the First Amendment.¹⁶⁴

Despite copyright law's creativity-enhancing purposes and the First Amendment's speech-furthering purposes, the district court preliminarily enjoined the publication and distribution of *60 Years*.¹⁶⁵ To its credit, the court did not attempt to ground its decision on an application of the distinction between ideas and expression. It included the seemingly obligatory mention of that distinction as a way of accommodating First Amendment interests, but rested its decision largely on a rejection of the defendants' fair use defense.¹⁶⁶ Although the Second Circuit upheld the lower court's fair use determination, it vacated the preliminary injunction because of issues related to the appropriate standard for granting such relief.¹⁶⁷ The district court and the Second Circuit seemed to recognize that the nature of Colting's novel necessitated some borrowing of expression from *Catcher*, but each court—erroneously, in our view—regarded the borrowing that occurred as excessive, insufficiently transformative, and

¹⁶¹ *Id.* at 253–54, 259–63.

¹⁶² *Campbell*, 510 U.S. at 582–83; *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512, 523 (7th Cir. 2002). If copyright law were to contemplate that courts serve as “judges of the quality of expressive works,” a First Amendment problem would arise. *Id.*

¹⁶³ *Campbell*, 510 U.S. at 575, 577, 579; *Stewart*, 495 U.S. at 236. *See Suntrust Bank*, 268 F.3d at 1265, 1268.

¹⁶⁴ *See supra* note 144.

¹⁶⁵ *Salinger*, 641 F. Supp. 2d at 268–69.

¹⁶⁶ *Id.* at 255–68.

¹⁶⁷ *Salinger*, 607 F.3d at 83–84.

unduly prejudicial to Salinger's interests as a copyright owner.¹⁶⁸

B. The Fair Use Doctrine: Not Always Reliable as First Amendment Safeguard

The fair use doctrine undeniably operates to protect free speech interests in some instances. When a court holds that the defendant engaged in fair use and therefore is not liable, the result is obviously the same one the defendant would have hoped for if a true First Amendment defense had been permitted. The problem arises, however, when the court rejects the fair use defense and infringement liability looms. In that situation, it should not automatically be assumed that the court's fair use analysis took suitable account of free speech concerns. Courts make that assumption, however, when they adhere to the traditional view of the relationship between copyright and the First Amendment. Further examination of *Salinger* and relevant Supreme Court decisions will help demonstrate the uneasy nature of that relationship.¹⁶⁹

1. Shortcomings in First Factor Analysis

Using standards set in *Campbell v. Acuff Rose Music, Inc.*,¹⁷⁰ the district court¹⁷¹ labored mightily to conclude that *60 Years* did not contain ascertainable parodic content regarding *Catcher* or the Holden Caulfield character and did not otherwise comment on Salinger's copyrighted material. Instead, the court saw extensive borrowing of protected expression—and little more.¹⁷² The supposed absence of commentary in Colting's novel on Salinger's copyrighted material caused the court to conclude that the novel either was not a parody or was not one that could

¹⁶⁸ See *id.* at 83; *Salinger*, 641 F. Supp. 2d at 256–68.

¹⁶⁹ The Supreme Court decision receiving the most attention will be *Campbell*, 510 U.S. See *infra* text accompanying notes 170–200.

¹⁷⁰ 510 U.S. at 577–78.

¹⁷¹ In the *Salinger* assessments in this subsection and the following one, mentions of “the court” or “the *Salinger* court” will be references to the district court decision unless the context clearly indicates otherwise. When we allude to something the Second Circuit held, said, or suggested regarding fair use or First Amendment issues, we will normally say “the Second Circuit” or “the appellate court.”

¹⁷² See *supra* text accompanying notes 89–98. The court “gave little weight to the fact that Colting had imaginatively recast Salinger's character in a wholly new novel that was highly transformative.” Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 67, 87 (2010).

meet *Campbell*'s test for whether fair use protection might be available.¹⁷³

The foregoing conclusion is troubling in two respects. First, it is surprising that the court could find no implicit commentary on Salinger's Caulfield character in Colting's novel. After repeatedly emphasizing the similar attitudes and traits shared by the Caulfield and Mr. C characters, the court characterized the similarities as clear indications that Colting had not engaged in commentary on Caulfield or *Catcher* and had not otherwise injected meaningful new content.¹⁷⁴ Yet the court might just as easily have seen implicit commentary in Colting's decision to have his elderly character possess many of the same attitudes and traits the character had as a teenager. If a rap version of "Oh, Pretty Woman" with altered lyrics reflected the requisite commentary on the copyrighted work,¹⁷⁵ how could there not be sufficient implicit commentary in Colting's novel, given its premise?¹⁷⁶

Second, the *Salinger* court's conclusion reveals problems with the *Campbell* approach insofar as it contemplates fine determinations concerning whether a supposed parody contains commentary on the copyrighted work. Such commentary in a parody will nearly always be implicit rather than explicit.¹⁷⁷ Although fair use determinations are always

¹⁷³ See *supra* text accompanying notes 91–94. Of course, Colting did not help himself by calling *60 Years* a sequel before Salinger filed the case and then attempting to make a parody argument after the case was filed. See *Salinger*, 641 F. Supp. 2d at 258, 260, n.3; *Salinger*, 607 F.3d at 83. But see *Suntrust Bank*, 268 F.3d at 1274 n.27 (noting that fair use protection may apply to use that was parody even though defendant did not use "parody" label).

¹⁷⁴ See *supra* text accompanying notes 89–92. Besides basing his Mr. C character on Salinger's Caulfield character, Colting included Salinger himself as a character in *60 Years*. The court noted that even if the use of Salinger as a character injected commentary, the commentary was on Salinger rather than on Salinger's copyrighted material. *Salinger*, 641 F. Supp. 2d at 261 n.4, 262. Accordingly, the court concluded that any commentary on Salinger would not enable Colting to satisfy *Campbell*'s test for whether a parody may qualify for fair use treatment. *Id.* at 261 n.4. See *Campbell*, 510 U.S. at 580–82. This conclusion serves as a further indication that *Campbell*'s test for whether a parody is eligible for fair use treatment does not adequately account for First Amendment interests. Colting's inclusion of commentary on Salinger, while not helpful to Colting in the *Campbell*-influenced fair use analysis, was speech that would normally be highly valued expression if a true First Amendment analysis were employed. See *supra* note 144.

¹⁷⁵ See *Campbell*, 510 U.S. at 581–83.

¹⁷⁶ According to the Second Circuit, the "premise [of *60 Years*] is that Salinger has been haunted by his creation [the Caulfield/Mr. C character] and now wishes to bring him back to life in order to kill him. Unsurprisingly, this task is easier said than done." *Salinger*, 607 F.3d at 72. See *Suntrust Bank*, 268 F.3d at 1268–69 (concluding that nature and content of defendant's novel reflected commentary on well-known, borrowed-from novel).

¹⁷⁷ For instance, the parody of "Oh, Pretty Woman" did not literally state the following: "The song being parodied here sets forth a naïve and overly romantic view of relationships

fact-specific, the danger of inconsistent results on seemingly similar fact patterns seems especially significant when any commentary that is present will be implicit.¹⁷⁸ This potential for inconsistent results in cases presenting similar instances of speech causes *Campbell*'s approach to the first fair use factor to be inadequate as a First Amendment safeguard.¹⁷⁹

Having concluded that Colting's novel did not meet *Campbell*'s test for whether a parody may merit fair use protection, the *Salinger* court considered whether Colting's use of Salinger's copyrighted material was otherwise sufficiently transformative to make the first factor point in favor of fair use.¹⁸⁰ The court went the plaintiff's way on the transformative use issues despite noting that Colting's novel was somewhat transformative in utilizing Salinger himself as a character for the purpose of engaging in commentary on the famous author. In determining that *60 Years* was insufficiently transformative,¹⁸¹ the *Salinger* court provided an analysis that was no more satisfactory than its analysis of whether Colting's novel

between men and women and as such bears little relationship to the reality of life on the street." Rather, if commentary of that nature were present, it would be by inference from the parody's lyrics. *See Campbell*, 510 U.S. at 582–83.

¹⁷⁸ It does not seem unreasonable to conclude that other courts, if faced with the same set of facts present in *Salinger*, would have little difficulty finding the necessary commentary on the plaintiff's copyrighted material. As suggested earlier, *see supra* text accompanying notes 175–176, the Supreme Court's conclusion that the necessary commentary was present in *Campbell* would seem to provide adequate cover for a court to identify the requisite commentary in a fact pattern resembling that of *Salinger*. *See Campbell*, 510 U.S. at 582–83. *See also Suntrust Bank*, 268 F.3d at 1268–69 (defendant's novel included commentary on borrowed-from novel). In *Salinger*, the district court cited *Suntrust Bank*, but characterized it as a case in which the commentary on the underlying work was obvious (in supposed contrast with *Salinger*, where the court said it was unable to identify any such commentary). *Salinger*, 641 F. Supp. 2d at 1257–58. We submit that on the implicit commentary issue, differences between the respective uses at issue in *Suntrust Bank* and *Salinger* were far less clear-cut than the latter court indicated.

¹⁷⁹ Similar problems attend *Campbell*'s previously noted parody versus satire distinction. *See supra* note 51. For further examination of the distinction's shortcomings in a First Amendment sense, *see infra* text accompanying notes 312–315.

¹⁸⁰ As noted earlier, *Campbell* had established that transformative uses of copyrighted works tend to be given a preferred status in fair use determinations. *See supra* text accompanying notes 45–47.

¹⁸¹ *Salinger*, 641 F. Supp. 2d at 262–63. One reason was the court's expression of doubt about Colting's assertion that criticizing Salinger was a primary purpose of his novel, given Colting's pre-litigation statements indicating that he regarded the novel as a sequel to *Catcher*. *Id.* at 260 n.3, 262. In its limited review of the district court's fair use analysis, the Second Circuit noted that the lower court's determination regarding Colting's credibility was "not clear error." *Salinger*, 607 F.3d at 83. Colting did himself no favors with his pre-litigation statements, but we submit that the district court and the Second Circuit placed too much weight on those statements—and too little weight on key fair use and free speech considerations—in deciding the case.

reflected commentary on Salinger's copyrighted material. The court took an unduly narrow view of what *Campbell* contemplated in that decision's discussion of transformative uses.¹⁸²

Perhaps because the well had already been poisoned by the court's conclusion that commentary on Salinger was irrelevant to whether *60 Years* satisfied *Campbell*'s parody-as-fair-use-candidate test,¹⁸³ the *Salinger* court inappropriately minimized the significance of Colting's use of Salinger as a character in order to comment on the well-known author. That commentary added significant new material to what Colting borrowed from *Catcher*¹⁸⁴ and served to give Colting's novel a purpose different from that of *Catcher*. Yet the court, seemingly set on downplaying the importance of any commentary on Salinger, read into *Campbell*'s discussion of transformative uses a supposed requirement that the use be consistently transformative. Colting's use did not meet that requirement, the court concluded, because the Salinger character appeared on "only 40" pages of a 277-page novel.¹⁸⁵ However, no such requirement is stated in *Campbell* or reasonably contemplated by it.¹⁸⁶

If properly applied, *Campbell*'s guidance concerning the first fair use factor can help lead to well-reasoned fair use determinations. With suitable modifications of the sort to be outlined later herein, *Campbell*'s guidance may also go a long way toward safeguarding First Amendment interests.¹⁸⁷ The *Salinger* court, however, misapplied *Campbell*, not only by ascribing too narrow a scope to the concept of a transformative use¹⁸⁸ but also by

¹⁸² See *Campbell*, 510 U.S. at 578–79. In *Salinger*, the Second Circuit chose not to second-guess the lower court's fair use determination. *Salinger*, 607 F.3d at 83. However, the appellate court observed: "It may be that a court can find that the [first] fair use factor favors a defendant even when the defendant and his work lack a transformative purpose, [but we] need not decide that issue here." *Id.* (emphasis omitted). This comment could suggest that if the Second Circuit had been in the district court's position, it might have viewed the first factor differently.

¹⁸³ See *supra* text accompanying notes 88, 94.

¹⁸⁴ It might be argued that Colting could have commented on Salinger and his reclusive nature without borrowing expression from *Catcher*. However, the strong public association between Salinger and his famous Holden Caulfield character would make references to that character a logical thing to do in the course of commentary on the well-known author. Moreover, commentary on a well-known author would normally receive very substantial First Amendment protection. See *infra* text accompanying notes 203–204.

¹⁸⁵ *Salinger*, 641 F. Supp. 2d at 262.

¹⁸⁶ Neither does *Campbell* seem to contemplate the page-counting exercise engaged in by the *Salinger* court. But if page-counting were relevant to the question of whether the use was transformative, use of Salinger as a character on 40 pages of the novel should not be seen as insignificant.

¹⁸⁷ See *infra* text accompanying notes 289–315.

¹⁸⁸ As will be seen, the court's mishandling of the transformative use issues under the first

summarily determining that Colting's profit motive caused the first fair use factor to operate against him.¹⁸⁹ *Campbell* called for a careful weighing and balancing process under factor one, with transformative uses and purposes such as criticism or commentary having the potential to offset a defendant's commercial motivation. The *Salinger* court failed to pay adequate attention to *Campbell*'s instruction that in the fair use analysis, the significance (or lack of significance) of a defendant's commercial motivation will vary from case to case—depending largely on the presence or absence of sufficient offsetting considerations.¹⁹⁰

Moreover, the *Salinger* court appeared to ignore an important observation in *Campbell* regarding different sorts of commercial motivations. The *Campbell* observation was not extensively developed,¹⁹¹ but if the *Salinger* court had heeded it, the first fair use factor would likely have operated in Colting's favor. In *Campbell*, the Supreme Court distinguished between two uses of a parody of a copyrighted work: a defendant's use of the parody in order to advertise a product and a defendant's sale of the parody itself. The court suggested that the former should trigger greater concern, and the latter lesser concern, in the fair use analysis.¹⁹² In *Campbell*, the parody itself—2 Live Crew's version of the copyrighted song—was being sold. The defendants were not attempting to advertise a product (say, beer) when they distributed their parody.¹⁹³

As in *Campbell*, the parody in *Salinger* (Colting's novel) was to have been sold.¹⁹⁴ The *Salinger* court, however, missed this insight from *Campbell*, and in the process overlooked what should have been a key consideration. Of course, the *Salinger* court concluded that *60 Years* was not a parody or, if it was a parody, was not one that commented on Salinger's copyrighted material.¹⁹⁵ But neither of those alternative conclusions makes *Campbell*'s distinction inapplicable. *Campbell* referred to a parody itself being sold because a parody was present in the facts. What *Campbell* logically contemplated, however, was a distinction between two uses of speech (whether a parody or not): speech used to promote the sale of

fair use factor seems to have had spillover effects regarding the third fair use factor. *See infra* text accompanying notes 219–222.

¹⁸⁹ *Salinger*, 641 F. Supp. 2d at 263.

¹⁹⁰ *See Campbell*, 510 U.S. at 584–85. The *Salinger* court's discussion of the commercial motivation issue was confined to two sentences. *Salinger*, 641 F. Supp. 2d at 263.

¹⁹¹ *See Campbell*, 510 U.S. at 585.

¹⁹² *Id.*

¹⁹³ *Id.* Therefore, the Court's comment on parodies used to advertise products was largely dictum—but nonetheless instructive dictum. *See id.*

¹⁹⁴ *See Salinger*, 641 F. Supp. 2d at 254.

¹⁹⁵ *Id.* at 256–61.

a product and speech itself being sold.¹⁹⁶ In *Salinger*, Colting's novel represented speech for sale, regardless of whether the novel amounted to a parody. The court therefore should have considered the nature of what Colting was selling when it applied the first fair use factor. Had it done so, Colting's chances of succeeding with the fair use defense would have been enhanced and the court might have reached a result more in accord with *Campbell*'s signal regarding the fair use analysis.

Campbell, moreover, appears to have contemplated something further: a First Amendment-friendly distinction between uses of speech, even though the Court did not expressly invoke the First Amendment.¹⁹⁷ A great deal of speech that receives full First Amendment protection is profit-motivated but amounts to speech itself being sold (*e.g.*, newspapers, magazines, books, movies, music, and the like). Such speech is classified as noncommercial in nature because the expression's entertainment, artistic, creative, or informational nature outweighs the underlying profit motive.¹⁹⁸ Less-protected commercial speech, on the other hand, is present when the speech is used to propose a commercial transaction (*e.g.*, sale of a product)—the very type of speech *Campbell* identified as a weaker fair use candidate.¹⁹⁹ The *Campbell* distinction thus offered a potential method for accommodating free speech concerns under the fair use rubric, if lower courts do a better job than the *Salinger* court did in picking up on it. Yet to be truly effective as a First Amendment safeguard, the distinction must be clarified and made a more explicit part of the analysis.²⁰⁰

¹⁹⁶ See *Campbell*, 510 U.S. at 585.

¹⁹⁷ See *id.* *Campbell*'s only mention of the First Amendment came in a parenthetical quotation of a sentence from a lower court decision dealing with trademark issues. See *id.* at 583.

¹⁹⁸ See, *e.g.*, *United States v. Playboy Entm't Group*, 529 U.S. 803, 807, 811, 814 (2000); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 47–51, 55–56 (1988); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952). Full First Amendment contemplates that the government will have little latitude to regulate the content of speech. See, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010); *Playboy*, 529 U.S. at 812–13. For further discussion of full First Amendment protection and the types of speech to which it attaches, see *supra* note 144.

¹⁹⁹ See *Campbell*, 510 U.S. at 585. Supreme Court decisions usually define commercial speech as “speech that does no more than propose a commercial transaction.” See, *e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The clearest example of commercial speech is an advertisement for the sale of a product or service or for the promotion of a business. See, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 488, 496 (1996); *Va. Bd. of Pharmacy*, 425 U.S. at 762. Commercial speech receives at most an intermediate level of First Amendment protection rather than the full protection extended to noncommercial speech. See, *e.g.*, *Va. Bd. of Pharmacy*, 425 U.S. at 763–65, 770–72.

²⁰⁰ We will propose a way to do so. See *infra* text accompanying notes 290–296.

One more aspect of *Salinger*'s first factor analysis bears mentioning because it further illustrates the inaccuracy of the conventional wisdom that the fair use doctrine adequately protects free speech interests and makes a First Amendment defense unnecessary.²⁰¹ As noted earlier, the court made much of the distinction between commentary on *Salinger*'s copyrighted materials and commentary on *Salinger* himself. The latter commentary was all the court could identify—a finding that helped to doom Colting's fair use chances.²⁰² What clearly hurt Colting in the fair use analysis would have helped him, however, if proper First Amendment scrutiny had been applied. Despite his desire to protect his privacy, *Salinger*'s status as one of the most well-known writers of our time made him a public figure.²⁰³ Commentary on, or other speech about, public figures normally receives very substantial protection under the First Amendment.²⁰⁴

Consider, for instance, what *Salinger* would have had to prove if he had been suing Colting for defamation rather than copyright infringement. A public figure such as *Salinger* cannot win a defamation case without proving that the defendant made the litigation-triggering false statement with actual malice (*i.e.*, with knowledge of the statement's falsity or with reckless disregard for the truth).²⁰⁵ This proof-of-fault requirement is an example of full First Amendment protection, as tailored to a particular type of case.²⁰⁶

If First Amendment considerations dictate that *Salinger* would have had to prove actual malice in order to win a defamation case, First Amendment considerations should have a role to play in other litigation—even copyright infringement litigation²⁰⁷—in which the defendants are at risk of liability for speech about a public figure. Although it could be argued that the free speech interests of defendants in copyright infringement cases should take a backseat to the plaintiff's important interest in protecting his copyright, the argument fails when one considers defamation law. The plaintiff in a defamation case has a very substantial interest at

²⁰¹ See *supra* text accompanying note 169.

²⁰² See *Salinger*, 641 F. Supp. 2d at 260–63.

²⁰³ Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (explaining scope of public figure classification in defamation cases).

²⁰⁴ See, e.g., *N.Y. Times*, 376 U.S. at 272.

²⁰⁵ *Id.* at 279–80; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162, 164 (1967) (Warren, C.J., concurring in the result); *Gertz*, 418 U.S. at 342.

²⁰⁶ See *N.Y. Times*, 376 U.S. at 264–65, 272.

²⁰⁷ See *Bunker*, *supra* note 146, at 294–95. Even though the Second Circuit in *Salinger* did not second-guess the lower court's fair use determination, *Salinger*, 607 F.3d at 83, and did not invoke the First Amendment as a ground for vacating the preliminary injunction, *id.* at 76, the appellate court acknowledged that defendants in copyright infringement cases have First Amendment interests at stake. *Id.* at 81, 82–83.

stake: protection of his or her reputation. Despite that interest's significance, defendants receive extensive First Amendment protection.²⁰⁸ Protecting a copyright, important as it is, seems no more significant an interest than protecting one's reputation. It may even be less important than the reputational interest. Reasonable ways to accommodate First Amendment interests in copyright infringement cases can be devised.²⁰⁹

2. Shortcomings in Second, Third, and Fourth Factor Analyses

The *Salinger* court's applications of the second, third, and fourth fair use factors were also problematic for, and not suitably accommodating of, the First Amendment interests of those who borrow from copyrighted works in the course of their own creative activity.²¹⁰ On its way to determining that the second factor (the nature of the copyrighted work)²¹¹ cut against fair use, the court noted that as a work of fiction, *Catcher* was the type of "creative expression [that] falls within the core of the copyright's protective purposes."²¹² The court then took an approach consistent with one courts often utilize in making fair use determinations: concluding that factor two worked against Colting because the work from which he borrowed was highly creative in nature, as opposed to largely factual.²¹³

At first glance, this conclusion seems unobjectionable. However, the court failed to consider the combined effect of *Campbell* and *Harper & Row*.²¹⁴ In *Harper & Row*, the Supreme Court emphasized that if a defendant borrowed from the plaintiff's unpublished work, such a borrowing would cause the second factor to cut strongly against fair use. A borrowing from a published work, on the other hand, would trigger far less concern in the fair use analysis.²¹⁵ Surprisingly, the *Salinger* court did not address the published versus unpublished consideration when it applied the second factor.²¹⁶ In borrowing from *Catcher*, Colting was borrowing from a

²⁰⁸ See *N.Y. Times*, 376 U.S. at 264–65, 272; *Butts*, 388 U.S. at 162, 164 (Warren, C.J., concurring in the result); *Gertz*, 418 U.S. at 325, 332, 346–48.

²⁰⁹ See *infra* text accompanying notes 279–358.

²¹⁰ Again, we focus on the district court's decision. The Second Circuit merely recited the basics of what the district court had determined regarding the second, third, and fourth factors, and did not subject the lower court's findings regarding those factors to any analysis. *Salinger*, 607 F.3d at 73–74, 83.

²¹¹ 17 U.S.C. § 107 (2006).

²¹² *Salinger*, 641 F. Supp. 2d at 263 (quoting *Campbell*, 510 U.S. at 586).

²¹³ *Id.* See HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 15:52 (2006).

²¹⁴ 471 U.S. 539 (1985).

²¹⁵ *Id.* at 550–55.

²¹⁶ See *Salinger*, 641 F. Supp. 2d at 263. That very issue had been key in *Salinger v. Random House, Inc.*, 811 F.2d 90, 97, 100 (2d. Cir. 1987).

very widely published work. The *Salinger* court thus appeared to ignore a consideration that should have made factor two insignificant in the analysis.

This conclusion is underscored by the approach taken in *Campbell* to the second factor. There, the Court noted that the defendants had borrowed from a highly creative work, but that such a fact “is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”²¹⁷ Given *Catcher*’s iconic status and Salinger’s renown, the novel and its author were logical targets for Colting’s commentary.²¹⁸ Accordingly, the *Salinger* court’s application of the second factor should have reflected reasoning similar to that employed in *Campbell*. Had such reasoning been employed, factor two would have been deemed unimportant. Moreover, the application of the second factor would have been more sensitive to First Amendment interests because it would have helped to preserve room for Colting’s creative activity involving speech.

Problems also attend the *Salinger* court’s application of the third fair use factor, which requires an examination of the amount and substantiality of the portion of the work used in relation to the work as a whole.²¹⁹ The court’s previously noted mishandling of the transformative use issues under the first factor²²⁰ probably had spillover effects regarding the third factor. In determining that factor three operated against Colting, the court stressed what it regarded as a large and excessive amount of borrowing of protected expression from *Catcher*.²²¹ The court failed, however, to take proper account of *Campbell*’s recognition that for purposes of the third factor, a parodist or other commentator may need to be able to borrow more from—and more recognizable parts of—the copyrighted work so that the public can recognize the object of the parody or other commentary.²²² The *Salinger*

²¹⁷ *Campbell*, 510 U.S. at 586.

²¹⁸ *See id.* Although the *Salinger* court thought that Colting was only borrowing from *Catcher* rather than commenting on it, the commentary Colting allegedly offered would have been premised on *Catcher*’s fame and stature. Moreover, there was Colting’s commentary on Salinger himself—commentary that the court recognized was present. *See Salinger*, 641 F. Supp. 2d at 260–63. It would be logical for anyone engaging in commentary on, or criticism of, a famous author to allude to and borrow from his best-known work. However, no such discussion appeared in the court’s opinion. *See id.* at 263.

²¹⁹ 17 U.S.C. § 107 (2006).

²²⁰ *See supra* text accompanying notes 170–190.

²²¹ *See supra* text accompanying notes 103–108.

²²² *See Campbell*, 510 U.S. at 587–89. *See also Suntrust Bank*, 268 F. 3d at 1271 (noting that even though defendant whose novel parodied *Gone With the Wind* (GWTW) borrowed heavily from that famous novel, “[i]t is hard to imagine how [the defendant author] could have specifically criticized GWTW without depending heavily on copyrighted elements of that book”).

court's factor-one error in undervaluing the commentary element in Colting's novel thus infected the court's factor-three analysis. If the court had been more cognizant of what *Campbell* suggested, the court's application of the third factor would have better accommodated First Amendment interests.

The *Salinger* court's application of the fourth fair use factor (effect of the use on potential markets for or value of the copyrighted work)²²³ also fell short in a First Amendment sense. The court complied with precedent—not just any precedent, but a Second Circuit decision involving J.D. Salinger²²⁴—in noting that the determination of harm to potential derivative markets should focus on reasonable markets of the sort that copyright owners would in general pursue, even if the copyright owner has “disavowed any intention to [exploit those markets] during his lifetime.”²²⁵ As the court noted, the copyright owner's “right to change his mind” suggests that opportunities to take advantage of such markets should remain unimpaired.²²⁶

Here, part of the fault lies with precedent cases whose call for focus on derivative markets that copyright owners would typically pursue allowed general rules to assume more significance in *Salinger* than a key fact to the contrary. Fair use, however, is supposed to be a fact-specific, case-by-case determination.²²⁷ *Salinger* made clear his unwillingness to create or license derivative works based on *Catcher*, the Caulfield character, or his other copyrighted works.²²⁸ That fact should have been accounted for in the fair use analysis, instead of being effectively ignored in favor of the fiction created by general rules regarding derivative markets that copyright owners typically exploit.²²⁹ Had that fact received proper attention, the fourth factor, which the district court regarded as weighing “only slightly” against

²²³ 17 U.S.C. § 107 (2006); *Salinger*, 641 F. Supp. 2d at 268.

²²⁴ *Random House*, 811 F.2d at 99.

²²⁵ *Salinger*, 641 F. Supp. 2d at 268 (quoting *Random House*, 811 F.2d at 99).

²²⁶ *Id.* (quoting *Random House*, 811 F.2d at 99).

²²⁷ *Campbell*, 510 U.S. at 577. *See* 17 U.S.C. § 107 (2006). Although *Campbell* did specify that fair use determinations are a case-by-case inquiry, the decision also indicated that the application of the fourth fair use factor should take into account the markets that copyright owners in general would pursue. *Campbell*, 510 U.S. at 592. We contend, however, that when specific facts in a given case stand in contrast with copyright owners' general tendencies, the specific facts should be given greater weight.

²²⁸ Both the Second Circuit and the district court mentioned this fact. *Salinger*, 607 F.3d at 71; *Salinger*, 641 F. Supp. 2d at 268. *See Random House*, 811 F.2d at 99.

²²⁹ The general rules were a fiction as to *Salinger*, given his refusals to create or license derivative works. *See Salinger*, 607 F.3d at 71. They are not necessarily a fiction as to copyright owners generally.

fair use,²³⁰ might have cut the other way. In the process, the defendants' free speech interests would have been more appropriately accounted for, and the First Amendment would have been better served.²³¹

The rest of the blame for a deficient fourth factor analysis must be placed directly on the *Salinger* court, which asserted that a copyright owner's entitlement to refuse to create or license derivative works may serve as an important incentive for a would-be creator to create an underlying work.²³² This premise is questionable. It is difficult to believe that J.D. Salinger regarded, or that any author would regard, the ability to adopt a no-derivative-works policy as a meaningful incentive to create a work. Of course, authors may—as Salinger did—find it desirable to refuse to allow derivative works *once the copyrighted work has been created*, but that is not the same as furnishing an incentive for the creation of the work. More likely, the real incentives will lie in the rights to exploit the resulting work in an economic sense, and in the self-fulfillment that results from exercising creative impulses.²³³

The *Salinger* court's assertion regarding incentives was part of a discussion in which the court stressed the importance of preserving an author's "artistic vision."²³⁴ This problematic reference suggests that the district court may have been influenced by moral rights-like arguments. As explained more fully elsewhere herein, moral rights are not available to authors of works of the sort at issue in *Salinger*.²³⁵ In the end, the court's fourth factor analysis was overly solicitous of copyright owners' interests

²³⁰ *Salinger*, 641 F. Supp. 2d at 268. See *Suntrust Bank*, 268 F.3d at 1277 (Marcus, J., specially concurring) (noting that copyright owner's practice of refusing to grant licenses for derivative works that would be parodies is a consideration that "further undermines" copyright owner's claim).

²³¹ Of course, now that Salinger has died and his heirs control the copyright on his works, they could be more inclined to consider licensing derivative uses of the copyrighted material. That possibility may have been what the Second Circuit suggested in its comments about what could be considered on remand. See *Salinger*, 607 F.3d at 83 n.12. But it is also possible that the heirs will decide to remain true to Salinger's clear wish that derivative works not be permitted.

²³² *Salinger*, 641 F. Supp. 2d at 268.

²³³ We refer here to the copyright owner's rights to make and distribute copies of the work, prepare derivative works, perform the work, and display the work. 17 U.S.C. § 106 (2006). Each of these rights, if affirmatively exercised, may benefit the copyright owner financially. See *Salinger*, 641 F. Supp. 2d at 268. However, the economic incentives provided by the Copyright Act are not the only reasons why authors create new works. See generally Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006).

²³⁴ *Salinger*, 641 F. Supp. 2d at 268.

²³⁵ For an introduction to this issue, see *supra* note 114 and accompanying text. The moral rights issue is examined more fully at *infra* text accompanying notes 267–273, 340–342.

and insufficiently attentive to countervailing speech interests. Thus, it was unsound from a First Amendment perspective.

3. The First Amendment Implications of Copyright Duration Extensions

Suitable allowance for First Amendment interests in copyright litigation is important for another reason: the very lengthy duration of copyrights. An erroneous exclusion of First Amendment safeguards—or the inclusion of an inadequate set of such safeguards—becomes especially problematic when copyright owners' rights receive extended periods of protection at the expense of would-be users' speech interests. Two duration extensions enacted by Congress during recent decades have given copyrights much longer lives than prior law contemplated.

Under the Copyright Act of 1909, copyrights lasted for a basic term of 28 years from publication of the work, plus a renewal term of 28 years if the renewal right was exercised during the basic term's last year.²³⁶ The Copyright Act of 1976 extended the duration of copyrights on pre-1978 works by tacking on 19 years to the renewal term. In addition, the 1976 Act created a new system for determining the duration of copyrights on works created in 1978 or later. For most such works, the copyright would exist for the life of the creator plus 50 years.²³⁷

Only two decades after the effective date of the changes just noted, Congress enacted the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).²³⁸ The CTEA added 20 years to the duration of future copyrights as well as existing copyrights. As a result, the copyright on a work created in 1978 or later lasts for the creator's life plus 70 years (rather than life plus 50 years).²³⁹ If a copyright on a pre-1978 work was still in effect as of 1998, it qualified for the CTEA's 20-year extension. Thus, for qualifying pre-1978 works, the copyright's maximum duration has become 95 years. This figure results from the combined effects of the 1976 and 1998 duration extensions, which have operated to supplement the 28-year basic term with a renewal term of 67 years.²⁴⁰

²³⁶ Copyright Act of 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1077–78 (1909) (current version at 17 U.S.C. § 304 (2006)).

²³⁷ 17 U.S.C. § 302 (2006).

²³⁸ Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827–28 (codified at 17 U.S.C. §§ 302, 304 (2006)).

²³⁹ 17 U.S.C. § 302(a). The rule stated in the text is the basic rule for copyright duration. The copyright on a jointly created work from 1978 or later exists for 70 years beyond the death of the last surviving creator. *Id.* § 302(b). If the work from 1978 or later is a work-made-for-hire, the copyright lasts for 95 years from first publication or 120 years from creation, whichever comes first. *Id.* § 302(c).

²⁴⁰ 17 U.S.C. § 304 (2006).

Salinger's copyright on *Catcher*, secured in 1951 and renewed in 1979, will exist until the end of the year 2046 because of the duration extensions provided for in the 1976 Act and the 1998 CTEA. If not for those two extensions, Salinger's copyright would have expired at the end of 2007 (56 years from 1951),²⁴¹ and there would have been no *Salinger v. Colting*. In that hypothetical world, *Catcher* would have been a public domain work—meaning that Colting would have had free rein to borrow however much he wanted in writing his 2009 novel without infringing upon Salinger's copyright.²⁴²

After Congress decided to enact the duration extensions criticized here, the Supreme Court held that Congress could constitutionally make such a policy judgment even if it acted unwisely in doing so.²⁴³ But the effects of the congressional actions should not be ignored when courts decide whether—and how—to accommodate First Amendment interests in copyright infringement cases. A rule that tells creators in Colting's position to “wait X more years, until the copyright expires” is unjustifiably dismissive of freedom of speech concerns when X is a substantial length of time that owes its existence solely to duration extensions.²⁴⁴

Of course, some readers of *Eldred v. Ashcroft*²⁴⁵ may contend that the Supreme Court's decision closed the door on arguments in favor of a greater role for the First Amendment in copyright litigation. The Court held in *Eldred* that the CTEA, even if an unwise enactment, violated neither Article I, § 8 nor the First Amendment.²⁴⁶ However, the Article I, § 8 issues dominated the majority opinion.²⁴⁷ The First Amendment issues received second-billing, largely because of the traditional notion that copyright's “built-in First Amendment accommodations”—the distinction between ideas and expression and the fair use doctrine—sufficiently safeguard free

²⁴¹ See *supra* notes 236–240 and accompanying text.

²⁴² See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29–30, 33–34 (2003) (noting that once copyright on work expires, there are no restrictions on others' ability to use or exploit the work).

²⁴³ *Eldred*, 537 U.S. at 208, 218–19, 222.

²⁴⁴ In Colting's case, “X” would have been 37 more years—measuring from 2009 (the date of his novel) through 2046. See *supra* notes 236–240 and accompanying text. See also Lessig, *supra* note 145, at 1067 (asserting that retrospective application of duration extensions implicates First Amendment); Netanel, *supra* note 74, at 23–24 (contending that in view of duration extensions, copyright's limited term does not serve as meaningful protector of First Amendment interests).

²⁴⁵ 537 U.S. 186 (2003).

²⁴⁶ *Id.* at 208, 218–19, 222.

²⁴⁷ See *id.* at 198–218. For a detailed analysis of *Eldred*, see Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193 (2004).

speech interests.²⁴⁸ The Court concluded that “when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”²⁴⁹ But the Court also recognized that the court below “spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’”²⁵⁰

So, how should we interpret *Eldred*’s discussion of First Amendment issues? Given the Court’s “as in this case” reminder,²⁵¹ it becomes important not to stray too far from the context in *Eldred*—a constitutional challenge to a duration extension that postponed the plaintiff’s ability to produce and distribute copies of works otherwise about to enter the public domain.²⁵² *Eldred* thus did not hinge on whether an otherwise infringing use should be protected under the fair use doctrine. Instead, it presented a broader question: whether uses that would not have been infringing in the absence of the CTEA could constitutionally be classified as infringing for many years to come through retroactive application of the duration extension.²⁵³ Accordingly, the *Eldred* Court made only general references to the fair use doctrine, as opposed to conducting the factor-based analysis that becomes essential when a case’s outcome depends upon a fair use determination.²⁵⁴ The Court’s suggestions about the relationship between the fair use doctrine and the First Amendment thus relate more directly to the context of a challenge to a sweeping congressional enactment than to whether the fair use doctrine does what a First Amendment defense would do when copyright owners sue users of particular works.

Using language that underscores this point, the *Eldred* Court observed that the CTEA “protects authors’ original expression from unrestricted exploitation.”²⁵⁵ According to the Court,

[p]rotection 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. To the extent such assertions raise First Amendment concerns, copyright’s

²⁴⁸ *Eldred*, 537 U.S. at 219, 221.

²⁴⁹ *Id.* at 221.

²⁵⁰ *Id.* (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).

²⁵¹ *Id.*

²⁵² *See id.* at 193–94.

²⁵³ *See id.* at 193–94, 198, 213–15.

²⁵⁴ *See id.* at 219–20.

²⁵⁵ *Id.* at 221.

built-in free speech safeguards are generally adequate to address them.²⁵⁶

The Court probably was incorrect in arguing that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.”²⁵⁷ But even assuming that this statement was correct and that the *Eldred* plaintiff should be seen as having asserted such a right, neither the Court’s statement nor the *Eldred* outcome should be treated as controlling in a case such as *Salinger*. Colting borrowed from *Salinger*’s copyrighted work, but he did so in presenting his own speech: a novel that added much to the borrowed material while offering commentary on *Catcher* and its famous author. He therefore was not simply asserting “the right to make [Salinger’s] speeches.”²⁵⁸ Accordingly, Colting and similarly situated defendants should not be stymied by *Eldred*’s statement that “copyright’s built-in free speech safeguards are generally adequate” to address the less weighty First Amendment concerns present when a speaker asserts the right to “make other people’s speeches.”²⁵⁹

When the considerations outlined here are coupled with *Eldred*’s acknowledgment that copyrights are not “categorically immune from challenges under the First Amendment,”²⁶⁰ it becomes clear that parties in Colting’s position should not be foreclosed from proposing a more expansive role for the First Amendment in infringement litigation. *Eldred* obviously cannot be read as calling for a freestanding First Amendment defense, but nothing in *Eldred* would seem to preclude adoption of a fair use analysis that is more First Amendment-friendly.²⁶¹ No such preclusion should result from *Eldred*’s statement that “when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”²⁶² In addition to the previously noted limiting factor of the Court’s “as in this case” language,²⁶³ *Eldred*’s mention of the government’s “not [having] altered the traditional contours of copyright protection”²⁶⁴ serves as a further indication that the First Amendment may play a more meaningful role in certain infringement cases. The Court regarded enactment of a copyright duration extension as

²⁵⁶ *Id.*

²⁵⁷ Tushnet, *supra* note 75, at 563–64.

²⁵⁸ *See Eldred*, 537 U.S. at 221.

²⁵⁹ *See id.*

²⁶⁰ *Id.* (quoting *Eldred*, 239 F.3d at 375).

²⁶¹ Later in the article, we will propose and elaborate on such an analysis. *See infra* text accompanying notes 279–342.

²⁶² *Eldred*, 537 U.S. at 221.

²⁶³ *See supra* text accompanying notes 249–54.

²⁶⁴ *Eldred*, 537 U.S. at 221.

consistent with copyright's "traditional contours,"²⁶⁵ but government action inconsistent with those contours may necessitate more rigorous First Amendment scrutiny than copyright's "built-in free speech safeguards" can provide.²⁶⁶

Consider, for instance, what Salinger sought in the case against Colting, and do so in light of the famous author's longstanding attitude toward *Catcher* and the Holden Caulfield character. One expects copyright owners to be a protective lot regarding their creations. Salinger, however, was protective in the extreme. He was adamant not only about preventing others from using his copyrighted material but also about his own refusals to write a *Catcher* sequel or otherwise re-employ the Caulfield character.²⁶⁷ Salinger seemingly wanted to classify *Catcher* and Caulfield as off-limits to all (himself included), as if any later use would compromise the integrity of the work and the character and would alter the vision he had for them at the time of creation.²⁶⁸

In this sense, Salinger went beyond what copyright law normally contemplates even in its recognition that copyright owners may choose not to prepare derivative works and may decline others' requests for such a license.²⁶⁹ Salinger's apparent focus on preserving the integrity of *Catcher* and the Caulfield character suggests a moral-rights-like objective for the requested preliminary injunction.²⁷⁰ Moral rights, however, have not been part of the "traditional contours" of U.S. copyright law.²⁷¹ The emphasis has been on economic rights, as opposed to a moral rights regime that would focus on preserving the work's integrity and the creator's artistic vision.²⁷²

²⁶⁵ See *id.* at 204, 208, 218, 221.

²⁶⁶ See *id.* at 221.

²⁶⁷ See *Salinger*, 607 F.3d at 71, 74.

²⁶⁸ See *id.*

²⁶⁹ See 17 U.S.C. § 106 (2006) (setting forth rights that copyright owner may choose to exercise or not exercise).

²⁷⁰ See H.R. REP. NO. 101-514, at 6915-16 (1990), reprinted in U.S.C.C.A.N. 6915-16 (noting nature of moral rights set forth in Visual Artists' Rights Act). For further discussion of the nature of moral rights, see Matt Williams, *Balancing Free Speech Interests: The Traditional Contours of Copyright Protection and the Visual Artists' Rights Act*, 13 UCLA ENT. L. REV. 105, 121-24 (2005).

²⁷¹ See, e.g., *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (noting that copyright law focuses on economic rights associated with protected works rather than on "personal[] rights of authors"). See also Williams, *supra* note 270, at 123-24 (suggesting that moral rights set forth in Visual Artists' Rights Act may alter traditional contours of copyright law if such rights are not regarded as subject to others' First Amendment interests).

²⁷² See 17 U.S.C. § 106 (2006) (setting forth rights of copyright owner). See also *Gilliam*, 538 F.2d at 24 (noting economic rights focus of copyright law); cf. *Suntrust Bank*, 268 F.3d at 1272 (observing that even though the Supreme Court has not given defendants

Where federal law recognizes moral rights, it does so only as to a narrow range of works of visual art, by virtue of the Visual Artists Rights Act (a set of 1990 amendments to the Copyright Act).²⁷³

Therefore, to the extent that Salinger's preliminary injunction request was premised on moral rights grounds, it sought government action that would alter the traditional contours of copyright. The same is likely to be true even when the relevant copyright owner is not as controlling as Salinger seemed to be regarding his creations but still seeks to stifle unwelcome commentary by suing for infringement.²⁷⁴ Accordingly, the Court's language in *Eldred* would seem to contemplate a more prominent role for the First Amendment in *Salinger*-like cases and commentary-stifling cases.²⁷⁵ As earlier analysis has shown, copyright law's "built-in free speech safeguards"²⁷⁶ do not protect free speech interests to the same extent that usual First Amendment principles do.²⁷⁷ Either a separate First Amendment defense, or a stepped-up fair use analysis more accommodating of First Amendment interests, is therefore in order.

V. BRINGING FAIR USE ANALYSIS MORE IN LINE WITH THE FIRST AMENDMENT

This section focuses on how the fair use analysis can be modified in order to make it more sensitive to First Amendment concerns. It also offers free-speech-influenced recommendations concerning injunctive relief and damages determinations when a plausible fair use defense fails.

Before turning to the fair use recommendations, however, we offer one that should be obvious from our previous analysis: courts should cease their rote mention of the notion that the distinction between ideas and expression

special latitude to borrow from a work because it happens to be famous, neither has the Court "go[ne] so far as to grant well-known works a special, higher copyright status"); *id.* at 1282 (Marcus, J., specially concurring) (noting that copyright owner cannot use copyright law to preserve "reputation" of work or to "protect [the work's] story from 'taint'").

²⁷³ 17 U.S.C. § 106A (2006). Congress enacted the Visual Artists' Rights Act (VARA) in an effort to bring the United States into compliance with the Berne Convention, a key international agreement regarding copyright. 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. However, Congress declined to extend moral rights to works other than the paintings, drawings, prints, sculptures, and photographs singled out in VARA. *See* 17 U.S.C. § 106A (2006).

²⁷⁴ *See Suntrust Bank*, 268 F.3d at 1274, 1276–77; *id.* at 1282–83 (Marcus, J., specially concurring); *Ty, Inc. v. Publ'ns, Int'l*, 292 F.3d 512, 521 (7th Cir. 2002).

²⁷⁵ *See Eldred*, 537 U.S. at 221.

²⁷⁶ *Id.*

²⁷⁷ *See supra* text accompanying note 198; *supra* note 144.

meaningfully safeguards First Amendment interests. The distinction accommodates First Amendment concerns only in the very limited sense that a far more onerous rule contemplating infringement liability for the use of ideas and facts would be indefensible from First Amendment and public policy perspectives. However, when a supposed First Amendment “safeguard” applies—as this one does—only when there would be no liability anyway,²⁷⁸ it does not serve a meaningful role as a free speech protector. So, it is time to drop the fiction.

Why is a modified fair use analysis preferable to a separate First Amendment defense? Copyright has a constitutional foundation because of Article I, § 8’s grant of power to Congress.²⁷⁹ Because both copyright and the First Amendment are rooted in the Constitution, the two must coexist in a reasonable fashion. The frequently outcome-determinative nature of the usual test for restrictions on fully protected noncommercial speech—whether the speech restrictions are necessary to the fulfillment of a compelling government purpose²⁸⁰—seems unlikely to lead to such coexistence. If the test were applied as it is outside the copyright context, free speech interests would likely prevail nearly all the time²⁸¹ when the defendant’s use of the plaintiff’s work amounted to noncommercial speech. That state of affairs may be appropriate outside the copyright setting, but probably does not create a suitable balance when copyright interests oppose First Amendment interests in infringement litigation.

What if the defendant in the infringement case engaged in commercial speech, which merits less First Amendment protection than if the speech had been noncommercial?²⁸² The prevailing test for assessing commercial speech restrictions²⁸³ does not gracefully fit the copyright litigation setting, mainly because it is designed for the direct government regulation context

²⁷⁸ See *supra* text accompanying notes 145–146.

²⁷⁹ U.S. CONST. art. I, § 8, cl. 8.

²⁸⁰ See, e.g., *Citizens United*, 130 S. Ct. at 898; *Playboy*, 529 U.S. at 813.

²⁸¹ The government usually will fail the test, either because it cannot show a compelling purpose (a legitimate or even substantial government purpose will not do), or because the particular speech restriction undergoing evaluation is not truly necessary to achievement of the compelling purpose. See, e.g., *Citizens United*, 130 S. Ct. at 898–911; *Playboy*, 529 U.S. at 813, 818, 826; *Reno v. ACLU*, 521 U.S. 844, 874, 876–77, 879 (1997).

²⁸² See *supra* notes 198–199.

²⁸³ In a judicial challenge to government action that directly regulates the content of nonmisleading commercial speech about a lawful activity, the action will be held not to violate the First Amendment if the government establishes that it possessed a substantial underlying regulatory interest and that the regulation or restriction at issue directly advances the underlying interest in a narrowly tailored way. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64, 566 (1980); *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

rather than the indirect regulation setting of infringement cases.²⁸⁴ In the indirect regulation context, special requirements may have to be adopted in order to address First Amendment interests—whether arising from commercial speech or from noncommercial speech—in ways better suited to the relevant type of case. The defamation cases noted earlier serve as an example of an indirect regulation setting in which the Supreme Court devised special First Amendment-based rules in order to protect free speech interests.²⁸⁵

Because the fair use doctrine already exists in copyright law and may be a meaningful First Amendment safeguard if the relevant analysis is modified, it makes sense to modify that analysis instead of constructing a framework for a separate First Amendment defense. We therefore proceed factor by factor, identifying the ways in which current fair use analysis should be adjusted to account more suitably for free speech interests.²⁸⁶

A.A First Amendment-Sensitive Factor One

The first fair use factor calls for consideration of the “purpose and character” of the defendant’s use of the copyrighted work, “including whether such use is of a commercial nature or is for nonprofit educational purposes.”²⁸⁷ Part of the foundation for a first factor analysis that would take appropriate account of First Amendment interests can be found in the examples Congress listed as potentially strong candidates for fair use protection: criticism or commentary; news reporting; and teaching, scholarship, or research.²⁸⁸ Given their purposes, such uses reflect important free speech interests, even if current fair use analysis sometimes yields them

²⁸⁴ In the direct regulation setting, the government is the source of the speech restriction as well as the initiator of, or an indispensable party to, the legal proceeding in which the First Amendment issue is being addressed. *See, e.g., Citizens United*, 130 S. Ct. 876; *Playboy*, 529 U.S. 803; *Reno*, 521 U.S. 844. For First Amendment purposes, there can also be indirect government action. It exists when a private party initiates a legal proceeding and asks the court to apply a rule that could lead to the imposition of adverse legal consequences (an injunction or a damages award) on a defendant because of the content of the defendant’s speech. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 892 (2002). *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964).

²⁸⁵ *See supra* text accompanying notes 205–208.

²⁸⁶ In *Suntrust Bank*, the Eleventh Circuit went beyond the traditional view that the fair use doctrine automatically furnishes adequate protection for First Amendment interests, and did so in part by suggesting the importance of applying the fair use factors in a manner that would be sensitive to First Amendment concerns. *See Suntrust Bank*, 268 F. 3d at 1265. However, the *Suntrust Bank* court did not propose a specific factor-by-factor set of modifications. *See id.* We undertake that task here.

²⁸⁷ 17 U.S.C. § 107 (2006).

²⁸⁸ *See id.*

less protection than they deserve. Add selected principles from *Campbell* to the statutory examples, and the foundation becomes relatively solid. Until that foundation is built upon, however, the first factor will continue to be insufficiently accommodating of the First Amendment in certain cases. The building process will require departures from the *Campbell* analysis as well as the addition of new speech-protective considerations.

Say that the defendant's use reflected a favored purpose of the sort singled out by Congress. If the speech interest connected with that purpose is to be appropriately protected, the first factor's reference to "commercial" must be applied in a way that does not improperly jeopardize the defendant's chances of succeeding with the fair use defense. "Commercial" must be applied more consistently with that term's meaning in First Amendment jurisprudence generally.²⁸⁹ Therefore, "commercial" and "profit motive" should not be considered synonymous. Many instances of speech reflect underlying profit motives but are classified as noncommercial for First Amendment purposes (including books, newspapers and magazines, movies, TV shows, songs and recordings, and visual art).²⁹⁰ If the defendant's use was noncommercial in the usual First Amendment sense, it should be considered noncommercial under the first fair use factor. Such a use's important factor-one purpose—whether commentary, news reporting, or educational—should no longer be diluted by an undue focus on the profit motive.

If an underlying profit motive does not make a use commercial for first factor purposes, it becomes necessary to clarify what does. We propose using the commercial speech definition employed in non-copyright settings.²⁹¹ The *Campbell* dictum, in which the Court suggested that use of a parody (or presumably other commentary) to sell a product might be viewed less favorably in the fair use analysis than where a parody itself was being sold,²⁹² is a step in the right direction. This selling product versus selling speech distinction should become an explicit part of the first factor analysis because it can help distinguish commercial uses from noncommercial uses. If the defendant borrowed from the copyrighted work while engaging in speech and then sold that speech—in the form of, say, a book, article, song, recording, work of visual art, movie, or TV show—the defendant's use should be classified as noncommercial. If the borrowing occurred in the course of speech designed to sell more of the defendant's product (*e.g.*,

²⁸⁹ See *supra* note 199.

²⁹⁰ See *supra* text accompanying note 144.

²⁹¹ By this, we mean "speech that 'does no more than propose a commercial transaction,'" see, *e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 762, or some definition akin to it. See *supra* note 199.

²⁹² *Campbell*, 510 U.S. at 585. See *supra* text accompanying notes 197–200.

cereal), the usual definition of commercial speech indicates that the use should be classified as commercial.²⁹³ The defendant's commercial use may then operate to undercut, though not necessarily negate, another more "noble" purpose such as engaging in commentary.²⁹⁴

Although we advocate making the *Campbell* dictum a formal part of the first factor analysis, our proposal for using the selling product versus selling speech distinction differs from *Campbell*'s suggestion. We see the distinction as a means of separating commercial uses from noncommercial uses, whereas the *Campbell* Court identified the distinction while discussing how the significance of a use's commercial nature will vary from case to case. The Court seemingly contemplated that the parody at issue was a commercial use, but was less disadvantageous to the defendants' fair use arguments than it otherwise might have been because the parody itself was being sold rather than being used to sell a product.²⁹⁵ Our proposal would classify a parody such as that in *Campbell* as *noncommercial*—meaning that it would weigh even more heavily in the user's favor under factor one than *Campbell* suggested. Accordingly, our proposal would go further to safeguard First Amendment interests.

Once the commercial versus noncommercial determination is made as described above, the first factor analysis should consider whether the defendant's use reflected mere appropriation of the copyrighted work or was, instead, transformative or otherwise in the public interest. This portion of the proposed analysis preserves *Campbell*'s designation of transformative uses as highly valued under the fair use doctrine, while underscoring the decision's acknowledgment that a transformative purpose is not a fair use prerequisite.²⁹⁶ The transformative use emphasis in *Campbell* fits the criticism and commentary context well because such uses typically add new creative content and employ the borrowed material for a purpose different from that of the copyrighted work.²⁹⁷ Insistence on a transformative use, however, may risk paying insufficient attention to uses that are in the public interest and entitled to First Amendment protection.

For instance, some educational uses may not be transformative in the sense that *Campbell* used the term because they may not involve adding new content to the borrowed material, even if the educational purpose differs from the purpose underlying the borrowed-from work.²⁹⁸ The same

²⁹³ See, e.g., *44 Liquormart*, 517 U.S. at 488, 496; *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

²⁹⁴ See 17 U.S.C. § 107 (2006); *Campbell*, 510 U.S. at 578–79, 585.

²⁹⁵ See *Campbell*, 510 U.S. at 572–73, 579, 584–85.

²⁹⁶ *Id.* at 579.

²⁹⁷ *Id.* at 578–79.

²⁹⁸ See *id.* at 579.

may be true of certain news reporting uses. Yet educational and news reporting uses, besides possessing significant speech elements, hold profound public benefit.²⁹⁹ Accordingly, the first factor analysis should not become fixated on whether the defendant's use was transformative under a rigid definition of that term, even though transformative uses should remain highly valued. Other uses that offer strong public benefit but do not have an obvious transformative component should not be discounted in the first factor analysis.³⁰⁰ However, if the defendant's use neither is transformative nor provides a meaningful public benefit, the use should be seen as mere appropriation of the plaintiff's work and therefore not likely to fare well in the factor one analysis.

If a transformative use or a use beneficial to the public is present, that characteristic must be balanced against the use's commercial or noncommercial nature. The profit motive underlying a commercial use—determined as proposed above—carries considerable weight that should operate against the defendant in the first factor analysis unless a very substantial degree of transformative character or public benefit is there to offset the profit-making component. The commercial user's uphill battle under the first factor³⁰¹ is consistent with the intermediate level of First Amendment protection extended to commercial speech outside the copyright setting.³⁰²

Assuming, however, that the defendant's use is noncommercial—determined as proposed earlier—the defendant comes to the first factor

²⁹⁹ See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1050–54 (2005) (asserting that information is a public good at no risk of being depleted and that treating copyrighted works as if they were real property as opposed to consisting of speech leads to an erroneous assumption that uses of information should be considered unlawful free-riding). Professor Lemley laments what he sees as a trend to treat copyright the same way real property is treated—a trend leading to overly broad intellectual property rights that hamper creativity. *Id.* at 1032, 1058–61. See also Rubinfeld, *supra* note 142, at 25, 28–29 (contending that because copyrighted works consist of speech, they should not receive the same legal treatment accorded other forms of property); 17 U.S.C. § 107 (2006) (listing educational and news reporting uses as good candidates for fair use treatment).

³⁰⁰ See Tushnet, *supra* note 75, at 537–38, 545, 556, 586. Moreover, if a use need not be transformative in order to be a fair use candidate, there should be no requirement that a use be *consistently* transformative. In *Salinger*, the district court invented an ill-advised requirement to that effect and applied it against Colting by engaging in what amounted to a page-counting exercise. See *supra* notes 98, 183–186 and text accompanying.

³⁰¹ Although defendants who had a commercial purpose have always encountered difficulty under factor one, our proposal has the effect of classifying a use as commercial in a significantly narrower range of cases than under the prevailing fair use analysis. See *supra* text accompanying notes 289–295. Accordingly, the uphill battle alluded to in the text will be faced by fewer defendants under our proposal.

³⁰² See *supra* note 199.

determination with a more weighty speech interest and a profit motive, if there is one, about which there should normally be less concern. Accordingly, that defendant should generally be able to get by with less of a showing of offsetting transformative character or public benefit.³⁰³ The noncommercial user's better shot at success³⁰⁴ under factor one is consistent with the greater degree of First Amendment protection extended to noncommercial speech.³⁰⁵

Next, we explore the proper evaluation of commentary under the first factor. We advocate a departure from *Campbell's* rule that parody or other commentary can be a fair use candidate only if it comments on the borrowed-from copyrighted work.³⁰⁶ This rule may seem sensible as a screening device, but it illustrates how current fair use doctrine falls short of being a meaningful First Amendment safeguard. We propose that

³⁰³ This is not to say, however, that the profit motive is irrelevant in all noncommercial use cases or that every noncommercial user is entitled to have the first factor resolved in his favor. The fact-specific nature of the fair use inquiry may call for distinctions among noncommercial users based on such considerations as how directly or indirectly they benefit the public and how directly or indirectly they stand to make a profit. Consider, for instance, a scenario in which a professor authorizes inclusion of portions of others' copyrighted materials in a readings packet that students taking her class must purchase from a copy shop. The professor does not receive any compensation based on sales of the packet. Her only profit motive is indirect and attenuated, in the sense that if she does a good job of providing students with a meaningful educational experience, she might receive a better salary increase than if she did a merely adequate job. If she is sued for infringement because of the readings packet—an example of noncommercial speech even though it is being sold—she should fare well under the first fair use factor. Her educational use is noncommercial in nature and of considerable benefit to the public, and there is no direct profit motive. But what about the copy shop, which sells the readings packets and receives the resulting profits? Under our proposal, the readings packet remains noncommercial speech because it is an example of selling speech. Yet the copy shop has a strong and direct profit motive. It is also only indirectly involved in furthering the educational purpose because it merely produces copies of the materials (unlike the professor, who selected the materials to be included). Thus, even though the readings packet would be considered noncommercial, the copy shop is not likely to be in a favorable position under factor one.

³⁰⁴ This assumes the existence of a transformative character or public benefit of the sort provided by the uses Congress listed as potentially good candidates for fair use treatment. See 17 U.S.C. § 107 (2006). Absent such character or benefit, even a noncommercial use can be considered mere appropriation and thus unlikely to succeed under fair use factor one. Consider, for example, the publishing company that produces and distributes copies of a copyrighted novel without a license from the copyright owner to do so. Books are noncommercial even when sold for a profit, but the publishing company's actions in this situation should be considered mere appropriation.

³⁰⁵ See *supra* note 198 and text accompanying; *supra* note 144.

³⁰⁶ *Campbell* may not have established this as an absolute rule, but its strong suggestions in that regard effectively created such a rule. See *Campbell*, 510 U.S. at 580–81.

commentary in which a defendant borrows from a copyrighted work should be treated as transformative and a fair use candidate even if the commentary does not criticize the work and pertains to other matters.³⁰⁷ The First Amendment would normally protect such broader commentary, especially if it were noncommercial in nature.³⁰⁸ It therefore should not face wholesale exclusion from possible fair use treatment, and should be considered at least potentially transformative for purposes of the factor one analysis.³⁰⁹

Absent the change just proposed, courts will continue doing what the district court did in *Salinger*: struggle to decide whether commentary pertained to the borrowed-from work or, instead, to some other matter. Given the implicit nature of the criticism in parody and certain other forms of commentary, courts' decisions on this point may tend to be inconsistent and somewhat arbitrary. This makes the screening-device nature of the commenting-on-the-work rule problematic from a First Amendment perspective. A court's erroneous determination may bar the defendant from making fair use arguments despite the presence of speech that would otherwise receive substantial First Amendment protection.³¹⁰ Of course, elimination of the commenting-on-the-work rule would not guarantee the defendant a win on fair use grounds. It would mean only that the screening device would not bar the defendant from seeking fair use protection, and that the court would have to consider the defendant's arguments on the four factors.

For the same reasons stated above, we advocate elimination of the judicial distinction that regards satire as a weaker fair use candidate than parody.³¹¹ The distinction between parody and satire is unhelpful as an indicator of fair use eligibility because it contemplates close-to-the-line determinations on matters of literary form.³¹² It is not an appealing prospect to expect judges who may not be well-versed in such matters to make determinations on whether parody or satire is present. Inconsistent outcomes concerning similar instances of speech would seem an inevitable consequence of the distinction between parody and satire. Such inconsistency makes the distinction an unsuitable way of safeguarding First Amendment interests because, either way, the defendant would have the

³⁰⁷ This change could occur through a Supreme Court decision or an amendment to the Copyright Act.

³⁰⁸ See *supra* note 198 and text accompanying; *supra* note 144.

³⁰⁹ See Thomas Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1318 (2008).

³¹⁰ See *supra* note 198 and text accompanying; *supra* note 144.

³¹¹ See *Campbell*, 510 U.S. at 581–82. See also *supra* note 51 (discussing this distinction).

³¹² See Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 1008–09 (2007).

same free speech interests at stake. Outside the copyright context, the defendant's speech—whether parody or satire—would be entitled to full First Amendment protection if the speech was noncommercial in nature.³¹³ The chances of an erroneous classification, and therefore of a defendant's being denied an opportunity to make fair use arguments despite strong First Amendment interests on her side, are too great. The distinction between parody and satire should go by the wayside.³¹⁴

We also propose that when a defendant borrows from a copyrighted work in order to comment on the work's *author*, such commentary should be treated as relevant to the factor one analysis. The *Salinger* district court regarded Colting's commentary on Salinger as not especially important for fair use purposes,³¹⁵ but commentary on authors—particularly famous ones—would normally carry substantial First Amendment protection. Consider, as noted previously, the stern First Amendment-based fault requirement that Salinger would have had to satisfy if he had been suing Colting for defamation.³¹⁶ It therefore seems odd that commentary on the well-known author would not have a meaningful role to play in the determination of whether commentary that borrowed from his work merited fair use treatment. Accordingly, we favor consideration of such commentary in the fair use analysis.³¹⁷

Finally, we propose that in applying the first factor, courts should consider the effects of the copyright duration extensions discussed earlier.³¹⁸ Where the borrowed-from work remains under copyright solely because Congress extended the duration beyond what the applicable law called for when the work's copyright arose, courts may want to give the defendant a favorable bump in the balancing of interests. Doing so would help the defendant under the first factor, but would not guarantee fair use

³¹³ See *supra* note 198 and text accompanying; *supra* note 144.

³¹⁴ Cf. David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials, and Bad Taste in Copyright*, 98 KY. L.J. 517, 565–70 (2010). But see Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 433–34 (2008) (suggesting that distinction between parody and satire is worth maintaining). We have less faith in the distinction than Professor Liu apparently does, but in any event, elimination of the distinction would not guarantee that every instance of satire would amount to fair use. Rather, the satirist simply would get a chance to make her arguments regarding the fair use factors.

³¹⁵ See *Salinger*, 641 F. Supp. 2d at 260–63.

³¹⁶ See *supra* text accompanying notes 205–208.

³¹⁷ Apart from the First Amendment reason to consider such commentary, there is a practical reason: the difficulty that may be encountered in separating commentary on the author from commentary on his copyrighted work, especially when the author and the work are entwined in the public's mind.

³¹⁸ See *supra* notes 236–244 and text accompanying.

treatment and thus would not undermine the current duration provision. Taking such a consideration into account would seem especially appropriate when, as in *Salinger*, the allegedly infringing activities did not occur until after the borrowed-from work would have entered the public domain if not for the statutory duration extensions.³¹⁹ The First Amendment interests seem particularly meaningful in that context.

If this subsection's proposals had been applied in *Salinger*, the first fair use factor would have been resolved in the defendants' favor. Their use was noncommercial; it was suitably transformative in its commentary on the borrowed-from work and its author (all of which we would have considered in the analysis); and the borrowed-from work would have been in the public domain if not for congressional extensions of copyright duration. Such an analysis would have accounted more appropriately for the relevant First Amendment interests.

Of course, no one fair use factor controls the outcome in any case. Because all four factors must be considered, the following subsections address the remaining three factors and the ways in which their application can make suitable allowance for free speech concerns.

B.A First Amendment-Sensitive Factor Two

When courts apply the second factor—the nature of the copyrighted work³²⁰—they frequently note that borrowing from a highly creative work may jeopardize the defendant's fair use chances more than would borrowing from a largely factual work.³²¹ The second factor can be made more sensitive to First Amendment interests if courts place less emphasis on the creative works versus factual works distinction when the defendant's use included commentary along the lines explored in the previous subsection. *Campbell* is instructive in that regard. There, the Court noted that the creative works versus factual works distinction is not particularly helpful in parody cases because well-known creative works are logical targets of parodists.³²² We would extend *Campbell's* reasoning to forms of commentary other than parody. The likely effect would be the same as in *Campbell*: a second factor that becomes insignificant in a case involving commentary or other transformative uses. The defendant's fair use chances thus would not be hampered, and First Amendment interests would be better served.

Courts can also be more accommodating of free speech interests if, in

³¹⁹ See *supra* text accompanying notes 241–242.

³²⁰ 17 U.S.C. § 107 (2006).

³²¹ See *supra* notes 211–213 and text accompanying.

³²² *Campbell*, 510 U.S. at 586.

applying factor two, they employ the published work versus unpublished work distinction outlined in *Harper & Row*.³²³ The Supreme Court concluded that because of the importance of the copyright owner's right of first publication, a borrowing from an unpublished copyrighted work should normally harm the defendant's chances of succeeding with the fair use defense but would not be conclusive in that regard.³²⁴ A borrowing from a published work, while not operating in the defendant's favor, should likely cause the second factor to be neutral (and therefore not damaging to the defendant's fair use prospects). Because many instances involving commentary or other transformative purposes would be ones in which the defendant borrowed from a published work, a published versus unpublished focus would help factor two account for First Amendment interests.

If the approaches we urge here had been taken in *Salinger*, the second factor would not have helped the defendants in the fair use analysis, but neither would it have favored the plaintiff. Although *Catcher* is a highly creative work, Colting's borrowing reflected considerable commentary on the widely distributed novel. *Catcher*'s notoriety, moreover, made it a logical object of commentary. Under our proposal, then, the second factor would have been deemed neutral.

C.A First Amendment-Sensitive Factor Three

The third factor requires consideration of the extent of the defendant's borrowing and an assessment of the importance of the portions borrowed to the copyrighted work.³²⁵ Making this factor sufficiently accommodating of First Amendment interests requires extension of a *Campbell*-approved approach and further consideration of our first factor proposals.

Campbell recognized that if a parody of a copyrighted work is to be effective, the parodist must be permitted to use enough of the work's expression, in either a qualitative or a quantitative sense, to "conjure up" the work and enable the public to recognize what is being parodied.³²⁶ As compared with users not engaged in parody, the parodist may be able to borrow more expression—and more of the especially important or recognizable expression—without the third factor operating against the defendant. Even a borrowing of the work's "heart" may not disadvantage the parodist under factor three.³²⁷

We propose that the conjure-up test be extended to cases in which

³²³ 471 U.S. 539 (1985).

³²⁴ *Id.* at 550–55.

³²⁵ See 17 U.S.C. § 107 (2006).

³²⁶ *Campbell*, 510 U.S. at 588.

³²⁷ *Id.*

commentary³²⁸ other than parody is present and to other cases in which the defendant's borrowing reflects purposes that go beyond mere appropriation. Other commentary reflects the same sorts of speech interests present with parody and seemingly animating the reasoning in *Campbell*.³²⁹ From a First Amendment perspective, therefore, it makes sense to employ the conjure-up test more broadly to instances in which speech interests are prominent.

In determining the extent of permissible borrowing under the conjure-up test, courts should remain cognizant of the commercial versus noncommercial classification issue and should resolve it as proposed in our first factor recommendations.³³⁰ If the defendant's use was noncommercial, the defendant should receive more latitude regarding the degree of borrowing permitted under the conjure-up test. If the defendant's use was commercial, the conjure-up test should still be applied—but less loosely than where the defendant's borrowing was noncommercial. This difference would recognize that noncommercial speech lies at the heart of the First Amendment.³³¹

Although the conjure-up test contemplates that the defendant not be permitted to borrow more than was reasonably necessary to bring the copyrighted work to mind,³³² the conjure-up test should not be considered a least-restrictive-means approach. The defendant engaged in commentary or another purpose going beyond mere appropriation should not be penalized for borrowing somewhat more expression than was absolutely necessary to conjure up the borrowed-from work. If the defendant did not go significantly overboard in that regard, the third factor should permit breathing room in recognition of speech interests.³³³

If the approach urged here had been employed in *Salinger*, the district court would have been less inclined to conclude that the third factor cut strongly against fair use. Colting's novel was noncommercial speech that involved significant commentary and an obvious need, given its purposes, to borrow easily recognizable aspects of the expression in *Catcher*. Therefore, reasonable latitude should have been extended to the defendants

³²⁸ By this, we mean commentary in the broader sense contemplated in our proposals regarding the first factor. See *supra* text accompanying notes 306–314.

³²⁹ See *Campbell*, 510 U.S. at 578–81, 588–89.

³³⁰ See *supra* text accompanying notes 289–295.

³³¹ See *supra* text accompanying note 198; *supra* note 143.

³³² See *Campbell*, 510 U.S. at 588–89.

³³³ For essentially the same reasons noted in our factor one proposals, we regard it as appropriate for courts applying the third factor to consider whether the borrowed-from work remains under copyright only because of duration extensions enacted by Congress. See *supra* text accompanying notes 318–319. In such an instance, the court may want to extend somewhat more latitude to the defendant under the third factor, especially if the defendant's borrowing for a speech-related purpose was noncommercial in nature.

under factor three. It is difficult to determine whether the borrowing exceeded what that latitude would contemplate, but it is far from obvious that the third factor should have favored Salinger.

D.A First Amendment-Sensitive Factor Four

Portions of the prevailing approach to the fourth factor—the effect, if any, of the defendant’s “use on the potential market for or value of the copyrighted work”³³⁴—comport with the First Amendment, but other aspects require modification if free speech interests are to be adequately safeguarded. *Campbell* set forth a speech-protective rule when the Court stated that harm to the copyrighted work from the force and effectiveness of the defendant’s parody does not count against the defendant in the factor-four analysis.³³⁵ The same rule, logically, should apply to forms of criticism or commentary that do not involve parody. Lower courts should continue heeding that message. They should also continue to conclude that the copyright owner cannot credibly argue for control over a supposed market for parody versions of the work or other versions that criticize it, because such a market is not one for which the copyright owner would realistically consider issuing licenses.³³⁶ Such a conclusion is sensible if the fair use defense is to retain meaning and speech interests are to be protected.

We agree that factor four normally should require consideration of harm to reasonable derivative markets that owners of copyrights on the type of work at issue would likely pursue (even if the copyright owner in the case before the court had not yet done so).³³⁷ However, we part company with the prevailing analysis when it permits assumptions about markets copyright owners typically would pursue to override facts clearly indicating that the relevant copyright owner has no interest in pursuing those markets. Fair use is a fact-specific inquiry, and fictions about possible exploitation of reasonable markets should not control over facts to the contrary. Such facts were present in *Salinger*, given the author’s longstanding stance against making any use—or licensing anyone else to make a use—of the Holden Caulfield character or of other expression in *Catcher*.³³⁸

The *Salinger* district court ignored reality when it concluded that despite Salinger’s firm position against exploiting any and all derivative markets, there was likely impairment of relevant markets for fourth factor

³³⁴ 17 U.S.C. § 107 (2006).

³³⁵ *Campbell*, 510 U.S. at 591–92.

³³⁶ *See id.* at 587–88, 592–93.

³³⁷ *See, e.g., id.* at 592–94.

³³⁸ *Salinger*, 607 F.3d at 71, 74.

purposes.³³⁹ To the extent that precedent dictated this favoring of fiction over reality, the prevailing analysis should be altered. Most copyright owners want to exploit, or at least consider exploiting, relevant derivative markets. The usual approach of looking at reasonable markets therefore makes sense in most cases. But in a *Salinger*-type case, courts should be free to apply factor four in accordance with the facts rather than copyright owners' general tendencies. Without such judicial flexibility, defendants' speech may be squelched and First Amendment interests disserved.

In applying the fourth factor, courts must also be wary of effectively granting the copyright owner moral rights when such rights are not lawfully available. As earlier analysis showed, *Salinger* seemingly wanted to preserve the integrity of his creations and the vision he had for them, and thus should have been seen as seeking moral rights. The district court obliged with its decision in his favor, despite the fact that only works of visual art—and not even all of them—are entitled to moral rights under U.S. law.³⁴⁰ The court thus altered the “traditional contours”³⁴¹ of copyright law and disregarded free speech interests when it would have been especially appropriate to apply meaningful First Amendment scrutiny. Other courts should avoid such a mistake, an error which seems all the worse when one considers how many more years *Salinger*'s work and that of other creators from the same time period will be under copyright protection thanks to the duration extensions enacted by Congress.³⁴²

E. Remedies When the Fair Use Defense Fails or Is Likely to Fail

In this subsection, we consider remedies issues that arise when the fair use defense does not come to the defendant's rescue or seems unlikely to do so. We first address matters pertaining to injunctive relief and then comment on damages questions, focusing in each instance on First Amendment concerns.

Although we disagree with the Second Circuit's conclusion that the *Salinger* defendants were unlikely to succeed with their fair use defense,³⁴³ we endorse that court's handling of the preliminary injunction issues. The Second Circuit correctly concluded that the Supreme Court's decision in *eBay*³⁴⁴ should be applied to the copyright setting even though it was a

³³⁹ *Salinger*, 641 F. Supp. 2d at 267–68.

³⁴⁰ See *supra* notes 234–235, 267–276 and text accompanying.

³⁴¹ See *supra* notes 262–276 and text accompanying.

³⁴² See *supra* notes 241–244 and text accompanying.

³⁴³ *Salinger*, 607 F.3d 68, 83 (2d Cir. 2010).

³⁴⁴ 547 U.S. 388 (2006). See Samuelson & Bebenek, *supra* note 172, at 73–74 (arguing prior to Second Circuit's *Salinger* decision that *eBay* should be regarded as barring

patent case and that *eBay* should guide preliminary injunction issuance (or non-issuance) even though it involved a permanent injunction request. Accordingly, the Second Circuit devised a sound test for use in preliminary injunction determinations and properly vacated the injunction that the district court had issued without benefit of the new standard.³⁴⁵ Our only disagreement with the Second Circuit on the preliminary injunction issues pertains to the court's decision to rest its holding solely on *eBay* and not also on the First Amendment. But that is a minor concern because, even though the Second Circuit stated that it did not need to decide whether the First Amendment required its approach to the preliminary injunction issues, the court offered comments that suggested reasonable sensitivity to free speech interests.³⁴⁶

For First Amendment purposes, there is particular value in the Second Circuit's *Salinger* holding that there can be no presumption of irreparable harm when a preliminary injunction is sought—even if the defendant's fair use contention probably would be unsuccessful on the merits.³⁴⁷ Because courts must actually consider whether irreparable harm would likely come to the copyright owner or whether, instead, an eventual award of damages would be an adequate remedy, speech is at far less risk of being enjoined during pendency of the case. To a similar probable effect is the Second Circuit's *eBay*-influenced holding that the public interest must be considered in determinations of whether to issue a preliminary injunction.³⁴⁸ The preemptive squelching of speech that occurred in *Salinger* until the Second Circuit vacated the preliminary injunction should be less likely to occur in future cases. Such results square with the usual First Amendment concerns about prior restraints on speech.³⁴⁹

Similarly, when the copyright owner prevails at the summary judgment stage or after trial, the court must carefully consider not only the irreparable harm issue but also the public interest issue when deciding whether to issue a permanent injunction.³⁵⁰ When coupled with *eBay*'s clear message that a permanent injunction is not a mandatory remedy when the plaintiff wins,³⁵¹ the standard for issuance of a permanent injunction pays due heed to First

presumption of irreparable harm in preliminary injunction determination).

³⁴⁵ *Salinger*, 607 F.3d at 76–82, 84.

³⁴⁶ *See id.* at 76, 81–83.

³⁴⁷ *Id.* at 79–80, 82.

³⁴⁸ *Id.* at 80, 82–83.

³⁴⁹ *See* Rubinfeld, *supra* note 142, at 6 (complaining that despite usual First Amendment-based concern about prior restraints, courts in copyright infringement cases “issue prior restraints . . . all the time”).

³⁵⁰ *eBay*, 547 U.S. at 391.

³⁵¹ *Id.* at 391–95.

Amendment concerns about enjoining speech. Perhaps the court concludes, after applying the *eBay*-required standard, that a permanent injunction is warranted. Alternatively, the court may determine that the defendant must pay a price in the form of damages, but that the circumstances do not demand an injunction whose operation would make speech unavailable to the public. However the court rules on the permanent injunction question, the requirement that the *eBay* standard be satisfied indicates that First Amendment interests will have been adequately considered.

We close with comments about awards of damages when a plausible fair use defense fails and the defendant faces liability. As defamation law indicates, First Amendment concerns may affect the governing rules regarding damages.³⁵² The same should be true in copyright cases in which the defendant is being held liable for his speech.

If monetary relief is being sought under the basic remedy of actual damages plus the infringer's profits,³⁵³ the court should be realistic about the markets impaired by the defendant's infringement, and should keep in mind the fact-over-fiction approach to reasonable markets that we advocated in our proposals regarding fair use factor four.³⁵⁴ The court should also take a hard look at the attributable profits question, in order to make certain that any profits the defendant must disgorge are confined to the actual infringement and do not sweep in profits attributable to non-infringing speech. Such an approach should lead to monetary awards adequate to compensate the copyright owner, but should keep the amounts of those awards in check and thus operate in a manner sensitive to the defendant's speech interests.

If the plaintiff chooses the statutory damages option,³⁵⁵ the plausibility of the defendant's fair use arguments—even though they failed—should make courts wary of concluding that willful infringement occurred. The statutory damages awarded in such cases should therefore fall within the range allowed for instances of non-willful infringement.³⁵⁶ The result should be meaningful compensation to the copyright owner without an undue chilling of the defendant's First Amendment interests.

In any event, whether actual damages or, instead, statutory damages are

³⁵² See *Gertz*, 418 U.S. at 349–50 (imposing First Amendment-based rules regarding recoverable damages in defamation cases brought by private figure plaintiffs, in order to guard against chilling effect of common-law rules on damages).

³⁵³ 17 U.S.C. § 504 (a), (b) (2006).

³⁵⁴ See *supra* text accompanying notes 338–343.

³⁵⁵ 17 U.S.C. § 504 (a), (c) (2006).

³⁵⁶ That range is a minimum of \$750 to a maximum of \$30,000. *Id.* § 504(c). If the plaintiff can prove willful infringement, the maximum amount of statutory damages becomes \$150,000. *Id.*

being sought, courts must not issue awards for supposed harms of a moral rights-type nature when the work at issue is not a work that qualifies for such rights. For the reasons noted earlier, according moral rights-like protection to works not entitled to them departs from the “traditional contours” of copyright law and cuts too deeply into defendants’ First Amendment interests.³⁵⁷

VI. CONCLUSION

For too long, courts have largely avoided deciding how to accommodate defendants’ First Amendment interests within the copyright protection realm. The traditional view has been that no special consideration of First Amendment interests is necessary in copyright infringement cases because defendants’ free speech interests are adequately accounted for by copyright’s supposed built-in safeguards: the distinction between ideas and expression, and the fair use doctrine. As we have demonstrated, the distinction between ideas and expression does not serve as a meaningful protector of First Amendment interests when defendants in infringement cases really need such a protector. That leaves the fair use doctrine, which has the potential to operate as an effective First Amendment safeguard. The Supreme Court’s decision in *Campbell* suggested some of that potential but stopped short of making it a reality.

The recent district court and Second Circuit decisions in *Salinger v. Colting* reveal that the speech protection afforded by the fair use defense is not coextensive with the protection that the First Amendment would provide if it were given appropriate consideration. Although the Second Circuit appropriately vacated the district court’s preliminary injunction, the appellate court erred in upholding the lower court’s determination that Colting’s fair use defense was likely to fail. A key message from *Salinger*, then, is one neither the district court nor the Second Circuit intended to provide: modifications of the prevailing fair use analysis are necessary if defendants’ free speech interests are to be suitably accommodated.

After engaging in critical analysis of *Salinger*, *Campbell*, and other fair use decisions, we have proceeded on a factor-by-factor basis to outline and justify a modified fair use analysis designed to make the doctrine function more meaningfully as a First Amendment safeguard. Judicial use of our proposed analysis would finally lend accuracy to the statement that the fair use doctrine sufficiently safeguards defendants’ First Amendment interests. In addition, free speech issues may still be present when a plausible fair use defense fails and the defendant faces infringement liability. Accordingly, we have made remedies-related observations regarding an appropriate

³⁵⁷ See *supra* text accompanying notes 267–277.

balancing of copyright owners' interests and defendants' First Amendment interests.

As *Salinger* indicates, copyright owners own their "rye" and are entitled to protect it. But others' First Amendment interests sometimes become caught in that rye. Those interests must then be addressed meaningfully, rather than through routine citations of the fiction that copyright's built-in safeguards appropriately protect free speech interests. If adopted, the proposals set forth herein would serve to free the First Amendment from constraints that copyright law has too long imposed.