

# University of Miami Law Review

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Volume 34  
Number 4 *Fifth Annual Baron de Hirsh Meyer  
Lecture Series*

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Article 11

7-1-1980

## Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity

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# STUDENT WORK

## Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity

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*The author presents a unique theory of personal expression under the Constitution, which posits that underlying the first amendment and the copyright clause is the principle that the public good requires encouragement, not suppression, of individual expression. Historically, decisions undermining authors' copyrights in favor of other social goals discouraged the creativity necessary for cultural development, and Congress and the courts responded by increasing the protection of authors and expanding the domain of copyrightable works. Similarly, official proscription of commercial and offensive speech for less than the most urgent social needs threatens to inhibit the creative spirit protected by the first amendment. The author urges that the Supreme Court read the first amendment and the copyright clause as integral parts of a constitutional philosophy, fostering the framers' goals of greater personal freedom and informed social decisionmaking.*

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## I. INTRODUCTION

Communication, the creation and sharing of individual expression, occupies a central position in our constitutional framework. While the first amendment forbids Congress to inhibit expression by speech or press,<sup>1</sup> the copyright clause affirmatively grants Congress the power to protect tangible manifestations of individual communication.<sup>2</sup> Thus, although not permitted to abridge speech, Congress may encourage the search for ever new forms of expression.

Most articles on the intersection of copyright and the first amendment have considered the first amendment as a defense to a copyright infringement action. They discuss how the monopoly afforded an individual author through a copyright must be balanced against the first amendment goals of free speech and the dissemination of ideas.<sup>3</sup> This comment proposes a different focus: an examination of the meaning that the copyright clause, as an integral part of the Constitution, imparts to the philosophy underlying the first amendment.<sup>4</sup> By comparing the evolution of the law affecting

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1. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

A majority of the United States Supreme Court has never interpreted the first amendment as an absolute ban on governmental regulation of all individual expression. Instead, a host of judicial methodologies have been premised on a view of the first amendment not as the result of a prior accommodation, but as the source of a continuous reconciliation, between its guarantees to the individual and other requirements of society. *See, e.g.,* *Dennis v. United States*, 341 U.S. 494, 519, 529-36 (1951) (Frankfurter, J., concurring) (national security); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (keeping the peace and preventing interference with business and social activities).

2. The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

Inherent in the constitutional provision is the distinction between unprotected ideas, which remain always in the public domain, and their expression in tangible forms, which renders them eligible for copyright status as "writings." *Cf. Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969) (conversations of the late novelist held unprotected because of implied waiver of common law copyright). The *Hemingway* court emphasized that expression should be in tangible form to receive copyright protection in most situations. It asked but did not answer the question whether unusual circumstances might justify copyrighting speech itself. *See also Baker v. Selden*, 101 U.S. 99 (1879) (bookkeeping system not subject to copyright); Copyright Act of 1976, 17 U.S.C. § 102; M. NIMMER, *NIMMER ON COPYRIGHT* § 2.18 (1978).

3. *See, e.g.,* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970).

4. The copyright clause merely authorizes Congress to exercise its granted power. The first amendment, on the other hand, explicitly prohibits the government from abridging individual rights. Yet this distinction, which concededly indicates a difference in substance as well as form of rights, compare *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624

individual expression under the copyright clause with that under the first amendment, a framework for analyzing free speech claims emerges: Even when balanced with conflicting social interests, the goals of the Constitution are best served by encouraging, not suppressing, individual expression.

In empowering Congress to secure exclusive rights for authors in their writings,<sup>5</sup> the copyright clause explicitly recognizes that individual expression is valuable in itself, deserving encouragement.<sup>6</sup>

(1943), *with United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), nevertheless provides only one means of analysis. While section 5 of the fourteenth amendment precludes contraction of individual rights guaranteed by that amendment, it simultaneously empowers Congress to implement its policies. Similarly, this comment argues that the copyright clause grants Congress the power to legislate to encourage individual communication, and that underlying both the copyright clause and the first amendment is a common perception of the value of individual expression, both to society and to the individual.

5. The Constitution confers upon Congress the power only to protect "writings" of authors. The term "writings" has been interpreted broadly to encompass any fixation of a work in tangible form. The current copyright statute, enacted in 1976, affords protection to "all the works of an author." According to the present statute, "all the works of an author" include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. Copyright Act of 1976, 17 U.S.C. § 102(a) (1976). Legislative history reveals that Congress deliberately did not follow the constitutional language by conferring statutory protection solely upon "writings." The intent of Congress was to allow expansion of the scope of constitutionally copyrightable subject matter along with the expansion of technology. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5666 [hereinafter cited as HOUSE REPORT].

6. The copyright clause has its roots in the Statute of Anne, enacted in England in 1709. The Act codified the common law property right of an author for the fruits of his intellectual labor. "[T]he express statutory recognition that the source of the copyright interest is in the creative act of authorship, rather than in the entrepreneurship of the printer was a major step forward." Ringer, *Two Hundred Years of American Copyright Law*, in *TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW* 117, 121 (1977). All but one of the thirteen original colonies fashioned copyright laws modeled on the antecedent English statute. The need and desire for national uniformity in the protection of authors led to formulation of the constitutional provision. *Id.* at 125-26. *See also*, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); M. NIMMER, *NIMMER ON COPYRIGHT* § 4.02 (1978).

Indeed, recognition of the right of copy can be found among primitive societies, which often view tangible forms of artistic expression as part of the personality or the self. "In primitive societies, notions of ownership of songs, dances, magical formulas and so forth have often been more elaborate and more rigidly enforced than our legally established copyright." Cohen, *Primitive Copyright*, 55 A.B.A. B.J. 1144 (1969). Similar perceptions continue to form a basic premise justifying copyright protection. The "philosophical reason for not wanting to see copyright destroyed . . . is simply a belief that copyright is one of a number of ways in which our society expresses its belief and hope that an individual can continue his identity in a world of mass efforts. . . ." G. SOPHAR & L. HEILPRIN, *THE DETERMINATION OF LEGAL FACTS AND ECONOMIC GUIDEPOSTS WITH RESPECT TO THE DISSEMINATION OF SCIENTIFIC AND EDUCATIONAL INFORMATION AS IT IS AFFECTED BY COPYRIGHT*, A STATUS REPORT viii (Final Report, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education and

At the same time, by linking protection of authors to "the Progress of Science and useful Arts," the copyright clause is a testament to the instrumental significance of individual expression to the common advancement.<sup>7</sup>

Through the exercise of congressional authority<sup>8</sup> to safeguard authors' rights, and through judicial interpretation of their bounds, a body of copyright doctrine has evolved that is sensitive to encouraging these values in light of new technology and competing social interests. Accordingly, copyright status has been extended to novel forms of expression arising from developments in the communications media. As reflected in ever-increasing copyright protection in the areas of musical sound recordings, photocopying, and cable and computer systems, Congress has consistently viewed the promotion of individual creativity as the best means of ensuring the benefits of continued technological change to the public.<sup>9</sup>

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Welfare, Project No. 7-0793 (1967)).

7. James Madison, who, together with Charles Pinckney, proposed the copyright clause to provide national protection for authors, asserted that:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at Common Law. The right to useful inventions seems with equal reason to belong to the inventors. *The public good fully coincides in both cases with the claims of individuals.* The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

THE FEDERALIST No. 43 (J. Madison) (emphasis added); see Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 114 (1929).

The Supreme Court has articulated the inextricable relationship between protection for the individual and the fostering of social progress: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

8. Congress passed the first copyright law of the United States in 1790. Superseding enactments followed in 1831, 1870, 1909, and 1971 (The Sound Recordings Act of 1971). The most recent revision is the Copyright Act of 1976, which culminated over two decades of hearings and analysis on the part of Congress and the Copyright Office. See HOUSE REPORT, *supra* note 5, at 47-50. See also U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 at 1 (1977).

One of the major features of the Copyright Act of 1976 is preemption of common law copyright by the federal government. Previously, a state-enforced right of common law copyright continued in perpetuity in unpublished works, with federal statutory protection attaching only at the moment of publication. Under the new act, federal copyright protection attaches at the moment the work is reduced to tangible form. This change affords authors the greater benefits accruing from federal protection and also accommodates public need for dissemination, because the term of federal copyright protection is limited. See Copyright Act of 1976, 17 U.S.C. §§ 301-302 (1976). Bringing copyright claims within the scope of exclusive national protection also achieves uniformity in the protection of authors.

9. "The history of copyright law has been one of gradual expansion in all types of works

Gradual expansion of first amendment protection evidences a parallel awareness of the significance of free speech both to the individual and to society. Free expression permits the development of personal autonomy, which simultaneously fosters self-development and makes possible the responsible exercise of choice.<sup>10</sup> The ideal of self-government is in this way served: persons whose individuality is respected and expression is uninhibited are better able to contribute to a truly representative social order, and citizens exposed to a wide range of data are better able to make informed decisions.<sup>11</sup> Protecting individual expression thus coincides with promoting society's vitality.<sup>12</sup>

Notwithstanding the increased latitude granted certain political and commercial expression,<sup>13</sup> recent Supreme Court decisions

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accorded protection. . . . [S]cientific discoveries and technological developments have made possible new forms of creative expression that never existed before." HOUSE REPORT, *supra* note 5, at 51. These include electronic music, filmstrips, computer programs, photographs, sound recordings, and motion pictures. *Id.* See also *id.* at 47.

10. According to Justice Brandeis, the guiding philosophy of the Constitution is a view of liberty as both an end for individual self-development and a means for society's enlightenment. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Thomas Emerson, a first amendment scholar, similarly perceived that the purpose of government is to promote individual welfare. Emerson wrote that the freedom to express one's individuality through communication was an essential prerequisite to all other freedoms and, on that basis, a good in itself. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

11. Another eminent constitutional theorist, Alexander Meiklejohn, viewed free speech as crucial to the processes of self-government. Meiklejohn saw the first amendment as protecting, most significantly, the individual's right to hear. Because, as the Declaration of Independence asserts, "governments derive their just powers from the consent of the governed," the free flow of information is essential to ensure the informed exercise of that consent on the part of each citizen. Meiklejohn, *What Does The First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). The Supreme Court articulated the instrumental relationship between free expression and the vitality of the political system in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), acknowledging the necessity for "uninhibited, robust and wide-open" debate on public issues. *Id.* at 270. A similar relationship exists between free commercial speech and intelligent public behavior in a free economy. See notes 33-39 and accompanying text *infra*.

12. Following such a view of first amendment values, the Court gradually abandoned earlier judicial attempts to define the parameters of permissible speech according to a determination of its social acceptability. Because the fostering of individual autonomy offered the best assurance for maintaining a democratic society, speech came to be valued for itself, regardless of the motivation of its speaker or tastefulness of its content. Thus, the Court extended first amendment protection to speech advocating subversive political viewpoints, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), language offensive to majoritarian sensibilities, *Cohen v. California*, 403 U.S. 15, 21 (1971), an expression critical of public officials, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), except in certain narrow, specifically defined instances of overriding state interest.

13. See note 12 *supra* and notes 28-40 *infra*.

demonstrate a growing paternalism, restricting first amendment protection in the face of other values imposed by majoritarian sensibilities. Concerns for protecting the quality of life<sup>14</sup> and guarding personal interests from deception<sup>15</sup> and intrusive communications<sup>16</sup> ostensibly underlie the Court's occasional balance against free expression. Recent decisions, however, betray a view of speech as deriving its legitimacy in large part from judgments about the social utility of its content.<sup>17</sup> The trend not only departs from established first amendment jurisprudence,<sup>18</sup> but is inconsistent with the understanding developed under copyright law, in which the balance between creativity and other competing interests weighs in favor of encouraging free expression.<sup>19</sup>

This comment will evaluate recent first amendment analysis by comparing it to the results achieved under the copyright clause through congressional policy and judicial case law. The discussion will trace the development of first amendment doctrine for commercial and offensive speech, with emphasis on how it follows or differs from that of copyright. The author will then examine the

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14. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

15. *Friedman v. Rogers*, 440 U.S. 1 (1979).

16. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

17. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), four justices agreed that states "may legitimately use the content of [pornographic movies] as the basis for placing them in a different classification from other motion pictures" consistent with the first and fourteenth amendments. *Id.* at 70-71 (plurality opinion).

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), three justices agreed that the first amendment does not prohibit all government regulation that depends on the content of speech. *Id.* at 744 (plurality opinion). Justice Powell, joined by Justice Blackmun, concurred because of "the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes." *Id.* at 762 (Powell, J., concurring). As Professor Emerson explains:

[T]he Burger court is only one vote shy of a majority that expressly takes into account its view of the social value of a particular communication in determining whether or to what extent such expression will be protected under the first amendment. Further, that approach is implicit in other rulings subscribed to by a clear majority of the Court.

Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 452 (1980).

18. In *Pacifica*, the majority agreed that a monologue including seven "cuss words," words "you couldn't say on the public . . . airwaves," was not obscene in the constitutional sense, but that given the content of the speech, its broadcast at times children were likely to listen was proscribable. Thus the decision implicitly expanded the domain of proscribable speech (except for fighting words) to embrace more than obscenity, inevitably limiting the words that people speak according to prevailing notions of acceptability. See 34 U. MIAMI L. REV. 147 (1979).

19. See section III *infra*.

balance that copyright law strikes between individual and public interests through the doctrines of fair use, compulsory license, and moral rights, because they offer the Court guidance for the best reconciliation of conflicting claims in the first amendment context. Through this comparative analysis, the flexibility of copyright policies in responding to changes in the area of communications will emerge as more consonant with a dynamic, *constitutional* approach to free expression.<sup>20</sup> The comment therefore advocates that the Court consider the values of expression justifying broadened copyright protection to be equally relevant in adjudicating first amendment claims, requiring higher levels of justification for official proscription of speech.

## II. THE CONCEPT OF SOCIAL VALUE IN FIRST AMENDMENT AND COPYRIGHT CONTEXTS

### A. *Commercial Speech*

The preservation of individual autonomy in all areas of social decisionmaking underlies the expansion of first amendment protection beyond purely ideological messages.<sup>21</sup> Because the wide dissemination of data is a crucial means of assuring informed exercise of choice, the Court has recognized such dissemination, regardless of its character or motivation, as a basic corollary of freedom of expression.<sup>22</sup>

Nevertheless, a hierarchy of speech based on the social utility that judges attribute to various types of messages continues to exist, and the degree of first amendment protection afforded speech varies according to this hierarchy.<sup>23</sup> Thus, the underlying profit motive and accompanying possibility of deception in commercial

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20. The word "constitutional" applies in the sense of that which develops organically. Its significance parallels that of Justice Marshall's oft-quoted phrase: "[W]e must never forget, that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). Justice Holmes expressed a similar opinion in *Gompers v. United States*, 233 U.S. 604, 610 (1914):

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

21. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

22. *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977).

23. *FCC v. Pacifica Foundation*, 439 U.S. 726 (1978).



speech lower its position on the scale of first amendment values. This lower position for commercial speech heightens the permissible degree of its abridgment by the government to an extent that would be impermissible for noncommercial expression.<sup>24</sup>

To avoid paternalistic inroads on the overriding right of individual access to information, the courts should scrutinize the regulation of economically motivated speech according to the same strict standard applied to noncommercial expression.<sup>25</sup> Some first amendment decisions provide support for the application of such a heightened standard; more may be derived from copyright doctrine, which makes no distinction between the copyrightability of speech laden with blatantly political or artistic messages, as opposed to economic messages. In copyright doctrine, protection of original contributions, whatever their content or motivation, is the key to fulfilling the constitutional goal of promoting "the Progress of Science and useful Arts."<sup>26</sup> In the same way that preserving original contributions is the guardian of cultural progress in the area of copyright, fostering independent decisionmaking and insulating the sphere of intellect and spirit from all official control may be seen as the mainstay of the stable yet evolving society envisioned by the first amendment's framers.<sup>27</sup> The value of speech, both to the individual and to society, should be recognized as constant under the first amendment, whether its content is political or economic.

Yet only recently has the Court affirmed that the flourishing of all communication is socially significant in itself, and extended even limited first amendment protection to speech conveying commercial information. Originally, the Court viewed commercial speech as altogether outside the scope of first amendment protection. The underlying profit motive of commercial speakers made such messages inherently less valuable to society. Dissemination of seemingly mundane commercial information, as opposed to the communication of ideas, appeared to the Court to be of little value in the search for truth and the maintenance of a politically informed electorate.<sup>28</sup>

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24. *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

25. See note 12 *supra*.

26. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 253 (1903) (Harlan, J., dissenting).

27. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

28. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court upheld a ban on the distribution of leaflets that both solicited customers for a submarine tour and protested the city's denial of permission to exhibit the submarine on a city pier. The Court

The commercial context of speech, however, did not bar its constitutional protection in *New York Times Co. v. Sullivan*,<sup>29</sup> in which, on first amendment grounds, the Court protected from a libel action a paid advertisement containing a political protest. The Court rejected the argument that the commercial nature of the speech took it outside the scope of the first amendment. Recognizing that editorial advertisements, such as the one at issue in the *Sullivan* case, are "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities," Justice Brennan wrote: "[I]f the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement."<sup>30</sup>

Justice Brennan, in a later dissent, emphasized that advertising may provide a legitimate and significant forum for disseminating information and expressing ideas.<sup>31</sup> He attacked a city ordinance banning political advertising on buses, while allowing commercial advertising. Justice Brennan opposed any distinction for first amendment purposes between speech labeled ideological and messages deemed commercial, arguing that freedom of expression should guarantee the broad communication of all ideas, economic or political.<sup>32</sup>

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characterized the city's ban as a regulation of business activity, not a proscription of speech. In *Breard v. Alexandria*, 341 U.S. 622 (1951), the Court held that the privacy interests of householders outweighed claimed speech rights of uninvited door-to-door solicitors of magazine subscriptions and added that the right of free speech had never been treated as absolute and is often subordinate to the rights of others. *Id.* at 642.

29. 376 U.S. 254 (1964).

30. *Id.* at 266. But see *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973), in which the Court refused to extend the rationale of *Sullivan* to newspaper listings of job advertisements, covered by an anti-sexual discrimination ordinance, in help-wanted columns designated by sex. Justice Powell reiterated that purely commercial speech was not entitled to full first amendment protection. His finding that the advertising restriction was merely incidental to a valid limitation of economic activity mirrored Justice Roberts's earlier stance in *Valentine*, and revived the distinction between commercial and other types of speech. In dissent, however, four justices preferred to confer first amendment protection upon commercial speech, at least when communicated in a newspaper. 413 U.S. 376, 393 (Burger, C.J., dissenting). In one dissenter's view, *Sullivan* had fully established the right of the press to control the content of speech it conveys, regardless of whether it is political or commercial in nature. 413 U.S. 376, 401 (Stewart, J., dissenting).

31. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 308-22 (1974) (Brennan, J., dissenting).

32. Justice Brennan asserted that commercial speech deserves at least some degree of first amendment protection, although he declined to address the issue of how much. 418 U.S. at 314-15 n.6 (Brennan, J., dissenting). He added that commercial advertising is speech

The Court later receded from inquiring into the social value of speech, in *Bigelow v. Virginia*.<sup>33</sup> Extending first amendment protection to advertisements for abortions, the Court asserted that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."<sup>34</sup> A later, more expansive decision held that commercial speech should not be denied protection on the basis of judicial determinations of its social utility. In that case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>35</sup> the Court struck down a prohibition on prescription drug advertising by pharmacists, based on the consumers' right to receive information. The Court rejected its earlier assertions that "speech which does 'no more than propose a commercial transaction' . . . is so removed from any 'exposition of ideas' . . . that it lacks all protection."<sup>36</sup>

Instead, the Court vindicated the consumer's right to receive information, grounded on society's concern for preserving the free flow of a variety of data. It perceived such widespread availability of all types of information as fostering responsible decisionmaking in a free economy. The Court abandoned the view that advertising is less socially beneficial than openly political or ideological speech, stating that a "consumer's interest in the free flow of commercial information . . . may be as keen [as], if not keener by far, than his interest in the day's most urgent political debate."<sup>37</sup>

In an important decision marking the breadth of the commercial speech doctrine, the Court struck down a state ban on the ad-

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nonetheless, often communicating information and ideas contributing to the first amendment ideal of nurturing "uninhibited, robust, and wide-open" expression of ideas and debate on public issues. *Id.* at 314-15.

33. 421 U.S. 809 (1975).

34. *Id.* at 826.

35. 425 U.S. 748 (1976).

36. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

37. 425 U.S. at 763. The Court later extended first amendment protection to corporate advertising in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). It stated that speech is indispensable to democracy, regardless of the mode or content of its expression, and regardless that the speaker is a corporation rather than an individual: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Id.* at 777. Dissenting Justice White, however, would have denied protection to the corporation. He argued that the additional value of speech to individuals as a means of emotive expression and self-realization is simply not present in the case of a corporation; hence, government regulation of such communications need not undergo strict scrutiny. *Id.* at 804-05.

vertisement and display of nonprescription contraceptives.<sup>38</sup> Arguments that the advertisements were offensive and ultimately would legitimize promiscuous sexual activity of young people could not withstand the strict judicial scrutiny applied to the regulation of speech, albeit commercial, that was not obscene.<sup>39</sup>

The most recent case dealing with commercial speech, however, retreats from the Court's earlier willingness to extend broad first amendment protection to advertising. The lower court in *Friedman v. Rogers*<sup>40</sup> had held unconstitutional a state prohibition on the practice of optometry under a trade name, because it unduly restricted the free flow of commercial information. Reversing that decision, the Supreme Court upheld the ban as a means of protecting the public from possible deceptive uses of such trade names. The Court categorized trade names as requiring less first amendment protection because they do not convey information about price or quality or any other particularly newsworthy fact.<sup>41</sup>

*Friedman v. Rogers* is troublesome because the state failed to present any concrete evidence that optometrist service trade names are anything but useful to eyeglass customers. The Court's decision appears to be an exercise of unwarranted paternalism because, in the guise of protecting the public, the majority closed off avenues of commercial information to consumers who are able to "perceive their own best interests if only they are well enough informed," as the Court had noted only two years earlier in *Virginia Board of Pharmacy*.<sup>42</sup> The Court's cutback in the degree of protec-

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38. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

39. Justice Brennan relied on the stringent test for banning offensive language which Justice Harlan had articulated in *Cohen*. The "essentially intolerable" level of offensiveness required to justify the speech ban according to the *Cohen* standard was simply not present in *Carey*; nor did the advertisements incite unlawful conduct so as to be proscribable under the *Brandenburg* test. 431 U.S. at 701.

40. 438 F. Supp. 428 (E.D. Tex. 1977), *rev'd*, 440 U.S. 1 (1979).

41. The Court distinguished *Virginia Bd. of Pharmacy* on the grounds that the subject of those advertisements was specific, factual information—drug prices. Trade names, on the other hand, represent nothing more than solicitation of patronage. Because consumers regularly associate trade names with price, quality, and related commercial information, the Court noted that they could be deceived in the event that the trade name remained the same while the nature or quality of the services changed. 440 U.S. at 12-13.

42. 425 U.S. at 770. Holding that people are entitled to the broadest possible exposure to all sorts of speech messages in order to develop their own ability to make responsible decisions, the Court struck down an ordinance prohibiting the posting of real estate "for sale" signs, in *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977). The purpose of the restriction was to prevent an exodus of white homeowners from the area, but the Court found it overly paternalistic.

A parallel concern for supplying the public's need for the free flow of information led the Court to invalidate a bar association disciplinary rule prohibiting lawyers from advertis-

tion afforded commercial speech, ostensibly to protect the public from possible deception, mirrors its concern for preserving the stability and "civility" of social mores reflected in the lowered standard for scrutinizing bans on offensive and obscene speech.<sup>43</sup>

A first amendment doctrine that links the value of speech to the motive of the speaker and the character of the expression<sup>44</sup> contravenes the value of expression as perceived in copyright cases. The commercial use to which a work is put is irrelevant to a determination of its copyrightability. Further, works that convey only factual information, as opposed to aesthetic or intellectual "ideas," regularly receive full copyright status. In *Bleistein v. Donaldson Lithographing Co.*<sup>45</sup> a painting used as part of an advertising poster was nevertheless copyrightable. Information directories and other factual works are similarly copyrightable, because they contribute equally to "the Progress of Science and useful Arts."<sup>46</sup>

For the same reasons, the Supreme Court in *Mazer v. Stein*<sup>47</sup> upheld the copyright of a statuette intended for mass production as a lamp base. Such protection of individual expression without regard to its intended use or motivation was, in the Court's view, the best means of encouraging literary or artistic works and thereby advancing the public welfare. The Court reasoned: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors. . . ."<sup>48</sup>

Congress codified the holding of *Mazer* in a provision of the Copyright Act of 1976, which extends copyright protection to pictorial, graphic, or sculptural works, regardless of their intended use. Legislative intent is clear:

[T]he definition of "pictorial, graphic, and sculptural works"

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ing. *Bates v. State Bar*, 433 U.S. 350 (1977).

43. See notes 14-17 and accompanying text *supra*.

44. *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

45. 188 U.S. 239, 251 (1903) ("A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.").

46. See *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971) (answer sheets used for IQ tests and corrected by machines are within the constitutional requirement of "writings" and hence protectible under the copyright law). See also *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922). Expression, in the context of a factual work, consists of the author's particular selection, ordering, and arrangement of facts. *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977).

47. 347 U.S. 201 (1954).

48. *Id.* at 219.

carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic work, works of these kinds intended for use in advertising and commerce, and works of "applied art" . . . . In accordance with . . . *Mazer v. Stein* . . . works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production [and] commercial exploitation. . . .<sup>49</sup>

According to the new Act, a useful article has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."<sup>50</sup> Such an article deserves copyright protection only to the extent that it contains a separable part that is expressive in some manner, apart from its utilitarian aspects. This distinction reflects the essential tenet of copyright theory that the contribution to the "Progress of Science and useful Arts" is the originality of a work, rather than its functional utility.

A refusal to evaluate communications according to their content or purpose is the wisest means of fulfilling the constitutional vision of cultural progress. Were the Court to apply this same insight to its analysis of commercial speech claims, it would not rank such messages lower than noncommercial speech in the first amendment hierarchy. The Court should view expanded protection for commercial speech as the best way of fostering informed decisionmaking. Like the requirement in defamation cases that a plaintiff prove "actual malice" to justify a ban on speech directed at public officials,<sup>51</sup> and the requirement that a speaker must threaten imminent lawless action to justify suppression of subversive speech,<sup>52</sup> the Court should require a more stringent standard to justify government restriction of commercial speech. Except when a litigant proves actual deception, the guiding philosophy of the Court in dealing with commercial messages should be a commitment to encouraging "more speech, not enforced silence."<sup>53</sup>

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49. HOUSE REPORT, *supra* note 5, at 54.

50. Copyright Act of 1976, 17 U.S.C. § 101 (1976).

51. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

52. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

53. 440 U.S. 1, 25 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

### B. *Obscene and Offensive Speech*

The value of communication lies not only in promoting informed political or economic decisionmaking, but also in permitting the expression of individuality and, hence, alternative concepts of society. To the extent that government attempts to suppress dissemination of messages that deviate from prevailing moral notions, it risks violation of this basic tenet of free speech.<sup>54</sup> Under the proffered analytic framework, the government should not abridge an individual's right to wide exposure to commercial data, absent a showing of actual deception or intolerable intrusiveness. Similarly, the right to free speech should forbid the government to protect people from what it considers undesirable thoughts of a sexual nature. Only when destructive conduct is threatened or likely to ensue should the courts permit governmental regulation of speech dealing with sexual matters.

Currently, however, a majority of the Court remains committed to discovering a proper standard for proscribing obscenity, in an unflinching belief that obscenity is unprotected by the first amendment because its message can make no positive contribution to society.<sup>55</sup> The various definitions adopted by the Court focus invariably on the deviation of purportedly obscene language from established views of morality—its “patent offensiveness” and lack of “serious value.”<sup>56</sup> Moreover, speech containing sexual or excretory imagery, even if not obscene, may nevertheless be proscribed as “indecent” when it might reach the ears of unwilling adults or children over the broadcast airwaves.<sup>57</sup>

As a minority, Justices Black and Douglas consistently eschewed all efforts to limit even “obscene” speech.<sup>58</sup> In their view,

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54. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

55. *Miller v. California*, 413 U.S. 15 (1973).

56. *Id.* at 24.

57. In the recent case of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court interpreted a statutory ban on the broadcast of “obscene, indecent, or profane” speech as creating separate proscribable categories. It held that indecent speech, language dealing with sexual or excretory matters in “patently offensive” terms, was a different category than obscene speech. This broad reading of the statute, 18 U.S.C. § 1464 (1976), passed first amendment muster in light of what the court asserted to be the particularly intrusive nature of broadcasting and its accessibility to children. Emphasizing that its holding was limited to the special factual situation at hand, the Court did not discuss whether the statutory use of the term “profane” indicates yet a third category of abridgable broadcast speech.

58. See, e.g., *Miller v. California*, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting); *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (“I believe that the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balanc-

the first amendment derives from a *prior* balancing on the part of the framers between social mores and individual rights. They advocated extension of first amendment protection to *all* speech, regardless of its purported pruriency or offensiveness. Most crucially, they perceived that an essential purpose of the first amendment is to protect speech *because* of its very individuality, regardless of its aberration from prevailing standards, whether in matters of sexuality, ideology, or taste. As Justice Douglas argued, dissenting in *Miller v. California*:

The First Amendment was not fashioned as a vehicle for dispersing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. . . . The use of the standard "offensive" gives authority to government that cuts the very vitals out of the First Amendment.<sup>59</sup>

Copyright doctrine strongly supports such a refusal to attribute to speech varying degrees of social value based on its content or motivation. Congress has pursued the ideal of cultural progress expressed in the copyright clause through adoption of a standard of originality, which affords copyright protection not only to works that please a majority, but to *any* works that represent an author's original expression of ideas.<sup>60</sup> All contributions that stem from the individual possess an intrinsic social worth, according to copyright doctrine. Bringing this perspective to the first amendment context, the Court should deem all expression valuable insofar as it represents the communications of an individual, for those unique ideas and feelings provide the substance for society's growth. Thus, any standard of first amendment protection that requires evaluation of the content or style of speech according to its conformity to majoritarian taste contravenes the overriding necessity for free and broad communication.

Nevertheless, the Court has consistently labeled obscene speech socially valueless, and hence abridgable, in part because it deviates from accepted views of sexual morality: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in

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ing' that was to be done in this field.").

59. 413 U.S. 15, 44-45 (Douglas, J., dissenting).

60. See HOUSE REPORT, *supra* note 5, at 51.



order and morality."<sup>61</sup>

On the basis of such reasoning, the Court has defined obscenity as speech "utterly without redeeming social importance."<sup>62</sup> *Roth v. United States*<sup>63</sup> involved an unsuccessful challenge to federal and state obscenity statutes on the ground that they "punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*."<sup>64</sup> Justice Brennan, writing for the majority, refused to require that a finding of censorable obscenity be based upon proof of imminent reactive violence, the standard used to outlaw politically subversive speech.<sup>65</sup> The presence of a dominant theme appealing to prurient interests—that is, a theme that incites lustful thoughts—was sufficient to render the speech outside first amendment protection.

The Court soon retreated from the position that the state could protect people from unpopular or immoral thoughts. It struck down a New York law, under which officials denied a license to show the film version of *Lady Chatterley's Lover* on the grounds that it portrayed adultery as proper behavior:

[The state's] argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.<sup>66</sup>

An important aspect of the case was that the state failed to claim that the film, if shown, would incite illegal action. Its aim, according to the Court, was clearly unconstitutional: the suppression of an idea. Importantly, the decision exposed the difficulties inherent

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61. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

62. *Roth v. United States*, 354 U.S. 476, 484 (1957).

63. 354 U.S. 476 (1957).

64. *Id.* at 485-86. As first amendment absolutists, Justices Black and Douglas believed that obscenity was not constitutionally proscribable. In their view, however, accompanying conduct may be subject to governmental regulation. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (Blackmun, J., dissenting). Yet, particularly in cases where conduct is actually symbolic of speech, the dichotomy is often contrived. Recognizing this point, the Court has extended protection to conduct which conveys a message, beyond the mere performance of an act. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966).

65. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (prohibiting subversive speech only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

66. *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959).

in the *Roth* standard, because *Roth* did not distinguish between incitement to action and mere stimulation of thought.

The Court took one further step toward completely recognizing the right to personal autonomy in *Stanley v. Georgia*,<sup>67</sup> invalidating a Georgia law against knowing possession of obscene matter. The Court held that under the first and fourteenth amendments, the state could not legislate to protect a person's *mind* from the effects of obscenity. This recognition of the individual's "right to receive information and ideas, regardless of their social worth,"<sup>68</sup> undermines the validity of any standard that proscribes certain speech based on an evaluation of its social import.

Yet reliance on just such a concept of social worth persists in obscenity doctrine, notwithstanding Chief Justice Burger's assertion in *Miller v. California*<sup>69</sup> that "[t]his is an area in which there are few eternal verities."<sup>70</sup> The Chief Justice "reject[ed], as a constitutional standard, the ambiguous concept of 'social importance' "<sup>71</sup> that the *Roth* Court had relied upon.<sup>72</sup> Instead, he inquired "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>73</sup> The Chief Justice failed, however, to explain why judgment of works according to the equally subjective standard of "serious . . . value" possesses any greater legitimacy.<sup>74</sup>

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67. 394 U.S. 557 (1969). "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.* at 566. See also Justice Harlan's dissenting opinion in *Roth*: "[I]n no event do I think that the limited federal interest in this area can extend to mere 'thoughts.' The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of 'thoughts.'" 354 U.S. at 507.

68. 394 U.S. at 564.

69. 413 U.S. 15, 25 (1973).

70. *Id.* at 23.

71. *Id.* at 25 n.7.

72. 354 U.S. at 484.

73. 413 U.S. at 24. The test has two other prongs: whether the work appeals to the prurient interest and whether it depicts, in a patently offensive way, sexual conduct specifically defined in the state law. *Id.*

74. In an attempt to clarify his definition of obscenity, Chief Justice Burger relied on a distinction between sexual matter disseminated "for its own sake, and for the ensuing commercial gain," 413 U.S. at 35, and other types of ideas. The Chief Justice reiterated this concern in the companion case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), when he justified censorship of obscenity as an effort to protect the "social interest in order and morality," *id.* at 61, from its debasement by "crass commercial exploitation of sex," *id.* at 63. Such reasoning reveals a view of speech very different from that articulated by Justice Marshall in *Stanley*, which emphasized the state's lack of authority to determine, for the individual, the social import of expression. 394 U.S. at 565-66. In *Paris*, Chief Justice Burger distinguished *Stanley* as applicable only to those situations implicating privacy interests in

Perceiving this inconsistency, Justice Brennan dissented<sup>76</sup> from the Court's new formulation of obscenity and espoused the right of consenting adults to receive all communications. Reexamining his own opinion in *Roth*, along with the seemingly endless array of obscenity standards framed subsequently,<sup>76</sup> Justice Brennan criticized the Court for engaging all along in an impossible, if not impermissible task: attempting to render objective evaluations under a standard that, at bottom, could never escape being subjective. Concepts such as "prurient interest," "patent offensiveness," and "serious literary value" generated by *Roth* and its progeny were all too vague and too relative; they led to judgments based on little more than taste or point of view.<sup>77</sup> Indeed, Justice Brennan recognized that because the value of particular communications remains a matter for individual judgment, the very search for a coherent obscenity standard may be constitutionally infirm.

Justice Harlan had earlier expressed an awareness of that possibility in the context of nonprurient, offensive speech.<sup>78</sup> Writing for the majority in *Cohen v. California*,<sup>79</sup> he perceived that speech has a value of its own, which makes it significant to the individual and to society *simultaneously*. He wrote that language is more than a mode of conveying rational thought; it possesses a symbolic, emotive aspect, as well.<sup>80</sup> For that reason, matters of taste and style *must* be left to the individual. Apart from its particular content or form, speech is thus important as a means of promoting individual dignity,<sup>81</sup> as a safety valve for minority opinions in a

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one's home; consequently, he found no fundamental privacy right to watch obscene movies in places of public accommodation, even in adult theatres expressly excluding minors.

75. 413 U.S. at 73 (Brennan, J., dissenting).

76. "[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level . . . ." 413 U.S. at 84 (Brennan, J., dissenting).

77. Justice Stewart revealed, perhaps inadvertently, the utter confusion plaguing the Court in its attempts to define obscenity when he spoke of hard-core pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

78. In *Cohen v. California*, 403 U.S. 15 (1971), a man had been convicted of disturbing the peace for wearing a jacket that bore the words "Fuck the Draft," as he stood outside a county courtroom. The Court, in an opinion by Justice Harlan, reversed the conviction.

79. *Id.*

80. *Id.* at 26.

81. *Id.* at 24. See also *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Emerson, *supra* note 10, at 880-82.

pluralistic society,<sup>82</sup> and, ultimately, as a way of fostering society's advancement.<sup>83</sup>

Just as the view that speech is essential to maintaining robust political debate in a representative democracy led the Court in *New York Times Co. v. Sullivan*<sup>84</sup> to require "actual malice" as a basis for a libel action brought by public officials, and in *Brandenburg v. Ohio*<sup>85</sup> to require a danger of imminent lawless action to justify government censorship of subversive expression, so too a sensitivity to the inherent value of free speech and the concomitant inability of judges to evaluate the worth of any particular communication led Justice Harlan to formulate in *Cohen* a similarly stringent test for "offensive" speech:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.<sup>86</sup>

Yet, the prevailing *Miller* standard for censorship of obscenity, with its "serious value" prong, cannot be reconciled with the *Cohen* formulation of speech values. In disposing of first amendment claims, the Burger Court has ignored the correlation of unrestricted individual expression with society's good, regardless of the subjectively assessed worth of such expression.

In the recent case of *FCC v. Pacifica Foundation*,<sup>87</sup> the Burger Court demonstrated its resolve to equate the content and context of communication with its social value and, hence, with its degree of first amendment protection.<sup>88</sup> A plurality of the Court invoked the special nature of the broadcasting medium to approve a restriction on the broadcast of sexual and excretory language. In the view of the Court, the minimal significance of such language in conveying ideas, together with its offensiveness to prevailing audi-

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82. "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." *Cohen*, 403 U.S. at 24. Language, then, is an alternative to, and a preventive of, the expression of hostility through violent behavior. See also Emerson, *supra* note 10, at 885.

83. *Cohen*, 403 U.S. at 24-25.

84. 376 U.S. 254 (1964).

85. 395 U.S. 444 (1969).

86. 403 U.S. at 21.

87. 438 U.S. 726 (1978).

88. *Id.* at 744-45.

ence sensibilities, justified the lower standard of first amendment protection.

In contrast, the concept of social value reflected in the present Court's formulations of obscenity and offensive speech doctrine is simply absent from and inconsistent with copyright law. Copyright recognizes that the social value of speech lies as much in its deviance from, as in its adherence to, prevailing standards of acceptability. Justice Holmes acknowledged this value over half a century ago in the cornerstone copyright case of *Bleistein v. Donaldson Lithographing Co.*:<sup>89</sup>

The copy is the personal reaction of an individual upon nature. 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. That something he may copyright unless there is a restriction in the words of the act.<sup>90</sup>

Justice Holmes refused to assess the artistic worth of the painting sought to be copyrighted. He characterized judgments about literary or artistic value as nothing more than matters of taste. Since concepts of aesthetic value vary over time, it would be a travesty of copyright's purpose—to promote cultural progress—were protection accorded only to those works whose merit judges had certified. The task of government, rather, is to facilitate the broadest possible dissemination of all kinds of original communications, leaving to the public the ultimate decision regarding the worth of copyrighted materials:

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 of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated

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89. 188 U.S. 239 (1903).

90. *Id.* at 250.

with contempt.<sup>91</sup>

Justice Holmes declared that the best means of fostering cultural progress was through protection of *originality*. As the standard for copyrightability, originality refers to any tangible expressions that have their source in the individual. Independent creation alone assures copyright status.<sup>92</sup> Such judicial recognition of the value to society's progress of unique, individual work, was an extension of reasoning found in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>93</sup> decided in 1884. The Court in *Burrow-Giles* explicitly defined the constitutional standard of copyrightability—originality—as meaning anything owing its origin to the individual creator.

The *Burrow-Giles* Court contrasted this copyright standard with the far more stringent standard required for patentability—novelty—which requires both a high level of creativity and newness. Close scrutiny of the patent applicant is necessary to ascertain not only whether the invention is a product of independent work on the part of the prospective patent holder, but also whether the invention is of substantive benefit to the advancement of science. Moreover, although two individuals may obtain copyright protection for exactly the same work as long as each has independently created the work and there is no plagiarism, an invention is patentable only if it is entirely *new*; it must be a discovery that no one else has *ever* made before.<sup>94</sup>

The different standards for copyright and patent eligibility reflect a distinction in viewing how government can best stimulate and protect cultural, as opposed to scientific, progress. Indeed, the very words of the copyright clause suggest that such a difference exists: "To promote the Progress of Science and useful Arts, by

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91. *Id.* at 251-52. Justice Holmes' argument, if applied in the first amendment context, would question the validity of outlawing speech as obscene based upon a jury's assessment of "prevailing community standards." His views also support the observation of Justice Brennan who, dissenting in *Pacifica*, cited data indicating that a significant portion of the listening audience, albeit a minority, possesses different cultural attitudes towards language and does not find the language of George Carlin's monologue offensive. 438 U.S. at 776 (Brennan, J., dissenting).

92. M. NIMMER, *supra* note 2, at § 2.01 (1978).

93. 111 U.S. 53 (1884). The Court interpreted the constitutional term "writings" to include photographs, based on its interpretation of legislative history and the purpose of copyright, as the protection of "all forms . . . by which the ideas in the mind of the author are given visible expression." *Id.* at 58.

94. *Id.* See also *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) ("A patentee, unlike a copyrightee, must not merely produce something 'original'; he must also be 'the first inventor or discoverer.'").

securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>95</sup> Analysis of its linguistic structure demonstrates that the term "authors" is parallel with the term "writings," which, in turn, is parallel with the term "science." Perusal of legislative history reveals that in colonial times "science" referred to authors' works.<sup>96</sup> From such a reading, one may infer that although inventions—the "useful Arts"—derive significance from their functional utility, writings form part of a cultural body—"Science"—presumed valuable without need of a modifier such as "useful." In other words, writings themselves have importance and therefore need no additional pragmatic utility. The extension of copyright protection to works that are *original*—that is, owing their origin to an author—derives from a constitutionally grounded awareness: Expression is valuable to society *because of its individuality*, not because a court has previously scrutinized its content to determine its social worth.<sup>97</sup>

In *Alfred Bell & Co. v. Catalda Fine Arts*,<sup>98</sup> Judge Frank explained further the distinction between copyright and patent protection. A valid patent requires a "substantial advance over the prior art."<sup>99</sup> Originality, on the other hand, will validate a copyright without regard to the level of creativity it demonstrates because, as Justice Holmes recognized in *Bleistein*, such determinations are matters of taste, and hence, not objectively determinable. For that reason, a work fully satisfies the Constitution and the copyright statutes enacted under it when "the 'author' contribute[s] something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own."<sup>100</sup>

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95. U.S. CONST. art. I, § 8, cl. 8.

96. See M. NIMMER, *supra* note 2, at § 1.03 [A] (citing *Graham v. John Deere Co.*, 383 U.S. 1 (1966)).

97. Thus legislators peculiarly familiar with the purpose of the Constitutional grant, by statute, imposed far less exacting standards in the case of copyrights. They authorized the copyrighting of a mere map which, patently, calls for no considerable uniqueness. They exacted far more from an inventor. And, while they demanded that an official should be satisfied as to the character of an invention before a patent issued, they made no such demand in respect of a copyright. . . . Accordingly, the Constitution, as so interpreted, recognizes that the standards for patents and copyrights are basically different.

*Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 101-02 (2d Cir. 1951).

98. 191 F.2d 99 (2d Cir. 1951).

99. *Id.* at 104.

100. *Id.* at 103 (quoting *Hoague-Sprague Corp. v. Frank C. Meyer, Inc.*, 31 F.2d 583,

In enacting the Copyright Act of 1976, Congress clearly intended that copyright be available without the need for substantive evaluation of the worth of the copy:<sup>101</sup> "The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes catalogues, directories, and similar factual, reference, or instructional works and compilations of data."<sup>102</sup>

Importantly, even obscene works are fully copyrightable. In *Mitchell Bros. Film Group v. Cinema Adult Theater*,<sup>103</sup> the Fifth Circuit held that the obscenity of the copyrighted material is no defense to an infringement action, because "[t]here is no . . . statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted."<sup>104</sup> According to the court,

Congress has concluded that the constitutional purpose of its copyright power . . . is best served by allowing all creative works (in a copyrightable format) to be accorded copyright protection regardless of subject matter or content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward.<sup>105</sup>

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586 (E.D.N.Y. 1929)). A recent Second Circuit decision, *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976), refused to allow the copyright of a plastic toy Uncle Sam bank copied from an iron version in the public domain. Evaluating the level of skill required, the degree and purpose of the change, and the nature of the reproduced work, the majority found that it lacked the required originality to warrant copyright; "substantial variation" from the original was necessary. The dissent rejected the majority's analysis because, as noted in *Alfred Bell*, "even an inadvertent variation can form the basis of a valid copyright." 536 F.2d at 493. To the extent the case can be read to require a high degree of originality for copyright, it is inconsistent with prior copyright doctrine.

101. In *Batlin*, the court contrasted the toy reproduction with an *exact* replica of a Rodin sculpture, which received copyright in *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959), because "'great skill and originality' were required 'to produce a scale reduction of a great work with exactitude.'" 536 F.2d at 491 (quoting 177 F. Supp. at 267). The opinion adds:

Rodin's sculpture is, furthermore, so unique and rare, and adequate public access to it such a problem that a significant public benefit accrues from its precise, artistic reproduction. No such benefit can be imagined to accrue here from the "knock-off" reproduction of the cast iron Uncle Sam bank. Thus [the] plastic bank is neither in the category of exactitude required by *Alva Studios* nor in a category of substantial originality; it falls within . . . a copyright no-man's land.

536 F.2d at 492. The suggestion, clearly *obiter dictum*, that social worth is a relevant criterion for copyright, is original with *Batlin*; it was not even a factor in the *Alva Studios* opinion. "Public benefit" has never had and does not have a place in copyright law.

102. HOUSE REPORT, *supra* note 5, at 54.

103. 604 F.2d 852 (5th Cir. 1979).

104. *Id.* at 854.

105. *Id.* at 855.



The philosophy of the copyright clause, as reflected in prevailing legislative and judicial pronouncements, recognizes that the protection of communication in its tangible manifestations is socially beneficial. Individual autonomy and its multifarious modes of expression are significant because they contribute to the overall progress of society. Society affords authors copyright protection not as a result of judgments about the quality of expression, but as a reward for that aberrant spark of uniqueness that copyright theory views as essential to society's welfare.

On the other hand, recent cutbacks in the degree of first amendment protection for speech dealing with sexual, excretory, or otherwise offensive material may be attributed to a countervailing concern of the Court: a desire to preserve the status quo of society, according to legislative determinations and the Court's sensitivities. The ensuing lowering of first amendment standards in justifying proscription of speech, however, simultaneously inhibits the possibility of society's creative evolution. A greater deference to individual communications would require a more rigorous standard akin to that fashioned by Justice Harlan in *Cohen*. Instead of evaluating purportedly obscene or offensive speech according to a taste-ridden yardstick of "social value," proscription would be permissible only when there is a danger of imminent violence or otherwise unlawful action. Such a heightened standard, consistent with the speech values perceived by the Court in dealing with copyright questions, would permit the preservation of social order, while at the same time providing the means for its imaginative growth.

### III. INDIVIDUAL EXPRESSION AND THE GROWTH OF MASS MEDIA

Just as the commercial or sexual content of speech has been invoked to lower its perceived social value, and hence its entitlement to constitutional protection, so the very media in which messages are communicated similarly trigger distinctions in the degree of their first amendment protection. Thus, government may proscribe even nonobscene speech as "indecent" when broadcast over the airwaves, out of deference to countervailing privacy rights of adults and concern for insulating children.<sup>106</sup>

By following such a balancing methodology, however, the Court has shifted focus from a central goal of the first amendment: furtherance of the widest possible communication among society's

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106. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

members. Perceiving broadcast media to pose a threat to traditional privacy interests, the Court has accentuated distinctions between modes of communication as a rationale for increased speech regulation.<sup>107</sup> In so doing, it has overlooked the intrinsic significance of all messages, regardless of their medium,<sup>108</sup> to the development of individual autonomy and, thereby, a progressive society.

The relation of public welfare to individual rights has been regarded entirely differently in the area of copyright. Congress has greeted and ultimately accommodated the expansion of technology, leading to the creation of novel forms of mass media, with a parallel increase in protection for individual communicators.<sup>109</sup> Rather than forestall the possible threat to existing culture from technology, copyright law has greeted the advent of new media as a welcome opportunity for advancement. It has come to regard *added* protection for individual contributions as the surest means of furthering such growth.

To adopt such a view in the adjudication of first amendment claims concerning broadcasting speech would require a strict limitation on regulations that now accommodate possibly unwilling listeners. Regulators could no longer rely on a hierarchy of socially valuable speech to justify purging the airwaves of purportedly indecent language. Instead, they would tailor their regulations so as not to contravene the primary aim of preserving a forum for all messages.<sup>110</sup> They would require only advance warnings to the pub-

107. The FCC identified, and the Court approved, four characteristics which warrant distinctive treatment of broadcasting:

(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Citizen's Complaint Against *Pacifica*, 56 F.C.C.2d 94, 97 (1975).

108. Under copyright law, the medium of expression is unimportant:

Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device “now known or later developed.”

HOUSE REPORT, *supra* note 5, at 52 (quoting the Copyright Act of 1976, 17 U.S.C. § 102(a)).

109. See Copyright Act of 1976, 17 U.S.C. § 102(a) (1976) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”) (emphasis added).

110. As Justice Brennan said in dissent, the *Pacifica* decision “permits majoritarian

lic, reflecting a balance weighted in favor of expression.<sup>111</sup>

Opposed to such an approach, the Court has stated that "[e]ach method [of expression] tends to present its own peculiar problems"<sup>112</sup> to support limiting the reach of the first amendment, most notably in the context of broadcasting. A concern for protecting the public from receiving communications the Court ultimately deems unwanted or undesirable has led the Court to approve a broadcast regulatory scheme particularly sensitive to majoritarian audience taste.

*FCC v. Pacifica Foundation*<sup>113</sup> demonstrates the variable protection afforded speech in light of both the mode of its dissemination and its judicially assigned position in the hierarchy of speech values. The Court applied a sliding scale to measure the protectability of broadcast language in order to insulate children from indecent language and to protect unwilling adult listeners. Thus, communication over the airwaves, given the sexual and excretory connotations in this case, rendered such speech much lower in social value and, by corollary, subject to stricter governmental control.

Such derogation of the significance of communications when presented in the context of broadcasting, solely because of possible intrusion into the privacy of the home, threatens the paramount first amendment goal of wide dissemination of data. Indeed, in light of this central concern, the Court should view broadcasting, as well as other modern mass media, as an avenue for increasing the possibilities of communication and, thereby, the generation and exchange of values within society.

Society's essential interest in creativity is manifest in the judicial and legislative evolution of copyright doctrine. Over time, copyright law has harnessed the cultural benefits of technological advances by affording added protection to individual contributions in those new forms.<sup>114</sup> In the doctrines of fair use, compulsory license, and moral rights, copyright law has successfully balanced conflicting interests to ensure both creativity and resultant

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tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority." 438 U.S. at 766 (Brennan, J., dissenting).

111. "[H]aving elected to receive public air waves, the scanner who stumbles onto an offensive program . . . can avert his attention by changing channels or turning off the set." *Pacifica Foundation v. FCC*, 556 F.2d 9, 26 (1977) (Bazelon, C.J., concurring), quoted in *Pacifica*, 438 U.S. at 765 (Brennan, J., dissenting).

112. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

113. 438 U.S. 726 (1978).

114. HOUSE REPORT, *supra* note 5, at 52.

communication.

A few examples illustrate how past judicial derogation of constitutional goals discouraged the values the Constitution intended to foster, and how the legislature responded to restore the protection needed to ensure creativity. This historical pattern offers guidance for first amendment analysis: attempts to accommodate values contrary to the constitutional mandate so suppress creative incentive that they harm the public interest. In the same way that encroaching on copyrights predictably discouraged the creativity essential to progress in "Science and the useful Arts," current subordination of free expression to majoritarian skittishness will erode the instrumental and personal goals of the first amendment. As copyright law has adapted by recognizing the imperative to reward and encourage creativity, the Court should similarly restore the protection to which speech is entitled in the first amendment context, to cultivate the enlightened society envisioned by the framers.

#### A. *Fair Use*

Accommodation of the public's right of access and the individual's right of protection is most evident in the doctrine of "fair use." Under the doctrine, the public may reproduce or exploit portions of copyrighted works—that is, abridge the copyright holders' entitlement to control dissemination of their works—without infringing the copyrights. Out of deference to a creator, a fair use defense rests on demonstrating that no negative impact on the copyright owner or the work will result.<sup>115</sup>

To determine the validity of a fair use claim, the court examines the content of the copyrighted work and the context of its communication.<sup>116</sup> Such assessment, however, does not evaluate

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115. In the recent case of *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429 (C.D. Cal. 1979), the district court found that off-the-air video taping for private, noncommercial home enjoyment was a fair use. One of the factors the court looked to was that there was no detrimental financial impact upon the copyright owners of the taped programs. Judge Ferguson explicitly excluded from his holding a determination of whether either off-the-air recording from cable or pay television, or taping for use outside the home, would constitute an infringement. *Id.* at 433.

116. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copy-

the quality of the work, but rather determines whether its free use by the public would harm the author economically or would detract from the integrity of the work itself.

In *Williams & Wilkins Co. v. United States*,<sup>117</sup> the Court of Claims found that mass photocopying of research periodicals by the National Institute of Health and National Library of Medicine was a fair use, and hence not an infringement of copyright. The court placed a high value on medical research, and assumed that to stop such library photocopying would "seriously hurt" it. The court's emphasis on the social value of the use of the copyrighted matter resulted, however, in its slighting the probable detrimental effects that wholesale copying would have upon publishers of the periodicals and ultimately, therefore, upon medical research itself.<sup>118</sup>

In the year following the affirmance of *Williams & Wilkins* by the Supreme Court, Congress enacted section 108 of the Copyright Act of 1976. Section 108 has ameliorated the possible adverse effects of *Williams & Wilkins* by establishing guidelines for permissible photocopying by libraries and archives.<sup>119</sup> The guidelines permit, but strictly limit, reproduction by noncommercial public or research libraries, the type of user in *Williams & Wilkins*. Through this innovation, the law has achieved the desired social goal of encouraging noncommercial research, without sacrificing the rewards to creativity called for by the Constitution.

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righted work.

Copyright Act of 1976, 17 U.S.C. § 107 (1976).

117. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

118. The court required plaintiff publishers to *prove* economic harm, rather than simply demonstrate probable adverse impact. Recognition of the great difficulty that copyright holders face in proving actual damages, however, has led Congress to enact a provision for recovery of statutory damages when actual harm cannot be shown. See Copyright Act of 1976, 17 U.S.C. § 504(c) (1976). Thus, the insistence by the Court of Claims in *Williams & Wilkins* that a copyright holder show actual damages in order to prevail on the threshold issue of liability poses an obstacle that appears unwarranted in light of current copyright purposes and supportive legislation. See Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. Rev. 1052 (1975).

One recently devised means of overcoming any detriment to publishers as a result of the *Williams & Wilkins* decision is the Copyright Clearance Center. The Clearance Center is a voluntary organization whose members' monthly payments enable them to photocopy copyrighted material without requesting individual permissions. See ASSOCIATION OF AMERICAN PUBLISHERS, INC. & AUTHORS LEAGUE, INC., *PHOTOCOPYING BY ACADEMIC, PUBLIC AND NONPROFIT RESEARCH LIBRARIES* 39 (1978).

119. Copyright Act of 1976, 17 U.S.C. § 108 (1976). The congressionally authorized National Commission on New Technological Uses of Copyrighted Works (CONTU) has proposed further guidelines. See 17 U.S.C.A. § 108 app. at 136.

### B. Compulsory Licensing

Compulsory licensing is a second method by which the law balances copyrights and public use of the fruits of creativity. Like the doctrine of fair use, the compulsory license is an attempt to maintain incentives for creation while facilitating the free flow of communication. Through this device, the public may use a copyrighted work in derogation of the author's right to control its dissemination, but the user must pay the composer for such use and must preserve the integrity of the composition itself.<sup>120</sup> Compulsory licensing has been successful in such diverse areas of communication as juke box transmissions and cable television.

The effective use of compulsory licensing as an accommodation of both constitutional and short-range goals is evident in the evolution of musical technology. In *White-Smith Music Publishing Co. v. Apollo*,<sup>121</sup> the Court narrowly construed the constitutional term "writings" as not including perforated piano rolls. Because the rolls were not *visually* perceptible, the Court found them to be part of a mechanical process and not tangible manifestations of expression. The Court thus denied copyright status to music communicated in the form of pianola sheets. The Copyright Act of 1909 attempted to counteract this disincentive to creation, by codifying a compulsory license provision for musical compositions.<sup>122</sup>

Paralleling its initial approach towards piano rolls in the field of musical creation, the Court held in *Fortnightly Corp. v. United Artists Television, Inc.*,<sup>123</sup> that cable systems do not infringe the copyrights on programs that they retransmit. In a later case, the Court applied the same reasoning and held that importation of distant signals into a new community by cable television did not infringe upon the broadcasters' copyrights.<sup>124</sup>

The intended purpose of these decisions was to promote development of the incipient cable industry. But Justice Fortas's dissent in *Fortnightly*,<sup>125</sup> which criticized such slighting of copyright hold-

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120. Copyright Act of 1976, 17 U.S.C. § 115(a) (1976); see HOUSE REPORT, *supra* note 5, at 109. The statutory provision for compulsory licensure "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied." *Id.*

121. 209 U.S. 1 (1908).

122. The Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, established a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music. See also HOUSE REPORT, *supra* note 5, at 52.

123. 392 U.S. 390 (1968).

124. *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).

125. 392 U.S. at 402 (Fortas, J., dissenting).

ers, proved prophetic. Just as the *White-Smith* decision had hindered the expansion of musical creativity, *Fortnightly* created disincentives for broadcasters by reducing their protection in favor of cable system companies.<sup>126</sup> Reduced protection discouraged broadcasters and other producers from creating television programs that they knew cable companies would use without remuneration. This result, in turn, threatened to reduce the amount of programs available for cable, as well as for traditional broadcasting. To counteract this likelihood, the FCC exercised its ancillary jurisdiction over cable to require that cable television transmitters first obtain the consent of broadcasters before retransmitting the latter's programs. The result was disastrous: Broadcasters simply withheld their consent.<sup>127</sup>

In the Copyright Act of 1976, Congress has attempted to ameliorate the detriment to cultural growth in the same way it responded to the dilemma of unprotected pianola composers in the Act of 1909. It has set up a compulsory licensing mechanism<sup>128</sup> that automatically confers permission for program retransmission, while requiring payment of compensation to all copyright holders of the programs. This legislative accommodation of competing values simultaneously encourages continued generation of programs and the development of cable systems.

### C. Moral Rights

Clearly, copyright doctrine has attempted to accommodate technological advancement in ways most sensitive to individual contributions. So central is the significance of individual contributions that protection extends beyond assurance of financial remuneration to vindication of the authors' moral rights. Thus, an author has a right to assume that if another uses the copyrighted work—whether through fair use or compulsory license or in some other way—the user's treatment will preserve the original work's integrity.

The recent case of *Gilliam v. ABC, Inc.*,<sup>129</sup> illustrated judicial protection of the primacy of artists' creativity by enforcing their "moral rights." The Second Circuit held that broadcast of an unauthorized, edited version of the Monty Python television program

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126. See *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

127. *Id.*

128. Copyright Act of 1976, 17 U.S.C. § 111(d); HOUSE REPORT, *supra* note 5, at 89-93.

129: 538 F.2d 14 (2d Cir. 1976).

infringed the comedy group's copyright in the script. Although the broadcaster had fully compensated the ensemble under a contract for the broadcast, the integrity of their work was nevertheless compromised:

Our resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.<sup>130</sup>

#### D. Computer Programs

A current problem facing copyright doctrine is the need for a means to protect expressions of individuals in computer forms, while facilitating wide public access to these novel communications.<sup>131</sup> Section 117 of the 1976 Act freezes copyrights in computer programs and data bases to those existing before the effective date of the Act.<sup>132</sup> The Act leaves further resolution of the problem to analysis and findings by the specially formed National Commission on New Technological Uses of Copyrighted Works (CONTU). In its *Final Report*, the Commission has recommended that Congress afford full copyright protection to computer programs, "to the extent that they embody an author's original creation."<sup>133</sup>

One CONTU Commissioner, novelist John Hersey, has expressed reservations regarding the conferring of copyright status upon the final phases of a computer program.<sup>134</sup> Because those phases are comprehensible only to machine parts, rather than to the people who program computers, he would characterize them as mechanical devices eligible only for patent protection. According to Commissioner Hersey, granting permission to copyright such computer phases would violate copyright's basic tenet: the protection of *human* expression, which includes all tangible forms of interpersonal communication. He would reject the copyrightability of material understandable to computers as a dangerous equation of

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130. *Id.* at 23 (citations omitted). Based on a similar recognition of the role of the individual creator, the Copyright Act of 1976 has increased markedly the protection afforded copyright holders by, among many other provisions, lengthening the author's term of copyright and making renewal rights unbridgable.

131. See HOUSE REPORT, *supra* note 5, at 116.

132. *Id.*

133. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 1 (1978) [hereinafter cited as CONTU FINAL REPORT].

134. *Id.* at 27 (Hersey, Comm'r, dissenting).



human beings with machines.<sup>135</sup> Although superficially appealing, on closer analysis Hersey's argument resembles the abandoned *White-Smith* rule, which denied copyright status to perforated piano rolls on the ground that they were mechanical producers of musical notes and not visually perceptible. The Commission properly rejected Commissioner Hersey's reasoning.

However well intentioned, the rules established in copyright decisions that were designed to serve other goals at the expense of encouraging creativity have indubitably failed. With the advent of new communications media, such as photocopying and cable television, the Supreme Court has denied or restricted authors' protection, to confer upon the public the immediate benefits of such advances. Rather than foster expansion of the media, however, these decisions produced the opposite results. With no financial incentive to individual creators and no protection of the fruits of their imaginations and intellects, the growth of such media was inhibited because there were fewer ideas to communicate. The makers of copyright policy soon realized that they had substituted the ephemeral benefits of short-range dissemination for much pre-

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135. A computer program is a set of printed instructions that tells a computer how it may solve a given problem. Generally, it consists of four phases: a flow chart, which indicates the logical steps necessary for the solution; a source program, which translates the flow chart into a computer language and is often punched on discs or cards; an assembly program, which converts the programming language into mechanically readable computer language; and the object program, which translates the machine language into further commands of electrical impulses. *Data Cash Sys., Inc. v. JS&A Group, Inc.*, 480 F. Supp. 1063 (N.D. Ill. 1979). It is the assembly and object phases of the program that Commissioner Hersey would exclude from copyright protection. In his view, it would be improper to confer copyright status upon those aspects of a program that are capable of communicating

not with our fellow human beings, but with machines—thus equating machines with human beings as the intended recipients of the distribution that copyright was designed to foster. . . . A society that accepts in any degree such equivalences of human beings and machines must become impoverished in the long run in those aspects of the human spirit which can never be fully quantified and which machines may be able in some distant future to linguistically "understand" but will never be able to experience, never be able to bring to life, never be able therefore to communicate. Those aspects include courage, love, integrity, trust, the touch of flesh, the fire of intuition, the yearning and aspirations of what poets so vaguely but so persistently call the soul—that bundle of qualities we think of as being embraced by the word humanity. This concern is by no means irrelevant to the issue of whether computer programs should be copyrighted. It is the heart of the matter.

CONTU FINAL REPORT, *supra* note 133, at 37. Although Hersey sees the latter phases of the computer program as noncopyrightable because they become part of the mechanical workings of the computer itself, he nevertheless admits that "[a] data base, when keyed or run into a computer, is being copied in this sense, for the data are maintained in the copy as data, and they issue as data for human use in the end product." *Id.* at 32.

ferred long-term communications development. Perceiving that the key to cultural progress is the increased protection for individual creativity, the law then readjusted the focal point of balance to where the Constitution originally placed it: on the creator.

#### IV. CONCLUSION

To further the constitutional goal of free expression, the Supreme Court should heed the pattern established in copyright law. To date, the Burger Court has reacted to modern communications technology by lowering the standards for permissible abridgment of speech. Its decisions ostensibly protect traditional privacy and family interests, but inevitably restrict unconventional ideas presented over broadcast or expansive communications media. Such selective regulation necessarily inhibits the personal expression specifically guarded by the first amendment.

This comment has suggested that the Burger Court reexamine its balancing methodology in its first amendment adjudication in light of the broad significance attributed to the individual communicator in copyright theory. Read together, these two components of the Constitution provide an opportunity, in our era of mass technologies, to maximize contributions of individual intellect and imagination, for in preserving "that inward eye/ Which is the bliss of solitude,"<sup>136</sup> we simultaneously ensure the creative potential of all society.

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136. W. WORDSWORTH, *The Daffodils; or, I Wandered Lonely as a Cloud*, in 3 *THE POETICAL WORKS OF WILLIAM WORDSWORTH* 6, at ll. 21-22 (W. Knight ed. 1883).