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Some academics have raised concerns that copyright law might be in conflict with First Amendment free speech law. Some scholars fear that copyright law might restrict the free flow of information in the marketplace of ideas. The typical answer to such concerns, embodied in the Supreme Court cases *Harper & Row Publishers Inc. v. Nation Enterprises* and *Eldred v. Ashcroft*, is that copyright law contains internal doctrinal mechanisms, namely the idea-expression dichotomy and fair use, which alleviate free speech concerns. Copyright law protects only expressions, not ideas or facts; so where free speech might encourage an idea or fact to be widely disseminated, copyright law would restrict it. The idea-expression dichotomy holds that ideas and facts are not within the subject matter of copyright protection. Therefore, the media is free to report on facts and spread ideas, so long as they do so using expressions alternative to those protected by copyright.

Commentators argue that sometimes the free-speech interest in spreading knowledge requires use of copyrighted expressions. These commentators suggest that cases that conflict with free speech might require the creation of a distinct free-speech defense to copyright infringement.

However, there is no need for a distinct free-speech defense. Copyright law already contains a doctrine, the merger doctrine, which, if properly applied, would reconcile copyright law and free-speech law in cases where expressions are necessary in order to effectively spread ideas or for the press and news media to report on facts. The merger doctrine was developed in two cases, *Morrissey v. Procter & Gamble Co.* and *Herbert Rosenthal Jewelry Corp. v. Kalpakian*.

In *Morrissey*, a manufacturer claimed copyright in the text describing the rules of a contest wherein consumers could mail in a box top to be entered to win a prize. The First Circuit determined that the manufacturer had no copyright in the contest terms, holding that the expression had "merged" with the idea. The court reasoned that because there are only a small, finite, and limited number of ways to express the idea of such a contest, and because the contest itself is not protectable subject matter, a finding of ownership of the expression would have granted ownership of the idea of a contest.

In *Kalpakian*, the plaintiff alleged that the defendant's jeweled bee pins, which were similar in appearance to plaintiff's own pins, infringed its copyright. The Ninth Circuit held that the pins did not infringe, because it was impossible to create a pin using a small number of jewels that looks like a bee without the pin looking similar to all other such jeweled bee pins. Therefore, the idea of a jeweled bee pin and the expression had merged. The court said that the intellectual property rights in such an item would properly be the subject of protection under patent law, not copyright law.

The merger doctrine essentially dictates that where there are very few ways to express an idea or fact, such that exclusive ownership of those expressions would be tantamount to a copyright in the non-copyrightable idea or fact, there is no copyright in the expression. In every case where the expression is necessary to effectively communicate an idea or report upon a fact, a court could apply merger

doctrine to find that no copyright exists. A brief analysis of how merger doctrine could have been applied in two cases might illustrate its potential for alleviating free speech concerns.

In *Time Inc. v. Bernard Geis Assocs.*, the plaintiff owned the copyright in the Zapruder film, which happened to be the only direct video footage of President John F. Kennedy's assassination. The defendant copied frames of the Zapruder film and used them as illustrations in a book that put forward a particular forensic theory regarding the assassination. The plaintiff sued, alleging copyright infringement. The judge held that such use of the plaintiff's film was a "fair use" outside the limits of copyright protection, but perhaps the court could have arrived at the same conclusion under the merger doctrine's reasoning since only a single video of the assassination exists. If there was factual visual information about the assassination contained in the film for which there was no substitute, then enforcing the plaintiffs copyright in some circumstances could provide the copyright-holder control over non-copyrightable visual aspects of the JFK assassination, therefore indicating that the fact and the expression had merged.

There is a line of Second Circuit and Southern District of New York cases from the 1980s involving copyright infringement by writers of famous authors' biographies. In these cases, biographers quoted the authors' writings in their biographies without the authors' permission. These cases include *Salinger v. Random House Inc.*, *Craft v. Kobler*, and *New Era Publ'ns Int'l v. Henry Holt & Co.* Judge Leval of the Southern District of New York, who heard more than one of these opinions, found that the biographers' copying was permissible—but was reversed on appeal by Second Circuit Judges Newman and Miner. In *Salinger*, Judge Leval argued that some quoting was necessary for the biographer to convey the writing style of the author. Judge Newman disagreed, arguing that the expression was protected by copyright, and therefore not available to be used without permission in the biography. Here too, the merger doctrine could have been applied. Salinger's writing was being used to show facts about the writing style. The writing itself is copyrightable subject matter, but the fact that it was written, and the fact that the writing was written in that style, are facts. Facts are not copyrightable subject matter. If the quotes were one of a limited number of means to present information about the author's writing style, which is factual information and cannot be accurately conveyed merely by verbally describing it, then a merger doctrine defense should prevail.

In *New Era Publications v. Henry Holt*, Judge Leval reasoned that quotes from the writings of L. Ron Hubbard had been used by the biographer to show that Hubbard was racist against Asians, and was dishonest and paranoid. In response to the plaintiff's argument that the biographer could have merely stated "Hubbard was a racist" instead of copying portions of Hubbard's protected expression which proved that fact, Judge Leval argued that it should be for the reader and not the biographer to reach a conclusion based upon the evidence, and that the quotes were factual information relating to Hubbard's life. The Second Circuit ruled against the fair use claims in *New Era*, based in part upon the since-overturned presumption against fair use of unpublished works. In *New Era* Judge Leval and the Second Circuit could have held that the copyrighted expressions had merged with the facts about Hubbard which could only be directly shown to readers by means of the biographer quoting the quotes. Thus, for the limited purpose of showing those facts about Hubbard such as his personality, his life, and his writing style, the merger doctrine should have been a defense to copyright infringement. The merger doctrine argument that the author's expressions had merged with those facts about the author's life or literary style which could only be adequately shown by the quoted expressions was never explicitly made in these cases.

In conclusion, the merger doctrine and the free speech defense are logically intertwined. If a copyrighted expression is absolutely necessary in order to disseminate an idea, to report on a fact or convey information, then the merger doctrine should apply. Where copyrighted expression is not necessary to do so, there is no need for a distinct free speech defense to copyright infringement

because the idea or fact could be conveyed by alternative expressions without use of copyrighted expression.
