

**FREE SPEECH:
THE FIRST AMENDMENT AND
DISTRIBUTIVE VALUES IN COPYRIGHT**

MOLLY S. VAN HOUWELING*

Despite recurring academic warnings that copyright may unjustifiably restrict expression,¹ the Supreme Court has repeatedly held, and recently reaffirmed,² that the Copyright Act's "built-in free speech safeguards are generally adequate to address" any First Amendment concerns.³ So long as Congress does not "alter[] the traditional contours of copyright protection," courts need not subject copyright to First Amendment scrutiny.⁴ Copyright, by this logic, is consistent with the First Amendment so long as it retains those free speech safeguards that are constitutionally required.

What, then, is constitutionally required? The Court has identified several safeguards within the Copyright Act, including fair use and the idea/expression distinction, whose removal or impairment might trigger First Amendment scrutiny.⁵ But even these features of the Act may include elements of congressional grace as well as constitutional imperative.⁶ In order to determine whether recent and proposed changes

* Assistant Professor of Law, University of Michigan Law School. Thanks to Jonathan Zittrain for comments on an earlier draft.

¹ See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VANDERBILT L. REV. 891 (2002); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 69-86 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 5, 53-60 (2002); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); see generally Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665 (1992) (addressing property rights in information, including copyright, more generally); Michael Birnhack, "The Copyright Law and Free Speech Affair: Making Up and Breaking Up," 43 IDEA 233 (2003) (reviewing literature). But see Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 3-4 (2000) (arguing that copyright is generally constitutional and that "the principles supporting copyright are applicable to other areas of the law").

² *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003).

³ *Eldred*, 123 S.Ct. at 789.

⁴ *Id.* at 790.

⁵ *Id.* at 788-89.

⁶ See generally Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 Liquormart, and Bartnicki, ___ HOUS. L. REV. ___ (forthcoming 2003) (draft at 18, available at <http://www.law.ucla.edu/faculty/bios/volokh/frame.html>).

to copyright law alter the traditional contours of copyright in a way that causes a First Amendment problem, we need to understand what specific characteristics of the Act are mandatory. Or, to put it another way, what are the potential First Amendment problems with copyright that must be guarded against?

Some courts and commentators who have focused on the tension between copyright and the First Amendment argue that the dangerous feature of copyright is that it gives copyright holders veto power over some expressive reuses of their works.⁷ Not only can a copyright holder demand a fee in exchange for permission to, say, make a movie based on her novel; she can deny permission altogether. Lawrence Lessig and others argue that copyright should be limited to ensure that expressive reuses of a copyrighted work can be made even if the copyright holder objects outright; they worry less about the fact that getting permission often costs money. Lessig thus advocates “[c]ompensation without control,”⁸ much as Melville Nimmer did decades ago when he argued that certain uses of news photographs should be permitted under a compulsory licensing regime.⁹ According to Lessig such regimes produce freedom—as in “free speech,” not “free beer.”¹⁰

Other commentators evince more concern with the expenses borne by users of copyrighted works.¹¹ But almost none of them explore the First Amendment jurisprudence addressing the constitutional implications of regulations that, like copyright, make speech expensive and thus disadvantage poorly-financed speakers and listeners.¹² Special

⁷ *E.g.*, LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 12 (2001); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 *CARDOZO ARTS & ENT. L.J.* 667, 688-89 (1993); *see generally* Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in *THE COMMODIFICATION OF INFORMATION* 79 (Niva Elkin-Koren & Neil Weinstock Netanel, eds., 2002).

⁸ Lessig, *supra* n. 7, at 12, 201; *see generally* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *L. & CONTEMP. PROBS.* 33, 62-63 (2003) (contrasting “freedom from the will of another” with “freedom from the background constraints of the economic system”).

⁹ Nimmer, *supra* n. 1, at 1199-1200.

¹⁰ Lessig, *supra* n. 7, at 12 (quoting Richard Stallman, founder of the Free Software Foundation, who uses this terminology to describe the freedom associated with the free software movement, Free Software Foundation, <http://www.gnu.ai.mit.edu/philosophy/free-sw.html>).

¹¹ *E.g.*, Boyle, *supra* n. 8, at n. 145; Pamela Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue—But to What Future?*, in *THE COMMODIFICATION OF INFORMATION* 63, 71 (Niva Elkin-Koren & Neil Weinstock Netanel, eds., 2002); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 295, 381 (1996); Negativland, *Two Relationships to a Cultural Public Domain*, 66 *LAW & CONTEMP. PROBS.* 239, 257-58 (2003); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 *CASE W. RES. L. REV.* 673, 699, 701 (2003).

¹² The one exception of which I am aware is Alan Garfield, who treats addresses this jurisprudence briefly in his article on the conflict between copyright and the First

solicitude for the speech opportunities of the poor is a recurring theme in First Amendment jurisprudence, although it has waxed and waned over the years. Recent cases involving both the most traditional of speakers and users of the new speech technology of the Internet suggest that the Court is taking the issue seriously again.

Drawing on this First Amendment jurisprudence, I argue that the limiting doctrines of copyright must be attentive to money, not merely control. As it turns out, the First Amendment is partly about “free” as in “free beer.” Regimes that make speech more expensive must sometimes yield if they make it too difficult for poorly-financed speakers or listeners to participate in the speech marketplace. Several of copyright’s limiting doctrines have traditionally served to give this kind of special leeway to poorly-financed users of copyrighted works. This leeway, I argue, is an element of “the traditional contours of copyright protection” that may be constitutionally required.

The article proceeds in five parts. First I describe the paradigmatic copyright/First Amendment conflict: a would-be speaker is forbidden to express herself using copyrighted expression because the copyright holder refuses to grant permission, even for a fee. I note that this type of conflict dominates the judicial analysis of the tension between copyright and the First Amendment, and that it has inspired the two major waves of scholarship on the topic. The consensus of the scholarship is that in order to avoid a First Amendment problem, copyright must yield to at least some expressive reuses that copyright holders would be unlikely to license voluntarily. In Part II, I contrast this classic conflict with the more typical case, in which copyright law merely makes speech more expensive by putting a supracompetitive price on use of copyrighted works. There is less commentary on the First Amendment consequences of this expense, and certainly no consensus. I aim to shed light on this under-examined issue in Part III, where I survey First Amendment cases addressing expensive speech in a variety of contexts. I observe that although First Amendment jurisprudence is typically satisfied with a marketplace of ideas paradigm that allocates speech opportunities based on willingness to pay, the courts have taken special care to ensure that at least some communicative opportunities remain open for the poor. This pattern may reflect the recognition that—whatever one may think of willingness to pay as a general metric for valuing speech—it is especially unlikely to reflect the importance of speech for poor speakers or listeners. Part IV shows how copyright law mirrors First Amendment solicitude for poorly-financed speakers and listeners by making exceptions from its own marketplace paradigm. Finally, I conclude that erosion of copyright’s special solicitude for the poor should trigger First Amendment scrutiny.

Amendment. Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 21 HASTINGS COMM. & ENT. L.J. 587, 601-03 (2001).

I. The Classic Conflict: Copyright Forbids Speech

Copyright sometimes has the effect of forbidding speech outright. A speaker wants to say something substantially similar to a copyright holder's copyrighted expression and the copyright holder denies permission. Copyright law backs up the copyright holder's veto and prohibits the speech.¹³ Hence we see observations like these: "Copyrights restrict the ability of people to disseminate speech; when material is protected by copyright there are legal limits on who can circulate or sell it."¹⁴ "Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please."¹⁵ "[T]raditional copyright law restricts the manner in which one can express an idea. Because of copyright, I cannot use certain expressive formulations to convey my ideas."¹⁶ "Copyright law restricts speech. It restricts what writers may write, what painters may paint, what musicians may compose. It prohibits not only slavish copying, but also creation of entirely new works, so long as those works use—even if only in part—another's expression."¹⁷

Outright refusals to license reuses of copyrighted works, and the specter that that copyright law would thereby suppress the reuses altogether, were at issue in most of the prominent cases in which copyright defendants have successfully raised First Amendment concerns—including the cases that helped trigger two major waves of scholarship on the potential conflict between copyright and the First Amendment.¹⁸

¹³ The copyright holder has the exclusive right, subject to various limitations, to reproduce his copyrighted work, to distribute it publicly, to perform it publicly, to display it publicly, and to make new "derivative works" based upon it. 17 U.S.C. § 106. People who do these things without the permission of the copyright holder, and without qualifying for a statutory exception, infringe copyright. 17 U.S.C. § 501.

¹⁴ Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech*, 36 *LOY. L.A. L. REV.* 83, 83 (2003).

¹⁵ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *DUKE L.J.* 147, 165-66 (1998).

¹⁶ Netanel, *supra* n. 1, at 54.

¹⁷ Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 *YALE L.J.* 2431, 2431 (1998).

¹⁸ Two cases in the 1960s helped to trigger the first wave of scholarship. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), and *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968), both involved copyright holders who refused to sell permission to reprint their works.

Rosemont was a publishing company, purportedly controlled by Howard Hughes, that purchased the rights to several magazine articles about him. Rosemont then sued the would-be publisher of an unauthorized Hughes biography that included excerpts from the articles. Rosemont won a preliminary injunction, but the Second Circuit vacated it on fair use grounds. The majority opinion expressed concern with the public's right to receive information: "By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary

For example, the recent wave of scholarship has been prompted in part by *Suntrust Bank v. Houghton Mifflin Co.*,¹⁹ in which the holder of the copyright to *Gone With the Wind* attempted to enjoin publication of *The Wind Done Gone*—a novel that “appropriates numerous characters, settings, and plot twists”²⁰ from *Gone With the Wind* and transforms them “in service of a general attack on”²¹ the earlier novel. The new work also includes many features absent from the original, including explicit references to homosexuality and biracial characters.²² In vacating a preliminary injunction for the copyright holder on the basis of fair use, the Eleventh Circuit explained that “First Amendment privileges are preserved [in part] through the doctrine of fair use”²³ and concluded that “the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law.”²⁴ The concurring opinion agreed, and also stressed that the copyright holder had refused to license derivative works that included references to “miscegenation and homosexuality.”²⁵ This refusal was critical to Judge Marcus, because “Copyright law is not designed to stifle critics. . . . [The law] should not . . . afford [copyright holders] windfall damages for the publication of the sorts of works that they themselves would never publish.”²⁶

talents. . . . Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual’s desire for privacy.” *Rosemont*, 366 F.2d at 309 (citations and internal quotation marks omitted). The concurring opinion went on to claim that Hughes waged the copyright battle “not with a desire to protect the value of the original writing but to suppress the Random House biography because Hughes wished to prevent its publication.” *Rosemont*, 366 F.2d at 313 (Lumbard, C.J., concurring). Although the opinion is not explicit on this point, the circumstances suggest that Hughes would not have been willing to license use of the excerpts even for a fee.

Time involved an outright refusal to license. *Time* had acquired the copyright in the Zapruder film of the assassination of President Kennedy. The publishing company refused to license images from the film for use in the defendant’s book about the assassination. *Time*, 293 F.Supp. at 137-38. On the way to finding that use of the images in the book constituted fair use, the court stressed the “public interest in having the fullest information available on the murder of President Kennedy.” *Time*, 293 F.Supp. at 146.

¹⁹ 268 F.3d 1257 (11th Cir. 2001). For recent commentary focusing on the case, see, e.g., Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 173, 195-96, 199-200 (2003); Netanel, *supra* n. 1, at 2, 81-85; Rubinfeld, *supra* n. 1, at 3, 8-9, 20, 54.

²⁰ *Suntrust*, 268 F.3d at 1267.

²¹ *Suntrust*, 268 F.3d at 1270.

²² *Suntrust*, 268 F.3d at 1270.

²³ *Suntrust*, 268 F.3d at 1264.

²⁴ *Suntrust*, 168 F.3d at 1277.

²⁵ *Suntrust*, 168 F.3d at 1282 (Marcus, J., concurring)

²⁶ *Suntrust*, 268 F.3d at 1283.

This is the clearest type of case in which a limitation on copyright may be constitutionally required: without fair use the defendant would be forbidden from expressing herself in the way she chooses, and the public would be deprived of her speech. Commentators interested in the conflict between copyright and the First Amendment have focused on this type of case and seem widely to agree that copyright should sometimes yield to works—like parodies²⁷—that reuse copyrighted expression in ways that the copyright holder is unlikely to license voluntarily.²⁸ My focus is different, as the next section explains.

II. The Under-Examined Conflict: Copyright Makes Speech More Expensive

Sometimes copyright has the effect of forbidding speech outright; I am interested in those cases in which copyright merely makes speech more expensive. Copyright holders often transfer their exclusive rights, or grant non-exclusive licenses, in exchange for money. Those who want to speak by copying, performing, displaying, distributing or making a derivative work based upon a copyrighted work need only pay the copyright holder's asking price. Their speech is not forbidden; it's just more expensive than it would be in the absence of copyright. This is one of the widely-acknowledged costs of the incentive-based copyright system: it increases the cost of creativity for authors who make derivative works based on copyrighted works, and it raises the cost of consumption for purchasers of copyrighted works.²⁹ Copyright thus makes some speech more expensive for speakers and for listeners.

Some commentators have dismissed the notion that this expense raises a constitutional concern. Richard Posner, for example, argues that “as we do not suppose that writers should be allowed to steal paper and pencils in order to reduce the cost of satire, neither is there a compelling reason to subsidize social criticism by allowing writers to use

²⁷ The seminal parody case is of course *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994),

²⁸ This consensus includes commentators who are generally quite skeptical about copyright exceptions. See, e.g., Richard A. Posner, *When is Parody Fair Use*, 21 J.LEGAL STUD. 67, 71-73 (1992) (arguing that parodies that “use[] the parodied work as a target rather than as a weapon” should be excused, because there is “an obstruction [to the market] when the parodied work is a target of the parodist’s criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work”). A few seem skeptical of fair use even under these circumstances, however. See, e.g., Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 594 (1998) (characterizing fair use exception for uses the copyright holder refuses to license as favoring “public access over sound economics”).

²⁹ See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325, 328, 332 (1988).

copyrighted materials without compensating the copyright holder.”³⁰ Others have similarly warned against limiting copyright in order to “subsidize” poorly financed users of copyrighted expression.³¹

The Supreme Court has itself suggested that whatever tension there is between intellectual property rights and the First Amendment springs from attempts to enjoin speech, not from mere demands for payment. In *Zacchini v. Scripps-Howard Broadcasting Co.*,³² the Court rejected a First Amendment defense to a right of publicity action against a television station that broadcast video footage of the plaintiff-petitioner’s human cannonball act. The Court stressed that Zacchini “simply wants to be paid.”³³ “An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.”³⁴ This demand for compensation—backed up by state law—appears to have no First Amendment consequences.

But some commentators express concern about the monetary expenses associated with copyright, and with the distributional consequences of those expenses. William Fisher has made the most forceful normative case, arguing that “the law should be adjusted to equalize consumers’ access to works of the intellect.”³⁵ More recently, Robert Merges has suggested that copyright should be limited by fair use in order to serve distributive goals.³⁶ To date, though, the participants in this debate have not focused on the rich body of First Amendment

³⁰ Posner, *supra* n. 28, at 73 (rejecting the argument that “freedom of expression will be curtailed if the creation of parodies is burdened by the costs of transacting with and paying royalties to copyright holders”).

³¹ See, e.g., Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L. J. 1532, 1559 (1989) (“If you do not believe that life-sustaining commodities—food, housing and clothing—should be provided for free if necessary, then you will be hard put to explain why intellectual property is so much more valuable than those other commodities as to justify an exception to marketplace rules.); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1632 (1982) (arguing that “courts should . . . take care that they do not tax copyright owners to subsidize impecunious but meritorious users under the guise of maximizing value”). Cf. Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 514, 524-27 (1999) (arguing that copyright holders should share in the profits generated by parodies).

³² 433 U.S. 562 (1977).

³³ *Zacchini*, 433 U.S. at 578.

³⁴ *Zacchini*, 433 U.S. at 573-74.

³⁵ William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1774 (1988).

³⁶ Robert P. Merges, *The End of Friction? Property Rights and Contract in the ‘Newtonian’ World of On-Line Commerce*, 12 BERK. TECH. L.J. 115, 116, 133-36 (1997).

jurisprudence that addresses expensive speech and distributive values in other contexts. The next section begins that task.

III. The First Amendment and Expensive Speech

Speech is seldom free, as in free beer. It costs money to buy a newspaper, to operate a book store, to broadcast a television commercial, to mail campaign literature. Some of this expense is directly traceable to government action: enforcement of property and contract regimes, collection of taxes from speech-producing businesses, and so forth. Undoubtedly these expenses prompt some would-be speakers to speak less than they would if speaking were cheaper—the same for would-be listeners.³⁷ Yet courts seldom conclude that the expensiveness of speech poses a First Amendment problem. For example, where a zoning law forced an adult movie theater to acquire expensive property in a new location, the Supreme Court explained that “we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.”³⁸ The Court seems to see the expenses associated with complying with otherwise valid laws as the justifiable cost of doing business—even where that business involves speech.

Courts accept the expenses associated with speaking and receiving speech even though those expenses give wealthy speakers and listeners more communicative capacity than the poor. Indeed, courts are often hostile to legislative attempts to equalize speech opportunities by limiting the spending power of rich speakers.³⁹ Most notably, and to some notoriously, the Supreme Court insisted in *Buckley v. Valeo* that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴⁰

³⁷ The First Amendment’s protections extend to both speakers and listeners. See, e.g., *Virginia State Bd. Of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 757 (1976).

³⁸ *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986).

³⁹ See generally Kathleen M. Sullivan, Essay, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950 (“[R]edistribution and paternalism are theoretically forbidden grounds for the regulation of speech.”) (1995); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1342-45 (1987) (questioning why the First Amendment “doom[s] legislative curtailment of the possessive claim to spend one’s holdings on political speech, while no corresponding, offsetting respect is owed to an ostensible congressional effort to meet a correlative distributive claim respecting political competence.”).

⁴⁰ *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). But cf. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (referring to quoted passage from *Buckley* and insisting that “those words cannot be taken literally”).

To some extent, then, the Court seems to take its view of the First Amendment from neoclassical economics: each speaker or listener gets as much speech as he is willing and able to buy; the First Amendment requires merely that the government not interfere with this speech marketplace.⁴¹ *Buckley* is notorious in part because this view of the value of speech is so unsatisfying. Even Kathleen Sullivan, a partial defender of *Buckley*, acknowledges that “[w]hether the exchange of ideas is valued for its connection to truth, self-government, or individual autonomy, the point in each setting is that speech is valuable independent of people’s willingness to pay for it.”⁴² Still, willingness to pay may generally be better than competing methods for calculating the value of speech.⁴³ Courts are justifiably wary of their own, and legislators’,

⁴¹ See generally LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 188, 194 (1985) (“Even in periods when the protection of free speech has enjoyed the greatest support, the First Amendment rights of those in positions of power and wealth have generally found greater favor than the First Amendment rights of those less well situated. . . . In the view of the Court . . . the ideal of equality is best served by prohibiting the government from enhancing the relative voice of some at the expense of others, even if those whose activities are regulated by the legislation currently hold a massive advantage.”); Eugene Volokh, *Cheap Speech and What it Will Do*, 104 *YALE L.J.* 1805, 1846 (1995) (“Existing First Amendment doctrine is founded on some rather idealized premises. . . . These premises may often be true, but sometimes they simply aren’t. Sometimes the supporters of a thought have millions of dollars, while opponents are too poor to compete effectively. . . . The Court has heard these arguments. It has accepted that they may sometimes have merit. And yet it has generally . . . refused to change the doctrine to accommodate them.”); A.J. Liebling, *The Press* 32 (2d rev. ed. 1975) (“Freedom of the press is guaranteed only to those who own one.”).

⁴² Sullivan, *supra* n. 39, at 963; see also Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management*, 97 *MICH. L. REV.* 426, 539 (1998) (“Creative and informational works affect individual and social self-determination in a variety of ways, many of which are not registered, very less measured, by markets.”); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination, and Digital Intellectual Property*, 53 *VAND. L. REV.* 2007, 2033-24 (2000) (“The idea of consumer sovereignty rests on the compelling argument that people know what is good for them and can value it accordingly. Whether or not one accepts that premise everywhere else, and I would argue that no one accepts it everywhere else, it is particularly hard to say that information can be valued in such a way.”); C. Edwin Baker, *Giving the Audience What it Wants*, 58 *OHIO ST. L.J.* 311, 385-411 (1997) (critiquing “reliance on the marketplace to determine the content and distribution of media content”); Gordon, *supra* n. 31, at 1631 (“Distrust of the market may also be triggered when defendant’s activities involve social values that are not easily monetized. When defendant’s use contributes something of importance to public knowledge, political debate, or human health, it may be difficult to state the social worth of that contribution as a dollar figure. If the defendant’s interest impinges on a first amendment interest, relying upon the market may become particularly inappropriate; constitutional values are rarely well paid in the marketplace and, while the citizenry would no doubt be willing to pay to avoid losing such values, it is awkward at best to try to put a ‘price’ on them.”); William Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 *SUP. CT. REV.* 539 (1978) (“Freedom of speech [is] abridged by a government policy that adheres only to a private property system and a market-pricing mechanism in determining who shall be able to speak.”).

⁴³ See, e.g., Vince Blasi, *Prior Restraints on Demonstrations*, 68 *MICH. L. REV.* 1481, 1529 (1969) (defending willingness to pay—with an indigency provision—as the optimal way to ration public demonstrations).

ability to gauge whether particular speech is especially worthy or worthless.⁴⁴

There is one area, however, in which willingness to pay seems an especially bad measure of the value of speech: where the speech is expensive and the would-be speaker or listener is poor. Of course, government action that makes speech expensive can dissuade both rich and poor from speaking or receiving speech. But poor speakers and listeners may be more likely to be dissuaded even when the speech is very important to them—they simply do not have the money.⁴⁵ Accordingly, although First Amendment jurisprudence is often inattentive to the expense associated with speech, it is sensitive to the special concerns of poorly-financed speakers and listeners who can so easily be silenced by expense.⁴⁶

Many types of laws make speech too expensive for poorly financed speakers and listeners. Some laws require speakers to pay a permit fee to the government with no exception for the indigent. Some laws outlaw or limit especially inexpensive modes of speech—handing out leaflets, for example. Some laws allocate property in a way that forces would-be speakers to bargain with property owners for permission to speak, or else to acquire their own speech-facilitating property. Some laws thus disadvantage poorly-financed speakers; other laws disadvantage poorly-financed listeners. In all of these contexts, courts have sometimes shown a special First Amendment-based solicitude for poorly-financed speakers and listeners.

⁴⁴ See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 467 (1996) (“The *Buckley* principle emerges not from the view that redistribution of speech opportunities is itself an illegitimate end, but from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas—or, even more commonly, from self interest.”); Volokh, *Cheap supra* n. 41, at 1847 (1995) (“[I]t might . . . be too dangerous to let the government intervene when it thinks it has found ‘market failure,’ or an inability to counterspeak . . .”).

⁴⁵ See generally Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U.L. REV. 4, 30-31 (1994) (explaining a concept of value based on “how much better off people might feel if they had something, even if they cannot not afford to pay for it”); David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America’s Public Forums?*, 62 TEXAS L. REV. 403, 437 (1983) (“A wealthy speaker may regard a charge as insignificant, while a poor speaker may regard the same charge as onerous.”).

⁴⁶ See generally Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U.PA. L. REV. 119, 122-23 (2001); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1210 n. 150 (1996) (“We might choose to ignore all incidental burdens that operate through a private actor’s indigence. Although such an approach would be broadly consistent with the Supreme Court’s unwillingness to recognize positive rights, . . . the Court has recognized that the impact of a law on ‘the poorly financed causes of little people’ is a relevant consideration in free speech analysis.”).

Poorly-financed speakers and fee requirements. The government can make speech expensive by requiring that speakers pay a fee to speak. Courts sometimes worry about the effect of such fees on poor speakers.

In *Murdock v. Pennsylvania*, the Supreme Court invalidated a license fee applied to distribution of religious literature by Jehovah's Witnesses.⁴⁷ Justice Douglas' majority opinion stressed that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."⁴⁸ The *Murdock* Court distinguished *Cox v. New Hampshire*,⁴⁹ in which the Court had upheld a permit fee, noting that "the fee [at issue in *Murdock*] is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors."⁵⁰

In another First Amendment context, the Supreme Court invalidated a statute requiring payment of a filing fee in order to be placed on the ballot for congressional, state, and county offices.⁵¹ Faced with an indigent candidate's challenge to the statute on First Amendment and Equal Protection grounds, the *Lubin v. Panish* Court held that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay."⁵²

Some lower courts read *Murdock* and *Lubin* to insist that speech permit fees be no more than "nominal," or that they include an indigence exception, in order to preserve speech opportunities for poorly-financed speakers. In *Central Florida Nuclear Freeze Campaign v. Walsh*,⁵³ for example, the Eleventh Circuit invalidated an ordinance requiring that demonstrators pay for additional police protection in order to receive a demonstration permit. The court cited *Murdock* for the proposition that "[a]n ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment."⁵⁴ The court went on to explain that:

⁴⁷ 319 U.S. 105 (1943); *see also* *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Jones v. Opelika*, 319 U.S. 103 (1943).

⁴⁸ *Murdock*, 319 U.S. at 111; *see generally* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 *Geo. L.J.* 257 (1985); Goldberger, *supra* n. **Error! Bookmark not defined.**; Blasi, *supra* n. 43.

⁴⁹ 312 U.S. 569 (1941).

⁵⁰ *Murdock*, 319 U.S. at 116.

⁵¹ *Lubin v. Panish*, 415 U.S. 709 (1974); *see also* *Bullock v. Carter*, 405 U.S. 134 (1972).

⁵² *Lubin*, 415 U.S. at 718.

⁵³ 774 F.2d 1515 (1985).

⁵⁴ *Central Florida Nuclear*, 774 F.2d at 1523.

indigent persons who wish to exercise their First Amendment rights of speech and assembly and as a consequence of the added costs of police protection, are unable to pay such costs, are denied an equal opportunity to be heard. . . . [T]here is no provision in the ordinance which exempts those persons from paying the costs for additional police protection who are unable to pay. The granting of a license permit on the basis of the ability of persons wishing to use public streets and parks to demonstrate, to pay an unfixd fee for police protection, without providing for an alternative means of exercising First Amendment rights, is unconstitutional.⁵⁵

Other courts of appeals read the case law more narrowly to insist that permit fees be no greater than necessary to defray legitimate expenses, but not to limit fees to a “nominal” amount or to require an indigence exception.⁵⁶ The Supreme Court granted certiorari to resolve the split in *Forsythe v. Nationalist Movement*,⁵⁷ then decided the case on different grounds, leaving the validity of large fees without indigence exceptions unclear.⁵⁸ But the logic of *Murdock*, with its concern with those speakers who cannot afford “to pay their own way,” suggests that the prospect that a large permit fee could preclude speech by poorly-financed speakers is a First Amendment problem.

Poorly-financed speakers and cheap speech avenues. The issue of expensive speech also arises when poorly-financed speakers challenge regulations that restrict relatively affordable methods of communication. In *Martin v. City of Struthers*, one of the first of these cases to reach the Supreme Court, the Court invalidated an ordinance banning residential handbilling and observed that “[d]oor to door

⁵⁵ *Central Florida Nuclear*, 774 F.2d at 1523-24.

⁵⁶ *E.g.*, *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136-37 (6th Cir. 1991).

⁵⁷ 505 U.S. 123, 128-29 & n. 8 (1992).

⁵⁸ The Court invalidated the permit scheme in *Forsythe* not because the fee was more than nominal (as the court of appeals had held), but because the scheme granted the administrator unbridled discretion to set the fee and because the fee could vary based on the expected cost of dealing with counter-demonstrators, a determination that the Court held was impermissibly content-based. *Forsythe*, 505 U.S. at 132-136. The Court said that even a nominal fee could not survive these deficiencies, and went on in dicta to suggest that fees that are more than nominal might nonetheless be constitutional. *Forsythe*, 505 U.S., at 136-37. This dicta has emboldened those courts that insist that significant permit fees are acceptable even if they do not accommodate those who cannot afford to pay. *See, e.g.*, *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1110-11 (6th Cir. 1997); *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 873-75 (Cal. Ct. App. 1993); *Sauk County v. Gumz*, 2003 WL 21707085 (Wis. Ct. App. Jul. 24, 2003); *see generally* Kevin Francis O’Neil, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411 (1999).

distribution of circulars is essential to the poorly financed causes of little people.”⁵⁹

Because door-to-door canvassing is so inexpensive, and because it is therefore the communication method of choice for Jehovah’s Witnesses and many other poorly-financed speakers,⁶⁰ restricting it may leave poor speakers with no adequate avenues of communication.⁶¹ The Court has used similar logic to protect traditional media including front yard signs,⁶² leafleting,⁶³ and billboards.⁶⁴

⁵⁹ 319 U.S. 141, 146 (1943); *see also* Watchtower Bible and Tract Society of New York v. Village of Stratton, 536 U.S. 150, 153 (2002); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986); City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986).

⁶⁰ *But see* Watchtower, 536 U.S. at 153 (Rehnquist, C.J., dissenting) (noting that Jehovah’s Witnesses are represented by a large legal team).

⁶¹ *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 979-80 (2nd ed. 1988) (“Like the proverbial ban on sleeping under the bridges of Paris, a ban on using loudspeakers or distributing handbills obviously falls with greater force upon the poor than upon those who can afford access to other methods of communication; thus the Court has in the past scrutinized such bans with special care. However neutral their intention with respect to speakers and messages, their impact is anything but neutral, and government must therefore go a substantial distance to justify enforcing them.”); Seth F. Kreimer, *supra* n. 46, at 120-23; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 765 (1986) (“Inexpensive media—such as leaflets, parades, street demonstrations, and picketing—are simply more important to poorly financed communicators than to the wealthy.”); Lee C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 U. MICH. L. REV. 1, 28 n. 88 (1976) (explaining that lack of access to the press justifies solicitude for “minor” modes of communication); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 30, 36 (1975-1976) (“The principle of equal liberty of expression, like the equal protection clause, has special relevance for protecting the downtrodden. . . . [E]ven a formally content-neutral time, place, and manner restriction may have unequal effects on various types of messages. The resulting inequality may be constitutionally unacceptable, whether or not the discrimination is intended.”); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30 (1965) (“Labor picketing apart, perhaps, the parade, the picket, the leaflet, the sound truck, have been the media of communication exploited by those with little access to the more genteel means of communication. We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing.”).

⁶² In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court invalidated a city’s ban of most signs on residential property in part because “[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.” *Ladue*, 512 U.S. at 57. The Court went on to note that inexpensive modes of communication can promote speech by the wealthy as well as the poor: “Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one’s house with a handheld sign may make the difference between participating and not participating in some public debate.” *Ladue*, 512 U.S. at 57.

⁶³ In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court invalidated a ban on distribution of anonymous campaign literature. Describing the breadth of the

Poorly-financed speakers and property rules. Property rules that give some people economic power over other people's speech could also disadvantage poor, property-less speakers. Jack Balkin explains that this problem is one explanation for the public forum doctrine, which gives special protection to speech in public places like parks and streets:

[W]hat is crucial to situations in which protesters seek access to a public forum is that most of the protesters in such situations do not, in fact, own much property. Moreover, one of the most effective places for them to get their message across might be on the largest or most centrally located plots of land in the city, where, we may assume, they own no property at all. Of course, the possibility exists that the strikers could purchase the right to form a picket line on the land of a centrally located landowner. . . . However, the central problem in this case is, once again, that the strikers might not have a great deal of property . . . , and their budget constraints might well prevent this solution to the problem of access. . . . From the foregoing discussion, you can see that the reason why public forums are essential to the

prohibition at issue, Justice Stevens noted that “[i]t applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources.” *McIntyre*, 514 U.S., at 351. Justice Ginsburg’s concurrence also stressed that the ordinance had been applied to “an individual leafleteer.” *McIntyre*, 514 U.S., at 358 (Ginsburg, J., concurring); see also Lee Tien, *Who’s Afraid of Anonymous Speech?* *McIntyre and the Internet*, 75 OR. L. REV. 117, 130 (1996) (observing that “the [*McIntyre*] Court’s concern was firmly grounded in the instrumental rationale that cheap speech is ‘essential to the poorly financed causes of little people,’ and you cannot read *McIntyre* without sensing great concern for ‘the right of the lonely pamphleteer’”); *Hays Cty Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) (invalidating anti-solicitation regulation as applied to handing out newspapers on university campus).

⁶⁴ In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court invalidated a ban on non-commercial billboards, noting the parties’ stipulation that “[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.” *Metromedia*, 453 U.S. at 516; see also *Linkmark Associates, Inv. v. Willingboro*, 431 U.S. 85, 93 (1977). Justice Stevens and Chief Justice Burger would have upheld the ordinance even assuming that alternative means of communication would not be as inexpensive or effective as billboards. Justice Stevens observed that “[Graffiti] is an inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves. Nevertheless, I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places.” *Metromedia*, 453 U.S. at 549-50 (Stevens, J., dissenting). Chief Justice Burger contended that “[The message conveyed on San Diego billboards] can reach an equally large audience through a variety of other media: newspapers, television, radio, magazines, direct mail, pamphlets, etc. True, these other methods may not be so ‘eyecatching’—or so cheap—as billboards, but there has been no suggestion that billboards heretofore have advanced any particular viewpoint or issue disproportionately to advertising generally.” *Metromedia*, 453 U.S. at 562-63 (Burger, C.J., dissenting).

liberty of expression is that otherwise one's right to speak would depend upon one's ability to purchase property rights from private parties.⁶⁵

The public forum doctrine limits the government's rights, as property owner, to object to speech on certain types of public property—notably streets and parks.⁶⁶ As Balkin notes, the economic power of private property owners could also limit speech opportunities for the poor. But, in part because of the public forum doctrine, private property is often adjacent to public property (sidewalks, for example) that is open to poorly-financed speakers.⁶⁷ So it may be rare that the veto power of private property ownership leaves poor speakers without speech outlets—at least where real property situated in a typical public/private mix is concerned.⁶⁸

⁶⁵ J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 400 (1990); see also Tribe, *supra* n. 61, at 998 (explaining that “[t]he public forum doctrine is an important recognition that it is not enough for government to refrain from invading certain areas of liberty. The state may, even at some cost to the public fisc, have to provide at least a minimally adequate opportunity for the exercise of certain freedoms.”); Sullivan, *supra* n. 39, at 960 (explaining that “the First Amendment is currently held to compel some implicit subsidies. For example, public forum doctrine in effect requires taxpayers to absorb the cost of cleaning up litter and furnishing the police officers necessary for orderly rallies and parades in the public streets and parks. And cases that reject the heckler’s veto as a ground for silencing controversial speakers in effect require taxpayers to absorb the cost of the thin blue line that separates the race-baiter from the surrounding angry mob.”); Farber, *supra* n. 96, at 571-76 (1991). *But see* Nimmer, *supra* n. 1, at 1203 (“The first amendment guarantees the right to speak; it does not offer a government subsidy for the speaker . . .”).

⁶⁶ See generally *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939); Kathleen M. Sullivan, *Discrimination, Distribution, and City Regulation of Speech*, 25 HASTINGS CONST. L.Q. 209, 210 (1998) (“Speakers have a prescriptive easement of access to some kinds of public property, which serve as a place of last resort for people without significant private resources to speak. Those who cannot command the airwaves, the cable network or the Internet may still stand on a soapbox on a street corner or hand out crudely-lettered leaflets to passersby. Thus public spaces provide some ultimate distributional floor ensuring that poorly financed causes may be heard.”); Geoffrey R. Stone, *Fora Americana, Speech in Public Places*, 1974 S.Ct. REV. 233.

⁶⁷ See generally Goldberger, *supra* n. 51, at 429 (“Streets, sidewalks, and parks are ubiquitous in American towns and cities; easy access to them assures a continuous flow of ideas at a large enough number of locations to maintain an informed citizenry. Even if all other access routes to information were closed down, even if the mass media refused to disseminate certain ideas, and even if speakers seeking to communicate unpopular ideas were excluded from all private property, ideas could still make their way to listeners via streets, sidewalks, and parks.”); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1941) (articulating need for public forums in light of likelihood that private property owners will refuse access to unpopular speakers).

⁶⁸ Cf. Tribe, *supra* n. 41, at 197 (arguing that “rapid social and technological changes . . . have increasingly shifted the channels of public communication into private control”); Balkin, *supra* n. 65, at 407 (noting that “[a]s new technologies of communication outstripped older forms in terms of effectiveness, there was greater and greater significance to the difference between access to traditional forms of communication (available under public forum law) and access to new forms that could only be purchased

Where there is no available public forum property, however, strict private property rules can disadvantage poorly-financed speakers. The Court recognized this in *Marsh v. Alabama*, where it overturned the trespass conviction of a Jehovah's Witness who distributed her religious literature on the sidewalks of a company-owned town that forbade the leafletting.⁶⁹ The Court relied on earlier cases like *Martin* and *Murdock* to insist that the trespass law yield to ensure some means of communicating with the community regardless of the property status of the town.⁷⁰

Poorly-financed listeners. The First Amendment protects speech recipients, as well as speakers;⁷¹ and in a few cases the Court has expressed concern with preserving access to speech for poorly-financed listeners. In *Marsh v. Alabama* the Court articulated the interests not only of the pamphleteer, but also of the workers who lived in the company town:

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments

from private sources. . . . For each private newspaper, or television or radio station, there was not a corresponding government-owned forum open to all on a first come, first served basis.”); Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J. L. & TECH. 149, 151-52 (1998) (“Paradigmatic public forums perform their function in our constitutional order not so much because of what happens inside them as because of what happens outside, or more precisely, alongside them. As trips to the clothing store, doctor's office, motor vehicle administration, or community center increasingly shift from the physical environment of our cities and towns to the electronic environment of cyberspace, we must create ‘the places in between’ that enable ordinary citizens to engage one another as they move between the places where they conduct their affairs. In particular, we must preserve the ability to contest what transpires in non-public places by ensuring communicative access to individuals as they enter stores, workplaces, government buildings, or family planning clinics. In short, we need sidewalks in cyberspace.”).

⁶⁹ 326 U.S. 501 (1946); *see also* *Thornhill v. Alabama*, 310 U.S. 88 (1940) (invalidating a ban on “picketing” and “loitering” that “embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute”); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, 82 (declaring First Amendment right of access to labor camp where there were no alternative avenues for communicating with the workers who lived there).

⁷⁰ *Marsh*, 326 U.S. at 504-05 & n. 1.

⁷¹ *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 757 (1976).

than there is for curtailing these freedoms with respect to any other citizen.⁷²

The Court is concerned here with ensuring that the workers receive information even though they do not own the property on which they live, just as it was concerned in cases like *Martin* with speakers who cannot afford expensive speech outlets.⁷³

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court again considered the ability of the poor to receive important information. Regarding First Amendment protection for pharmacy advertisements, the Court weighed the consumers' right to receive the information as well as the advertisers' right to communicate it, and paid special attention to poor consumers:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.⁷⁴

Finally, the Court has shown its solicitude for poorly-financed listeners by protecting free broadcast television. The Court has stressed the value of this medium on several occasions, recently suggesting that its maintenance "promotes values central to the First Amendment."⁷⁵

Recent developments. Despite the forceful rhetoric of cases like *Murdock*, *Martin*, and *Marsh*, the claims of poorly-financed speakers were rejected so often in recent decades that some commentators questioned whether the special interests of the poor were relevant to contemporary First Amendment analysis.⁷⁶ Although the Court

⁷² *Marsh*, 326 U.S. at 508-09.

⁷³ *Cf. Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198 (2001) (reh'g pending) (holding that application of trespassing regulations to bar door-to-door campaigning in public housing development violated tenant's First Amendment right to receive political information).

⁷⁴ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

⁷⁵ *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 663 (1994).

⁷⁶ *See, e.g., Tribe, supra* n. 41, at 197-99; *Kreimer, supra* n. 46, at n. 17; *Lee, supra* n. 61, at 765 (1986); *see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 n. 9 (1983) (describing *Martin* as "substantially undercut" by

invalidated the permit fee at issue in *Murdock* it has upheld other fees without any exceptions for poor speakers.⁷⁷ As for cheap methods of communication, the Court has upheld restrictions on sound trucks,⁷⁸ sleeping in public parks,⁷⁹ posting handbills on public property,⁸⁰ protesting in a jail yard,⁸¹ organizing boycotts,⁸² placing unstamped literature in mailboxes,⁸³ and participation in a government charity drive,⁸⁴ all over the objections of dissenters who stressed the regulations' impact on poorly-financed speakers.⁸⁵ And the Court has refused to extend *Marsh* to other circumstances in which speakers claimed that private property rights interfered with their ability to communicate inexpensively with their intended audiences.⁸⁶ But the force of the earlier cases, and of the general proposition that the special concerns of poorly-financed speakers and listeners should be part of First Amendment analysis, has been reaffirmed recently in a case involving the most traditional of inexpensive speech avenues, and in two cases involving the new phenomenon of Internet speech.

The Court reaffirmed *Martin* in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, in which it invalidated a

subsequent case law); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1572 (7th Cir. 1986) (Coffey, J., dissenting) (“[T]he continuing vitality of *Martin* is questionable.”); Kenneth M. Casebeer, *The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearance of the Civil Rights Movement*, 54 *Miami L. Rev.* 247, 292 (describing *Marsh* as “limited to its facts”). Cf. Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 *Nw. U.L. Rev.* 1083 (1999) (arguing that advances in communications technology alleviate concern about imbalance in speech resources); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *CHI. L. REV.* 225, 252 (1992) (similar).

⁷⁷ In *Cox v. New Hampshire* the Court expressed no concern with disadvantaging poor speakers when it approved a parade license fee (up to \$300 per day) designed to cover the expenses of administering the licensing regime and maintaining public order during the parade.⁷⁷ *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

⁷⁸ *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁷⁹ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

⁸⁰ *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

⁸¹ *Adderley v. Florida*, 385 U.S. 39 (1967).

⁸² *F.T.C. v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

⁸³ *U.S.P.S. v. Greenburgh*, 453 U.S. 114 (1981).

⁸⁴ *Cornelius v. N.A.A.C.P. Legal Defense and Education Fund, Inc.*, 468 U.S. 288 (1984).

⁸⁵ *Clark*, 468 U.S. at 315 n. 14 (Marshall, J., dissenting); *Cornelius*, 473 U.S. at 815 (Blackmun, J., dissenting); *Greenburgh*, 453 U.S., at 144 (Marshall, J., dissenting); *Adderley*, 385 U.S., at 50-51 (Douglas, J., dissenting); *F.T.C.*, 473 U.S., at 790 (Brennan, J., concurring in part and dissenting in part); *Vincent*, 466 U.S., at 820 (Brennan, J., dissenting).

⁸⁶ See, e.g., *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

village ordinance banning door-to-door advocacy without a solicitation permit.⁸⁷ Justice Stevens' majority opinion recounts some of the Court's history of solicitude for poorly-financed speakers, and for Jehovah's Witnesses in particular:

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. . . . Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.⁸⁸

Justice Stevens recalled *Martin*'s concern about "the poorly financed causes of little people" and added that "the Jehovah's Witnesses are not the only 'little people' who face the risk of silencing by regulations like the Village's."⁸⁹

The Court has also recognized the potential of new technologies to facilitate inexpensive speech, and the attendant danger of burdening those technologies with extra expenses. In *Reno v. American Civil Liberties Union*, the Court noted the Internet's potential to enable speech by poorly-financed speakers.⁹⁰ The Court then went on to invalidate provisions of the Communications Decency Act ("CDA") designed to protect minors from harmful material on the Internet—in part because the technological safe harbors in the statute were either ineffective or "not economically feasible for most noncommercial speakers."⁹¹ The act did not ban speaking via this new and inexpensive medium, but it did make it expensive in a way that impermissibly disadvantaged the poorly-financed speakers whom the medium otherwise empowered.

Congress revised the invalidated provisions of the CDA in the form of the Child Online Protection Act ("COPA"). COPA applies a "community standard" to gauge what material qualifies as "harmful to

⁸⁷ 536 U.S. 150 (2002).

⁸⁸ *Watchtower*, 536 U.S. at 160-61.

⁸⁹ *Watchtower*, 536 U.S. at 163.

⁹⁰ 521 U.S. 844, 870 (1997) ("[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."); *see generally* Volokh, *supra* n. 44. *But cf.* Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1179-81 (1999) (describing expenses involved in various types of Internet speech).

⁹¹ *Reno*, 521 U.S. at 881.

minors.” Although in *Ashcroft v. American Civil Liberties Union*⁹² the Supreme Court disagreed with the Third Circuit’s conclusion that application of a community standard necessarily violated the First Amendment, five justices expressed discomfort with the notion that Internet speakers should be forced to develop or adopt technology to locate their audience geographically. Their objection seems to be that complying with the requirement would be expensive if not impossible, and that this is especially problematic where the medium regulated is otherwise relatively cheap.

For example, Justice Kennedy, joined by Justices Souter and Ginsburg, observed that “it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset.”⁹³ They distinguished the challenged Internet regulation from similar regulations of obscenity distributed over the phone or in the mail;⁹⁴ in those contexts the Court treated the expense of determining where a recipient was located as an acceptable cost of doing business using a technology with nation-wide reach. For example, regarding the commercial dial-a-porn operator Sable Communications, the Court said: “While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.”⁹⁵ But where the medium at issue, be it pamphlet or

⁹² 535 U.S. 564 (2002).

⁹³ *Ashcroft*, 535 U.S. at 595 (Kennedy, J., concurring in the judgment); *see also id.* at 587 (O’Connor, J., concurring in part and concurring in the judgment) (“I agree with Justice Kennedy that, given Internet speakers’ inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.”); *id.* at 590 (Breyer, J., concurring in part and concurring in the judgment) (“To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.”); *id.* at 605 (Stevens, J., dissenting) (“COPA . . . covers a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors. The Internet presents a unique forum for communication because information, once posted, is accessible everywhere on the network at once. The speaker cannot control access based on the location of the listener, nor can it choose the pathways through which its speech is transmitted.”). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took the contrary view that “[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” *Id.* at 583 (Thomas, J.). *Cf. Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 125-26 (1989); *Hamling v. United States*, 418 U.S. 87, 106 (1974).

⁹⁴ *Ashcroft*, 535 U.S. at 587 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 590-91 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 594-96 (Kennedy, J., concurring in the judgment; *id.* at 606 (Stevens, J., dissenting).

⁹⁵ *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 125 (1989).

electronic mail, is unusually affordable even for poor speakers, the Court is less willing to expose speakers to expense.

Together, *Watchtower* and these recent Internet cases reaffirm the Court's earlier solicitude for poorly financed speakers, and its related skepticism about laws that make otherwise inexpensive speech expensive. This solicitude recognizes that poor speakers' and listeners' unwillingness to pay a high price for their speech activities does not mean that their speech (or consumption of speech) is not desirable in terms of producing well-being for themselves and others,⁹⁶ in terms of maximizing the diversity of messages,⁹⁷ and in terms of preserving each individual's autonomy as a speaker, listener, and participant in society.⁹⁸ I do not mean merely that poor people's speech might produce positive externalities; that is true of course for the speech of both rich and poor. What is special about poor people is that their willingness to pay for speech may simply be limited by their finances (and by the high marginal utility of the money they do have)—even where the speech would be very important to them. It makes sense, then, that legal regimes that make speech more expensive—even regimes that merely facilitate private property ownership⁹⁹—must sometimes yield if they make it too difficult for poorly-financed speakers or listeners to participate in the speech marketplace, as the First Amendment cases surveyed above suggest.

IV. Copyright Makes Exceptions for the Poor

Copyright makes speech expensive by design. Were it not for the restrictions imposed by copyright, authors would compete with unauthorized copiers. The price for copies of creative works would be driven toward marginal cost—the cost of making the copy. Because an author's costs include not just the cost of copying but also the initial investment in creating the work, revenues equal to marginal cost are unlikely to be sufficient to incentivize further creativity—so goes the

⁹⁶ See generally Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-60 (describing positive externalities associated with speech and asserting that “the disparity between the private and social value . . . is greater for speech than for typical consumer goods”) (1991).

⁹⁷ See, e.g., Karst, *supra* n. 61, at 40-41 (“Even assuming the correctness of Meikeljohn's limited view of the equality principle—that what is important is ‘that everything worth saying shall be said’—it must be recognized that the content of the messages carried by leafleters and pickets is apt to differ significantly from the content of the daily press and the broadcast media.”).

⁹⁸ See, e.g., Sullivan, *supra* n. 39, at 963 (“Whether the exchange of ideas is valued for its connection to truth, self-government, or individual autonomy, the point in each setting is that speech is valuable independent of people's willingness to pay for it.”).

⁹⁹ See discussion of *Marsh v. Alabama*, *supra*.

logic behind copyright, anyway.¹⁰⁰ By prohibiting most unauthorized copying, copyright allows at least some authors (those who produce works for which there are not perfect non-infringing substitutes) to price copies of their works, and permission to exercise their exclusive rights, above marginal cost.

Artificially expensive speech is what drives this incentive-based regime, and yet the courts have never questioned the basic consistency of copyright-created expense and the First Amendment. The prices of copyrighted works and licenses are just a cost of doing business, and for many speakers and listeners the expense does not preclude valuable speech.

But what about poorly-financed speakers and listeners who want to use copyrighted works but cannot afford the supracompetitive prices, and for whom ability to pay is especially unlikely to accurately reflect the importance of communicating? Can copyright be consistent with the First Amendment if it makes speech impossible for them?

As it happens, the copyright regime—like the First Amendment jurisprudence just surveyed—makes allowances that facilitate access by poor speakers and listeners without undermining the collection of supracompetitive prices from those who can afford to pay.¹⁰¹ The key allowances fall into four main categories: the first sale doctrine, the fair use doctrine, specialized statutory exemptions, and underenforcement.

The first sale doctrine. The first sale doctrine is now codified in 17 U.S.C. § 109, which provides that, notwithstanding the copyright holder's exclusive right of distribution, "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." So if you buy a book, for example, you may in turn sell it, give it away, lend it to a friend, etc.

The first sale doctrine has traditionally served to facilitate affordable access to copyrighted works without undermining copyright's incentive system.¹⁰² Most notably, the doctrine enables lending libraries,

¹⁰⁰ See generally Landes & Posner, *supra* n. 29, at 326-28; Fisher, *supra* n. 35, at 1700 (1988). For a skeptical view, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹⁰¹ See Merges, *supra* n. 36, at 135 ("While the basic economic theory of intellectual property is most often pitched in terms of allocative efficiency, a strong redistributive element remains in the law.").

¹⁰² For a more comprehensive analysis of the doctrine, including its impact on affordability, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003); see also JESSICA LITMAN, *DIGITAL COPYRIGHT* 81 (2001); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 608 (1997).

rental outlets, and competitive secondary markets like used book stores to provide access for those unwilling or unable to purchase copies of copyrighted works at their original retail prices.¹⁰³ The existence of these outlets also provides competition that drives down the price of new copies sold by the copyright holder or retail outlets.¹⁰⁴ Many well-off consumers are not willing to wait until the book (or record, or video) is available at the library or on the secondary market; many want a new copy that they can keep for as long as they like.¹⁰⁵ So although the first sale doctrine makes copyrighted works more affordable, copyright holders still sell many relatively expensive new copies.

Note that the ownership of the physical manifestation of a copyrighted work does not carry with it any exclusive rights of the copyright holder apart from distribution. If I lawfully acquire a book I can give it away; I cannot necessarily copy it or make a derivative work based upon it. This distinction between the physical copy and the copyright, sort of the flip side of the first sale doctrine, arguably serves the needs of some poorly financed users by facilitating price discrimination between mere readers (whose willingness and ability to pay is likely small) and publishers and other copiers (whose willingness and ability to pay is likely higher).¹⁰⁶

Special statutory exceptions. The Copyright Act also includes specific exemptions for certain uses of copyrighted works, several of which favor poorly-financed users.

Parts of the Copyright Act make special provisions for libraries, which in turn serve patrons who cannot afford to buy the materials they wish to read. Section 108 makes exceptions for limited reproduction of

¹⁰³ See Reese, *supra* n. 102, at 586-92; see also Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1388 (1998) (“[I]t may be a good thing that the First Sale Doctrine denies movie companies and book publishers a legal right over resales and rentals. Under that Doctrine, the owner of copyright in a movie or novel who wishes to sell embodiments must compete with second-hand, library, and rental copies of the same embodiment. Competition from these other sources reduces the price the copyright owner can charge, and gives consumers a number of alternate choices at alternate prices. This is good for consumers--provided that the other rights that the law does give to the copyright owner (such as the right to control reproduction) provide sufficient incentives for the desired amount of creation.”); Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 286 (2001); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1806 (2000) (noting that “social institutions enabled by copyright law . . . traditionally have provided lower-income consumers with alternative means of access to works that they cannot afford to purchase outright.”). For a survey of the possible negative effects of the first sale doctrine on the affordability of copyrighted works, see Reese, *supra* n. 102, at 590-92.

¹⁰⁴ See generally Gordon, *supra* n. 103, at 1388; Reese, *supra* n. 102, at 585-90.

¹⁰⁵ See generally Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1840 (1995).

¹⁰⁶ See Gordon, *supra* n. 103, at 1370-71.

copyrighted works by libraries and archives.¹⁰⁷ Section 109 permits non-profit libraries to lend phonorecords (which are otherwise excepted from the first sale doctrine).¹⁰⁸

There are other exceptions targeted to non-profit activities, including a provision that permits live performance of musical works and non-dramatic literary works “without any purpose of direct or indirect commercial advantage” and without payment to performers or collection of an admission charge.¹⁰⁹ The exception was broader under the 1909 Copyright Act, which exempted all performances that were not “for profit.” The 1976 House Report explains that the old exemption was too broad because “[m]any ‘non-profit’ organizations are highly subsidized and capable of paying royalties.”¹¹⁰ Presumably, then, the narrow exemption is intended to allow performances by poorly-financed groups that would be unable to afford the fees required to perform the works of their choice. Again, this type of exception appears to make copyrighted works more affordable for some, without interfering with the high prices copyright holders can charge in general.¹¹¹

Fair use. Like the first sale doctrine and the special exemptions described above, fair use can privilege use of copyrighted works by poorly-financed speakers and listeners.¹¹² The statute explains that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of

¹⁰⁷ 17 U.S.C. § 108.

¹⁰⁸ 17 U.S.C. § 109(b)(1)(A).

¹⁰⁹ 17 U.S.C. § 110(4). If there is an admission charge, such performances are still permitted so long as the proceeds are used only to cover costs, and for educational, religious, or charitable purposes, and so long as the copyright holder does not object via procedures specified in the statute. 17 U.S.C. § 110(4)(B).

¹¹⁰ H.R. Rep. No. 94-1476 (1976), at 62.

¹¹¹ *But see* Litman, *Reforming Information Law*, *supra* n. 102, at 617 (“Copyright law has also avoided any serious concern with distributional issues. . . . The distributional policy decisions reflected in the statute . . . derive not from copyright policy but from the political clout gained from policy determinations made in other arenas.”)

¹¹² *Cf.* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting) (“[T]he fair use doctrine acts as a form of subsidy--albeit at the first author's expense--to permit the second author to make limited use of the first author's work for the public good”); Merges, *supra* n. 36, at 116, 133-38; PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 223 (1994); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107 (2001) (arguing that fair use enables economic redistribution); Tushnet, *supra* n. 1, at 42 (“fair use arguably requires some authors to subsidize others for the greater good”). For skeptical views of the role of fair use in subsidizing some users, see, e.g., Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 866 (2001) (noting that “fair use is a redistribution of wealth to meet the special needs of certain users” but arguing that bright line rules would be a preferable method for redistribution”); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc'y U.S.A. 1, 15 (1997);

copyright.”¹¹³ It directs judges to consider several non-exclusive factors to determine “whether the use made of a work in any particular case is a fair”:

- (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 copyrighted work.¹¹⁴

The “commercial” character of a use, a consideration under the first fair use factor, can be a rough gauge of the user’s ability to pay¹¹⁵—or vice versa. A commercial user of a copyrighted work is more likely than a non-commercial user to generate revenue from the use that could go to pay for permission to use the work.¹¹⁶ Flipping this logic around, the Supreme Court suggested in *Harper & Row Publishers v. Nation Enterprises* that a user’s ability to pay qualifies his use as commercial: “The crux of the . . . distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹¹⁷ Some users exploit a work without paying when they otherwise would have paid for the work; others exploit a work without paying when they otherwise would have done without. Only the former category “stands to profit from exploitation of the material without paying the customary price,” because only those users would have paid the customary price in

¹¹³ 17 U.S.C. § 107.

¹¹⁴ 17 U.S.C. § 107.

¹¹⁵ See Gordon, *supra* n. 31, at 1631 (“Where the defendant does not seek to earn profits, it may be argued that his willingness and ability to pay for the copyrighted resources he uses will not provide an accurate measure of the public interest served by his use.”); see generally Tushnet, *supra* n. 1, at 70-74 (2000) (suggesting that noncommercial speakers have few resources and are easily suppressed, and that “commercial” should be understood as narrowly in the fair use context as it is in the First Amendment context). On the other hand, poorly-financed speakers may need to sell their messages (in the form of simple t-shirts, for example) to defray their costs. See, e.g., *Ayres v. City of Chicago*, 125 F.3d 1010, 1017 (7th Cir. 1997).

¹¹⁶ See generally Gordon, *supra* n. 31, at 1631.

¹¹⁷ *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 562 (1985); cf. Melville B. Nimmer, *Copyright Liability for Audio Home Recording*, 68 VA. L. REV. 1505, 1523 (1982) (“The individual who engages in audio home recording may not be seeking a commercial advantage by selling the recordings, but for fair use purposes his motivation is nevertheless commercial. By engaging in audio home recording, he avoids the cost of purchasing records or prerecorded tapes.”).

the first place.¹¹⁸ Under this definition of “commercial,” inability to pay weighs in favor of fair use.

The user’s inability to pay the market price is also relevant to the fourth factor, effect of the use upon the copyright holder’s market. Where there is no effect on the market, no incentive-oriented purpose is served by enforcing the copyright. As the Court explained in *Sony*:

[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.¹¹⁹

Where a user is willing and able to pay the market price for his use, then his use necessarily has some impact on the potential market for the copyrighted work. But the exercise of a copyright holder’s exclusive rights by a user who cannot afford the asking price—e.g., a child copying a friend’s electronic book because she can’t afford her own—may have no effect on the copyright holder’s market.¹²⁰

Thus, fair use can operate to make copyrighted works more affordable by excusing uncompensated uses by the poor.¹²¹ But because the doctrine is so attentive to the potential effect on the copyright holder’s market, it does not appear to undermine the incentive structure that intentionally jacks up the prices of copyrighted works.

Underenforcement. Although the multi-factored fair use doctrine appears to be solicitous of poorly-financed users, a copyright defendant’s inability to pay the market price for the use she made of a

¹¹⁸ At another point the *Harper & Row* Court explicitly considers ability to pay: “[T]o propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.” *Harper & Row*, at 559. This statement doesn’t ring true, because the social value of dissemination may be very high under circumstances when the user’s ability to pay is very low. Nonetheless, the statement suggests that a user’s ability or inability to pay is relevant to the Court’s fair use analysis.

¹¹⁹ *Sony*, 464 U.S., at 450-51; see also Recording Industry Ass’n of America, Inc. v. Diamond Multimedia Systems, Inc., 29 F.Supp.2d 624 (C.D. Cal. 1998), aff’d, 180 F.3d 1072 (9th Cir. 1999) (suggesting that private copying of copyrighted music onto portable MP3 player may be fair use).

¹²⁰ Glynn Lunney has made a similar argument regarding sharing of copyrighted music: “Private sharing may . . . provide copies of the work to low reservation value consumers who could not afford an authorized copy’s market price in any event, and yet not interfere with the copyright owners’ sales to high reservation value consumers.” Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1026 (2002).

¹²¹ Note, however, that making fair use of a copyrighted work is not necessarily free—in terms of time, effort, and expense. See generally Bell, *supra* n. 28, at 580.

protected work is seldom actually litigated—presumably because people who cannot afford licenses are seldom worth finding and suing.¹²² Instead, copyright has traditionally been enforced primarily against commercial publishers and other relatively well-financed speakers and consumers.¹²³ So, even apart from the doctrinal limitations discussed above, copyright's impact on poorly-financed speakers and listeners has been limited by the economics of detection and enforcement.

Summary. The central purpose of copyright is incentivizing creativity, not ensuring distributive fairness.¹²⁴ Copyright incentivizes creativity through the mechanism of property rights, making some uses of copyrighted works expensive.¹²⁵ Nonetheless, as a practical matter the Copyright Act and the realities of its enforcement have given some special leeway to the poor.

¹²² See generally Lessig, *supra* n. 7, at 180-81; LITMAN, *DIGITAL COPYRIGHT*, *supra* n. 102, at 180; Deborah Tussey, *From Fan Sites to Filesharing*, 35 Ga. L. Rev. 1129 (2001); Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property*, 39 WM. & MARY L. REV. 1585, 1656-57 & nn. 253 & 258 (1998); R. Polk Wagner, Essay, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1010-12 (2003) ("As a form of price discrimination, such toleration is likely to be welfare-enhancing in the intellectual property context."); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. Rev. 397, 417 (2003); Jarayshri Srikantiah, Note, *The Response of Copyright to the Enforcement Strain of Inexpensive Copying Technology*, 71 N.Y.U. L. Rev. 1634, 1645-46 (1996) (discussing economics of enforcement).

¹²³ See generally LITMAN, *DIGITAL COPYRIGHT*, *supra* n. 102, at 167.

¹²⁴ See generally Litman, *Reforming Information Law*, *supra* n. 102, at 617.

¹²⁵ At the same time, copyright gives power to wealthy holders of large copyright portfolios. See generally Benkler, *supra* n. 19, at 181-82 (2003) ("Individuals with a commercial focus to their work and, more significantly, commercial organizations that build their business model around selling information and culture as finished goods benefit from strong protection. These rights are particularly helpful to organizations that own large inventories of existing information and cultural goods and that integrate new production with inventory management. Strong intellectual property rights are particularly harmful to organizations and individuals who produce information without intending to sell their output as a good. This includes non-profit organizations, such as universities, various public interest organizations, the government, and individuals who communicate with each other either as 'amateurs' or as professionals driven by internal motivations, not by a profit motive."); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 408 (1999) (similar); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1906 (2000) ("Firms owning large inventories of copyrighted expression are far more likely to be the unwilling or monopoly-rent-seeking licensor. Others, including in particular non-wealthy individuals, not-for-profit entities, and critics of the licensor's expression, are far more likely to be the frustrated would-be licensee."); Baker, *supra* n. 1, at 949 ("Increases in the scope of copyright protection will predictably most advantage centralized, conglomerate media enterprises and their communications, while most likely disadvantaging nonmarket-oriented participants in the communication order.").

V. Conclusion

Through copyright the law facilitates property ownership that has the potential to deny communication opportunities for speakers and listeners who cannot afford to purchase their own property; it creates an artificial market that has the impact of imposing a fee requirement on speakers and listeners; it imposes this fee even where the communication methodology that the speaker or listener is using is otherwise inexpensive. But the first sale doctrine, several specific statutory exceptions, the multi-factored fair use doctrine, and the reality of copyright enforcement give some leeway to poor users of copyrighted works. In light of the First Amendment's special concern for the poor, this special leeway must constitute part of the "traditional contours of copyright protection" that keep copyright consistent with the First Amendment.¹²⁶ If this special leeway were abandoned, then courts could not simply assume without further analysis (as they now do) that copyright survives First Amendment scrutiny.

In fact, many commentators have observed that all four of the traditional features of copyright law just discussed are threatened by copyright management technologies and the provisions of the Digital Millennium Copyright Act that reinforce them, by the enforcement of mass-market contracts that purport to trump the limiting doctrines of copyright, by cramped interpretations of copyright's limiting doctrines, and by stepped-up enforcement of copyright against poorly-financed speakers and listeners.¹²⁷ Some commentators claim that these

¹²⁶ Indeed, because copyrighted expression is a nonrivalrous good the justification for protecting it with strong property rights—even in instances in which the would-be user cannot afford to pay—is much weaker than in the real or personal property contexts. *See generally* Netanel, *supra* n. 1, at 4 n. 12, 39 n. 161 and accompanying text; Lunney, *supra* n. 120, 994; Volokh & Lemley, *supra* n. 15, at 184-85; Benker, *supra* n. 19, at 205-08 (further distinguishing intellectual property from other property rights); Rubinfeld, *supra* n. 1, at 25 (same).

¹²⁷ *See, e.g.*, Lessig, *supra* n. 7, at 199-200; Litman, Digital Copyright, *supra* n. 102, at 82-85; LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 122-41 (1999); Benkler *supra* n. 19, at 210; Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2064-65 (2000); Benkler, *supra* n. 125, at 413-40; Netanel, *supra* n. 1, at 20-26; Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L. J. 519 (1999); Charles R. McManis, *The Privatization (or 'Shrink-Wrapping') of American Copyright Law*, 87 CAL. L. REV. 173 (1999); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998); Niva Elkin-Koren, *Contracts in Cyberspace: Rights Without Laws*, 73 CHI.-KENT L. REV. 1155 (1998); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L. J. 93 (1997); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998); Reese, *supra* n. 102, at 610-15; Dan Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 168-71 (1999).

developments imperil poorly financed speakers and listeners.¹²⁸ Others counter that these developments benefit the poor by, for example, facilitating price discrimination¹²⁹ or reducing transaction costs.¹³⁰ That debate is beyond the scope of this paper.¹³¹ My claim here is that the debate has a constitutional dimension that has nothing to do with copyright holders' ability to stifle speech they don't like, and everything to do with the special impact of expensive speech on the poor.

¹²⁸ See, e.g., Cohen, *supra* n. 127, at 1812-13 (worrying that contractual price discrimination will deter creators who are now subsidized by limitations on copyright and by institutions like libraries); Cohen, *supra* n. 42, at 510 (arguing that digital rights management technology "[works] redistribution . . . from the public to the copyright owners"); *id.*, at 557-58 (noting that changes could control over progress "toward existing authors and away from poorer (or simply younger) authors"); Reese, *supra* n. 102, at 615-24 (predicting that the decline of first sale may threaten affordability for some users).

¹²⁹ See, e.g., Wagner, *supra* n. 122, at 1027-28; William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1234-40 (1998); Bell, *supra* n. 28, at n. 142; Ginsburg, *supra* n. 112, at 16 (suggesting that "copyright owners could build the redistribution into the pricing scheme."); see also *ProCD, Inc. v. Zeidenberg* 86 F.3d 1447 (7th Cir. 1996).

For more skeptical views about price discrimination, see, e.g., Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001); Benkler, *An Unhurried View of Private Ordering*, *supra* n. 127; Boyle, *supra* n. 42; Cohen, *Copyright and the Perfect Curve*, *supra* n. 128; Netanel, *supra* n. 125, at 1912-15; Gordon, *supra* n. 103.

¹³⁰ See, e.g., Bell, *supra* n. 28, at 580-81 (claiming that access controlled through digital rights management technologies may be more affordable than fair use because of reduced transaction costs).

¹³¹ The larger project of which this paper is a part will gather empirical evidence regarding the effect of recent legal and technological developments on access to copyrighted information by poorly financed speakers and apply my First Amendment analysis to those findings.