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Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It
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Introduction

What is copying good for? Why would someone of good faith want to copy? Debates over massive file sharing of music and movies have helped to make "copier" a synonym for "pirate." At the same time, many people, particularly in the academy, have expressed concern about the use of copyright to suppress critical and creative - "transformative," in copyright's terms - uses of copyrighted works, such as a retelling of *Gone with the Wind* from the perspective of an invented mulatto character. Defenders of transformative uses have invoked the First Amendment to bolster claims that such uses should not be subject to the copyright owner's permission. But this focus on transformation is critically incomplete, leaving unchallenged much of copyright's scope, despite the large number of nontransformative copying activities that are also instances of free speech. The current debate leaves the way open for expansions of copyright that, while not targeted at dissenting viewpoints, nonetheless may have a profoundly negative effect on freedom of speech. In other words, transformation has limited our thinking about the free speech interests implicated by copying. As fair use has grown in doctrinal importance as a means to harmonize copyright with the First Amendment, it has also, paradoxically, begun to shrink, excluding activities such as copying for research or educational purposes. Courts increasingly find that these traditional fair uses, which do not directly involve critical commentary, are unfair and require the copyright owner's permission. Using fair use and free speech as interchangeable concepts thus has a profound and negative narrowing effect on the scope of fair use and in turn threatens First Amendment freedoms, because noncritical uses of copyrighted works have substantial value to society and to freedom of speech.

The purpose of this Essay is not to propose a solution to the conflict between protecting copyright owners' rights and allowing freedom of speech. Indeed, I do not believe that such a solution is possible, because copying may sometimes be an instance of free speech even when it is also copyright infringement. Tradeoffs are inevitable, and although there are better and worse ways of balancing the interests at stake, my main aim in this Essay is to explain what copying is good for rather than to define the ideal scope of the rights granted by copyright....

III. The Value of Pure Copying

The opinion in *Eldred v. Ashcroft* relied on fair use to uphold term extension against a First Amendment challenge; at the same time, it treated copiers' interests with indifference. n123 This Part contests that negative evaluation of copiers. In particular, copying is of value to audiences who have access through copying to otherwise unavailable speech. It also enhances copiers' ability to express themselves; to persuade others; and to participate in cultural, religious, and political institutions.

Precedent made *Eldred's* First Amendment claims plausible: Copyright is at least a content-neutral speech restriction, n124 and the Court has generally applied intermediate scrutiny to such restrictions. n125 They will be upheld if they further an important or substantial governmental interest unrelated to the suppression of free speech, provided the resulting restrictions on speech

[*563] do not burden substantially more speech than is necessary. n126 Applying this test, *Turner Broadcasting System v. FCC* upheld government-imposed requirements that cable systems carry a certain number of local broadcast channels. n127 Although the must-carry requirement burdened cable systems' speech in the sense that it denied them some control over the channels they carried, it served a substantial government interest in preserving free broadcast channels that might otherwise be driven off the air if cable systems refused to carry them. Eric Eldred argued that *Turner* provided the proper analytical framework for his First Amendment challenge to term extension.

Explaining why intermediate scrutiny was not required, Justice Ginsburg distinguished *Turner* from *Eldred* by drawing a line between copiers and real speakers: n128 "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." n129 As a matter of doctrine, this is false. The *New York Times* is one of the most securely protected speakers imaginable, even when it prints other people's words on its op-ed pages and in its letters section. n130 It was not the author of [*564] the *Pentagon Papers*, but that mattered not a whit when the government (which was the author) sought to prohibit publication. n131 That the *New York Times* adopts other people's words as its own makes it just like *Eric Eldred* choosing a public domain work to publish, n132 or a judge accepting a draft of an opinion by a clerk, or a bookstore selling *Ulysses*, or a senator quoting the Bible in a debate; the question is precisely what "one's own speech" is. n133

Imagine that the government, in the name of promoting creativity and deterring imitativensness, banned speakers from copying directly from the public domain. This would be an enormous, intolerable burden on speech, no less so because someone else said the words first, a long time ago. n134 Justice Ginsburg's statement is at the least impossibly overbroad. Making other people's speeches can be an honorable endeavor, as many a politician would surely attest. First Amendment doctrine should recognize the value of copying, which can be an important part of self-definition and of participation in culture, from singing the national anthem to discussing *The West Wing* online in exact detail. n135 The following Sections explore how copying can promote important speech interests, both for the audience and the speakers.

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A. Copying's Value to the Audience

Audiences benefit from copied as well as original expressions. Eugene Volokh points out that any repetition of his speech is informative to listeners whether delivered by its author or not, because speech's value to consumers "isn't just in its existing somewhere in a bookstore - the value lies in consumers actually hearing or reading it. . . . Republished work is materially more valuable to readers than the original that they can't get, that costs too much, or that they don't know about" n136 Copying promotes democracy by literally putting information in citizens' hands. n137 When developing countries condemned the dominant international copyright regime as designed to promote the interests of wealthy countries, they appealed to the need to make copies of works for educational and scholarly purposes. n138 Access to the works, which residents of those countries couldn't afford at copyright owners' prices, was a precondition of any further response to or use of those works. n139 When Paul Goldstein writes that uses in schools and libraries "advance copyright's general aim of promoting cultural and political discourse," n140 he is also invoking the value of access, which can sometimes only be had if the copyright owner's price need not be paid. n141

Copyright's prohibition on copying can create differential access in precisely the way some First Amendment theorists fear government regulation can subtly distort debate. For example, *Who Built America?* is an award-winning historical CD-ROM series for high school and college students that uses numerous primary sources. Owners of the sources' [*566] copyrights often wanted large payments for use of historically significant works, payments the authors couldn't afford. They substituted federal government and public domain works, altering the way students will understand the past; the materials now overemphasize the federal government's role in Depression-era society and culture. n142

The access-enhancing benefits of copying are quite similar to the values identified by audience-centered theories of free speech. They show up in Jack Balkin's concept of democratic speech n143 and to some extent in Owen Fiss's. n144

The audience's interests in obtaining speech may apply even if we don't think that copying is a valuable activity. As the next Section suggests, however, copying regularly has profound First Amendment value for the copiers themselves.

B. Copying's Value to Speakers

Pure copying, or copying that is not sufficiently distinct to count as "transformation," serves vital social purposes. I should note that I use the term "copying" to encompass both physically reproducing a work in concrete form - copyright's reproduction right - and singing, playing and otherwise communicating - copyright's performance and distribution rights. Though copyright law distinguishes between reproduction, distribution, and performance rights, its distinctions do not correlate to the ways in which copying as I define it works as free speech.

We tend to divide people into "producers" and "consumers" of copyrighted works and to devalue the act of consumption. Yet what consumption means in this context is reading, watching, listening, and talking about copyrighted works - all valuable expressive activities that can be extremely important to people, both as individuals and as part of a community. n145 Copying can serve as self-expression, using the most apt words to explain and define beliefs and thoughts; it can assist persuasion, using the best words to reach a particular audience; and it can work as [*567] affirmation, a way of connecting to a larger group. Many uses serve more than one of those functions.

Not all copying serves First Amendment values, and I am not claiming that it does. I have no free speech right to download entire works for which I could readily pay. But copying is significant to free speech in enough situations that a fair use test that privileges transformation into a new work and discounts pure copying is radically insufficient to protect free speech against copyright's encroachments. Free speech doesn't have to focus on the individual on his soapbox, snarling at the dominant paradigm; it doesn't have to pretend that his words are unique to him. Unfortunately, the reigning model of free speech in First Amendment law is a particular kind of individualism, protecting speakers from government intervention into an otherwise neutral market and assuming that the individual's speech is entirely self-generated rather than assembled from preexisting cultural resources. When that vision gets imported into fair use law, it tends to discount the value of pure copying that promotes access to the means of speech production or enhances participation in a common culture.

My claim here is that pure copying (core copyright infringement, if unauthorized) can also be core First Amendment speech, regardless of the values you think the First Amendment protects. Randall Bezanson argues that adopting other people's speech should be protected by the First Amendment only when it is "sufficiently transformative to support the assertion of intent to speak for oneself and, as importantly, to identify a new expression that justifies calling the First Amendment into play." n146 He values the act of speaking, rather than the artifact of speech. n147 But someone who copies is speaking, even though the words have been said before. Consider, for example, the meaning of speech to the unconscious copier, who believes herself to be the originator of her words but may still be found to be an infringer. n148

Bezanson suggests that, absent personal investment in an idea, the act of speaking doesn't represent individual free will or choice: Without requiring transformation of some kind, "no claim by the selector (the person communicating a message, for example) can be made that the speech is his or her own." n149 Yet this characterization seems odd. Both my body and my [*568] coat are mine, though I didn't make them. Floating underneath seems to be some sort of idea about claiming speech through labor - but then we'd have to decide what sort of labor, presumably including thought-labor, counted. We would probably accept, for example, the proposition that all fifty-six signers of the Declaration of Independence adopted the words as their own - and it was thereby a more powerful document than a collection of fifty-six different explanations of the colonies' plight. n150 The following Subsections discuss copying as a First Amendment activity, first in furtherance of self-expression, then as a more overtly political, communal act of persuasion and affirmation.

1. Self-Expression

Copyrighted works often serve as the self-expression of someone other than the author; they can both feel like the products of the copier's own personality and be perceived by others as such. One of the best-received films at the 2004 Cannes Film Festival, *Tarnation*, comprised autobiographical home video footage combined with music and video clips. n151 The director-star used the clips to show the culture that surrounded him and into which he escaped when his home life became too traumatic. n152 Anne Frank copied a poem to celebrate a friend's birthday, combining it with stickers (possibly copyrighted by someone else) to create a personal tribute. n153 Teenage girls making home videos to explain their lives play music to show what they value and what they feel. n154 Putting a song in the [*569] context of a life reflects on both the music and the life, shaping our understanding of each. Indeed, most Americans can probably recall some song, book, or movie that seemed so perfectly expressive of their own lives that they identified completely with it and would even explain themselves to others by reference to that work. n155

Symphony patrons debate the merits of one recording of the same piece over another because, although each copies the same musical work, the performances differ in ways both subtle and overt. Recordings can even spark political controversy: Peter Breiner's 1994 arrangement of *The Star-Spangled Banner*, which was used at the Athens Olympics, has been interpreted as a "blue-state" version of the anthem, full of "nuance" and "local variation and possibility" as compared to the traditional arrangements that emphasize "primary colors" and more aggressive music. n156 Musicians fill concert venues because fans enjoy live performances of the same musical works they can hear at home. n157 Each new performance produces a different effect on the audience because each one represents the artist's self-expression; the copy bears the unique marks of its copying.

Musicians cover songs they didn't write, often thereby making their careers. n158 Some are tributes; some, though generally faithful to the lyrics [*570] and score, operate as commentary on the original simply by virtue of a different performance style. For example, Tori Amos recorded an album of covers of songs about women by men, including Eminem's Bonnie and Clyde '97, in which the singer describes murdering the mother of his child. Both the choice of the song and the delivery convey a message. Amos believed that she could "best express [herself] through other people's words," specifically songs that were already important to the men she consulted. n159 Only other people's songs could appeal to listeners' preexisting connections with those songs. n160

Like songs, plays are produced multiple times, because even though they involve wholesale copying of the text, they also offer enormous opportunity for new insights and new emphases - Richard III set during World War I or The Merchant of Venice played in full yuppie costume, for example. n161 The production of a play clearly involves much creativity, and the director and actors are usually considered as important as the playwright. But the underlying play (like the musical works covered by various performers) is a complete work and, if written sometime in the last eighty years, probably a copyrighted one. Thus, copyright law, even one with only minimal protection for derivative works, must give playwrights some control over full productions of their plays - control that has been exercised, for example, to prevent cross-racial casting of Porgy and Bess n162 and cross-gender casting of Waiting for Godot. n163 The variations worked by [*571] the director and the cast put an individual stamp on any given production, but they also constitute a single iteration in a chain of copies, gaining meaning in part by reference to the other ways one might stage the same play. n164 Performances simultaneously involve wholesale copying and wholesale creativity.

People express personal meaning through copying even without performance. Translation is another kind of complete and creative copying. Though translation is mostly confined to the publishing industry because copyright grants translation rights to copyright owners, thousands of fans of Japanese anime add English subtitles to the cartoons and make the subtitled copies available for free on the Internet in order to share their finds with English-speaking viewers. n165

In theory, performances can be separated from their texts and translations from their sources. Yet as performance and translation involve creative choices, so does reproduction. Personality may also be expressed inseparably from copying. Making mix CDs, discussed above, is not so different from selecting and assembling pieces for anthologies of poetry, articles, letters from a historical figure, or other collections. Those things all require the exercise of judgment and creativity and can be quite socially beneficial; they also inform us about the commitments of the editors and compilers. n166 Although we may wish to distinguish between "pure" copying [*572] and distribution, such as handing out Bible tracts in the street, and copying that incorporates creative input, editing, or interpretation, the line between the two is often blurred. Selection of what to copy is an editorial, interpretive task, as Tori Amos's work and the contents of newspaper letters columns testify. The proselytizer, after all, has to choose a particular version of the Bible, and the Bible over the Bhagavad Gita. n167 In other areas, copyright law recognizes that selection and arrangement can be highly creative, valuable activities even if the editor does not add content of her own. The editor possesses a copyright in her selection and arrangement as a "collective work" (at least if she has the right to use her selections). n168 Copying becomes a creative, expressive act.

Even a single selection can have expressive power. Consider the Clinton-Gore campaign's adoption of the 1977 Fleetwood Mac song Don't Stop (Thinking About Tomorrow) n169 as its theme song, following a long tradition of appropriating popular songs to distill and promote a campaign

theme. Truman's theme I'm Just Wild About Harry was revived from the 1920s; Eisenhower's I Like Ike was taken from Irving Berlin's hit They Like Ike from the 1950 musical Call Me Madam; Johnson's Hello, Lyndon was a version of Hello, Dolly; George H.W. Bush's theme was This Land Is Your Land, written by Woody Guthrie in 1940. n170 Even when supporters sing [*573] specially created songs, they are using expression created by others to demonstrate their own, powerfully held sentiments. n171

Or consider that Chief Justice Rehnquist, dissenting in *Texas v. Johnson*, could think of no more eloquent way to argue for the value of the American flag than by quoting John Greenleaf Whittier's poem Barbara Frietchie, among other sources whose reproduction added power to his argument. n172 Likewise, reprints of W.H. Auden's poem September 1, 1939 filled a deep need in many people to explain their feelings about September 11, 2001. n173 We recite poetry because it seems to us to express profound truths that could not be better expressed - could not even be expressed at all - with other words. n174

This recontextualization is not transformative in a way that copyright could ever recognize, but that does not mean that the meaning of the copied work is static. n175 Many copyright scholars have promoted the idea that there is no such thing as originality, in the sense of authorship without debt to other works. The flip side is that there is no such thing as an identical copy. n176 The difference between two copies of *Ulysses* is, of course, not the same as the difference between *Ulysses* and *The Odyssey*. Nonetheless, our [*574] recognition that poems are made out of other poems n177 should be balanced by the recognition that no woman reads the same poem twice, because even if it's the same poem, she's not the same woman. n178

2. Persuasion

Sometimes people copy not because someone else's words suit them but because the words suit the situation. They copy instrumentally, to produce a desired result, which is usually that the audience agree with the speaker. "Boilerplate" in a news report or a social worker's case report may thus be perfectly acceptable; new forms of expression might even get in the way of communicating the relevant information. As Russell Hunt points out, unlike academics, the authors of most texts "aren't in a position where the main point of the text is to demonstrate their own expertise; the point is to generate a text that gets done what needs to get done." n179 When words are tools, the speaker's creativity may be less important than her words' suitability for the task at hand.

Copying may be useful to provide the right words for the job; it may also be useful to provide the right source. David McGowan's recent article on why the First Amendment cannot provide much guidance for copyright law is itself an example of copying that is valuable because the copied speech is valuable. n180 In the course of arguing that copying is worth less than writing one's own words, McGowan quotes and relies heavily on a word-by-word analysis of one of Justice Brandeis's more famous opinions. n181 This isn't just irony. McGowan has reason to think that Brandeis's words, familiar to readers and invested with Brandeis's nearly century-old legal reputation, are likely to be more persuasive than McGowan's own words filling the same amount of space. n182 Moreover, the [*575] subject of McGowan's copying, a judicial opinion, is itself a work whose authority is constituted by repetition. Much more than poems are made out of other poems, cases are made out of other cases. At the same time, copying may increase the authority of the copied work, making the fact of copying part of the reason a work is persuasive. n183

The history of one famous speech further illustrates the limited relevance of originality. On August 28, 1963, at the Lincoln Memorial, in front of 250,000 marchers (and with millions of others watching on television), Martin Luther King, Jr. delivered what we now know as the I Have a Dream speech. The vivid expression in the speech was unique neither to King nor to that particular speech. He and others had said the same things before, often in the same words or nearly exact paraphrase. n184 [*576] What was historically significant was that huge numbers of people in the audience had never heard him preach. n185 For them, that he was copying was irrelevant to the power of his words. It didn't matter that the expression wasn't original; it did matter that it was King speaking, at that time, at that place, to those people. Keith Miller argues that King's copying helped promote his agenda of racial justice, by drawing on familiar words that reassured white listeners: "King skillfully inserted his arguments against segregation into a web of ideas and phrases that moderate and liberal white Protestants had already approved. . . . Using words his listeners had already heard, he reinforced what they already believed." n186

The subsequent appropriation of I Have a Dream also illustrates the way quotation in a new context can change, even reverse, meanings. King's line about wanting his children to be judged not by the color of their skin but by the content of their character was appropriated by affirmative action opponents. n187 The King estate argued that a Republican ad incorporating a clip of King delivering those lines was infringement and succeeded in having the ad pulled from the air. n188 In that case, it was important to opponents of affirmative action to use both the powerful rhetoric and the attribution to King as a civil rights hero; it was significant to the persuasive power of the ad that they were quoting King. n189

[*577] King's writings also generated some controversy when scholars announced that, in some cases, large portions of his scholarly work were copied without attribution from other sources. Although King's practices deviated from norms of scholarship, others have pointed out that such copying was ordinary in the homiletic tradition of preaching from which he came. n190 Certain stories, parables, and biblical explications were time tested and religiously effective, whereas originality might not have produced the necessary worship effect. n191 By adopting earlier work, King gained authority as the embodiment of a respected tradition. n192

In fact, King's practices demonstrate the value to individuals of being able to use the words they think most appropriate. n193 Whatever we think about King's failure to cite and attribute in the academic context, we would [*578] be hard pressed to disagree with his assessment of the value of the words he copied. Some speech lacks a substitute.

For more ordinary citizens, copying can also be a means of persuasion. David Thelen's study of how ordinary citizens responded to the Iran-Contra affair relies on hundreds of letters written to Representative Lee Hamilton, the chair of the joint congressional committee investigating the scandal. Many communicated with Congress using others' words, often whole newspaper articles, "underlined, highlighted, starred, [with] exclamation points, [or] arrows." n194 "The thoughts were the writers', but the words were often those of wordsmiths that they expected would more effectively persuade the likes of congressmen." n195 Likewise, advocacy groups promoting letter-writing campaigns to politicians often suggest a specific text or even provide preprinted postcards so that a citizen need only fill in her name. In such cases, copying is a political tool, used to produce particular results. n196 Originality does not matter - indeed, it might be counterproductive when the aim is to sound authoritative - to the resulting democratic dialogue.

3. Affirmation

Just as copying can serve to persuade, it can make a copier part of something larger. n197 For example, to many Americans, reciting the Pledge [*579] of Allegiance - with or without a reference to God - is (or can be) a profoundly political act, important because of the repetition of a precise series of words.

Affirmation, like persuasion, is a type of self-expression, but it is unlike the usual image of self-expression because it consists of subordinating uniqueness to conform with a group. Nonetheless, individual freedom is freedom to endorse and agree - freedom to copy - along with freedom to dissent. A Republican who agrees with her party's positions is engaging in core political speech when she repeats them, notwithstanding that her words sound just like other Republicans'. Repetition confirms membership to herself and to the world around her. n198

More than just a product of individual choice, however, repetition has extra value, both intrinsic and instrumental, that comes from public association with like-minded souls. As discussed above, the Declaration of Independence drew power from being the statement of a body of men rather than the work of a single pen. "We mutually pledge to each other our lives, our fortunes, and our sacred honor": The words are performative, creating a bond by stating shared principles, announcing to the world that this group stands together.

First Amendment doctrine has generally upheld this value under the rubric of freedom of association. Recognizing that shared opinions are easier to maintain than those held in isolation, the Supreme Court has declared that freedom of association is "especially important in preserving political and cultural diversity and in shielding dissident expression." n199 People who do not hear their opinions reflected in others' speech may well be pressured into silence. The connection to copying is that the right of a group of people to advocate a consistent message presupposes a repeated message, like the oath all Boy Scouts must take. n200 First Amendment jurisprudence has recognized that a group has a "voice" that may be heard when individual voices would be ignored; the metaphor suggests a voice composed of many voices, all singing the same song. n201

[*580] Religion, like patriotism, often requires exact replication of sacred texts. As David Nimmer observed in discussing the Dead Sea Scrolls, "When the precise wording of a text is at stake, . . . to paraphrase is heresy." n202 *Worldwide Church of God v. Philadelphia Church of God*, for example, involved a splinter sect that made copies of a religious text that the mother church had disavowed. n203 Because the mother church owned the copyright in the text, the court enjoined the splinter sect from copying what its members believed to be the true words of God and from sharing those words with other people. n204 *Worldwide Church of God* provides an example of copying at the core of self-definition, in this case self-definition through religious expression. n205

In modern times, proselytization (spreading the words of a prophet) can easily involve copyrighted works. A religion's core texts may still be within copyright, as Scientology's are. Christian teenagers even defend file sharing of religious music as a method of spreading the Word, likening music to the Bible itself, which should be disseminated by any means necessary. n206

Nor are God and country the only motivations for copying as affirmation. A number of people celebrate June 16, Bloomsday, with James Joyce-related activities, including (at least before the copyright holder objected) public readings of *Ulysses*. n207 The online LiveJournal community [*581] provides another example of copying as literal badge of identity. LiveJournal members use one or more "icons" to signify themselves and their commitments, usually pictures, usually copied

from other sources. The content of the copied picture serves to identify the LiveJournal member with a group that shares her interest, producing identification in the sense of both defining a unique personality and linking the user with the image she uses. n208

One recent case about copyright in model legal codes provides an even more fundamental challenge to the idea that the first person to arrange words in a particular order has the strongest claim to them. In *Veeck v. Southern Building Code Congress International*, the en banc Fifth Circuit ruled that once a model code written by a private organization had been adopted into some jurisdiction's positive law, others were free to copy the law despite the private group's copyright claims. n209 The majority explained its rationale several different ways, reasoning that there can be no copyright in the law that governs us and that, as law, the code became a fact. n210 The majority's most breathtaking claim was, however, that the adoption of the code as law by the legislature, as representatives of the people, made the people the relevant authors. n211 Their adoption had consequences the original code writing didn't - it put the coercive power of the state behind the words - and that was a relevant sort of authorship. Adoption was the most powerful kind of endorsement possible.

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C. Copyright's Real-World Suppressive Effects

Maybe the situation isn't as bad as all that. Maybe we can call many of the uses I've discussed either *de minimis* or transformative and thus noninfringing. In that case, no one has to worry that mere quotation will be deemed illegal. Even setting aside the many instances of full-scale copying discussed above as instances of free speech, however, both case law and experience counsel against the assumption that most casual copying is too trivial to copyright owners to be suppressed. The suppression may be direct, or it may be the result of a chilling effect caused by legal uncertainty. Either way, copyright interferes with piecemeal quotation and reuse as well as with wholesale copying.

De minimis uses do exist; n212 they're just not the way to bet. Where sound recordings are at issue, for example, courts have found sampling brief excerpts for use in other recordings to be infringement or potential infringement, n213 and record companies now require artists to obtain permission for any sample. n214 One court has even found that unrecognizable, *de minimis* sampling of a sound recording infringes the copyright owner's absolute right against any physical reproduction of protected material. n215 While the situation is worst in music, a television company was found to be an infringer for showing portions of a poster in the background of a scene for a total of 26.75 seconds over the course of one episode of the half-hour sitcom *Roc*. n216 As the poster case illustrates, the *de minimis* defense is especially unlikely to protect copying of images, which are often useless if not reproduced in full or nearly so. n217

[*583] Even where copying only reproduces small portions of a work, however, the current definition of *de minimis* copying would not apply to most of the uses described above, because those uses often depend on the recognition of quotation, and "a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation." n218 As a result, a recognizable use is not going to be *de minimis*. It may still have some chance as a fair use, but even fair use is inadequate to protect much partial copying. Current doctrine generally refuses to recognize noncritical recontextualization as fair use. n219 The sound recording sampling cases and the coursepack photocopying cases, which involve copying portions of books and articles and joining them with other excerpts, are the most obvious examples. n220

Likewise, one court wrote that using the Louis Armstrong classic *What a Wonderful World* to contrast with scenes of violence and pain requires licensing, because that use just comments on the negative aspects of the world portrayed rather than commenting on the song itself. n221

It should be no surprise that publishers thus require permission for even brief quotations, resolving the legal uncertainty with a bright-line rule that affords security by rigidly controlling speech. Stephen King's author's note to *Christine* states rather plaintively that "getting the necessary legal permissions to use lyrics is hard work," n222 hard work that was done forty-six [*584] times for that book, including permission to use quotes such as "Tach it up, tach it up / Buddy, gonna shut you down" n223 and "Take you for a ride in my car-car" (repeated several times). n224 King, whose work chronicles the details of late-twentieth-century life and whose characters listen to the radio, watch television, and often think in terms of the popular (copyrighted) culture they know well, usually gets multiple permissions for each novel, often for similarly abbreviated quotes. n225 Most high school yearbooks contain many more quotations than King's work, and if they were as readily available to copyright owners as King's novels - if, for example, they were available online - it would take a brave attorney to advise a school board to keep quotations up against a copyright owner's protest. n226

In such a case, the school would have less of a commitment to the copied material than the student who had chosen it and a greater incentive to avoid litigation because its pockets would be relatively deeper and its image less sympathetic than that of a poor student. Indeed, any time there is an intermediary such as a publisher or an Internet service provider (ISP), pure copying may easily be controlled and suppressed, even when the copying is minimal and the profit potential is low. To get their films distributed, directors of documentaries must get permission for every song fragment or piece of art appearing momentarily in the background of a scene. n227 Correspondingly, publishers generally now require permission for almost any copying, even in academic contexts, especially when images are [*585] involved. n228 Most film journals, for example, will not publish even a single frame of film without permission. n229 The problem affects both those who come to bury copyrighted works and those who come to praise them: Numerous scholars have been denied permission to quote or reprint pictures on the basis of copyright owners' disagreement with their interpretations, and fair use is no help to such scholars if publishers refuse to rely on the uncertain doctrine. n230 Publishers and distributors rationally fear copyright owners' threats, especially when they can publish an inoffensive book or article instead of one that would require risking a fair use defense. n231 Copyright owners' aggressive stances make the situation worse. Owners often assert that any copying by anyone, however minimal, requires permission, and many would-be users lack the resources to challenge these ownership claims. n232 These structural features of publishing and distribution are unlikely to change any time soon.

In addition, it is worth emphasizing that quoting in new contexts isn't independently creative. The idea of transformation tends to make us focus on what has been added, presuming that the new material is what is valuable, when in many cases it is the mixture that matters. Grace Kelly's [*586] role was added to Cornell Woolrich's story *It Had To Be Murder* to create *Rear Window*, but collecting all of Grace Kelly's bits from the movie wouldn't create a work that could stand on its own, and the parts would mean something different and less than before. n233 The copied and the new elements are both vital, and the value added is not independent of the value appropriated.

One could restate the objection that I am overly pessimistic in the following way: Regardless of what copyright doctrine says and what traditional publishers do, most copying by ordinary people is

beneath copyright owners' notice. Even if they could protest to schools and ISPs, they rarely do, and thus copyright law poses no real obstacle to this type of free speech. Yet there's something problematic about a defense of a law that relies on massive underenforcement to protect speech, in part because random, infrequent enforcement can too easily become discriminatory enforcement. Moreover, enforceability changes, both through technological means such as copy protection and through broader societal shifts to monitorable media such as the Internet. Nor should citizens who want to comply with the law be deterred from speaking because they believe that the letter of the law prohibits any recognizable copying....

FOOTNOTES:

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n124. See, e.g., Baker, *supra* note 68, at 922-33 (citing commentators who argue that copyright is content-neutral, but arguing against that position); cf. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and Bartnicki, 40 *Hous. L. Rev.* 697, 702, 703-10 (2003) (noting that petitioners' briefs in *Eldred* took the view that restrictions were content-neutral "for the sake of argument" but arguing that copyright is in fact content based). See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stan. L. Rev.* 1, 47-54 (2001) (reviewing arguments for seeing copyright as content based but arguing that copyright is content-neutral because it does not seek to suppress any specific viewpoint or subject matter).

n125. See, e.g., Netanel, *supra* note 124, at 51-53.

n126. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180 (1997). The Supreme Court, years earlier, had remanded the case back to the district court. *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622 (1994).

n127. *Turner II*, 520 U.S. 180.

n128. In *Eldred* Justice Ginsburg also distinguished *Turner I* in another way. She stated that special constitutional concerns arise when the government "compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221. Presumably, in her analysis, in *Turner I* the government burdened the cable stations with the facts and ideas contained on the channels cable companies were required to carry. But the government did not select those facts or ideas; the television broadcasters did. If the regulation in *Turner I* had been as specific as Justice Ginsburg suggested, surely it would have been content based and therefore invalid even by the *Turner* majority's standards. Copyright does burden a speaker's use of facts or ideas by requiring her to recast them enough to avoid a finding of "substantial similarity" to another work. See Tushnet, *supra* note 1, at 19-20 & nn.61-63. Even were that not so, it is the unique value of the expression itself that is lost when copying is prohibited, just as a cable operator loses some channel capacity to must-carry stations even though it retains many others. The standard adopted by the *Turner I* Court is supposed to provide moderately speech-protective standards even for content-neutral speech regulations, and to say that copyright doesn't restrict communication of particular facts or ideas is only to say that copyright is content-neutral.

n129. *Eldred*, 537 U.S. at 221; see also Jane C. Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 *Cardozo Arts & Ent. L.J.* 651, 701 (2000) ("The First Amendment is certainly about the freedom to make your own speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt.").

n130. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) ("The presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper." (citation omitted)); *Turner I*, 512 U.S. at 675 (O'Connor, J., concurring in part and dissenting in part) ("Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place."); *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that both an author and a publishing house that selects authors for publication are "speakers" for First Amendment purposes); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286-88 (1964).

n131. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case); see also McJohn, *supra* note 48, at 109. McJohn discussed the Pentagon Papers case, which extended First Amendment protection to a newspaper wishing to reprint government documents, and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which held that publication of an illegally recorded phone conversation was protected by the First Amendment. He noted that "originality of speech has never been part of the various tests for evaluating laws that restrict speech." McJohn, *supra* note 48, at 109.

n132. Arguably, we need the New York Times to get the speech disseminated, and we don't need Eric Eldred. But this is an empirical question, and the evidence suggests that being in the public domain would make dissemination of at least some works much more likely, particularly where a scholarly or cultural institution is attempting to preserve works with more historical than economic value. See, e.g., Brief of Amici Curiae American Association of Law Libraries et al., Eldred (No. 01-618); Brief of Amici Curiae College Art Association et al., Eldred; Brief of Amici Curiae Hal Roach Studios & Michael Agee, Eldred; Brief of Amicus Curiae Internet Archive, Eldred.

n133. Some of these examples involve consent by the author, while others do not. We may think of the New York Times and the judge as different from Eldred and the senator because the former have an agency-type relationship with the speakers whose words they use and the latter do not (divine inspiration aside). But if one person's words can become another's for First Amendment purposes through some relationship not involving creative composition on the part of the second comer, then creation isn't the only way to create a tie between speaker and speech; the question then is what the other ways should be. It is law that creates the agency-property relationship, not nature. (Indeed, many countries do not treat employees' creations as the copyrighted property of their employers, as the United States does, but rather vest rights in the employees. See generally Ghislain Roussel, *The Copyright of Salaried and Employed Authors - a Comparative Study of National Laws*, 26 Copyright 221 (1990)).

n134. *Comedy III Prods. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) ("The film at issue is in the public domain. We all own it now.").

n135. See, e.g., *Television Without Pity*, <http://www.televisionwithoutpity.com> (last visited Nov. 24, 2004) (offering detailed recaps of current television shows).

n136. Volokh, *supra* note 124, at 726.

n137. See David Owen, *Power to the People: The Photocopier*, L.A. Times, Aug. 10, 2004, at B13 ("[Photocopying] has given ordinary people a simple means of reproducing and sharing printed information, and, by doing so, it has reduced the ability of the strong to keep secrets from the weak. (Without photocopying, there could have been no Pentagon Papers, for example.) A telling indication of xerography's significance is that in the former Soviet Union, whose rulers maintained their power in part by monopolizing access to information, copiers were guarded more closely than computers, and individual copies were numbered so that they could be traced.").

n138. See, e.g., Goldstein, *supra* note 11, at 153-54.

n139. See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1358 (Ct. Cl. 1973) (holding that copying, for research purposes, material that is "stimulating or helpful," even if not "crucial," produces important social benefits), *aff'd* by an equally divided Court, 420 U.S. 376 (1975); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 *Vand. L. Rev.* 1799, 1816 (2000) (noting the connection and potential temporal gap between access and further uses, including transformative uses); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 *Vand. L. Rev.* 1879, 1907-09 (2000) (arguing that works shared by many people have additional value over and above the intrinsic value to the individual consumer).

n140. Goldstein, *supra* note 11, at 208.

n141. See also Stephen Jay Gould, *Poe's Greatest Hit*, *Nat. Hist.*, July 1993, at 10, 15, 18-19 (discussing a book that, without acknowledgement, copied two expensive and inaccessible academic books on mollusks, making their contents inexpensive and available to students in the first half of the nineteenth century).

n142. See Brief of Amici Curiae College Art Association et al. at 7, 18, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

n143. See Balkin, *supra* note 2.

n144. See Owen M. Fiss, *The Irony of Free Speech* (1996) (arguing for a democracy-promoting interpretation of the First Amendment, which would allow government to regulate the marketplace of ideas as it regulates economic markets, to correct imbalances of power).

n145. See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 *B.C. L. Rev.* 397, 406-20 (2003) (arguing that consumers have interests in autonomy, communication with others, and self-expression that cannot be captured by seeing them either as passive or as new authors). The greatest trick the content industry ever pulled was getting people to believe that readers and listeners are "consumers," as if they swallowed speech like candy.

n146. Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 *Wake Forest L. Rev.* 983, 1056 (2003).

n147. See *id.* at 1067.

n148. See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971).

n149. Bezanson, *supra* note 146, at 1069; see also Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, in 19 *Copyright Law Symposium* 43, 72-73 (1971) (arguing that repetition of another's expression serves no First Amendment purpose). Bezanson suggests that certain copying can become First Amendment-protected speech when the copier puts her own credibility or commitments at issue, as when a newspaper implicitly endorses a reporter's claim by running his story. Copyright law does not make that distinction, and Bezanson doesn't claim that his theory is consistent with copyright law. See Bezanson, *supra* note 146, at 1081.

n150. Again, Bezanson's argument would encompass signing the Declaration as a transformative act of endorsement, but copyright law wouldn't.

n151. See Ian Youngs, *Micro-Budget Film Wows Cannes*, *BBC News Online*, May 18, 2004, <http://news.bbc.co.uk/2/hi/entertainment/3720455.stm>.

n152. See Pressbook: Tarnation 2-3, 5, 7, available at <http://www.wellspring.com/movies/images/upload/TARNATIONPRESSBOOK.pdf> (discussing the film's use of other copyrighted materials to evoke and explain the director's life); see also id. at 11 (explaining that the film "used many of the films and songs that were a part of [the director's] childhood as metaphors for [his] personal experiences and feelings").

n153. See David Lange, Reimagining the Public Domain, *Law & Contemp. Probs.*, Winter/Spring 2003, at 463, 482 ("'Dear Henny,' Anne Frank wrote . . . , 'Pluck roses on earth, and forget me not.' The words are haunting now, poignant, simple, terribly sweet and sad. . . . The poet who wrote them was named Snelders. . . . Was [Frank] a plagiarist, a pirate, a thief? No decent person would lay such a charge against her memory." (footnote omitted)); see also Nimmer, *supra* note 93, at 284 (describing the card in greater detail).

n154. See Gerry Bloustien, "Ceci N'Est Pas une Jeune Fille": Videocams, Representation, and "Othering" in the Worlds of Teenage Girls, in *Hop on Pop: The Politics and Pleasures of Popular Culture* 162, 173-74 (Henry Jenkins et al. eds., 2002); see also Commercial: Sounds Like First Love (MTV 1999), available at <http://www.commercialcloset.org/cgi-bin/iowa/portrayals.html?record=74> (illustrating the importance of music in ordering and explaining people's lives by featuring a young man making a mix tape of songs about heartbreak after a failed relationship).

n155. Cf. John Fiske, TV: Re-Situating the Popular in the People, 1 *Continuum: Australian J. Media & Culture* n.p. (1987-1988), available at <http://www.mcc.murdoch.edu.au/ReadingRoom/1.2/Fiske.html> ("Viewers of Crossroads [a British television program] . . . were vehement that the program was theirs, it was their cultural capital. And they made it theirs by the pleasures and meanings they produced from it, that articulated their concerns and identities.").

n156. Philip Kennicott, Changing Our Tune: Athens Honors American Winners with Kinder, Gentler National Anthem, *Wash. Post*, Aug. 26, 2004, at C1.

n157. See Mark Brown, Bootleg Pirates, *Orange County (Cal.) Reg.*, Mar. 19, 1995, at F25 ("All collectors have their own favorite performances that make the compulsion worthwhile 'Radio had burned out the regular songs by playing them constantly. I wanted to hear something new and different. After that, I went out of my way to find them,' said [one fan]"); Allan Kozinn, Bootlegging as a Public Service: No, This Isn't a Joke, *N.Y. Times*, Oct. 8, 1997, at E2 ("Live recordings . . . capture an electricity that more pristine studio recordings lack. They also let a listener track changes in taste and performance style over the decades and changes in the orchestra's response to different conductors.").

n158. See, e.g., Robert Everett-Green, Classics and Beyond, *Globe & Mail* (Toronto), Oct. 27, 2001, at R1 (discussing, among others, the Beatles, the Rolling Stones, and Elvis Presley). Karaoke singers perform songs written by others to be part of a group that values singing, even unprofessional singing, and listening as well. See, e.g., Robert Drew, "Anyone Can Do It": Forging a Participatory Culture in Karaoke Bars, in *Hop on Pop*, *supra* note 154, at 254. Now, "movieoke" offers movie fans a similar opportunity to act out favorite scenes. See Randy Kennedy, Oughta Be in Pictures? So Just Drink Up!: Amateur Celebrities Pick a Movie and Join In, *N.Y. Times*, Mar. 10, 2004, at E1. A woman who credits herself with inventing the concept had earlier "made a movie short about a kind of cartoon version of herself, a girl whose only way of communicating was speaking movie lines. . . . Ms. Fite said [that] movieoke is . . . a means to allow people who 'are married to our television sets' and whose personalities are basically a pastiche of pop-culture references to get together, drink and put some of that hard-won knowledge to good use." *Id.*

n159. Michael Senft, In the Mood for Tori Amos? Meet "Strange Little Girls," *Ariz. Republic*, Nov. 18, 2001, at 1E.

n160. *Id.* ("Men often document their emotional lives by music. . . . When they had a breakup, they had a certain CD. When someone died, they had a certain CD. When they lost their jobs, they had a certain CD. . . . If I would have written these songs myself, they wouldn't have had the same impact."); see also Karla Peterson, Pop Talk: Tori Amos, *Copley News Service*, Nov. 26, 2001 n.p. ("'What I wanted to say with this album could only be said by using men's words,' said Amos. . . . 'I am as protective of them as I am of my own [songs]'").

n161. See Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* 16-30, 36-45 (1988) (discussing the use and reuse of Shakespeare as both popular and elite playwright, the prevalence of productions of and quotations from Shakespearean plays in the nineteenth and early twentieth centuries, popular alterations to the plays, and the use of Shakespeare to articulate a specifically American morality). Even evanescent changes in production can make an enormous difference: "An interpretive artist could turn a tragic work into a farce merely by exaggerating the emotional range of his performance or by speaking his lines with an unintended irony." Otto W. Konrad, Note, *A Federal Recognition of Performance Art Author Moral Rights*, 48 Wash. & Lee L. Rev. 1579, 1588 (1991).

n162. See Anthony Tommasini, *All-Black Casts for "Porgy"? That Ain't Necessarily So*, N.Y. Times, Mar. 20, 2002, at E1.

n163. See Leonard Jacobs, *German "Godot" a No Go: Beckett Publisher Quashes Cross-Gender Production*, Back Stage, Feb. 6, 2004, at 62. Samuel Beckett was also involved in a lawsuit over a Robert Brustein production of *Endgame* that substantially changed the set design: "Beckett's empty room reflected [a] sense of desolation. A set suggesting a bombed-out bunker after a nuclear holocaust, by contrast, altered the play's dynamics, for it grounded the individual's despair in an external event that was shared by all." Martin Garbus with Stanley Cohen, *Tough Talk: How I Fought for Writers, Comics, Bigots, and the American Way* 192 (1998). Otto Konrad discusses Beckett's *Endgame* and other instances in which performances, though faithful to the underlying script or score, were perceived by authors as travesties. See Konrad, *supra* note 161, at 1580. Further afield, a recent alternate soundtrack to the film *Harry Potter and the Sorcerer's Stone* was designed to be played while watching the original movie but alters the characters' relationships. It attempts to create an experience closer to the oral tradition, in which each storyteller put a unique spin on a standard story; the artist who created the soundtrack noted that "'whenever anybody does a production of [a play], it's fair game' to turn tragedy into farce or slapstick into melancholy, simply by devising new line readings or stage directions." Daniel Radosh, *Harry Potter: The Digital Remix*, Salon, June 22, 2004, <http://archive.salon.com/ent/feature/2004/06/22/harry>.

n164. I am indebted to Francesca Coppa for these insights. See also Marvin Carlson, *Theatrical Performance: Illustration, Translation, Fulfillment, or Supplement?*, 37 *Theatre J.* 5 (1985) (discussing theories of performance as altering a play, for better or worse, and concluding that performances and plays are both necessarily incomplete); Konrad, *supra* note 161, at 1602 (noting that works intended to be performed are both self-contained and in need of an interpreter).

n165. See Christopher Palmeri & Nanette Byrnes, *A Tsunami of Japanese Pop Culture*, BusinessWeek Online, July 26, 2004, http://www.businessweek.com/magazine/content/04_30/b3893094.htm (quoting an expert who describes "fan-subbing" groups as "cottage cultural intermediaries").

n166. See *Sony Music Entm't v. Does* 1-40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) ("The file sharer may be expressing himself or herself through the music selected and made available to others."); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 *Harv. L. Rev.* 1137, 1143 n.29 (1990); cf. Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit, and Power* 211 (2001) (discussing defenders of Martin Luther King, Jr.'s copying who argue that King's originality lay in his selection and arrangement of material); *infra* notes 184-186 and accompanying text (discussing King's copying). A recent article describes many CD burners' attitudes toward their creations:

Most users of music file-sharing services do not copy the products for sale by the music industry. While the industry sells albums, artificially shaped to the capacities of their commercial format, LP or CD, file-sharers tend to rip songs.

As their favorite musicians recombine digital samples to create new music, downloaders recombine digital songs in new contexts.

"I don't think they think of it as copying music," said Joe Levy, deputy managing editor of *Rolling Stone*. "It's a very individual experience for them. They want the songs they want in the order they want. Then it becomes not the new Mary J. Blige album, but their own mix. It's a much more individual package of music. Kids view it as an interactive and creative act."

Betsy Frank, the executive vice president for research and planning at MTV Networks, who studies young TV and music audiences, said the people in her focus groups tended to describe copying as an assertive act, a way of navigating a media environment that bombards them with information

Leland, *supra* note 172.

n167. I thank Neil Netanel for pressing me on this point.

n168. See 17 U.S.C. 101 (2000) (defining "collective work").

n169. See Fleetwood Mac, *Don't Stop*, on *Rumours* (Warner Bros. Records 1977). Christine McVie, who wrote the song, intended a different meaning than the Clinton-Gore campaign espoused, yet the song proved perfectly effective when recontextualized into a political statement.

n170. See Oscar Brand, *Presidential Campaign Songs: 1789-1996* (Smithsonian Folkways 1999).

n171. See Fran Wood, John Kerry, *Can You Name That Tune?*, *Star-Ledger* (Newark), July 25, 2004, *Perspective*, at 3; Stuart Schimler, *Singing to the Oval Office: A Written History of the Political Campaign Song* (Feb. 13, 2002), http://www.presidenclect.org/art_schimler_singing.html.

n172. 491 U.S. 397, 424-25 (1989) (Rehnquist, C.J., dissenting).

n173. Stephen Burt, "September 1, 1939" Revisited: Or, Poetry, Politics, and the Idea of the Public, 15 *Am. Literary Hist.* 533, 534-35 (2003); see also Volokh, *supra* note 124, at 726-27 (discussing other core political speech that requires copying expression).

n174. Cf. Gordon, *supra* note 116, at 1569 ("Some poems, some ideas, some works of art, become 'part of me' in such a way that if I cannot use them, I feel I am cut off from part of myself." (footnote omitted)). Gordon is most interested in people who create new, transformative works in response to existing works, see *id.* at 1556, whereas I am arguing that endorsing and adopting existing works is itself an important part of self-definition and, therefore, self-expression. But see Rubinfeld, *supra* note 2, at 34 (suggesting that reading poetry is generally not self-forming).

n175. See Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *Illuminations* 211, 214 (Hannah Arendt ed. & Harry Zohn trans., Fontana Press 1992) (1955) (arguing that all reproduction transforms the copied work because "it enables the original to meet the beholder halfway," as when a public choral production plays in a private living room); John Berger et al., *Ways of Seeing* 29 (1972) (explaining that context inevitably changes meaning); Terry Eagleton, *Literary Theory: An Introduction* 11 (2d ed. 1996) ("All literary works . . . are 'rewritten[.]' if only unconsciously, by the societies which read them; indeed there is no reading of a work which is not also a 're-writing[.]'"); *supra* note 97.

n176. One need only look at the reader reviews on Amazon.com to see that people often seem to be reading very different books with the same text. The uniqueness of texts for readers is quite literal in modern times, when we rarely huddle around a book together; we read our own, individual copies or watch programs on our own TVs. Cf. Fiske, *supra* note 155 (noting that researchers have found multiple contradictory interpretations of the TV show *Dallas* in different groups).

n177. See Northrop Frye, *Ethical Criticism: Theory of Symbols*, in *Anatomy of Criticism: Four Essays* 71, 97 (Princeton Univ. Press 2000) (1957) ("Poetry can only be made out of other poems; novels out of other novels.").

n178. See Virginia Woolf, *The Modern Essay*, in *The Common Reader* 267, 276 (1925) ("Life wells up and alters and adds. Even things in a book-case change if they are alive; we find ourselves wanting to meet them again; we find them altered.").

n179. Russ Hunt, *Two Cheers for Plagiarism*, *Inkshed*, Autumn 2003, at 10, 15, available at <http://www.stthomasu.ca/inkshed/nletta03/hunt.htm>.

n180. David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 *U. Pitt. L. Rev.* 281 (2004).

n181. See *id.* at 323-24 (quoting 142 words from *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

n182. McGowan would probably point out that he has made substantial contributions to the work in interpreting Brandeis and in making many points of his own, which is certainly true. Yet the value of his work wouldn't be the same if it had a Brandeis-shaped hole in it; the copying provides argumentative weight and grounds his argument in a tradition of constitutional interpretation. See *id.* at 323-26. But cf. *id.* at 329 (arguing that derivative works created by copiers lack any First Amendment value that couldn't be achieved without copying and that derivative authors remain "free to distribute their own work, without whatever they have copied" under the current copyright system).

n183. See, e.g., *Consumers Union of the United States v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 n.6 (2d Cir. 1983) (holding that the defendant could reprint Consumers Union's positive review of its vacuum cleaner and characterizing the defendant as "saying that it believes that the viewing public places great stock in what Consumer Reports has to say" and that "in this way, the use of such statements and the credit given to Consumer Reports actually may reinforce a positive public perception of the magazine" (emphasis altered)). Jack Balkin and Sandy Levinson, themselves quoting extensively, explain this phenomenon well in the context of legal scholarship:

As Barbara Herrnstein Smith has noted, "the repeated inclusion of a particular work in anthologies" or "its frequent citation or quotation by professors [and] scholars" is more than a simple repetition. It is a "recommendation of value" that "not only promotes but goes some distance toward creating the value of that work." Citations and quotations not only draw attention to works, they make works the kinds of works that attention is paid to and hence should be paid to. "By making the work more likely to be experienced at all," citations and quotations "make it more likely to be experienced as valuable."

J.M. Balkin & Sanford Levinson, *How To Win Cites and Influence People*, 71 *Chi.-Kent L. Rev.* 843, 844-45 (1996) (alterations in original) (footnotes omitted); see also Ralph Waldo Emerson, *Quotation and Originality*, in *Letters and Social Aims* 155, 173 (Boston, James R. Osgood & Co. 1876), available at <http://www.emersoncentral.com/quotations.htm> ("[A] writer appears to more advantage in the pages of another book than in his own. In his own, he waits as a candidate for your approbation; in another's, he is a lawgiver."); Marjorie Garber, *Quotation Marks* 19-20 (2003) (discussing the ways in which quotation creates authority for the original speaker and the second speaker); Randall, *supra* note 166, at 211 (same).

n184. For discussion of King's earlier use of the same language, see Drew D. Hansen, *The Dream: Martin Luther King, Jr., and the Speech That Inspired a Nation* 70, 109-13, 118, 171-73 (2003). Cf. *id.* at 171 ("Several important NAACP figures had heard King many times before, and so, to them, his speech at the march sounded like any other King address."). The speech twice quoted the Bible, see *id.* at 103, and borrowed other biblical language, see *id.* at 101-02, 119-20. It also quoted the Declaration of Independence, see *id.* at 53, 58, the song *America*, see *id.* at 61, and the spiritual *Free at Last*, see *id.* at 62. King drew on other sources, as well. See *id.* at 108-09; *id.* at 115 ("King was always quick to pick up an apt turn of phrase or line of oratory and adapt it for use in his own speeches."). King made some changes in wording: For example, he changed another preacher's "Green Mountains and the White Mountains of Vermont and New Hampshire" to the "prodigious hilltops of New Hampshire." See *id.* at 109 (internal quotation marks omitted). But the changes most likely would be insufficient to save him from charges of copyright infringement. See, e.g., *Wildlife Ex-*

press Corp. v. Carol Wright Sales, 18 F.3d 502, 511 (7th Cir. 1994) (noting that substantial similarity, not identical copying, is the test for copyright infringement). For additional instances of King's use of others' words in his sermons and other works, see Keith D. Miller, *Voice of Deliverance: The Language of Martin Luther King, Jr. and Its Sources* 3-7, 15-16, 55, 70, 72-73, 75, 78-80, 88-91, 100-01, 107-08, 120-21, 191-93 (1992). King apparently thought his practices were perfectly acceptable, making no attempt to hide his borrowing and copying from well-known sources. See *id.* at 135-36.

Oscar Wilde was also prone to self-plagiarism. His most famous speech, made from the dock after his conviction for sodomy, was actually a patchwork of earlier, lesser-known speeches. See Francesca Coppa, *Performance Theory and Performativity*, in *Palgrave Advances in Oscar Wilde Studies* (Frederick S. Rosen ed., forthcoming 2004) (manuscript at 72, 87-88, on file with author). Many other examples of public figures finding the right words and sticking with them could doubtless be found.

n185. See Hansen, *supra* note 184, at 99-100 ("King's speech at the march was so powerful in part because it exposed a national audience, for the first time, to his genius as a preacher The March on Washington simply provided a national audience with its first opportunity to witness a pulpit performance that those active in the civil rights movement could see many times a year.").

n186. Miller, *supra* note 184, at 85, 195-96 (describing how King became inextricably linked with his borrowed words and thus a powerful symbol against injustice of all kinds); see also *id.* at 192 ("King's listeners retained his ideas and phrases more easily because the familiar strains of his sermons made them more memorable. . . . Had he instead supplied sermons with profoundly original content, he would never have legitimized his radical tactic of civil disobedience and his radical goals of ending racism, poverty, and war.").

n187. Dave Leshner, *GOP Pulls King Segment from TV Ad for Prop. 209*, *L.A. Times*, Oct. 25, 1996, at A26.

n188. See Miller, *supra* note 184, at 223. The King estate litigates aggressively to control dissemination of excerpts of the *I Have a Dream* speech. See, e.g., *Estate of King v. CBS*, 194 F.3d 1211 (11th Cir. 1999); *Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd*, 694 F.2d 674 (11th Cir. 1983).

n189. Cf. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) ("The identity of the speaker is an important component of many attempts to persuade. A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window . . ." (footnote omitted)). Just as King is linked to his speech regardless of who originally came up with the turns of phrase, it is not Theodore Sorensen but John F. Kennedy who is indelibly associated in the public mind with famous lines such as "Ask not what your country can do for you - ask what you can do for your country." Text of Kennedy's Inaugural Outlining Policies on World Peace and Freedom, *N.Y. Times*, Jan. 21, 1961, at A8. Sorensen wrote the words, but Kennedy made them powerful and is commonly regarded as their source. Thomas Mallon believes Sorensen plagiarized the phrase from Oliver Wendell Holmes, Jr., who wrote, "It is now the moment . . . to recall what our country has done for each of us, and to ask ourselves what we can do for our country in return." Thomas Mallon, *Stolen Words: Forays into the Origins and Ravages of Plagiarism* 130 (1989). Sorensen's phrasing, however, seems so far superior, tightening the chiasmus, that it serves as another example of borrowing that improves upon the source.

n190. See Miller, *supra* note 184, at 25-26, 125-28, 191.

n191. See *id.* at 127. Ministers count eloquence as successful only when it saves souls, and originality ranks lower still:

After all, how many truly original sermons are possible on Luke's account of Christ's birth . . . ?

Moreover, the alternative to borrowing is not always wondrous. . . . Some ministers are entirely capable of preaching homilies that are highly original, yet perfectly dreadful.

....

... If a sermon inspires a deeper faith and better living, it succeeds; if not, it fails. Nothing else matters.

Id.

n192. See *id.* at 137 ("For King and others, borrowing sermons . . . served as a way of arguing from authority. By lauding certain preachers, the Protestant community had in effect placed upon their sermons its Good Housekeeping Seal of Approval. When King reiterated their texts, he evoked the authority of those certified by all of liberal Protestantism.").

William Alford's account of classical Chinese attitudes toward copying invokes similar themes: Copying showed respect for the wisdom of the past, demonstrated knowledge and judgment, and preserved general access to the state's heritage. See William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* 25-29 (1995).

n193. See *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 569 (1987) (Brennan, J., dissenting) (comparing the rhetorical power of Paul Cohen's war protest slogan "Fuck the Draft" with one reading "I Strongly Resent the Draft"); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

n194. David Thelen, *Becoming Citizens in the Age of Television* 112 (1996); cf. Garber, *supra* note 183, at 21-22 ("We are as much informed of a writer's genius by what he selects as by what he originates. We read the quotation with his eyes, and find a new and fervent sense; as a passage from one of the poets, well recited, borrows new interest from the rendering. As the journals say, "the italics are ours." (quoting Emerson, *supra* note 183, at 172)).

n195. Thelen, *supra* note 194, at 112. Many letter writers explicitly indicated that newspaper columns and other materials expressed their thoughts better than they could themselves. See *id.*; see also *id.* at 114 ("Writers drew on [Bible quotes, lines from popular songs, poems, or folk expressions], not to demonstrate erudition - for they rarely cited chapter, verse, or page, or worried about the original or accurate form of the quotation - but because the sentiment seemed to distill the wisdom of ages."); cf. Randall, *supra* note 166, at 36 ("Repetition is the means by which non-authors - scribes, imitators, compilers - participate in eternal truth by facilitating its transmission.").

n196. See, e.g., Am. Library Ass'n, *Action Alert: Protect the Balance in Copyright Law*, <http://congress.nw.dc.us/ala/mail/oneclick/compose/?alertid=6670186> (last visited Nov. 24, 2004) (suggesting that citizens cut and paste given text into a message to their congressional representatives). The point is not to impress with new rhetoric, but to convince someone to take action.

n197. A brief aside on negation, the opposite of affirmation. Sometimes copying serves to criticize rather than laud - most notably as "appropriation" art, which mocks popular culture and challenges conventional notions of art, value, and originality. See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 *Yale L.J.* 1359, 1366-67 (1990); E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 *Colum. L. Rev.* 1473 (1993). Because others have argued for reassessment of fair use standards for appropriation artists and because my concern is with more usual kinds of copying, I will not discuss appropriation art or other forms of explicitly critical copying in any detail. But cf. Gordon, *supra* note 116, at 1568 (noting that copying may be necessary in order to criticize or contest a religious interpretation). The existence of appropriation art is further evidence that copying is not necessarily unthinking, unconditional, or uncritical. My argument is that this can be true even when the copying comes from love rather than contempt.

n198. Establishment Clause jurisprudence is, in fact, crucially concerned with the associational effects of copying - the message sent when one party (a government entity) adopts the speech of another (a religious group). See *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989) ("The very concept of 'endorsement' conveys the sense of promoting someone else's message. . . . The Establishment Clause prohibits . . . the government's lending its support to the communication of a religious organization's religious message.").

n199. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

n200. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

n201. See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494-95 (1985) (noting that political action committees, by aggregating contributions, "amplify the voice of their adherents" and that donations allow contributors to "add their voices" to the group's message (alteration in original) (internal quotation marks omitted)); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 309 (1984) (Stevens, J., dissenting) (arguing that joining together to speak with one voice may be the only way to "make[] the right to express one's views meaningful"); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981) (noting that banding together can make views known when individual voices "would be faint or lost").

n202. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 *Hous. L. Rev.* 1, 136 (2001) (internal quotation marks omitted); see also David Nimmer, *Copyright: Sacred Text, Technology, and the DMCA* 227-28 (2003) ("The Torah commands of the king that he personally write a copy of sacred scriptures. . . . The king, emblematic of the people as a whole, must discharge the sacred task of copying the Torah word-for-word."); Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 *Cal. L. Rev.* 323, 359-62 (2003) (arguing that the exact words of religious texts, like those of secular laws, may be crucial to adherence to religious law).

n203. 227 F.3d 1110 (9th Cir. 2000).

n204. *Id.* at 1121.

n205. Though, like many affirmations, this one was made in the face of opposition, the members of the splinter church believed that their religion required them to share a text that copyright law said they could not disseminate. They copied to agree with the source, not to condemn it.

n206. See Katharine Mieszkowski, *Thou Shalt Not Steal*, *Salon*, May 25, 2004, http://archive.salon.com/tech/feature/2004/05/25/christian_pirates/index.html ("For some Christian kids . . . sharing the religious hits that express their faith is their way of spreading the word. "They wanted it to be part of their ministry. They wanted to share some of the positive messages from their music with non-believers. It's an evangelistic impulse." (quoting David Kinnaman)).

n207. In 2000, Stephen Joyce, trustee of the Joyce estate, took legal action against public readings of Joyce's works, and he recently warned the Irish government and arts institutions that "any failure to clear the use of material under the copyright of the estate" would result in a lawsuit, thus preventing public readings on the centennial of Bloomsday. See Tara Pepper, *Portrait of the Daughter: Two Works Seek To Reclaim the Legacy of Lucia Joyce*, *Newsweek Int'l*, Mar. 8, 2004, at 67, available at <http://msnbc.msn.com/id/4408820>; Jamie Smyth, *Joyce Estate Warns Festival over Copyright Issues*, *Irish Times*, Feb. 9, 2004, at 3.

n208. See Alek Tarkowski, *Petri Dishes, 100px x 100px: User Pictures on LiveJournal and Associated Cultural Practices: Version 1.0: An Initial Exploration*, http://terminal.n17.waw.pl/stable/pliki/petri_dishes.html (last edited Mar. 12, 2004) ("In fandom communities users often use images of celebrities or characters in a manner that blurs the distinction between signifying that is iconic (of the celebrity) and symbolic (of the user)."); Alek Tarkowski, *Petri Dishes, 100px x 100px: User Pictures on LiveJournal and Associated Cultural Practises: Version 2.0: A Further Exploration of the Phenomenon 21*, http://terminal.n17.waw.pl/stable/pliki/petri_dishes_2.pdf (last visited Nov. 24, 2004) ("Fandom sometimes expresses its interests and allegiances through simple multiplication of content, without any transformations, by using them as user pictures."). Trademarks (many of which are also protected by copyright) often function in similar ways to announce a user's commitments to himself, to others like him, and to the world. See Rosemary J. Coombe, *Critical Cul-*

tural Legal Studies, 10 Yale J.L. & Human. 463 (1998); Rochelle Cooper Dreyfuss, We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity, 20 Colum.-VLA J.L. & Arts 123 (1996); Jessica Litman, Breakfast with Batman: The Public Interest in the Advertising Age, 108 Yale L.J. 1717 (1999).

n209. 293 F.3d 791 (5th Cir. 2002) (en banc).

n210. See *id.* at 795-96, 800-01.

n211. See *id.* at 799; see also *Bldg. Officials & Code Admin. v. Code Tech.*, 628 F.2d 730, 734 (1st Cir. 1980) (reversing grant of preliminary injunction and noting that "citizens are the authors of the law, and therefore its owners" regardless of who drafted the law); Thomas Hobbes, *Leviathan* 112 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651) (referring to an "author" as one who has "authority" to act).

n212. See, e.g., *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (holding that copying a sequence of three notes from a musical composition was *de minimis* because the average audience would not recognize the appropriation). Such cases do not show that the doctrine of *de minimis* copying offers substantial protection for copiers. Not only did copying three notes suffice to buy the copier a lawsuit, but the equally brief sample from the sound recording containing the musical composition was licensed, because the record company would not rely on a *de minimis* defense for a sound recording. See *id.* at 593. Under current law, one copyright covers the words and music, while a separate copyright covers each recording of the musical work, so two copyrights are potentially involved in each sample.

n213. See, e.g., *Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

n214. See Howard Siegel et al., *Music Publishing*, in 2 *Counseling Clients in the Entertainment Industry 1999*, at 323, 379 (PLI Intellectual Prop., Course Handbook Series No. G-554, 1999); see also Michael P. McCready, *The Law Regarding Sampling*, <http://www.music-law.com/sampling.html> (last visited Nov. 24, 2004) ("When you sample someone's song without permission, it is an instant copyright violation. . . . One note from a sound recording is a copyright violation.").

n215. See *Bridgeport Music v. Dimension Films*, No. 02-6521, 2004 WL 1960167 (6th Cir. Sept. 7, 2004).

n216. See *Ringgold v. Black Entm't Television*, 126 F.3d 70, 73 (2d Cir. 1997).

n217. See *Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 804 (9th Cir. 2003) (suggesting that, while songs, video, and written works "are naturally severable," visual works may require wholesale reproduction in order to comment on them); *Ty, Inc. v. Publ'ns Int'l*, 292 F.3d 512, 522 (7th Cir. 2002) (pointing out that copying part of a picture of a Beanie Baby would be useless in a guide to Beanie Babies); Ames, *supra* note 197, at 1483-84.

n218. *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986). This result occurs because *de minimis* copying is defined as the absence of substantial similarity, which itself exists when "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).

n219. See *supra* note 97. Sometimes excerpting transforms works, and sometimes it doesn't. Compare *Hofheinz v. AMC Prods.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001) (holding that use of brief film clips in documentaries was transformative fair use), *aff'd*, No. 01-7060, 2002 U.S. App. LEXIS 13562 (2d Cir. May 20, 2002), with *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (holding that use of brief video and audio clips was not fair use), *amended*, 357 F.3d 896 (9th Cir.), *cert. denied*, 124 S. Ct. 2886 (2004), and cases cited *supra* note 98.

n220. See cases cited *supra* note 98.

n221. *Abilene Music v. Sony Music Entm't*, 320 F. Supp. 2d 84, 92 (S.D.N.Y. 2003) (discussing Terry Gilliam's 12 Monkeys and Barry Levinson's *Good Morning, Vietnam*, in which the song is used in this ironic way).

n222. Stephen King, Christine, at author's note (1983). The amicus brief of the College Art Association in *Eldred v. Ashcroft* describes the rigors of the permission process for academics; the costs in time and money are often substantial if not prohibitive. See Brief of Amici Curiae College Art Association et al. at 6-10, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); see also Promoting Technology and Education: Turbo-Charging the School Buses on the Information Highway: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 19 (2001) (prepared statement of Gerald A. Heeger, President, Univ. of Md. Univ. Coll.) (describing a university cinema program that spent \$ 600,000 on a failed attempt to develop a distance education course ("Negotiations [to use five-to thirty-second film clips] went on interminably. . . . Some people never responded, others demand a great deal of money, some simply said no.")); Youngs, *supra* note 151 (describing a film with a budget of \$ 218 for production and \$ 400,000 for copyright clearance of the song and video clips it borrowed).

n223. King, *supra* note 222, at 168.

n224. *Id.* at 203.

n225. See, e.g., Stephen King, *Dreamcatcher* 621 (2001) (seven permissions); Stephen King, *It* (1986) (thirty-one); Stephen King, *Misery* (1987) (eight); Stephen King, *Rose Madder* (1995) (seven); Stephen King, *Salem's Lot* 293 (1975) (four, including permission to quote one line - nine words - from Bob Dylan's *North County Blues* ("Tell you now that the whole town is empty.")); Stephen King, *The Stand* (complete & uncut ed. 1990) (ten); see also William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 *Cal. L. Rev.* (forthcoming Dec. 2004) (manuscript at 18, on file with author) ("In Margaret Atwood's recent novel *Oryx and Crake*, the author thanks "John Calder Publications and Grove Atlantic for permission to quote eight words from Samuel Beckett's novel, *Mercier and Camier*.' Eight words? Please." (footnote omitted)). But see Stephen King, *Firestarter*, at epigraph (1980) (not showing permission for "It was a pleasure to burn," from Ray Bradbury's *Fahrenheit 451*).

n226. Cf. *School Settles CD Flap*, *DJ Zone: DJ News Source*, May 17, 2004, <http://www.djzone.net/pg/news/wire/school-settles-cd-flap.shtml> (discussing souvenir CDs produced for a high school prom, which got the prom committee in trouble with a major music label for including three of the label's songs, though ultimately the label granted a retroactive license).

n227. See, e.g., William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 216 n.16 (2003) (criticizing interpretations of the law that require permissions for minimal use); Lessig, *supra* note 22, at 95-99; Lawrence Lessig, *Innovating Copyright*, 20 *Cardozo Arts & Ent. L.J.* 611, 612-14 (2002).

n228. See, e.g., Free Expression Pol'y Project, "The Progress of Science and Useful Arts": Why Copyright Today Threatens Intellectual Freedom 16 (2d ed., rev. & updated 2003), available at <http://fepproject.org/policyreports/copyright2d.pdf>; Patry & Posner, *supra* note 225 (manuscript at 16-19).

n229. See Brief of Amici Curiae College Art Association et al. at 13, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

n230. See *id.* at 8; see also *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 83 n.8 (1995) (prepared statement of Dennis S. Karjala) (noting press reports that the estate

of songwriter Lorenz Hart refuses permission to quote Hart's lyrics to any biographer who mentions Hart's homosexuality); *The Many Lives of the Batman: Critical Approaches to the Superhero and His Media*, at vi (Roberta E. Pearson & William Uricchio eds., 1991) ("DC Comics refused to grant us the right to use images as they did not feel that this book was consistent with their vision of the Batman."). Fair use is especially unhelpful for those who wish to comment on visual images, where usually one needs to use all or most of an image, meaning that one of the fair use factors is an automatic strike against the use. See Brief of Amici Curiae College Art Association et al. at 12 n.8; see also id. at 13-14 ("CAA members . . . repeatedly report that rights issues are so murky that no publisher will take the risk of relying on fair use of images of artwork."); id. at 14 (stating that one publisher of books about film and television refuses to use any photograph without permission).

n231. See Brief of Amici Curiae College Art Association et al. at 14.

n232. See, e.g., Patry & Posner, *supra* note 225 (manuscript at 16) ("The Copyright Society of the U.S.A. advises on its website that the copying even of just a few seconds of a movie or a television program is not fair use: "if film clips or photographs from motion pictures, television programs, or other sources are used, consent is required from the copyright owner to use clips or photographs in a motion picture, no matter de minimis or short." (alteration in original)); id. (manuscript at 17-18) ("Recently the New York Review of Books published a newly discovered notebook entry by Virginia Woolf, and a note at the end of the article states: "Copyright © 2003 by the Estate of Virginia Woolf. No part of this text may be reproduced without the express prior consent of Hesperus Press.' . . . The note is pure bluff, but a public-domain publisher threatened by a lawyer representing Hesperus Press with legal action would think twice about publishing even the briefest passage without consent." (footnotes omitted)).

n233. See *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (holding that unauthorized use of Woolrich's story was unfair even if it only constituted a small part of the motion picture); Weinreb, *supra* note 166, at 1144 & n.34 (discussing how the film was "transformative" yet not a fair use according to accepted doctrine).