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COPYRIGHT'S PARADOX:
Property in Expression/Freedom of Expression

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by Neil Weinstock Netanel

Chapter 1
Introduction

The United States Supreme Court has famously labeled copyright the "engine of free expression."[1] Copyright law, the Court tells us, provides a vital economic incentive for the creation and distribution of much of the literature, commentary, music, art, and film that makes up our public discourse.

Yet copyright also burdens speech. I may need to copy or build upon another's words, images, or music to convey my own ideas effectively. I can't do that if the copyright holder withholds permission or insists upon a license fee that is beyond my means. And copyright does not extend merely to literal copying. It can also prevent me from parodying, remolding, critically dissecting, or incorporating portions of existing expression into my own independently created work.

Consider *The Wind Done Gone*, a recent, bestselling novel by Alice Randall. Randall's novel revisits the setting and characters of Margaret Mitchell's classic Civil War saga, *Gone With the Wind*, from the viewpoint of a slave. In marked contrast to Mitchell's romantic portrait of antebellum plantation life, Randall's story is laced with miscegenation and slaves' calculated manipulation of their masters. As Randall has explained, she wrote her novel to "explode" the racist stereotypes that she believes are perpetuated by Mitchell's mythic tale.[2]

Mitchell's heirs didn't gladly suffer Randall's adulterations.[3] They brought a copyright infringement action against Randall's publisher, and a Georgia district court preliminarily enjoined the novel's publication.[4] The Eleventh Circuit reversed and remanded, insisting that copyright law must be interpreted in line with First Amendment protections of free speech. But the case settled before a final judicial determination of the heirs' claim and Randall's defense. As we shall see, the extent to which the First Amendment protects such uses of copyrighted works remains uncertain.

Of course, even the lower court injunction did not absolutely prevent Randall from speaking. She still could have vented her views in an op-ed piece or scholarly article. But what more poignant way to drive her point home than to radically recast Mitchell's iconic work? Retellings of classic stories are a time-honored conceit for fiction writers seeking to challenge prevailing ideological and artistic perceptions.

Copyright is thus at once "engine of free expression" and impediment to free expression. It does provide an economic incentive for speech. But copyright may also prevent speakers from effectively conveying their message and challenging prevailing views.

This book addresses the conflict between copyright and free speech. Melville Nimmer, the leading copyright and First Amendment scholar of his day, once aptly termed that conflict a "largely ignored paradox."[5] Those who valued creative expression happily favored both strong copyright protection and rigorous judicial enforcement of First Amendment rights without perceiving any potential tension between the two.

A recent spate of widely debated lawsuits has shattered that sanguine view. Op-ed pieces across the nation pondered whether copyright, as used by Margaret Mitchell's heirs to suppress Randall's politically charged, acerbically parodic sequel, unduly chills speech. Publishers of public domain books and sheet music challenged the constitutionality of a Copyright Act amendment that adds another twenty years to the copyright term. The ACLU defended artist Tom Forsythe against Mattel's copyright and trademark infringement action over Forsythe's Food Chain Barbie series.[6] A Princeton University computer science professor petitioned a court to affirm his First Amendment right to present his research at an academic conference after a record industry trade association threatened that the presentation would subject him to liability under the Digital Millennium Copyright Act. Martin Luther King's heirs provoked concerted media protest when they sued CBS for copyright infringement over a CBS documentary on the civil rights movement that included some of the network's original footage of King delivering his seminal "I Have a Dream" speech. Diebold Election Systems, a leading producer of electronic voting machines, sent cease-and-desist letters to three college students and their Internet service providers in a vain attempt to quash the Internet posting of internal company emails revealing technical problems with the machines' performance and integrity. Millions of users of peer-to-peer file trading networks, like Grokster, Kazaa, and the original Napster, have been given cause to consider whether assembling and exchanging a personalized mix of one's favorite music recordings is an exercise of expressive autonomy or the deplorable theft of another's intellectual

property. *The New York Times Magazine* ran a cover story on this emerging "copyright war," encapsulating the tumultuous cross-currents both in the article's perplexed, interrogatory title, "The Tyranny of Copyright?" and its unmistakably declarative notice, "Copyright 2004 The New York Times Company."[7]

Why has the conflict between copyright and free speech come so virulently to the fore? What values and practices does it put at stake? How should the conflict be resolved? These are the principal questions that this book seeks to answer.

At its core, copyright has indeed served as an engine of free expression. In line with First Amendment goals, the Constitution empowers Congress to enact a copyright law in order to "Promote the Progress of Science," meaning to "advance learning." Copyright law accomplishes this objective most obviously by providing an economic incentive for the creation and dissemination of numerous works of authorship. But copyright promotes free speech in other ways as well. As it spurs creative production, copyright underwrites a community of authors and publishers who are not beholden to government officials for financial support. Copyright's support for authorship may also underscore the value of fresh ideas and individual contributions to our public discourse.

But, as I argue in this book, copyright has strayed from its traditional, speech-enhancing core. So much so that in copyright's present configuration and under present conditions, copyright imposes an unacceptable burden on the values that underlie First Amendment guarantees of free speech. As the Supreme Court has emphasized, the First Amendment aspires to the "widest possible dissemination of information from diverse and antagonistic sources."[8] Yet copyright has come systematically to stifle criticism, encumber individual self-expression, and ossify highly skewed distributions of expressive power. Copyright's speech burdens cut a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment.[9] As I will argue, copyright imposes those speech burdens to a far greater extent than can be justified by its vestigial speech-enhancing benefits.

The primary, immediate cause for copyright's untoward chilling of speech is that copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose.[10] As traditionally conceived, copyright law strikes a precarious balance. To encourage authors to create and disseminate original expression, it accords them a bundle of exclusive rights in their works. But to promote public education and creative

exchange, it both sharply circumscribes the scope of those exclusive rights and invites audiences and subsequent authors freely to use existing works in every conceivable manner that falls outside the copyright owner's domain. Accordingly, through most of the some 300 years since the first modern copyright statute was enacted, copyright has been narrowly tailored to advance learning and the wide circulation of information and ideas, ends that are very much in line with those of the First Amendment. Copyright holder rights have been quite limited in scope and duration, and have been punctuated by significant exceptions designed to support robust debate and a vibrant public domain. Indeed, as courts have repeatedly suggested, it is copyright's traditional free speech safety valves — principally the fair use privilege, copyrights' limited duration, and the rule that copyright protection extends only to literal form, not idea or fact — that have enabled copyright law to pass First Amendment muster.

In recent decades, however, the copyright bundle has grown exponentially. It now comprises more rights, according control over more uses of an author's work, and lasting for a longer time, than ever before. In tandem, the exceptions and limitations that once safeguarded First Amendment values have significantly eroded. If copyright law remained as it was in 1936, the year Margaret Mitchell wrote *Gone With the Wind*, Mitchell's copyright would have already expired, and Randall could have written her sequel without having to defend a copyright infringement lawsuit. In fact, under prior law, even if Mitchell's copyright were still in force, Alice Randall's parodic refashioning of the civil war saga's literary characters and settings might well be considered a perfectly acceptable use of noncopyrightable ideas, not an appropriation of copyright protected expression. Similarly, prior to the Digital Millennium Copyright Act of 1998, Professor Felten's paper on digital music encryption would have fallen entirely outside the reach of copyright law. Had he presented his findings before the DMCA took effect, he would have had no need to invoke the First Amendment to protect his right to speak.

Of course, copyright's ungainly distension has not occurred in a vacuum. Copyright protected expression has assumed a growing importance in the national and global economy. As a result, the industries that produce, distribute, and maintain vast inventories of expressive product have gained considerable political power. The Copyright Act, a product of Congress' wholesale revision in 1976 and numerous additions and modifications since, reflects this influence. The Act's key provisions, especially those of recent amendments, have been passed upon and indeed drafted by copyright industry representatives. The industry has sometimes agreed to carve out narrow, discrete exceptions for well-heeled user organizations like the

telecommunications companies that provide cable television and Internet service. But the broad interest in maintaining a vibrant public domain, an interest diffusely held by the citizenry at large, has consistently been given short shrift.

Concurrently, courts have, for the most part, joined in copyright's expansion by narrowly construing limitations on copyright holder rights. Copyright owners enjoy a decided rhetorical advantage over defendants who assert that their uses of copyrighted works are fair use or otherwise noninfringing. Like other government officials, judges are swayed, no doubt, by the copyright industry's widely-touted importance to our nation's economy. Lower court judges also frequently evince a conventional understanding of copyright as "property," with all the connotations of Blackstonian absolute dominion that that term typically (if incorrectly) implies.[11] Imbued with that formulaic propertarian understanding, courts, like the district court in the *Gone With the Wind* case, have labeled as "theft" and "unabated piracy" any unauthorized use of a copyright holder's work, including even uses like Alice Randall's that contain considerable independent creative expression and critique.[12]

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The sharpening conflict between copyright and free speech cuts across traditional and emerging electronic media alike. Yet digital technology adds a vast new dimension to that conflict. It radically transforms the creation, dissemination, and enjoyment of expression, overturning copyright's delicate balance in the process.

The ubiquity of personal computers and other consumer devices capable of copying, storing, manipulating, and communicating expression, coupled with the global reach of digital communications networks, challenge the fundamental assumptions upon which copyright law has traditionally been built. Prior to the advent of digital technology, only large-scale organizations had the wherewithal to produce and distribute expression to a mass audience. Film studios, record companies, television and radio broadcasters, and print publishers came to dominate our cultural landscape because they have the funds and infrastructure to mass produce, package, and distribute authors' works. In that universe of centralized production and distribution, copyright's principal concern was the free riding competitor. Copyright law was designed to create order in the publishing trade, to prevent ruinous competition when unscrupulous firms engage in the bulk sale of counterfeit or substantially similar expressive goods.

Digital technology upends that universe, posing a new, fundamentally different type of threat to the copyright industry. It enables individuals easily to make perfect copies as well as to cut and paste, edit, and remix existing works, and to disseminate those copies and remixes to Internet users the world over. It also makes it possible for authors cheaply to produce and distribute their works directly to audiences, without having to rely on publishers, record companies, movie studios, television networks, or other such intermediaries.[13] Digital technology, in short, could radically undermine traditional copyright markets not by facilitating misappropriation by unsavory studios and publishers (though it may do that, too), but by enabling consumers and artists to sidestep copyright industry distribution channels altogether.

The copyright industries understandably view the possibility of individuals' untrammeled copying, remixing, and exchange as a mortal threat to the copyright system as we know it. They argue that more extensive copyright protection and enforcement mechanisms are required both to combat massive "digital piracy" and to enable copyright holders better to serve the digital marketplace. The industries have met a receptive ear in Congress and the courts. Yet the millions who regularly download texts, cartoons, music, TV programs, and other material for personal edification, enjoyment, sharing with others, or use in their own creative expression seem increasingly to perceive copyright as an undue and unworthy impingement on their liberty and expressive autonomy. This *Kulturkampf*, possibly even more than the expansion of copyright's scope with respect to traditional media, has brought the copyright-free speech conflict — Nimmer's "largely ignored paradox" — to the fore.

Both sides to this acrimonious debate purport to be the sole, legitimate claimants to copyright's pedigree. The copyright industry posits that copyright serves fundamentally to protect the copyright holder's property and that exceptions, such as fair use, are warranted only in cases of insurmountable market failure, when the high costs of negotiating a license exceed the license fee the copyright owner would demand. Translating those propositions into the digital arena, the industry insists that it must enjoy the effective and enforceable right hermetically to control its content, including the right to charge Internet users every time they read, view or hear a work online. To this end, the copyright industry has sought — and obtained — statutory protection for its planned use of digital technology, including digital watermarking and encryption, to control and meter every access and use of its content.

Internet user advocates, on the other hand, seek faithfully to carry over traditional copyright limitations into the digital arena. In the offline world, I'm largely free to make

personal copies of texts, video, and music, and to share those copies with friends. Many insist that personal copying and posting on the Internet is merely a manifestation of that "right to copy," and thus should be protected as fair use. Likewise, in the offline world, I can read my books or listen to my sound recordings as often as I like without having to pay a royalty or obtain the copyright owner's consent. The Internet user advocates accordingly see the specter of a pay-per-use world, a celestial jukebox in which all content resides online and readers and listeners must drop in a digital coin every time they wish to access it, as a horrific expansion of copyright holder prerogatives.

In one important sense, the copyright industry has the better argument. Digital technology radically alters the economic assumptions upon which copyright doctrine is predicated. Accordingly, if we are to remain true to the shared goals of copyright's fundamental goals, we need to adapt copyright doctrine to changing economic and technological conditions. We cannot simply carry over pre-digital "free use zones" into the digital network environment. At some not-too-distant time, for example, we might generally read texts, view video, and listen to music by ordering access online rather than owning or renting a copy. If so, the law might well need to secure creators' rights in accessed content in order to maintain the copyright incentive.

But while the copyright industry is correct about the need to translate and adapt copyright doctrine, it is wrong about copyright's fundamental goals. Copyright is not ultimately about securing property rights. Rather copyright's fundamental ends, like those of the First Amendment, are to "Promote the Progress of Science" by spurring the creation and widespread dissemination of diverse expression. To the extent exclusive rights in original expression best serve those ends, copyright doctrine should provide for proprietary rights. To the extent not, copyright law should provide for other mechanisms to further education, cultural expression, and robust debate.

From that perspective — and not because Internet users have some inherent "free speech right to copy" — the Groksterization of our expressive matrix may well be a glass half-full rather than the unmitigated disaster that the copyright industries portray. Digital technology offers unprecedented opportunities for collaborative, "peer-to-peer" creation and dissemination of expression at near-zero marginal cost.[14] The Internet already comprises a profuse and richly diverse array of expression, information, and debate, much of it available without any reliance — or intended reliance — on copyright or copyright industry intermediaries. It opens vast new horizons for speakers and audiences alike, making available a wealth of material for inspiration, reconfiguration, sorting, comment, discourse, learning, and enjoyment, all at the click of a mouse.

Thus, even without copyright, the Internet (together with its rapidly evolving wireless counterparts) may well realize as never before the First Amendment ideal of expressive diversity. Indeed, some contend that the Internet will realize its full free speech potential only if copyright is banished from its realm. I would not go so far. As I will argue in this book, there *are* free speech values that copyright will continue to serve in the digital arena, as well as in the creation and distribution of expression offline. But just as in the brick-and-mortar world, copyright should be narrowly tailored to serve its speech-enhancing ends. Our fidelity must be to copyright's speech enhancing purpose, not to extending property rights in expression or propping up traditional industries for their own sake.[15] To the extent property rights in expression unnecessarily stand as an obstacle to free speech, they should be limited or jettisoned in favor of less constraining and less censorial mechanisms for securing authorship credit and remunerating producers and purveyors of original expression. To the extent free speech values are best served by the emergence of new media and greater opportunities for decentralized production and dissemination of original expression, copyright law should encourage, not stand as a barrier, to those developments.[16]

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An overly capacious copyright may impose a variety of costs. These range from inhibiting innovation in digital technology, to raising prices for entertainment products, to impeding the development of decentralized peer-to-peer production of information products that might make more efficient use of human know-how than do media and information technology conglomerates. Much can be said about each of these costs.[17] But this book addresses them only tangentially. My central focus and theme, rather, is that copyright's expansion and extension unduly burden free speech. This book's premise is that, given the primacy of free speech in a liberal democratic society and the extent to which copyright intertwines with free speech concerns, those concerns must play a central role in shaping copyright doctrine.

In that regard, let me now say a word about economics. Economic analysis has become the dominant framework for explaining intellectual property law, certainly in American scholarship and jurisprudence. Indeed, some commentators have forcefully argued that copyright's scope and duration should be limited on general principles of economic efficiency, just as other economic analysts have sought to justify copyright's broad scope.[18] Lest I be thought blithely to shunt economic analysis aside, I will stress at the outset: Economics is central to understanding how copyright operates. For that reason, much of my argument is made, explicitly or implicitly, with economic tenets in mind. Yet,

efficiency arguments alone fail to capture the essence of what is at stake in copyright's untoward expansion. Unlike patent law, copyright's intellectual property counterpart, copyright law operates almost entirely in the realm of speech. Copyright regulates traditional First Amendment media, new digital media, and, increasingly, individual speakers. Copyright's economic calculus has vital implications for those voices. It determines which speech and whose speech is — and is not — expressed and heard. The complex interplay of copyright's speech benefits and burdens must therefore lie at the fore of copyright doctrine and policy.

Moreover, the limitations of economic analysis do not lie merely in that economics fails adequately to account for copyright's import for speech. Rather, by its very terms, the economic analysis of copyright inevitably devolves to speech policy. In shaping copyright, even from an economic perspective, we must turn to questions regarding the place and contours of speech in our society. How much of society's resources do we want invested in the production and dissemination of original expression as opposed to other endeavors? How willing are we to sacrifice some quantity of investment in, and thus presumably production of, original expression to enable greater access to existing expression? How should copyright be tailored to promote expressive diversity? What balance should be drawn between owners of subsisting copyrights and speakers who desire to use existing expression to convey their message? When does an individual have a right to self-expression that both extends to reiterating or building upon another's expression and trumps a broad societal interest in maximizing investment in producing original expression? How much do we want or need copyright-incented expression as opposed to volunteer authorship that does not rely on copyright? What is our desired mix of speakers as among copyright industry media, individuals, state-subsidized, and nonprofits? All these are fundamentally considerations of speech jurisprudence and policy. As we will see, basic copyright economics, as well as economic analysis of matters such as price discrimination, transaction costs, monopolistic competition, product differentiation, and market concentration, serve as highly useful tools in approaching these questions. But our answers must ultimately turn on our best understanding of and judgments regarding free speech values and copyright's complex role in promoting, shaping, and chilling speech.

That focus on copyright's complex role highlights another important sub-theme of this book: the copyright-free speech conflict can be fully comprehended only by examining how the copyright regime operates in practice. How do markets for original expression and copyright licenses actually work? What are the nature and shape of audience

demand for copyright-protected works? Who owns most copyrights of value to speakers and audiences? How competitive are copyright markets? How concentrated are copyright industries? How are digital creation, communication, and distribution impacting copyright markets and what might they portend for the future? Do new technological media for distributing expression face entry barriers? How are copyrights enforced and what affect does that have on speech? Neither formal economic models nor an exposition of copyright doctrine and case law fully illuminate copyright's impact on speech. Rather copyright law is intertwined with the industries, markets, and legal system through which copyrights are licensed and enforced and original, copyright-protected expression is created and sold.

Finally, crafting solutions to the copyright-free speech conflict requires that we locate copyright in relation to free speech law and policy. Copyright engages free speech law and policy at two basic points. First, copyright implicates the matrix of rules and policies that broadly promotes free speech values. As Thomas Emerson emphasized more than three decades ago, liberal democracy must encompass and nurture a "system of freedom of expression," comprising various speech-related rights, institutions, and types of speakers, and requiring affirmative state support as well as limitations on the power of the state to abridge speech rights.[19] Copyright is an integral part of that framework. It is designed to spur creative expression and to underwrite a sector of authors and publishers who can find financial sustenance from paying audiences (and advertisers) rather than potentially censorial government largess. But in so doing, copyright enables some speakers to speak and not others; it effectively allocates expressive power to certain institutions and not others. Depending on its contours and application, it has the capacity either to promote or to stifle individual self-expression and "the robust debate of public issues" that is the "essence of [collective] self-government."[20] To the extent copyright's free speech costs have come to exceed copyright's free speech benefits, it is thus incumbent upon lawmakers to restore copyright's traditional balance. And they must do so within a framework that comports with the changes and new possibilities that accompany digital technology.

Second, in the more narrow, doctrinal sense, copyright implicates the First Amendment. Courts have generally recognized that fact, but have nevertheless held that copyrights are immune from First Amendment scrutiny. In *Eldred v. Ashcroft*,[21] decided in January 2003, the Supreme Court rejected copyright's categorical First Amendment immunity but left only limited room for First Amendment oversight of copyright owner prerogatives. Contrary to the Court's dismissive view, a considered and consistent application of First Amendment precedent militates in favor of such oversight. Artistic

expression now enjoys a level of First Amendment protection on par with political commentary. Likewise, the First Amendment has been held to limit not only the state's ability to regulate speech through public law, but its power to enforce sundry private rights - including intellectual property rights — as well. There is no reason why those limits should not apply equally to copyright. At the very least, courts should apply the First Amendment to ensure that copyright's traditional free speech safety valves are still up to their task….

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

[2] See David D. Kirkpatrick, "A Writer's Tough Lesson in Birthin' a Parody," *N.Y. Times*, Apr. 26, 2001, p. E1. The book jacket to *The Wind Done Gone* describes the novel as "[a] provocative literary parody that explodes the mythology perpetrated by a Southern classic."

[3] The *New York Times* reports that the heirs have twice gone to court to prevent alleged copyright infringements and that writer Pat Conroy broke off talks about writing an authorized sequel, saying that "the executors had put undue restraints on the plot." *See Id.*

[4] See Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 252 F.3d 1165 (11th Cir. 2001).

[5] Melville B. Nimmer, *"Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*," 17 UCLA L. Rev. 1180, 1181 (1970).

[6] The ACLU represented Forsythe along with the law firm of Howard, Rice, Nemerovsky, Canady, Falk & Rabkin. Forsythe's series depicted nude Barbie dolls in various absurdly compromising situations in order to lambaste the objectification of women and perfection-obsessed consumer culture that, in his view, Barbie embodies. Forsythe's defense was ultimately successful. See Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

[7] Robert S. Boynton, "The Tyranny of Copyright?," *N.Y. Times Magazine*, Jan. 25, 2004, p. 40.

[8] See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 226-227 (1997), and FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799 (1978), both quoting Associated Press v. United States, 326 U.S. 1, 20 (1945).

[9] News reporting: Harper & Row, 471 U.S. at 541 (*The Nation*'s publication of excerpts from President Ford memoirs describing Nixon pardon), L.A. News Serv. v. Reuters T.V. Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998) (transmission of videotaped scenes of Los Angeles riots), and Belmore v. City Pages, Inc., 880 F. Supp. 673 (D. Minn. 1995) (paper's publication of racist fable from police department newsletter, held to be noninfringing fair use).

Political commentary: Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (biting satire of O.J. Simpson trial), and Los Angeles Times v. Free Republic, 54 U.S.P.Q.2D (BNA) 1453 (C.D. Cal. 2000) (web site postings of news stories for criticism by right-wing group).

Church dissent: Worldwide Church of God v. Phila. Church of God Inc., 227 F.3d 1110 (9th Cir. 2000) (dissident offshoot's distribution of deceased church leader's tract, now repudiated by mainstream church), and Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 923 F. Supp. 1231 (N.D. Ca. 1995) (Internet posting and criticism of Church of Scientology documents by former Scientologists).

Historical scholarship: Estate of Martin Luther King, Jr. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999) (TV documentary using portions of King's "I Have a Dream" speech); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (biographer's quotations from Salinger's unpublished letters).

Cultural critique: Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (counterculture comic parody of Disney characters), and Mattel, Inc. v. Walking Mountain Productions,353 F.3d 792 (9th Cir. 2003) (photographer's savage parodies of Barbie dolls designed to "critique [ ] the objectification of women associated with [Barbie]").

Artistic expression: Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), *cert. denied sub nom.*, Koons v. Rogers, 506 U.S. 934 (1992) (postmodern sculpture infringing photgrapher's copyrighted work).

Quotidian entertainment: Castle Rock Entm't., Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 146 (2d Cir. 1998) (multiple choice trivia quiz regarding the television series Seinfeld), and Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987) (movie poster infringing copyright on magazine illustration).

10 Other commentators have also lamented copyright's transformation from a paradigm of limited government grant to a paradigm of property. See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 83-84, 117-19, 172 (Penguin Press 2004); Jessica Litman, Digital Copyright 81 (Prometheus Books 2001); Mark. A Lemley, *"Property, Intellectual Property, and Free Riding,"* 83 TEX. L. REV. 1031 (2005). James Boyle.

11 For an insightful discussion of the role of such conventional understandings in copyright expansion, see Lloyd L. Weinreb, *"Copyright for Functional Expression"*, 111 HARV. L. REV. 1149, 1211-16 (1998), and Mark. A Lemley, *"Property, Intellectual Property, and Free Riding,"* 83 *TEX.* L. REV. 1031 (2005). As Professors Weinreb and Lemley recognize, to denominate copyright "property" does not inherently connote an expansive, long-term right to exclude. Other commentators concur. See Hanoch Dagan, *"Property and the Public Domain,"* 17 YALE J. L. & HUMANITIES (forthcoming 2006); Richard A. Epstein, *"Liberty Versus Property? Cracks in the Foundations of Copyright Law,"* 42 SAN DIEGO L. REV. 1, 9, 22 (2005). But as I discuss further in Chapter 8, the view and label of copyright as "property" has nevertheless been used to support a broad scope and duration of copyright holder exclusive rights.

12 Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001). The view that copying another's work is "piracy" has a long pedigree. See Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (stating that while a person may prepare his own map of territory surveyed by another, "[i]f he copies substantially from the map of the other, it is downright piracy"). But until the late nineteenth century, courts generally did not view borrowing from an existing work while adding one's own creative expression as "copying." See Glynn S. Lunney, Jr., *"Reexamining Copyright's Incentives-Access Paradigm,"* 49 VAND. L. REV. 483, 534-40 (1996).

13 Eugene Volokh was one of the earliest academic commentators to identify and explore some possible ramifications of this phenomenon. See Eugene Volokh, *"Cheap Speech and What it Will Do,"* 104 YALE L.J. 1805 (1995).

14 See Raymond Ku, *"The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology,"* 69 U. CHI. L. REV. 263, 273-274 (2002).

15 As Larry Lessig has cogently argued, "fidelity" to a legal regime's original purpose, principles, and, indeed, meaning requires "translation" in light of new circumstances, not rote application of literal doctrine and text. See Lawrence Lessig, *"Fidelity in Translation,"* 71 TEX. L. REV. 1165 (1993). See also Daniel A. Farber, *"Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the 'Digital Millennium,'"* 89 MINN. L. REV. 1318, 1345 (2005) (concluding that in light of the radical changes wrought by the Internet, [w]e cannot meaningfully translate copyright rules to the digital world without considering the goals of the copyright regime.")

16 For illuminating discussion of the democracy-enhancing possibilities of decentralized production and dissemination of expression, see Niva Elkin-Koren, *"Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace,"* 14 CARDOZO ARTS & ENT. L.J. 215 (1996).

17 *See* Lawrence Lessig, *"The Future of Ideas,"* (New York: Random House, 2001).

[18] For a discussion justifying a limited scope for copyright, see Mark A. Lemley, *"Property, Intellectual Property, and Free Riding,"* 83 TEX. L. REV. 1031 (2005), Glynn S. Lunney, Jr., *"Reexamining Copyright's Incentives-Access Paradigm,"* 49 VAND. L. REV. 483 (1996), and [Not sure what article: Abramowitz, Copyright as Industry]. For a discussion justifying a broad scope for copyright, see Christopher S. Yoo, *"Copyright and Product Differentiation,"* 79 N.Y.U. L. REV. 212 (2004), and [Not sure what article: Wagner]

[19] Thomas I. Emerson, The System Of Freedom Of Expression (New York: Random House, 1970), p. 3-5.

[20] Harper & Row, 471 U.S. at 605 (Brennan, J., dissenting).

[21] 537 U.S. 186 (2003).