Copyright, Moral Rights and the First Amendment: The Problem of Integrity and Compulsory Speech

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INTRODUCTION

The primary aim of copyright law is to promote the creation and dissemination of knowledge by protecting the economic rights of authors.[1] Economic rights, though valuable, do not encompass the free speech rights that can be threatened by the tension between copyright and the First Amendment. Conflicts between copyright law and the First Amendment are sometimes characterized as pitting the economic rights of authors against the free speech rights of those who wish to use their copyrighted works.[2] The so-called fair use doctrine and the idea/expression dichotomy—two exceptions to copyright law's categorical prohibition on copying—are often touted as sufficient to accommodate the First Amendment problems raised by copyright law.[3] However, in copyright cases in which an author's message is distorted in ways she disavows, these two exceptions are inadequate to protect original authors' free speech rights, which may be in jeopardy.

There are cases in which a change to the content, form or context of a copyrighted work distorts its author's message. When this kind of distortion is found to be fair use, the author has no further recourse, as American copyright law does not recognize an author's right to the integrity or attribution of her work ("moral rights").[4] In these cases, an author's First Amendment right against forced speech can be violated if the change to the message of her work forces her to communicate in ways that she expressly disavows.

In weighing the competing speech interests of an author and a second user (a party who facially violates copyright law through unauthorized copying), courts

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1. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

2. *See, e.g.*, *id.* at 556–57 (noting that First Amendment values did not necessitate an expansion of the fair use doctrine amounting to an exception to the rule that "copyright assures those who write and publish factual narratives . . . that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment").

3. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003).

4. Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught In the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985, 986–87 (2002).

frequently base their decisions on the perceived value of the disputed work's content, or even the status of its author.[5] As a result, some copyright decisions have the incidental effect of regulating speech in a way that is not content-neutral. This conflicts with traditional First Amendment jurisprudence, which subjects content-based restrictions to strict scrutiny under most circumstances.[6] Decisions in which this kind of tension between copyright and the First Amendment arises suggest that the lack of moral rights recognition in American copyright law leaves authors insufficiently protected.

The introduction of a right of integrity, attribution or disclosure in American copyright law would likely carry costs that would outweigh the protective benefits or, like many statutes, such a law might be prohibitively difficult to enact. However, courts could mitigate this particular First Amendment problem by narrowly construing the preemption provisions in the Visual Artists Rights Acts of 1990 (VARA).[7] Some states, including California and New York, have statutes that protect the moral rights of authors.[8] However, these are entirely ineffective if and when they are preempted by VARA.[9]

VARA, a federal statute that protects a very limited category of works of visual art from modification or misattribution, preempts all "legal or equitable rights that are equivalent" to the rights conferred by VARA and that apply to the same category of works.[10] A narrow construction of what constitutes "equivalent" rights would allow an author to bring an action for unauthorized copying under the Copyright Act together with a cause of action for violating her work's integrity under an applicable state moral rights statute such as the New York Artists' Authorship Rights Act.[11] Under this kind of regime, even if a court found the unauthorized copying of the author's work to be fair use under federal law, she might still be awarded legal or equitable relief for the state law violation.

Section I of this Note begins with a basic introduction to moral rights, first explaining the ways in which they are left unprotected by American copyright law and then discussing the reasons why they are nonetheless important. Section II lays out the connection between the moral right of integrity and the First Amendment, concluding that damage to the integrity of an author's work can violate the author's right not to speak through her work. Section III explores in detail the conflict

5. *See* R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 430 (2005) (observing that judicial discretion to determine fair use and the inconsistency that results "is likely to systematically disadvantage the new and unfamiliar . . . and may yield results that seem to turn as much on aspects of the parties themselves (e.g., socially conscious African-American author: 'good'; Norwegian hacker teenager: 'bad') as on the merits").

6. *See* 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.66 (2011).

7. Copyright Act, 17 U.S.C. § 106(a) (2006).

8. CAL. CIV. CODE § 987 (West 2011); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2011).

9. *See* Bd. of Managers of SoHo Int'l Arts Condo. v. New York, No. 01 Civ. 1226 DAB, 2003 WL 21403333, at *16 (S.D.N.Y. June 17, 2003) (holding that VARA preempts the New York Artists' Authorship Rights Act).

10. *Id.* §§ 106(a), 301(f).

11. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2011).

between the free speech rights of authors and the free speech rights of second users. Section III.A uses several examples to illustrate how the conflict operates conceptually, while Section III.B discusses three cases in which the right of the author not to speak is actually violated. Section IV discusses the implications of the competing free speech rights for both copyright and the First Amendment. Section V addresses potential solutions to the problem, arguing for a narrow construction of the preemption provisions in VARA that would allow state moral rights statutes to give broader protection to authors than federal copyright law can.

I. MORAL RIGHTS AND AMERICAN COPYRIGHT LAW

A. A BASIC INTRODUCTION TO MORAL RIGHTS

Moral rights are rights afforded to authors and creators that protect their personal interests, as opposed to their economic interests, in their work.[12] The term "moral rights," which originates from the 19th century French concept of *droit moral*, does not connote moral judgments of right and wrong, but merely the idea that there are rights linked to an author's identity that are separate from her economic motivations.[13] The basic set of moral rights includes an author's right to have her work attributed to her, the right to have the integrity of her work safeguarded and the right to choose when to disclose or withhold the work from the public.[14] Moral rights are normally said to protect the reputation and honor of the author, but can also be understood to protect an author's individual dignity.[15]

The primary moral rights discussed in this Note are the rights of attribution and integrity. The justifications for both rights share a premise with one of the traditional justifications for copyright law: when an author creates a work, that work constitutes a part of the author's personality and an extension of her identity.[16] Justice Holmes famously observed: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."[17]

The notion that art expresses something irreducible about its maker is complemented by the Hegelian idea that the creation of a work results in the author's personal development, to which she is entitled as a condition of her autonomy.[18] Taken together, these two ideas present both personality- and

12. *See* Mark A. Petrolis, *An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence When Fair Use Battles with Actual Malice*, 8 J. MARSHALL REV. INTELL. PROP. L. 190, 191 (2008).

13. *Id.* at 192.

14. *See* Kwall, *supra* note 4, at 986.

15. *See id.* at 987.

16. *See, e.g.*, Christian G. Stallberg, *Towards a New Paradigm in Justifying Copyright: An Univeralistic-Transcendental Approach*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 333 (2008) (arguing that copyright can be justified if an intellectual work constitutes a complex speech act by the author).

17. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 300 (1903).

18. *See* Stallberg, *supra* note 16, at 348.

autonomy-based justifications for copyright and for moral rights, which American copyright law largely fails to recognize, as discussed at length below.[19] If every author is entitled to create works that are inextricably linked to her identity, then the act of creation produces a permanent relationship between author and work. That relationship can be made public by the attribution right and protected by the right of integrity.

Despite this apparent conceptual harmony between copyright and the rights of attribution and integrity, moral rights are left largely unprotected by copyright in the United States.[20] Copyright law prior to 1988 did not protect moral rights at all.[21] In 1989, the United States attempted to join the Berne Convention, which is an international agreement governing copyright that also protects moral rights with respect to all literary and artistic works.[22] The United States had maintained a longstanding opposition to joining the convention because it would force Congress to accept moral rights in some capacity—something Congress was disinclined to do for a variety of reasons.[23] Nonetheless, in 1989 the United States finally joined the agreement in an attempt to reap the economic benefits of its international copyright provisions, claiming that existing U.S. law complied with Berne's moral rights regime.[24]

Though at the time, Congress insisted that existing United States law sufficiently protected the moral rights envisioned by the Convention, legislative history suggests otherwise.[25] Senator Orrin Hatch, even while maintaining that the United States fully complied with Berne, insisted that "our judicial system has consistently rejected causes of action denominated as 'moral rights' or arising under the moral rights doctrine."[26] While the U.S. joined the Convention, Congress found a way to sidestep moral rights. Congress interpreted the agreement as requiring specific implementing legislation; this interpretation allowed the United States to join the Convention while indefinitely postponing the fulfillment of its obligation to protect moral rights.[27]

At the time of U.S. accession to Berne, Section 43(a) of the Lanham Act was thought to be the only federal law capable of protecting the moral right of attribution.[28] One of the claims that can be brought under Section 43(a) is that a defendant has misled the public by representing the plaintiff's goods or services as

19. *See* Kwall, *supra* note 4, at 987.

20. *See id.*

21. Section 106 of the Copyright Act, which enumerates the exclusive rights afforded to authors in their works, was and is entirely silent on moral rights. 17 U.S.C. § 106 (2006).

22. *See* Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 45 (1997).

23. *See* Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 247 (2006).

24. *Id.* at 251–52.

25. *See* Dana L. Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 641 (1995).

26. *See id.* (citing 138 Cong. Rec. 28,306 (1988) (statement of Sen. Hatch)).

27. *See* Bird & Ponte, *supra* note 23, at 251.

28. *See* Kwall, *supra* note 4, at 988.

its own.[29] In 2003, however, the Supreme Court held in *Dastar v. Twentieth Century Fox* that 43(a), which provides a cause of action for the "false designations of origins" in connection with goods or services, has application only to the origins of a physical good and not to any underlying copyrightable material.[30] Though the scope of *Dastar* is the subject of debate, it may have eviscerated Section 43(a) as a shield for artists' moral rights.[31]

Even before *Dastar*, however, Section 43(a) was an imperfect safeguard for the right of attribution, for example, because the Lanham Act is focused on consumer protection and not on noneconomic authorial interests.[32] The Act seeks to prevent consumers from being confused by the false designation of goods or services. Without a showing of consumer confusion, which has been called "a concept totally unrelated to the authorial interests violated by a defendant's failure to attribute authorship," a 43(a) action fails.[33]

Though Congress had claimed at the time of the United States accession to Berne that no change in U.S. law was required to satisfy Berne's moral rights requirements, it nonetheless enacted the Visual Rights Artist Act of 1990 (VARA), in part to promote uniformity of the law against a backdrop of disparate state moral rights statutes.[34] VARA purports to protect certain works of visual art from mutilation, but does so in a very limited way.[35] It applies only to a very restricted category of works of art.[36] Protection is confined to works of visual art prepared for exhibition in editions of 200 copies or fewer, and does not extend to books, films, drawings, works made for hire or a host of other types of work.[37] Beyond

29. *See id.* at 1003.

30. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31–32 (2003).

31. *See* Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?*, 23 CARDOZO ARTS & ENT. L.J. 379, 380 (2005) ("The moral right of . . . attribution of authorship, always precariously positioned in the U.S., may be moribund following . . . *Dastar v. Twentieth Century Fox*.").

32. *See* Kwall, *supra* note 4, at 988.

33. *See id.* at 1026.

34. *See* Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 427 (2009).

35. *See* Kwall, *supra* note 4, at 987.

36. The Copyright Act, 17 U.S.C. § 101 (2006), defines "visual art" as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.
>
> A work of visual art does not include: (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.

37. *See* Burton, *supra* note 25, at 642.

VARA, there is nothing in the Copyright Act that protects moral rights, and VARA itself is inadequate to do so.[38] Further, VARA preempts state moral rights statutes that were enacted in the wake of the United States' failure to comply with the moral rights provisions of Berne.[39] At least fourteen states and Puerto Rico enacted moral rights statutes following the U.S. accession to Berne.[40] Though these statutes vary, most include a right of attribution and integrity.[41] Under a liberal construction of VARA's preemption provisions, as discussed at length below, these statutes are preempted by federal law.

B. WHY SHOULD WE CARE ABOUT MORAL RIGHTS?

There are at least two reasons to care about the moral rights of authors. The first has to do with incentives for creation. The Supreme Court has repeatedly made clear that the primary purpose of copyright is to promote progress by providing authors with economic incentives to create.[42] Powerful as economic incentives may be, they nevertheless fail to account fully for the desire to create.[43] Strong arguments have been made that the urge to create in some ways cannot be incentivized by extrinsic motivations, either economic or reputational.[44] However, it does not follow that because creation cannot be fully explained by extrinsic incentives, those incentives serve no essential function. From a theoretical and a practical perspective, moral rights provide reputational supplements for the economic system of incentives put in place by copyright law.[45] As Professor Lastowka argues, self-interested authors create their works in pursuit of attention and recognition, not just for monetary profit: "Promoting personal reputation within a particular community is certainly not the sole motivator for . . . copyright production, but . . . it is among the top two."[46] For example, law professors often distribute their work products for free or spend their time writing nonmonetized blogs in hopes of reaping the reputational benefits that come with disseminating their (properly attributed) work.[47]

The second reason to care about moral rights, and the one that is the focus of this Note, has to do with the concept of an original work as an act of free speech. The First Amendment protects every person's right to make speech and largely to

38. *See id*.
39. *See* Bird & Ponte, *supra* note 23, at 256.
40. *See id*. at 254.
41. *See id*. at 255.
42. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991); Mazer v. Stein, 347 U.S. 201 (1954); Kwall, *supra* note 4, at 989.
43. *See* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 516 (2009).
44. *See id*.
45. *See id*. at 520 ("[N]on-monetary incentives sometimes suffice to inspire authorship." (quoting Tom Bell)).
46. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 58 (2007).
47. *See id*. at 60.

make it in the way that she chooses.[48] The rights of attribution and integrity protect the contours of that speech. Attribution links the speech to the speaker, while integrity ensures that the content of the speech is as the speaker intended. In certain recurring types of copyright cases, the connection between moral rights and the First Amendment produces a tension between the speech interests of the first author and the speech interests of the second user.[49] Before exploring that tension and the way in which courts resolve it, it is important to clarify the relationship between moral rights and the free speech rights protected by the First Amendment.

II. MORAL RIGHTS AND THE RIGHT NOT TO SPEAK

A. THE RIGHT OF INTEGRITY PROTECTS SPEECH, NOT JUST REPUTATION

Though moral rights are frequently said to protect the reputation and honor of the author, they protect more than that.[50] Moral rights—specifically the right of integrity and, to a lesser extent, attribution—protect the free speech interests of the author. The idea that moral rights protect reputation and honor is based on the premise that a link between author and work is created because the work embodies and extends the author's identity.[51] The work is such an extension because its creation is an act of speech on the part of the author.[52] Authors, once they have spoken through their original creation, should not be divorced from the speech act made unless they explicitly disclaim it.

The Romantic idea that there is a personality-based connection between author and work has been criticized by many theorists and commentators, as has the copyright law in general, to the extent it has been argued to rely on that idea.[53] The postmodern view that no work can be said to have a single author and that unitary authorship is a myth is a compelling one for the purposes of interpretation.[54] Indeed, outside of the legal context and its dependence on absolute distinctions of ownership and property rights, the idea that a work bears no essential relationship to its author may encourage artistic production by loosening the strictures of attribution and influence. The logic of copyright law, however, depends on such ownership distinctions. The idea that an author should be rewarded for her work

48. Within the confines of permissible government regulation as defined by the body of First Amendment doctrine.

49. In this Note, "first author" refers to the original creator of a work and "second user" refers to the person who uses the copyrighted work in a way that may either be infringing or fairer. 17 U.S.C. § 107 (2006).

50. *See* Kwall, *supra* note 4, at 986–87 (arguing that moral rights protect the author's dignity as an individual and serve a spiritual function that transcends reputation).

51. *See supra* Section I.A.

52. *See generally* Stallberg, *supra* note 16, at 361–60.

53. *See* Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint-Authorship Doctrine*, 75 S. CAL. L. REV. 1, 21 (2001) [hereinafter Kwall, *Author-Stories*].

54. *Id. See also* Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., Noonday Press ed., 1988) (1977); Michel Foucault, *What is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979).

and that it is possible to incentivize her to create more of it is premised on a proprietary relationship between author and work.[55] What would be the point of rewarding a work of authorship if that work were entirely divorced from its author? The incentive structures fundamental to copyright law depend on the assumption that an author maintains some essential relationship to her creations.[56]

The idea that authors speak through their work and that their work, once released, acts as an existing artifact of the author's speech, logically leads to a conclusion that a distortion or misappropriation of the work implicates the author's right to free speech. Specifically, a violation of an author's right *not to speak* arguably arises with every violation of the moral right of integrity. If an author's work is distorted or misappropriated, she is forced to speak again through the work to which she is inextricably linked, in a way that she has not chosen or has even disavowed.

The First Amendment recognizes not only a right to speak and to make speech in a mode of your choosing, but also the right *not* to speak.[57] The forced speech doctrine of the First Amendment dictates that the government cannot compel a speaker to make statements or state beliefs against her will.[58] The prohibition on forced speech is invoked when the government threatens or punishes speech with government action that is "regulatory, proscriptive, or compulsory in nature."[59] The forced speech doctrine is primarily intended to prevent the government from forcing people to make speeches or state beliefs that the government favors (i.e., political, national or religious statements).[60] Because the doctrine rests on a fundamental constitutional principle, however, it has wider applicability.[61] As the Supreme Court stated in *Turner Broadcasting System, Inc. v. F.C.C.*, "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[62]

By refusing to recognize the moral rights of attribution and integrity in even a limited way, copyright law in some ways does what the First Amendment prohibits: it forces people to speak. It is true that there is a qualitative difference between, for example, requiring children to recite the Pledge of Allegiance and deciding a copyright dispute in favor of the second user, so that the first author's original work is distorted in a way that directly contradicts her political message and views.[63] The first is a clear violation of the First Amendment and its core protections,

55. The constitutional provision enabling Congress to enact copyright law, U.S. Const. art. I, § 8, cl. 1, identifies this incentive system: "To *promote* the progress of Science and the Useful Arts..." (emphasis added).

56. *See* Kwall, *Author-Stories*, *supra* note 53, at 21.

57. *See* SMOLLA & NIMMER, *supra* note 6, § 4.26.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n, 512 U.S. 622, 641 (1994).

63. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986).

whereas the second violation is more attenuated and depends on a number of inferences (i.e., a work of authorship is a speech act; moral rights protect speech, not just reputation).

However, the key principle behind the forced speech doctrine is that "no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . ."[64] Judges, in evaluating the content of a disputed work in copyright cases, are officials who choose favored or "valuable" speech and thus prescribe what is orthodox. For example, if a judge evaluates two political messages—that of the author and that of the second user—and chooses the content of one over the other under the guise of fair use, he both "prescribes what is orthodox" and violates the free speech rights of the author by imposing a restriction on her speech that is not content-neutral.

Furthermore, the link between the forced speech doctrine and copyright law is an important topic of scrutiny because copyright law is supposed to be "the engine of free expression."[65] In fact, the Supreme Court has stated that fair use and the idea/expression dichotomy are generally sufficient to protect all potential First Amendment interests implicated by copyright law.[66] Though this may be an accurate assessment from the perspective of the second user, it may not be for the author. If these copyright doctrines, by law, are meant to encompass all First Amendment claims, they are inadequate to the task.

The idea that free speech concerns are implicated by copyright disputes is far from a new one, and is in fact explicitly acknowledged by many courts, particularly those dealing with fair use.[67] However, most courts and scholars tend to focus on the free speech interests of the second users and the interests of the community in hearing as much speech as possible.[68] The statement that copyright is "the engine of free expression" was intended to emphasize that the existing limitations on the rights protected by the Copyright Act strike a balance between protecting the economic interests of authors and the free speech interests of everyone else.[69]

However, the conflict between authors and second users is sometimes best understood as a conflict between the right not to speak and the right to create speech rather than as one that pits a limited authorial monopoly against the tides of free speech. There are speech interests on both sides of the equation, and courts' valuation of these interests, whether acknowledged or not, determine whose First Amendment rights win out.

64. *Barnette*, 319 U.S. at 642.

65. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

66. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) (stating that unless a law alters the traditional contours of copyright, it is generally immune from First Amendment scrutiny because of the safety valves of fair use and the idea/expression dichotomy).

67. *See, e.g.*, *Maxtone-Graham*, 803 F.2d 1253.

68. *See, e.g.*, David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1406 (2009) (describing the ways in which the speech interests of speakers and listeners are in conflict with the authorial monopoly granted by copyright).

69. *Harper & Row*, 471 U.S. at 558.

III. THE CLASH IN PRACTICE: THE RIGHT AGAINST FORCED SPEECH VS. THE RIGHT TO CREATE SPEECH

The right of the first author not to speak through his work is pitted against the right of the second user to create new speech in cases in which the integrity of the disputed work is at stake, either explicitly or implicitly. This can happen in several different contexts. First, this kind of free speech conflict arises in cases where a second user has infringed one of the exclusive rights granted to authors by Section 106 of the Copyright Act: the right to reproduce the copyrighted work; the right to prepare derivative works based on the original; the right to distribute, sell or license the work; the right to perform the work publicly; the right to display the work publicly; or the right to digitally transmit the work.[70] Second, the free speech conflict occurs in cases in which a second user has exceeded the scope of a license granted to her by the author. Finally, and perhaps most frequently, it arises in cases where a second user raises the defense of fair use. In each of these situations, a second use is ostensibly in conflict with an author's legal right to her work. This apparent economic conflict could instead be viewed as a conflict between the second "fair" use and the author's First Amendment right not to speak.

The cases in each of these contexts present their own set of issues and questions, but there are common threads in all of them. First, they are all cases that involve a work that is within the realm of literary and artistic works (broadly construed), rather than, for example, in the realm of software or new media. Second, each involves the integrity of the underlying work in dispute. Third, courts in each of these cases are forced to evaluate the content of the speech on both sides of the conflict—something that First Amendment doctrine generally prohibits the government from doing.[71]

By evaluating the content of the speech in this way, courts arguably violate the First Amendment principle that regulations based on the content of speech are disfavored and normally trigger strict scrutiny, whereas regulations that are content-neutral are subject to less rigorous scrutiny.[72] The strict scrutiny standard requires that the challenged regulation be justified by a "compelling" government interest and that the regulation be "narrowly tailored" to that interest, or the "least restrictive means" of effectuating that interest.[73] Regulations subject to strict scrutiny very rarely satisfy those requirements.[74] By evaluating the content of speech in copyright cases that implicate the First Amendment, a court can effectively implement a content-based speech restriction without having to subject that restriction to the rigors of strict scrutiny.

70. Copyright Act, 17 U.S.C. § 106(1)-(6) (2006).

71. *See* SMOLLA & NIMMER, *supra* note 6, §§ 2.3–2.5.

72. *Id.* § 2.66 (explaining that content-neutral speech regulations are ones not based on the content of the speech). A paradigmatic category of content-neutral speech regulations are restrictions on the time, manner or place in which the speech occurs. *Id.*

73. *Id.* § 4.2.

74. *See* Burson v. Freeman, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives [strict] scrutiny . . . .").

The implications of all of these common threads are discussed in Section IV, but for the purposes of the following analysis, it is enough to identify the two recurring themes: (1) a common type of speech conflict and (2) a common mode of resolving that conflict.

The following Section provides two examples of the way in which a threat to the integrity of a work can function as a threat to the First Amendment rights of the first author. First, *Gilliam v. American Broadcasting Systems* illustrates how an actual change in the content of a copyrighted work can mutilate it and damage its integrity, thus presenting a potential violation of the author's speech rights.[75] Second, the unauthorized use of popular songs at political rallies demonstrates that a similar mutilation can be effected simply by placing the work in an objectionable context.[76] The latter example is particularly useful for the purposes of exploring First Amendment violations because it is political in nature.

It may seem counterintuitive to begin with *Gilliam*, which holds in favor of the first authors, thereby avoiding any potential violation of their First Amendment rights. However, the reasoning of the case and the attention that the court pays to the moral rights of authors provides valuable context for the cases that follow. The sections that follow deal with cases in which the second user's use is deemed fair, consequently validating his speech while violating the first author's right against compulsory speech.

A. ILLUSTRATIVE CASES: *GILLIAM V. AMERICAN BROADCASTING COMPANIES* AND THE USE OF PRO-LICENSED SONGS IN POLITICAL CAMPAIGNS

Gilliam v. American Broadcasting Companies is fairly unique in its explicit acknowledgment that copyright law inadequately protects the integrity of authors' works.[77] In *Gilliam*, the British comedy group Monty Python entered into an agreement with the British Broadcasting Corporation (BBC) under which Monty Python would write and deliver scripts for the thirty minute BBC series "Monty Python's Flying Circus."[78] Though the BBC was licensed to use the scripts to create derivative works (the recorded programs), Monty Python retained the copyrights in the original scripts and the majority of control over any revisions to those scripts.[79] The BBC licensed the distribution rights in the program to Time-Life Films with extremely minimal editing privileges (inserting commercials and complying with government regulations only); Time-Life in turn licensed the program to American Broadcasting Company (ABC) to broadcast.[80]

75. Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

76. Unauthorized, here, means unauthorized by the author or copyright holder of the song and not necessarily unlicensed. Even when songs are licensed by Performing Rights Organizations (PROs), the author generally remains uninvolved and therefore may still object to the use, though he typically has no legal claim.

77. *Gilliam*, 538 F.2d at 24.

78. *Id.* at 17.

79. *Id.* at 17, 19–20.

80. *Id.* at 17–18.

When ABC broadcast the first episode of the series, the version it presented had been significantly edited. Not only had the program been truncated to make room for commercials, but it had been substantially stripped of subject matter that ABC had found to be too offensive or obscene for commercial broadcast.[81] Monty Python, upon seeing a tape of the first broadcast, sought injunctive relief after a negotiation attempt with ABC failed.[82] Under copyright case law, one who obtains a license to use a copyrighted work must not exceed the scope of the license.[83] The existence of a licensing contract does not obviate the necessity of compliance with copyright law. Therefore, the Second Circuit granted a preliminary injunction against ABC, finding that ABC's extensive revisions to the script and the recorded program exceeded the scope of the license between Monty Python and the BBC.[84]

ABC's unauthorized editing, the court reasoned, had deprived Monty Python of the right to control the way in which the original work was presented to the public.[85] The court went further, however, stating that ABC's editing constituted an actionable mutilation of Monty Python's work and that the version that was broadcast impaired the original's integrity and "represented to the public as the product of [Monty Python] what was actually a mere caricature of their talents."[86] ABC, in the absence of more than "speculative" harm to the company, could not persuade the court that this mutilation was warranted.[87] ABC's editing implicated the moral rights of both disclosure and integrity. Monty Python, having suffered the distortion of their work (and thus their speech), also lost the ability to control the release of their original message to the public.[88]

The court's reasoning in *Gilliam* reveals that the damaged integrity of Monty Python's work implicated the group's rights to free speech. ABC's mutilation forced Monty Python to *speak* in a way that they did not endorse, and indeed, in a way that they expressly rejected. ABC effected the mutilation, moreover, in the service of making the program more commercially marketable. The only conceivable speech interest at stake for ABC was in broadcasting a cleaner, more socially moderate version than the original.[89] In balancing the hardship to each party, the court was implicitly weighing these two speech interests.

By contrast to the "mutilation" suffered by Monty Python, all injury to ABC was "speculative" and involved, at most, a threat to ABC's relationship with its affiliates or the cost of unforeseen advertising expenses.[90] Whereas Monty Python's speech was both creative and provocative, it strains interpretation to say

81. *Id.* at 18.
82. *Id.*
83. *Id.* at 21.
84. *Id.* at 21, 23 (granting a preliminary injunction and finding a "substantial likelihood that, after a full trial, appellants will succeed in proving infringement of their copyright by ABC's broadcast of edited versions of Monty Python programs").
85. *Id.* at 23.
86. *Id.* at 25.
87. *Id.* at 19.
88. *Id.* at 23.
89. *See id.*
90. *Id.* at 19.

that ABC's speech interest was creative in any way. Had the court found in favor of ABC rather than Monty Python, it would have allowed Monty Python's speech, as expressed through their copyrighted work, to be distorted against their wishes. By forcing Monty Python to speak in a way they expressly disavowed, the court would effectively violate Monty Python's First Amendment right against forced speech. If it had done so because of a perceived lack of value or a bias against obscenity, it would also have been regulating speech in a way that is not content-neutral, thus contravening First Amendment doctrine.[91]

Gilliam is notable in that the court advocates explicitly for moral rights. Judge Lumbard writes:

> [T]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent . . . . Although [decisions granting relief for misrepresentations of artists' work] are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.[92]

Though the court does not recognize the relevance of the First Amendment to moral rights here, it puts the pieces together, so to speak. By linking the personal right of disclosure (in other words, the right to speak publicly) to the right of integrity (the right to choose one's expression), the court identifies the underlying values of the First Amendment and posits them as a necessary condition for American copyright law. Economic incentives, the court seems to suggest, cannot function adequately without the availability of a remedy for the violation of moral rights.

The reasoning in *Gilliam* bears heavily on another set of situations in which an otherwise licensed use exceeds the scope of that license, implicating the authors' rights not to speak: the use of popular music during political campaigns. The central idea of *Gilliam*—that an author has a right to control the message of his work, either by maintaining the integrity of the work's content or the context of its presentation—is very much at stake in this emerging issue.

The use of music in political campaigns dates back at least to the first presidential election.[93] A basic First Amendment and moral rights problem arises,

91. *See* Hurley v. Irish Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995) ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."); SMOLLA & NIMMER, *supra* note 6, § 4.26.

92. *Gilliam*, 538 F.2d at 24 (citations omitted).

93. *See* Lauren M. Bilasz, *Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305, 305 (2010) (observing that during George Washington's campaign, supporters sang along to "Follow Washington," and in subsequent years presidential candidates set political lyrics to familiar songs, including William Henry Harrison and John Tyler's use of the music to the popular song "Little Pigs" for their campaign song "Tippecanoe and Tyler Too").

however, when politicians use popular songs to support their candidacy and the artists behind those songs object to the implicit endorsement that is inevitably invoked by the use.[94] The core message of the artist's work in these situations is damaged by its use in context. For example, the band Heart publicly denounced Vice-Presidential candidate Sarah Palin's use of their song "Barracuda" on her campaign trail, releasing the following statement:

> Sarah Palin's views in NO WAY represent us as American women. We ask that our song 'Barracuda' no longer be used to promote her image. The song "Barracuda" was written in the late 70s as a scathing rant against the soulless, corporate nature of the music business, particularly for women. (The "barracuda" represented the business.) . . . [H]eart did not and would not authorize the use of their song at the RNC . . . .[95]

The statement by Ann and Nancy Wilson reveals several important points. First, the use of the song to endorse a political candidate changed the song's meaning in a way that the authors did not intend. This happened simply because of the context in which the song was played, and by whom. No change to the content of the song was required to distort its message. Second, what was at stake for the artists was their right to free speech. Their critique of the corporate nature of the music business with regard to women, in their view, was directly at odds with the Sarah Palin campaign message. The statement that they "did not and would not authorize" Sarah Palin's use of their song because her views "in no way represent [them]" indicates that the misappropriation of the song compelled Ann and Nancy Wilson to speak in a way they explicitly disavowed.

Though Palin's use of the song arguably violated Heart's right against forced speech, it did not violate copyright law. The McCain-Palin campaign obtained a blanket license to use and perform the song from a performing rights organization (PRO).[96] Without such a blanket license, however, artists have recourse to sue. Jackson Browne, for instance, sued the GOP, the RNC and John McCain for running a campaign ad against Barack Obama that used Browne's song "Running on Empty."[97] Don Henley sued Charles DeVore, a Republican California State Assemblyman who ran for United States Senate against Senator Barbara Boxer in 2010, for making two anti-Obama videos that copied portions of Henley's songs "The Boys of Summer" and "All She Wants to Do is Dance."[98] The copyright litigation was resolved on summary judgment in favor of Henley.[99]

Henley sued in part because he thought that DeVore's use of the songs falsely

94. *See, e.g.*, Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010).

95. Whitney Pastorek, *Exclusive: Heart's Nancy Wilson Responds to McCain Campaign's Use of 'Barracuda' at Republican Convention*, ENT. WKLY. (Sept. 5, 2008), http://insidetv.ew.com/2008/09/05/heart-responds.

96. Bilasz, *supra* note 93, at 309.

97. This case settled, so it is not clear how a court would have evaluated the competing speech interests of McCain as a political candidate and Browne as the copyright holder and performer of the copyrighted work.

98. *Henley*, 733 F. Supp. 2d at 1147–49.

99. *Id.* at 1169.

suggested his endorsement of Charles DeVore.[100] In fact, a survey prepared by an expert for Henley showed that 48% of people who saw DeVore's version of Henley's two songs thought that Henley either "endorsed the video(s) or authorized or approved the use of his music in the video(s)."[101] The court ultimately found that DeVore's use of Henley's songs was infringing, but primarily because it did not qualify as a parody.[102] Under established copyright doctrine, if the court had found that DeVore's use of Henley's songs constituted parody (a form of free speech typically considered transformative) rather than satire, the use would likely have been deemed fair.[103] Instead, it was found to be a satire, which does not weigh in favor of fair use, as transformative parody does.[104] Therefore, DeVore's unauthorized use of Henley's songs for satirical purposes created an implied act of speech on Henley's part that he disavowed, but that was only actionable because of a doctrinal nuance. Had DeVore created a parody and not a satire, his use might not have created a cognizable legal claim; the court took pains to distinguish parody from satire and suggested that would be much easier for a defendant to succeed on a defense of fair use if he created the former instead of the latter.[105] Cognizable claim or not, Henley's First Amendment right against forced speech would have been threatened in the case of parody *or* satire by DeVore's exercise of his First Amendment right to free speech. These campaign cases provide a clear and relatively uncomplicated example of the way in which free speech interests are forced to compete under copyright law.

B. PROBLEMATIC CASES: FORCING AUTHORS TO SPEAK

Copyright disputes in which the second user prevails shed light on the values that courts tend to rely upon in weighing the speech interests of authors against those of second users. The cases presented in this section all involve the defense of fair use. Unsurprisingly, therefore, all three contain explicit judgments about the "purpose and character" of the second use as compared to that of the underlying work; the fair use doctrine, as codified in the Copyright Act, compels this analysis.[106] The fair use doctrine provides that under some circumstances, an

100. *Id.* at 1149.

101. *Id.* at 1169.

102. As discussed in greater detail in this section, parody doctrinally falls within fair use because it requires the use of the copyrighted work to produce socially valuable commentary. Satire, by contrast, simply uses a copyrighted work to produce social criticism not closely related to the work itself. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994).

103. *See* BRUCE P. KELLER, JEFFREY P. CUNARD & ROBERT SPOO, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 8:5.5 (2011) (noting that though there is no categorical rule that parodies always constitute fair use, a finding of parody weighs in favor of fair use such that "a true, transformative parody is likely to be deemed a fair use under section 107").

104. *See id.*

105. *Henley*, 733 F. Supp. 2d at 1158 ("[These songs are] satire, not parody . . . [which] is insufficient justification for appropriating Henley's works . . . [S]atire faces a higher bar for fair use because it requires greater justification for appropriating the original work.").

106. *See* Copyright Act, 17 U.S.C. § 107 (2006) (providing "purpose and character" analysis in the first factor).

unauthorized use of copyrighted work is "fair" rather than infringing. In evaluating whether a given use is fair, courts must consider the following four factors:

> (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 upon the potential market for or value of the copyrighted work.[107]

The purpose and character factor, together with the market effect factor, tends to be dispositive in fair use cases as this focuses the fair use analysis on the transformative nature of the second use.[108] The second factor, the nature of the copyrighted work, is a proxy for the idea that "some works are closer to the core of intended copyright protection than others."[109] What this means in practice is that courts are more likely to find a use fair when the underlying work is factual rather than creative and less likely to find a use fair when the underlying work is unpublished.[110] The character, nature and purpose of both the underlying work and the second use seem to be permissible subjects of consideration in fair use.[111]

So what, then, is the problem with these courts' value-laden modes of evaluation? While purporting to consider the broader questions of "type" and "purpose," courts actually evaluate the quality of the content of the underlying work and the second use. *Blanch v. Koons*, discussed immediately below, provides a good example of this evaluation. This mode of reasoning, which weighs the comparative value of the original and the second use in a way that is anything but content-neutral, may result in a finding of fair use. By finding fair use, the court permits the second user to distort the original message of the underlying work based on an evaluation of its content. Because of the personality- and speech-based link between author and work, this has the effect of violating the author's right against compulsory speech.

In *Blanch v. Koons*, photographer Andrea Blanch sued Jeff Koons, a successful visual artist known for neo-Pop appropriation art, for copying her photograph "Silk Sandals by Gucci" in his painting "Niagara."[112] Blanch's photograph was commercial, depicted a woman's legs and sandal-clad feet and was originally published in *Allure* magazine as part of a feature on metallic cosmetics.[113] The photograph was not devoid of substance. Blanch herself indicated that she had intended to convey "sexuality" and to vest the image with an "erotic sense."[114] Koons's painting incorporated the image of the legs and feet into a scene depicting

107. *Id.* § 107(1)–(4).
108. KELLER et al., *supra* note 103, § 8.4.2.
109. This is because facts and ideas are uncopyrightable and because copyright law provides original authors with the right of first publication, *see Campbell*, 510 U.S. at 586.
110. *See* Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006).
111. *See* KELLER et al., *supra* note 103.
112. Blanch v. Koons, 467 F.3d 244, 247–48 (2d Cir. 2006).
113. *Id.*
114. *Id.* at 248.

a landscape and an assortment of desserts.[115] The painting, Koons explained, was meant "to comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images."[116]

The court found that Koons's use of the image was fair, relying not only on the lack of economic harm to Blanch but also on the value of Koons's social commentary, as opposed to the value of a commercial photograph.[117] Though the court applied the four fair use factors as instructed by statute, it focused primarily on the subjective value of the content of each work. In the eyes of the court, Koons's work was valuable social and artistic commentary and therefore useful speech, whereas Blanch's work contained a seemingly less valuable message. Notably, the court devoted a substantial amount of space to reproducing Koons's own statement about the content of his work, while relegating Blanch's explanation of her work to a mere sentence or two.[118] Their juxtaposition of the two "purposes" of the image was in actuality a juxtaposition of quality:

> Koons's . . . purposes in using Blanch's image are sharply different from Blanch's goals in creating it. *Compare* Koons's [statement] ("I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.") *with* Blanch's [statement] ("I wanted to show some sort of erotic sense[;] . . . to get . . . more of a sexuality to the photographs."). The sharply different objectives that Koons had in using, and Blanch had in creating, "Silk Sandals" confirms the transformative nature of the use.[119]

The mere fact that the court quoted the words "I want" from both Koons's and Blanch's statements does not mean that it is evaluating *purpose*; clearly, what is at stake here is the value of the underlying messages. The court, in finding Koons's use fair, decided that a social commentary on commercially mediated experience was, in this instance, more valuable than an aesthetic representation or statement about sexuality.

The court's content value judgments are even more apparent in its refusal to apply copyright law's parody/satire distinction. A parody that copies an underlying work, even if it would otherwise constitute copyright infringement, may fall within fair use because it uses the elements of the underlying work to comment or criticize *that work*, which is considered socially valuable.[120]

Another way of putting this is that parody "needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination . . . ."[121] For example, "When Sonny Sniffs Glue," a song by DJ Rick Dees intended to mock "When Sunny Gets Blue," sung by Johnny Mathis, was found to constitute parody because it was intended "to poke fun at the composers'

115. *Id.* at 247–48.
116. *Id.* at 247.
117. *Id.* at 253–54, 258.
118. *See id.* at 247.
119. *Id.* at 252.
120. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
121. *Id.* at 580–81.

song, and at Mr. Mathis's rather singular vocal range . . . [not] merely as a vehicle to achieve a comedic objective unrelated to the song."[122]

Satire, as the quoted passage indicates, does not need to use the underlying work. It can "stand on its own two feet" and criticizes something outside of the underlying work.[123] For example, *The Cat NOT in the Hat!*, a book about the O.J. Simpson double murder trial written in the style of Dr. Seuss, was found to be satire rather than parody because, though it "broadly mimic[ked] Dr. Seuss' characteristic style, it [did] not hold *his style* up to ridicule."[124] A second user borrowing for the purposes of satire looks like an infringer looking to draw attention to his work or "to avoid the drudgery in working up something fresh."[125] Satire, without additional justification, is doctrinally outside of fair use.[126]

The court in *Koons* acknowledges that "Niagara" is aptly characterized as satire because it comments not on Blanch's photo but on commercialism and contemporary life.[127] Despite the fact that it was "clear enough to [the court] that Koons's use of a slick fashion photograph enable[d] him to satirize life . . . seen through the prism of slick fashion photography," the court refused to apply the distinction between parody and satire (which would have weighed in favor of Blanch) and instead simply found that Koons had stated a justification for his borrowing.[128] Ironically, in doing so, the court disavowed its own ability to judge the artistic merits of either work.[129]

The key point to take from *Blanch v. Koons* is that even if the court is *right* by most accounts, its decision does have the effect of forcing Blanch to speak through her photograph. It achieves that effect by making a normative judgment about her speech that is not content-neutral. If an author's work is distorted or misappropriated, she is forced to speak again through the work to which she is inextricably linked, in a way that she has not chosen or has even disavowed. This is not to say that the case necessarily should have been decided differently or that Koons' piece is not valuable. However, the fact that Blanch's speech rights—not just her economic rights—are implicated and threatened by Koons's use, should not be ignored in the fair use analysis.

These questions become even more salient in a First Amendment context in cases dealing with speech that is explicitly political. Two cases from the Southern District of New York demonstrate the difficulty of the speech conflict in the political arena: just as the author's right not to participate in stating a political view she does not espouse becomes more crucial, so does the second user's right to make new political speech and contribute to political discourse.

122. Fisher v. Dees, 794 F.2d 432, 434–36 (9th Cir. 1986).
123. *Blanch*, 467 F.3d at 255.
124. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1396, 1401 (9th Cir. 1997).
125. *Campbell*, 510 U.S. at 580.
126. *See Blanch*, 467 F.3d at 255.
127. *Id.*
128. *Id.*
129. *Id.* ("[W]e need not depend on our own poorly honed artistic sensibilities.").

In *Maxtone-Graham v. Burtchaell*, Katrina Maxtone-Graham, the author of the journalistic, pro-choice book *Pregnant By Mistake*, sued the author of a scholarly pro-life book, *Rachel Weeping*.[130] Reverend James Burtchaell, the author of *Rachel Weeping*, had requested Maxtone-Graham's permission to reproduce various interviews, published in *Pregnant by Mistake*, conducted with women who had had experiences with unwanted pregnancy.[131] Maxtone-Graham refused, explaining that the women "told their stories in order to further understanding of the Pro-Choice view. They believed—and expressly stated—that their material was not to be used for any other purpose."[132] Burtchaell, upon the advice of his publisher's legal counsel, used the material anyway.[133] Maxtone-Graham sued for copyright infringement on the theory that the anonymous interviewees had transferred the copyright in their commentary to her. Burtchtaell asserted the defense of fair use.[134]

The district court explicitly addressed the First Amendment issues at stake in the case, noting the "apparent tension" between the Copyright Clause and the First Amendment.[135] However, as is common in fair use cases, the tension noted by the court was between the author's economic right to her work (not her speech-implicating right of integrity) and the second user's free speech rights. The court ultimately found that Reverend Burtchaell's use was fair, and in doing so made several judgments as to the value of the speech interest on both sides.[136] These judgments resulted in the forced speech of both Maxtone-Graham as an author and the interviewees as contributors.

In evaluating the value of Maxtone-Graham's work, the court noted that *Pregnant By Mistake* was "essentially reportorial in nature" and that as such, it enjoys fewer protections under copyright law's second fair use factor.[137] The court also found that *Pregnant By Mistake* was a book of "source material" that lacked analysis (even though the material was edited and conveyed a clear viewpoint).[138] By contrast, the court classified Reverend Burtchaell's book as "a non-dogmatic scholarly argument on behalf of the Pro-Life viewpoint" that attempted to analyze the interviewees' personal accounts "in the most effective and persuasive manner."[139] The fact that a use is "non-dogmatic" should have no bearing on whether or not it is found to be fair.[140] Whether or not a work is dogmatic or non-dogmatic is a loaded question that misinterprets the purpose and character inquiry, which focuses on whether the use was commercial or educational or otherwise not-

130. Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432, 1432 (S.D.N.Y. 1986).
131. *Id.* at 1433.
132. *Id.*
133. *Id.*
134. *Id.* at 1434.
135. *Id.* at 1435.
136. *Id.* at 1437–38.
137. *Id.* at 1437.
138. *Id.*
139. *Id.* at 1437.
140. To use the word "dogmatic" is to insert a content-based requirement into the purpose inquiry of the fair use analysis.

for-profit. The Second Circuit, which ultimately affirmed the Southern District's opinion, acknowledged this error: "We [do not] think it wise to give much legal relevance to whether the allegedly infringing work may be labeled 'scholarly' or 'dogmatic,' for the dogma of one individual may be the original scholarship of another."[141]

The lower court, in explicitly favoring a use that was "non-dogmatic" against one that was "reportorial" was favoring one political statement over another and forcing Maxtone-Graham and her subjects to speak through an analysis that directly contravened their beliefs. It is and should be possible, under the fair use doctrine, to use direct quotation in political commentary. However, it is important to recognize when fair use is actually being used by a court to privilege certain political messages over others.

Wojnarowicz v. American Family Ass'n provides a clear example of how a distortion of an author's work violates that author's right against forced speech.[142] Wojnarowicz was a professional multimedia artist whose work commented on the failure of the people and government of the United States to deal with the AIDS crisis, and the impact of that failure on the homosexual community.[143] To convey this message, Wojnarowicz "incorporat[ed] sexually explicit images [into his work] for the avowed purpose of shaping community attitudes towards sexuality."[144] Wojnarowicz received a grant from the National Endowment for the Arts (NEA) for an exhibit at Illinois State University.[145]

The American Family Association (AFA), a nonprofit organized for the purposes of "promoting decency in the American society and advancing the Judeo-Christian ethic in America," was campaigning at the time against the NEA's subsidization of "offensive" and "blasphemous" works of art.[146] Donald Wildmon, the executive director of the AFA, wrote a pamphlet entitled *Your Tax Dollars Helped Pay for These 'Works of Art*,' Which the AFA published and distributed.[147] Included in the pamphlet were photographs of fourteen fragments of Wojnarowicz's work that Wildmon found most offensive, described as part of Wojnarowicz's exhibit catalog for the Illinois State show.[148] The pamphlets were enclosed in envelopes marked with the words "Caution—Contains Extremely Offensive Material."[149] Wojnarowicz sued for copyright infringement and also for claims under New York's Artists' Authorship Rights Act, New York's equivalent to the then-pending Visual Artists Rights Act, for mutilation of his work and damage to his reputation.[150] By presenting only the sexually explicit fragments of his work and doing so out of context, he argued, his message was fundamentally

141. Maxtone-Graham v. Burchtaell, 803 F.2d 1253, 1261 (2d Cir. 1986).
142. Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130 (S.D.N.Y. 1990).
143. *Id.* at 133.
144. *Id.* at 133.
145. *Id.* at 133–34.
146. *Id.* at 133.
147. *Id.* at 134.
148. *Id.*
149. *Id.*
150. *Id.* at 132.

distorted.[151]

The court first determined that federal copyright law did not preempt the New York Act.[152] Prior to the enactment of VARA, moral rights were entirely unrecognized by federal copyright law, which therefore could not preempt the field.[153] The court found that the AFA's alteration to Wojnarowicz's work reached a far greater audience than his own, thus damaging his reputation and his moral right to the integrity of the work.[154] Explicitly recognizing the risk that "the public [might] associate plaintiff with only the sexually explicit images which were taken out of his intended political and artistic context," the court found that AFA had violated the New York Act.[155] In addition, the court delivered the following exegesis on the speech value of the pamphlet under the First Amendment:

> [T]his Court cannot agree that the alteration, defacement, mutilation or modification of artwork is protected speech [under the First Amendment] . . . Clearly, the pamphlet contained protectable speech, namely, the protest against the subsidy of "obscene" art, which is entitled to the utmost First Amendment protection as the "unfettered interchange of ideas for the bringing about of political and social changes deserved by the people." . . . The public display of an altered artwork, falsely attributed to the original artist, however, is not the type of speech or activity that demands protection, because such deception serves no socially useful purpose.[156]

The court eloquently defended Wojnarowicz's right not to speak in a way that falsely represented his political message, emphasizing the low value of the mutilation of the work in the pamphlet as compared to the value of the pamphlet's message as a whole. With regards to the stated cause of action, the court fully addressed the conflict between the AFA's right to create speech and Wojnarowicz's right against compulsory speech, and in doing so reached a decision that protected the artist and his original speech act from distortion.

However, when it came to the federal copyright infringement claim and the defense of fair use, the court reached a dissonant result, finding that AFA's use was a fair one.[157] Because moral rights are unrecognized by federal copyright law, the court was guided only by an evaluation of the four statutory factors. In an analysis that is somewhat jarring to read following the court's vigorous defense of Wojnarowicz's right to integrity, the court followed the reasoning of *Maxtone-Graham* and found that the AFA's dominant purpose for publishing the pamphlet was "to oppose federal funding of 'pornography'" for the purposes of criticism and comment rather than to make a profit.[158] It emphasized that Section 107, the fair

151. The court phrased the claim as follows: "By excising and reproducing only small portions of plaintiff's work, defendants have largely reduced plaintiff's multi-imaged works of art to solely sexual images, devoid of any political and artistic context." *Id.* at 138.

152. *Id.* at 135.

153. *Id.* at 136.

154. *Id.* at 138.

155. *Id.* at 139.

156. *Id.* at 139–40 (citations omitted).

157. *Id.* at 147.

158. *Id.* at 143–44.

use provision of the Copyright Act, allows consideration of factors beyond the four listed in the statute and that the important First Amendment purpose of criticizing the expenditure of federal funds was furthered by AFA's use, making it fair.[159]

It is notable that the fair use portion of the opinion is far less impassioned than the moral rights portion. That dissonance highlights the contrast between the federal fair use analysis, under which there is no way to defend Wojnarowicz's right not to speak, and the state law moral rights statute, which protects the message of Wojnarowicz's original work and thus his First Amendment right. For the AFA's violation of the New York Artists' Authorship Rights Act, Wojnarowicz was awarded an injunction against further publication or distribution of the pamphlet in controversy, a mandatory injunction requiring that the AFA mail a correction to everyone who received the original pamphlet and nominal damages of one dollar.[160] The injunction against publication did not categorically prevent the AFA from reproducing Wojnarowicz's images in future pamphlets for the purpose of discouraging federal subsidies for art that it found offensive.[161] However, it did provide that no such pamphlet could suggest to a reasonable reader that a fragment of Wojnarowicz's work constituted his entire work.[162]

Wojnarowicz reveals that state law is capable of doing a much better job of protecting artists' moral rights than federal copyright law. Even if VARA had been enacted at the time of *Wojnarowicz*, it would not have covered the pamphlet.[163] Even if it *had* covered the pamphlet, the defense of fair use would still have been raised and would have likely succeeded (in the same way it did here), because all of VARA is subject to the fair use defense in 17 U.S.C. § 107. Furthermore, the state law claim would have been entirely preempted by VARA, meaning that the plaintiff's free speech interest could not have been vindicated.[164]

In the end, the court in *Wojnarowicz* was able to accommodate the First Amendment rights of the plaintiff as well as the defendant precisely because it could address the state law claim. It provided equitable relief to Wojnarowicz for the harm he suffered to his reputation by construing the New York Artists Authorship Rights act to cover AFA's use of his work by awarding him an injunction. It then justified AFA's act of copying as fundamentally protectable speech (criticism of government) with its finding of fair use.

The injunction that the court awarded to Wojnarowicz vindicated both his First Amendment right not to speak and his moral right of integrity, while opening the door to AFA for future uses of his work. The injunction that the court issued prohibited *only* the intentional and misleading distortion of Wojnarowicz's images, specifically suggesting that the AFA could reproduce his images as long as they did not misleadingly present fragments of his work as the whole. Thus, the injunction

159. *Id.*
160. *Id.* at 149.
161. *Id.*
162. *Id.*
163. *See* 17 U.S.C. § 101 (2006)
164. *See infra* Part V, Critiques & Proposed Solutions, for discussion of the two-pronged test for Copyright Act preemption.

did not categorically deny the free speech rights of either Wojnarowicz or AFA. This form of relief is a satisfactory method of resolving the free speech conflict between Wojnarowicz and AFA. It was only available because the court was able to allow the state law cause of action to go forward, something that would now be impossible: the case preceded the passage of VARA, which would now preempt the state law claim entirely.[165]

Taken together, these cases demonstrate that to the extent that the creation of a copyrighted work constitutes a speech act by the author, a threat to the integrity of that work is a threat to the free speech rights of the author. Under current copyright law, including the fair use doctrine and the preemption provisions in VARA, this type of free speech threat is incapable of resolution.

IV. IMPLICATIONS OF THE COMPETING FIRST AMENDMENT RIGHTS

Characterizing certain copyright disputes as conflicts between two First Amendment rights is analytically useful for two reasons. First, it tracks courts' reasoning in these areas, as discussed in detail in Part III. Second, it suggests that, contrary to Supreme Court precedent, there is a clash between copyright law and the First Amendment that is not adequately mediated by fair use and the idea/expression dichotomy.[166] The problem of forced speech demonstrates that copyright decisions can create speech regulations. A finding of liability incidentally regulates the second user's speech, whereas a failure to find liability compels the first author to speak. Though First Amendment doctrine dictates that speech regulations must be content-neutral to avoid strict scrutiny, these types of copyright decisions are systematically based on value judgments about the two competing speech rights that are anything but content-neutral.[167] These judgments, deployed in the service of a copyright law that purports to sustain a robust free speech principle, actually create a normative mode of regulating speech through the back door.

Copyright law is supposed to be relatively neutral in its judgments, affording protection to fixed original works of authorship regardless of their purpose or perceived quality. However, it has failed to live up to this type of value neutrality, which has effectively become a myth.[168] Judges in copyright cases make value judgments all the time, both explicitly and implicitly. The fair use defense explicitly requires judges to undertake qualitative evaluation of copyrighted works.[169] In addition, as we have seen, courts frequently look to the artistic or

165. *See, e.g.*, Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226 (DAB), 2003 WL 21767653 (S.D.N.Y. July 31, 2003).

166. *But cf.* Eldred v. Ashcroft, 537 U.S. 186 (2003) (holding that unless a new copyright law alters the traditional contours of copyright, the potential First Amendment problems in copyright are sufficiently addressed by fair use and the idea/expression dichotomy).

167. *See* SMOLLA & NIMMER, *supra* note 6, § 3.4.

168. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

169. Copyright Act, 17 U.S.C. § 107(1) (2006) (describing the purpose and character factor).

social speech value of a work to determine its status under copyright. Judges in copyright cases, in other words, regularly evaluate the content of copyrighted works.

First Amendment doctrine, by contrast, relies on the distinction between speech regulations that are content-based (and thus receive strict scrutiny) and those that are content-neutral (and must only pass some form of intermediate scrutiny).[170] The question of whether a regulation is content-based or content-neutral is a complicated one that is frequently at issue and outcome determinative in First Amendment litigation.[171] In its most basic form, however, the test for content neutrality is one of purpose. If the government regulates speech because it disagrees with the message, the regulation is content-based and will likely be struck down if challenged. By contrast, if the regulation can be justified without reference to the message of the speech, the regulation is probably content-neutral.[172]

Returning to the examples discussed in Section III, we see that courts' unacknowledged evaluation of the speech interests of the first and second users are, in a basic sense, regulatory. In *Maxtone-Graham*, for example, the both district court and the Second Circuit favored the defendant's use of the women's interviews over the plaintiff's.[173] By finding that the defendant's use was fair, the court (as government actor) regulated the use of the underlying work such that a compilation of Pro Choice personal narratives was both appropriated and subsumed by a Pro Life argument.[174] This is not to say that the defendant would be categorically wrong to use and build upon arguments diametrically opposed to his own in making his point. The fair use doctrine is, after all, a legal manifestation of the fundamental idea that freedom of speech is inherently appropriative.[175] However, there is another speech right implicated by the decision in *Maxtone-Graham*—one that belongs to the author—that is ignored and arguably violated by the court's reasoning.

Similarly, in *Wojnarowicz*, the court's willingness to find fair use was both productive and suppressive of free speech.[176] It was productive of free speech because political commentary such as the AFA's is central to the First Amendment. It was suppressive of free speech because it allowed the distortion of Wojnarowicz's work-as-speech. This is the crucial problem raised by the conflict between authors' rights against compulsory speech and second, "fair" uses. Any decision labeling a use "fair," when it distorts the underlying message of a work in a way that the author disavows, suppresses the author's speech even as it enables the production of the second user's speech. This frequently leaves authors' First

170. *See* SMOLLA & NIMMER, *supra* note 6, §§ 2.66, 3.2.

171. *See id.* § 3.1.

172. *See id.* § 3.4.

173. Maxtone-Graham v. Burchtaell, 803 F.2d 1253 (2d Cir. 1986); Maxtone-Graham v. Burchtaell, 631 F. Supp. 1432 (S.D.N.Y. 1986).

174. *See Maxtone-Graham*, 803 F.2d at 1263 (finding that Burchtaell's use was not infringing, in part because Maxtone-Graham's book "has no identifiable core that could be appropriated").

175. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 5 (2004).

176. *See* Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130 (S.D.N.Y. 1990).

Amendment rights underprotected. Had it not been for the New York's Artists' Authorship Rights Act and its protection of Wojnarowicz's right to the contextual integrity of his work, for example, his right against compulsory speech would have been entirely ignored.

V. CRITIQUES & PROPOSED SOLUTIONS

Copyright law implicates the First Amendment in ways that it cannot always address, as the foregoing cases reveal. *Wojnarowicz* suggests that the conflict between speech rights in these contexts can be intractable. One major difficulty with respect to free speech conflicts in copyright cases is that it is not certain that any line can be clearly drawn between a second use that damages the integrity of an underlying work and thus the First Amendment rights of its author, and a second use that simply propels the engine of free speech without harming the author's right against compulsory speech.

Much of the art of the 1980s, for instance, was created on the basic premise that art is interactive and appropriative, and that authorship is a confining myth.[177] Take, for example, Sherrie Levine's "After Walker Evans," a show in which Levine rephotographed Evans's photographs from a catalog of his work and presented them with no further manipulation.[178] Contrast Levine's second use with Koons's appropriation of Blanch's photograph.[179] Koons's "Niagara" seems to distort the underlying photographic work in a way that Levine's work does not. This kind of line, however, is not one for courts or legislatures to draw. As in many areas of the law, the law's tools may be "too crude to make the fine distinctions that prevail in ethics" and in critical theory.[180] As the Court observed in *Bleistein v. Donaldson Lithographing Co.*, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits."[181]

The inadequacy of the law's line-drawing tools poses a difficult practical question: how can courts protect the rights of authors against forced speech, while still accommodating the important speech interests of second users? In the areas where the clash typically arises—artistic works and social and political commentary—the speech interests on both sides are particularly crucial to a robust freedom of speech.[182] One would not wish to preclude a second user from marshalling available political statements to make new ones, thereby erecting a barrier to major First Amendment freedoms. Nor, however, is it desirable to distort

177. *See generally* Barthes, *supra* note 54; Foucault, *supra* note 54.

178. *See, e.g.*, a description of Sherrie Levine's "After Walker Evans: 2" in *Heilbrunn Timeline of Art History*, METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/toah/works-of-art/1995.266.2 (last visited Nov. 20, 2011).

179. *See* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

180. Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 822 (2007) [hereinafter Tushnet, *Naming Rights*].

181. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

182. *See* SMOLLA & NIMMER, *supra* note 6, § 2.29 n.1 (citing cases that emphasize the central role of political and social commentary in the First Amendment context).

an author's message in such a way that she is forced to speak through her work in a way she expressly disavows.

One possible solution would be a stronger regime of disclosure requirements that could make it easier for first authors to disassociate themselves from their work when that work has been distorted.[183] When an author does not agree with the use to which her work has been put, she could force the second user to include a disclosure as to the changes made to the work and a disclaimer as to her disavowal of the work. As a practical matter, required disclosures would probably have little effect; viewers, readers and consumers are unlikely to pay attention to disclaimers of this kind.[184] Think, for example, of "click to read" disclosures and disclaimers on standard terms of use agreements. The average person may click "agree" but will probably not take the time to read each provision, even when those provisions are binding.[185] Because they might fail to have practical effect, disclosure requirements alone would not obviate the problem of authors being forced to speak through their works.

Another possible solution—amending VARA to expand the right of integrity in both scope and substance—would stifle and possibly eviscerate fair use, trampling on free speech rights even while it tried to protect them.[186] A categorical right of integrity that protected an author's work from any distortion or mutilation would act as a barrier to criticism, political speech, parody and the fair creation of entirely new and legitimate works. It would be hard to defend a rule that prohibited *any* change to any existing work.

However, a right of integrity, centered on due process, that simply required notice to the first author and a meaningful opportunity to object to the distortion of the work could be far less detrimental to fair use.[187] In this vein, Professor Kwall has argued for a narrowly tailored right of integrity that would "vindicate the author's right to *inform the public* about the original nature of her artistic message and the meaning of her work."[188] This right would be triggered when objectionable modifications are made to an original work or when the work is displayed in an objectionable context while attributed to or likely to be recognized as the author's work.[189]

The remedies for violations of this right would include declaratory relief mandating an appropriate disclaimer, for prospective harm, and money damages for prior objectionable use under certain circumstances.[190] By focusing on the act of communication between the author and the public, Professor Kwall's right of

183. *See* Tushnet, *Naming Rights*, *supra* note 180, at 800–01.

184. *See id.* at 801.

185. *See id.*

186. This is why the limited right of integrity created by VARA is in fact subject to the fair use provision of the Copyright Act, 17 U.S.C. § 107.

187. *See* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 840–41 (2001).

188. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 151 (2010).

189. *See id.*

190. *See id.*

integrity mitigates the problem of compelling authors to communicate in ways they disavow.

Another possible solution is the one suggested by the two holdings in *Wojnarowicz*: interpret VARA narrowly so as not to preempt state moral rights statutes, or even amend the governing preemption provision. Fourteen states and Puerto Rico have state moral rights statutes.[191] Though they lack uniformity, all provide protections for artists' moral rights that are unavailable under federal law.[192]

There is a two-part test for state law preemption embodied in Section 301(a) of the Copyright Act.[193] If both prongs are satisfied, then the state law is preempted. The first part asks whether the right it grants is equivalent to one granted by the Copyright Act.[194] The word "equivalent" is construed broadly, which means that a state law may be preempted if it falls within the general realm of the Copyright Act, even if the exact right differs from any of the rights found in the Act itself.[195] The second prong requires that the state law apply to works that are subject to federal copyright law.[196] VARA also has its own preemption provision, which reiterates the general two-part test of the rest of the Copyright Act but is arguably even broader.[197]

VARA preempts all state law rights, both legal and equitable, that are "equivalent" to the rights protected under VARA.[198] Though the provision is broad, there is room to narrow the interpretation of what constitutes "equivalent" rights. In addition, VARA only preempts state law with respect to the types of works that VARA itself covers. A narrow reading of the already restricted category of works defined in VARA would prevent federal law from rendering state law moral rights statutes completely toothless. If courts would interpret the preemption provisions of VARA narrowly, state laws could be permitted to protect rights of integrity where the federal law fails to do so; the corollary of this added protection would be the vindication, if not the safeguarding, of authors' rights against compulsory speech.

VI. CONCLUSION

The lack of protection for moral rights in American copyright law creates a basic First Amendment conflict. On one side of the conflict is the right of the author not to speak. This right is threatened by a distortion or mutilation of the

191. *See* Bird & Ponte, *supra* note 23, at 254.

192. *See id.* at 255–56.

193. Copyright Act, 17 U.S.C. § 301 (2006).

194. *Id.*

195. *See* Joshua H. Brown, *Creators Caught in the Middle: Visual Artists Rights Act Preemption of State Moral Rights Laws*, 15 HASTINGS COMM. & ENT. L. J. 1003, 1005 (1993).

196. 17 U.S.C § 301.

197. *See* Brown, *supra* note 195, at 1007 (noting Professor Damich's warning to a Senate subcommittee that VARA's preemption provision is worded in a way that might preempt more comprehensive, existing protection).

198. *See* 17 U.S.C. § 301(f).

author's work by a second user, who usually claims fair use. On the other side of the conflict is the right of that second user to create speech. This conflict, which pits one First Amendment right against another, arises when the integrity and message of a work is altered or damaged. The competition between these two free speech rights presents difficult practical questions about how to adequately protect each and how to define when one has threatened the other. Though there seems to be no way to fully protect speech rights on both sides of copyright disputes, courts could mitigate this kind of problem by narrowly construing the preemption provisions in VARA to allow state moral rights statutes to step in where the federal law cannot.