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The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property[†]

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I. THE REHNQUIST COURT'S IP/FIRST AMENDMENT JURISPRUDENCE

In the last few years, many pages have been devoted to retrospectives on Justice Rehnquist and the Rehnquist Court,¹ a fair number of which focused on Justice Rehnquist's First Amendment jurisprudence.² I focus here not on Justice Rehnquist specifically, but on the Supreme Court as a whole during Rehnquist's tenure. Specifically, I want to address the Court's view of the role of the First Amendment in intellectual property cases. My thesis is a modest one: while one certainly cannot describe the Rehnquist Court as eager to find a conflict between intellectual property laws and the First Amendment, there is reason to believe that it set the stage for greater First Amendment scrutiny of intellectual property protections. At the very least, the Court left that road open to future courts, which might be inclined to view intellectual property more skeptically.

This conclusion is not, I admit, one that leaps from the pages of the Supreme Court's decisions. In fact, if we look only at the intellectual property cases the Rehnquist Court decided at least in part on First Amendment grounds, we have very little to work with. By my count, the Court decided only four intellectual property cases even partially on First Amendment grounds during Rehnquist's

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1. See THE REHNQUIST LEGACY (Craig M. Bradley ed., 2006); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002); Symposium, *The Rehnquist Court*, 99 NW. U. L. REV. 1 (2004).

2. Some of that discussion has not been charitable. See, e.g., Geoffrey R. Stone, *The Hustler: Justice Rehnquist and "the Freedom of Speech, or of the Press," in THE REHNQUIST LEGACY*, *supra* note 1, at 11, 12 (arguing that "relative to his colleagues, Rehnquist was no friend of the First Amendment").

tenure on the Court,³ five if you count product disparagement as an intellectual property claim.⁴ The Court decided only two of those cases while Justice Rehnquist served as Chief Justice.

There is some irony in this lack of precedent. A good deal of modern intellectual property scholarship focuses on the conflict between intellectual property protection and First Amendment values and related concepts such as “semiotic democracy.”⁵ The Supreme Court, however, appears not to have taken these commentators’ concerns terribly seriously. Moreover, the Court’s inattention to First Amendment concerns cannot be attributed to a lack of interest in intellectual property generally; the Court decided forty-seven intellectual property-related cases during Rehnquist’s tenure on the

3. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (considering the constitutionality of the Copyright Term Extension Act); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (dealing with statutory protection of “Olympic” as a quasi-trademark); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (addressing whether parody can constitute fair use under the Copyright Act); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (dealing with a right of publicity claim under Ohio law).

4. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Product disparagement, or “trade libel” as it is sometimes called, traditionally was regarded as a tort, see RESTATEMENT (SECOND) OF TORTS §§ 623A–52, but commentators have suggested that Congress enacted section 43(a) of the Lanham Act to cover trade libel and product disparagement when it passed the Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:9 (4th ed. 2005).

5. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2 (2004) (arguing that technological changes require “free speech values—interactivity, mass participation, and the ability to modify and transform culture—[to] be protected through technological design and through administrative and legislative regulation of technology, as well as through the more traditional method of judicial creation and recognition of constitutional rights”); see also Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that “copying is good” and noting the impact on First Amendment freedoms of narrowing fair use defense). The term “semiotic democracy” comes from John Fiske, who used the term to describe popular participation in cultural meaning making, which can be frustrated by intellectual property law. JOHN FISKE, *TELEVISION CULTURE* 95, 236–39 (1987); see also William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998) (“In an attractive society, all persons would be able to participate in the process of meaning-making. Instead of being merely passive consumers of cultural artifacts produced by others, they would be producers, helping to shape the world of ideas and symbols in which they live.”); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 146 (1993) (defining semiotic democracy as “a society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values”).

Court, and twenty-six during his tenure as Chief Justice.⁶ To put this

6. The cases, in reverse chronological order, are: *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 125 S. Ct. 2764 (2005) (holding that one who distributes a device with the object of promoting its use to infringe a copyright is liable for the resulting acts of infringement by third parties); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004) (holding that a defendant asserting fair use under the Lanham Act need not prove absence of any likelihood of confusion to sustain defense); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (rejecting false designation of origin claim based on copying of public domain work without attribution); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (holding that the Federal Trademark Dilution Act requires a showing of actual dilution); *Eldred*, 537 U.S. 186 (upholding constitutionality of the Copyright Term Extension Act of 1998); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002) (considering the question of when prosecution history estoppel applies to bar claim of infringement under doctrine of equivalents); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (holding that newly developed plant breeds are patentable subject matter); *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (holding that databases containing individual articles taken from periodicals were not reproduced and distributed “as part of” “revisions” of periodical issues and therefore could not be relicensed by owner of copyright in collective work); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (dealing with the constitutionality of a punitive damages award on a false advertising claim); *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001) (holding that existence of expired utility patent covering product is strong evidence that the design is functional); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000) (holding that a product design is entitled to protection as unregistered trade dress only if it has acquired a secondary meaning); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that state sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State’s activities in interstate commerce); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act’s purported abrogation of sovereign immunity); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55 (1998) (holding that commercial marketing of invention triggers on-sale bar under the Patent Act, even if invention was not actually reduced to practice); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (holding that Copyright Act does not grant right to have jury assess statutory damages, but the Seventh Amendment provides the right to jury trial on all issues pertinent to statutory damages); *Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135 (1998) (holding that the first sale doctrine under Copyright Act is applicable to imported copies); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997) (reaffirming validity of doctrine of equivalents and outlining standards for application); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995) (holding that color alone may serve as a trademark if it has acquired secondary meaning); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew’s adaptation of Roy Orbison’s *Pretty Woman* was a parody protected by fair use doctrine); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (holding that prevailing plaintiffs and prevailing defendants must be treated alike in awarding attorneys’ fees under Copyright Act); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) (holding that inherently distinctive trade dress is protectable under the Lanham Act without showing that it has acquired secondary meaning); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that facts are not copyrightable and that alphabetical arrangement of white page listings lacked the requisite originality for copyright protection); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (holding that the use of a patented invention to develop and submit

information for marketing approval of medical devices under the Federal Food, Drug and Cosmetic Act was not infringement); *Stewart v. Abend*, 495 U.S. 207 (1990) (considering renewal rights of the statutory successors of a deceased author); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (articulating standard for determining when a work should be considered a “work for hire” under the Copyright Act); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (finding Florida statute prohibiting use of the direct molding process to duplicate unpatented boat hulls or knowing sale of hulls preempted by Supremacy Clause); *S.F. Arts & Athletics*, 483 U.S. 522 (finding, among other things, that the First Amendment did not prohibit Congress from granting exclusive use of the word “Olympic” to the U.S. Olympic Committee); *Harper & Row*, 471 U.S. 539 (holding that magazine’s unauthorized publication of quotes from President Ford’s unpublished memoirs was not a “fair use” within meaning of Copyright Act); *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) (holding that descriptiveness defense is unavailable to defendant when plaintiff’s trademark has become incontestable under Lanham Act); *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) (dealing with effect of termination on pre-termination grant of right to create derivative work); *Bose*, 466 U.S. 485 (applying actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), to product disparagement claim, and subjecting lower court’s decision to standard of “convincing clarity”); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that manufacturers of multipurpose equipment cannot be secondarily liable for users copyright infringements as long as the equipment is capable of substantial non-infringing uses); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982) (dealing with the vicarious liability of a manufacturer under the Lanham Act where a third party mislabeled the manufacturer’s generic drug with the competitor’s registered trademark); *Diamond v. Diehr*, 450 U.S. 175 (1981) (finding that while a mathematical formula by itself is not patentable, a developed process containing the mathematical formula is patentable); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (finding a patent holder’s suit to prevent contributory infringement by the party selling an herbicide with instructions for applying it by the patented method did not amount to patent misuse); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (finding living matter patentable as long as it is the product of human invention); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (finding that the issuance of blanket licenses by licensing agencies for composers, writers, and publishers did not constitute price fixing that was per se unlawful under the antitrust laws); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979) (finding that federal patent law does not preempt state contract law); *Parker v. Flook*, 437 U.S. 584 (1978) (finding that when the only new feature of a process is a mathematical formula, the new or improved process is not patentable subject matter); *Zacchini*, 433 U.S. 562 (dealing with a right of publicity claim under Ohio law); *Dann v. Johnston*, 425 U.S. 219 (1976) (holding that a “machine system for automatic record-keeping of bank checks and deposits” was unpatentable on grounds of obviousness); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (finding that a restaurant owner who presented music to his customers by the use of a radio and ceiling loudspeakers did not infringe on the copyright holders’ exclusive right to perform the copyrighted musical works publicly for profit); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that Ohio’s law of trade secrets was not preempted by the patent laws of the United States); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (dealing with an infringement claim for the interception of broadcast transmissions of copyrighted television programs); *Goldstein v. California*, 412 U.S. 546 (1973) (dealing with the constitutionality of a California statute criminalizing the offense of ‘pirating’ recordings produced by others); *United States v. Glaxo Group Ltd.*, 410 U.S. 52 (1973) (holding that where patents were directly involved in antitrust violations, the Government could challenge the patents’ validity even though the owner did not rely on the patents in defending the antitrust claim); *Gottschalk v. Benson*, 409 U.S. 63 (1972) (finding that

in perspective, the Court decided only thirteen intellectual property cases during the twenty years before Rehnquist was confirmed.⁷

Many of the intellectual property cases the Court decided while Rehnquist served were quite significant. And while the Court during that period cannot be characterized as hostile to intellectual property protection,⁸ it took positions in many of these cases that restricted the scope of intellectual property laws. For example, the Court relied on

a certain computer program was a mathematical formula and thus was not patentable subject matter). As with any such collection of cases, the number is subject to some subjective assessment because some of these cases deal with intellectual property issues more squarely than others. For example, I count *Bose*, 466 U.S. 485, as an intellectual property case because it involved a product disparagement claim, which is a form of unfair competition claim. See *supra* note 4. I recognize that others would not count this case, though it is interesting in that it accepted without deciding that the *New York Times v. Sullivan* actual malice standard applied to a claim of product disparagement based on a critical product review. Justice Rehnquist called it “ironic” that the *New York Times v. Sullivan* test, which originated “because of the need for freedom to criticize the conduct of public officials,” was applied to a “magazine’s false statements about a commercial loudspeaker system.” *Id.* at 515 (Rehnquist, J., dissenting).

7. *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969) (considering whether a patent was invalid for obviousness); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (holding that a patent licensee is not estopped from challenging patent validity); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (interpreting performance right under Copyright Act); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (determining availability of attorneys’ fees in trademark infringement litigation under Lanham Act); *Graham v. John Deere Co.*, 383 U.S. 1 (1966) (interpreting nonobviousness requirement of Patent Act); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (finding state law unfair competition claim preempted by Patent Act where state law claim targets copying itself); *Pub. Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111 (1962) (addressing but declining to determine the copyrightability of speeches by public employee); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961) (finding replacement of a spent unpatented element of a combination to constitute permissible repair and not reconstruction); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (interpreting statutory renewal rights of deceased composer); *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (determining interests in statutory renewal rights of author’s widow and illegitimate child); *Mazer v. Stein*, 347 U.S. 201 (1954) (considering copyrightability of works of applied art); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (determining whether a District Court has jurisdiction to award relief to an American corporation for trademark infringements consummated in a foreign country by a citizen and resident of the United States); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952) (determining appropriate damages for copyright infringement).

8. Some of the Rehnquist Court’s intellectual property decisions were quite expansionist. See, e.g., *Eldred*, 537 U.S. 186 (upholding constitutionality of the Copyright Term Extension Act of 1998); *Qualitex*, 514 U.S. 159 (holding that color alone may serve as a trademark provided that it has acquired secondary meaning); *Two Pesos*, 505 U.S. 763 (holding that inherently distinctive trade dress is protectable under the Lanham Act without showing that it has acquired secondary meaning); *Chakrabarty*, 447 U.S. 303 (holding that living matter may be patentable as long as it is the result of human invention).

copyright law's fair use doctrine to protect parodies⁹ and on other doctrinal constraints, such as the originality requirement, to limit the scope of copyright protection.¹⁰ The Court has similarly relied on internal constraints of patent law to limit its scope, including twice revisiting and recognizing the doctrine of prosecution history estoppel, which limits the range of equivalents a patentee may claim as infringing his or her patent.¹¹

Some of these "restrictionist" results can be explained simply as the result of strict constructions of the governing statutes.¹² Frequently, however, the Court's positions have been motivated at least in part by concerns about the effect of excessive protection on the policies underlying other statutory regimes, or on competition more generally. Several recent cases reflect a particular concern about trademark law trenching on areas traditionally reserved to patent and copyright law.¹³ In *TrafFix Devices Inc. v. Marketing Displays, Inc.*, for example, the Court adopted a somewhat broader definition of functionality than appellate courts had been using, concluding that a product feature need not be a competitive necessity to be deemed functional.¹⁴ Instead, a product feature should be deemed functional, and therefore unable to serve as a trademark, if it affects "the use or purpose of the article or if it affects the cost or quality of the article."¹⁵ Moreover, largely because of concerns about the potential for trade dress protection to extend the patent period, the Court held that expired utility patents give rise to a strong presumption of functionality.¹⁶

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the Court showed similar a concern about trademark law interfering with the balance struck by copyright law.¹⁷ In *Dastar*, the Court refused to

9. See *Acuff-Rose Music*, 510 U.S. 569.

10. See *Feist Publ'ns*, 499 U.S. 340 (holding that facts are not copyrightable and that alphabetical arrangement of white page listings lacked the requisite originality for copyright protection).

11. See *Festo Corp.*, 535 U.S. 722; *Warner-Jenkinson*, 520 U.S. 17.

12. See *KP Permanent Make-Up*, 543 U.S. 111; *Moseley*, 537 U.S. 418.

13. See *Dastar*, 539 U.S. 23; *TrafFix*, 532 U.S. 23; *Wal-Mart*, 529 U.S. 205.

14. *TrafFix*, 532 U.S. at 32–33.

15. *Id.* at 32 (quoting *Qualitex Co. v. Jacobsen Prods. Co.*, 514 U.S. 159, 165 (1995)).

16. *Id.* at 34–35.

17. *Dastar*, 539 U.S. at 32–35.

allow a false designation of origin claim against a party that reproduced material in the public domain and failed to attribute the content to the copyright holder.¹⁸ Though to reach its result the Court employed a somewhat tortured definition of “origin,” the key statutory term, it clearly was concerned that allowing a false designation of origin claim in this context would amount to backdoor protection of content. Justice Scalia noted that allowing the claim would “create a species of mutant copyright law that limits the public’s federal right to copy and to use expired copyrights.”¹⁹

The Court has even expressed constitutional objections to the application of intellectual property laws. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁰ the Court, in an opinion by Justice Rehnquist, invalidated the Patent Act’s purported abrogation of state sovereign immunity, leaving states and their instrumentalities, including state universities with large technology transfer offices, immune from infringement lawsuits.²¹

So what can be said of the Rehnquist Court’s treatment of intellectual property? It has on several occasions seen good reason to limit the scope of intellectual property protection to prevent its encroachment on other values. But the Court has not been convinced that intellectual property laws inappropriately burden free speech. In *Eldred v. Ashcroft*,²² the Court’s only decision squarely considering a First Amendment objection to copyright law,²³ the Court was quite dismissive of any potential conflict between copyright and the First Amendment.²⁴ In fact, the *Eldred* decision seems to have placed copyright predominantly outside the First Amendment scheme, at

18. *Id.* at 37–38.

19. *Id.* at 34 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989)) (internal quotation marks omitted).

20. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

21. *Id.*

22. 537 U.S. 186 (2003).

23. Specifically, *Eldred* involved a challenge to extension of the copyright term by the Sonny Bono Copyright Term Extension Act of 1998.

24. *Eldred*, 537 U.S. at 218–22.

least as long as Congress does not alter the “traditional contours of copyright protection.”²⁵

II. CONVENTIONAL WISDOM ABOUT THE IP/FIRST AMENDMENT INTERFACE

The Supreme Court’s disinterest in intellectual property’s impact on free speech interests is consistent with courts’ general disinclination towards seeing First Amendment problems in intellectual property cases.²⁶ Indeed, the conventional wisdom holds that copyright law, through its internal limiting mechanisms such as the idea/expression dichotomy and the fair use defense, adequately protects First Amendment values.²⁷ The Supreme Court clearly embraced the notion that the fair use defense provides sufficient First Amendment protection in *Harper & Row*,²⁸ and it emphasized copyright’s internal safeguards in reaching its decision in *Eldred*.²⁹ The appellate courts also seem to have been convinced that

25. *Id.* at 221 (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”). For a persuasive critique of the Court’s reasoning, see Neil Weinstock Netanel, *Copyright and the First Amendment; What Eldred Misses—And Portends*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 127, 136–39 (Jonathan Griffiths & Uma Suthersanen eds., 2005).

26. See Netanel, *supra* note 25, at 128 (“Courts have almost never imposed First Amendment limitations on copyright, and most have summarily rejected First Amendment defenses to copyright infringement claims.”). Netanel suggests that this reluctance is relatively unique to copyright law, and that courts have been more interested in First Amendment implications of other forms of intellectual property. See *id.* at 129–30. As a relative matter, Netanel is probably right, but courts only seem more concerned in those areas by comparison to copyright, where they have exhibited virtually no concern. Courts’ inattention to First Amendment issues, as Eugene Volokh has said, is “unfortunate, because most intellectual property rules—copyright law, trademark law, right of publicity law, and trade secret law—are speech restrictions: They keep people from publishing, producing, and performing the speech that they want to publish, produce, and perform.” Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 Liqueurmart, and Bartnicki, 40 Hous. L. Rev. 697, 698 (2003).

27. See Alfred C. Yen, *Eldred, The First Amendment, and Aggressive Copyright Claims*, 40 Hous. L. Rev. 673, 676 (2003). Yen cites several cases that make claims about copyright’s internal protections of First Amendment values. See *id.* n.11.

28. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (accepting that copyright’s idea/expression dichotomy “strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression”) (internal citations omitted).

29. *Eldred*, 537 U.S. at 218–22.

copyright's internal safeguards are sufficient: as far as I have been able to determine, no federal court of appeals has ever held that the First Amendment provides a defense distinct from the traditional "fair use" defense of copyright law.

Courts have been somewhat less willing to assert that there is no separate First Amendment defense to trademark infringement. In fact, some appellate courts have held that trademark law's likelihood of confusion test does not sufficiently protect First Amendment interests.³⁰ But those examples are the exception. In most of the cases that have involved serious conflicts with free speech, courts have found or created tools within trademark law to avoid explicit engagement of the First Amendment.³¹ Prior to the Supreme Court's definitive pronouncement last term,³² for example, many courts insisted that fair use could not be found unless the defendant could show that there was no likelihood of consumer confusion, essentially subsuming fair use within the traditional infringement test.³³ Unfortunately, the Supreme Court's decision in *KP Permanent*, which repudiated that view, was rendered purely on statutory grounds. Thus the fact remains that the Supreme Court has never decided a trademark case on First Amendment grounds, even though many trademark cases in lower courts during the Rehnquist years raised serious First Amendment issues.³⁴

30. See, e.g., *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (rejecting approach taken by other circuits that gave no special treatment to expressive works, and following, at least superficially, the *Rogers v. Grimaldi* test); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (adopting a test that protects from liability a defendant who uses a trademark as the title of an expressive work, unless the title has no artistic relevance or is explicitly misleading).

31. See, e.g., 15 U.S.C. § 1125(c)(4)(A), (C) (2006) (providing defenses to federal dilution cause of action for comparative advertising and news reporting); *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3d Cir. 2005) (recognizing nominative fair use defense); *New Kids on the Block v. News Am. Publ'g Inc.*, 971 F.2d 302 (9th Cir. 1992) (articulating nominative fair use defense in part to protect First Amendment interests).

32. See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).

33. See, e.g., *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998). McCarthy holds a similar view with respect to parody, concluding that "parody is no 'defense' to a likelihood of confusion," but "merely a way of phrasing the traditional response that customers are not likely to be confused as to source, sponsorship or approval." 5 J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:153 (4th ed. 1996).

34. See, e.g., *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769 (8th Cir. 1994), cert. denied, 513 U.S. 1112 (1995); *Roy Exp. Co. Establishment v. Columbia Broad. Sys., Inc.*, 672

One of the few areas of intellectual property in which the Supreme Court has recognized an explicit role for the First Amendment is the right of publicity, which the Court addressed in 1977 in *Zacchini v. Scripps-Howard Broadcasting Co.*³⁵ Not surprisingly, however, even though it recognized that free speech interests were at issue, the Court ultimately rejected the defendant's First Amendment defense.³⁶ This decision has been severely, and I think rightly, criticized both on right of publicity and First Amendment grounds.³⁷ Some appellate courts recently have picked up on this criticism and have subjected right of publicity claims to greater First Amendment scrutiny,³⁸ but the Supreme Court has never considered another right of publicity case.³⁹

F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

35. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

36. *Zacchini* was a circus performer whose entire act (which was only a few seconds long and consisted of being shot out of a cannon) was shown on a local news program. *Zacchini* sued, claiming a violation of his right of publicity, despite what appeared to be classic noncommercial use by the defendants. The Court concluded that the use was *not* noncommercial, because it might negatively affect *Zacchini's* ability to generate money for his performance. *See id.* at 563–64, 575–76.

37. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 251 n.122 (2005) (noting that the Court conflated performance value and the value of *Zacchini's* personality and that it inverted the traditional analysis of whether the use was commercial by focusing on the impact of the use on the plaintiff's market rather than on the nature of the defendant's use).

38. *See* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 335 F.3d 1161 (10th Cir. 2003) (concluding that Oklahoma would recognize a fair use defense to state law right of publicity claim that would shield the defendant's parody baseball cards); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (finding defendant's limited edition print featuring Tiger Woods to be non-infringing fair use and thus entitled to First Amendment protection from plaintiff's trademark and right of publicity claims).

39. Like in the trademark area, the Court's refusal to address First Amendment implications of the right of publicity was not for lack of opportunity. *See* *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc), *cert. denied*, *McFarlane v. Twist*, 540 U.S. 1106 (2004) (denying certiorari in case in which former hockey player asserted right of publicity claim based on the use for a character in a comic book of a name similar to his).

III. SOME DEVELOPMENTS THAT MAY AFFECT THE CONVENTIONAL WISDOM

A. Increasing Numbers of IP Events

This story of reluctance to find First Amendment problems in intellectual property cases is not a heartening one for those who see significant conflict in these types of cases. But there are reasons to believe that courts might someday change their tune. As others have observed, the *Eldred* opinion itself leaves the door open, ever so slightly, for challenges to legislation that alters the “traditional contours of copyright protection.”⁴⁰ And at least three other developments may contribute to a change in the legal landscape.

First, increasing adoption and use of digital technologies has led to a rise in the number of “IP events.”⁴¹ In some cases, these events have raised new and different types of legal issues, or at least have changed the nature of old issues so substantially as to require new rules. For example, the VCR enabled users to time-shift an, in addition to raising the question of whether such activity was infringing, forced the Court to consider when the manufacturer of such a multipurpose device, capable of both infringing and non-infringing uses, might be held secondarily liable for infringing uses by its customers.⁴² Similarly, filesharing software significantly complicated analysis of the Audio Home Recording Act’s provision allowing noncommercial copying.⁴³

40. See Netanel, *supra* note 25, at 144–47 (using the Digital Millenium Copyright Act’s anti-circumvention provisions, which forbid access itself, as a possibly objectionable provision even after *Eldred*); Yen, *supra* note 27, at 685–86 (noting that, after the *Eldred* decision, a copyright regime with appropriate limits largely escapes scrutiny, but one without such limits is subject to constitutional doubt).

41. I draw the term “IP events” from Michael Carroll, who has identified an explosion of “copyright events” that digital technologies have let loose. See Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 1 (defining a “copyright event” as “any action in the world that entails the exercise of one or more of a copyright owner’s exclusive rights to copy, distribute, perform, display or adapt information”). As Carroll explains, not all copyright events are infringing, but all implicate copyright law.

42. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

43. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024–25 (9th Cir. 2001) (discussing application of AHRA to Napster’s filesharing software, and concluding that the file exchange was not the type of “noncommercial use” protected from infringement and that the

What distinguishes modern technology from prior technological advancements that affected the copyright system, however, is that digital technology has made possible and visible certain uses with offline analogs that were traditionally considered outside the ambit of intellectual property protection or, at least, were unlikely to be noticed by intellectual property owners.⁴⁴ As Lawrence Lessig explained, the architecture of the offline world made enforcement of intellectual property rights against a large number of private individuals inefficient; as a result, individuals were practically free to make a variety of technically infringing uses of copyrighted material.⁴⁵ Digital technologies upset this equilibrium, making many creative uses of copyrighted material not only easier to disseminate but much more visible to copyright owners. As a result, intellectual property owners now are able to pursue a variety of uses that before would have gone unnoticed. Because many of those uses are private, non-commercial uses, it seems very likely that many of these cases will implicate speech interests more directly than the average cases did in the analog era.

B. Fair Use and First Amendment Values Are Diverging

The second development is internal to copyright law. In those cases in which the Court has been faced with First Amendment issues, it frequently has fallen back on the fair use doctrine and suggested, sometimes explicitly, that the fair use doctrine adequately protects any relevant First Amendment interests. In *Eldred*, for example, the Court determined that the fair use doctrine allows ample room for criticism, comment and parody, and that independent First Amendment review was therefore unnecessary.⁴⁶ But the extent to which the fair use doctrine can be counted on to protect First Amendment interests, perhaps always to some extent overstated, is now in serious doubt.

Act does not cover downloading of MP3 files to computer hard drives); see also 17 U.S.C. § 1008 (2006).

44. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 139–47 (2004).

45. *Id.*

46. *Eldred v. Ashcroft*, 537 U.S. 186, 220–21 (2003).

Two related trends in fair use law over the last twenty-some years have worked together to loosen fair use from whatever First Amendment core it once had. First, the “fair use as a market failure” approach has degenerated fair use into a simple question of whether the defendant’s use might affect the market for the plaintiff’s work.⁴⁷ In other words, the law has increasingly embraced the view that fair use should be found only when the market cannot be counted on to clear transactions between the affected parties, possibly because transaction costs are too high.⁴⁸ Second, the “effect on the market” factor has been viewed increasingly broadly, focusing now not only on the potential effect of the defendant’s use on the market for the plaintiff’s work in its original form, but also on the potential effect on hypothetical derivative markets the copyright owner has not even shown an inclination to exploit.⁴⁹

When this view of fair use predominates and the cost of exploiting derivative markets continues to fall because of advances in technology, it will only be an accident if fair use happens to track speech values. There is no good reason to believe that markets fail only in circumstances in which speech is valuable (except, perhaps in the parody context). If fair use has no normative premise other than market efficiency, it is likely to diverge from First Amendment values, making the Court’s reliance on fair use as a bulwark for speech values increasingly questionable.

One very recent development illustrates this divergence well. The Copyright Clearance Center (CCC), a collective agency that acts as an intermediary between content owners and users, recently announced its development of a product that will allow faculty and

47. See Barton Beebe, *An Empirical Study of American Copyright Fair Use Cases* (Working Paper), abstract available at <http://bartonbeebe.com/workingpapers.htm> (“Preliminary analysis confirms the widely-held belief that factor four (“the effect of the use upon the potential market for or value of the copyrighted work”) is uniquely dispositive” of the fair use analysis) (draft on file with author).

48. Though she resists the association, the concept of fair use as a function of market failure originated with Wendy Gordon. See 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 (1982). For recent work showing her reluctance to embrace this mantle, see Wendy J. Gordon, *The “Market Failure” and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002).

49. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

staff using Blackboard automatically to seek permission for their use of copyrighted material.⁵⁰ The problem with this system is that many of the uses faculty and staff might make of copyrighted material would traditionally be regarded as classic examples of fair use. Teaching, scholarship, and research, for example, three of the uses of copyrighted materials faculty are most likely to make, are explicitly listed as examples of potential fair uses in the preamble of section 107 of the Copyright Act.⁵¹ CCC's program ignores the possibility of fair use and erects a market structure that presumes a requirement of licensing. Yet, in so doing, CCC may make it so; by creating a market for licensing of this material, CCC has a legitimate argument that this use should no longer qualify as fair use when done without permission.⁵² In such a case, the fair use doctrine might not adequately protect academics' First Amendment interests.

C. Restrictions on Commercial Speech Get Greater Scrutiny

The final development is the increasing respect the Court has shown commercial speech, formerly the poor stepchild of First Amendment law. The Court first held that commercial advertising was constitutionally protected in its 1976 ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.⁵³ Though

50. See Copyright.com, Blackboard, <http://www.copyright.com/ccc/do/viewPage?pageCode=i14> (last visited May 16, 2006).

51. 17 U.S.C. § 107 (2006).

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id.

52. *Cf. Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1995) (holding that corporation's unauthorized copying of scientific articles for its researchers was not fair use). This case arose in a corporate setting, of course, and is therefore distinguishable from potential academic uses. Nevertheless, the case turned significantly on the fact that there was a market for copies of individual articles, which CCC provided. For a general description of the problem of feedback of licensing practices into copyright law, see James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law* 3–21 (July 26, 2006) (unpublished manuscript, draft on file with author and available at <http://papers.ssrn.com/abstract=918871>).

53. 425 U.S. 748 (1976) (holding unconstitutional a Virginia statute that prohibited pharmacists from advertising drug prices).

the Court “seemingly pulled back on that protection in the 1980s[, it] has been providing more and more protection [to commercial speech] since the early 1990s.”⁵⁴ Particularly notable was the Court’s decision in *44 Liquormart, Inc. v. Rhode Island*,⁵⁵ which overturned *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁵⁶ a case that allowed legislatures to choose to regulate truthful, non-misleading speech. In *44 Liquormart*, Justice Stevens stated that a “state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.”⁵⁷

Even more striking given commercial speech’s long pedigree as outcast, a plurality in *44 Liquormart* was willing to jettison, at least in part, the controlling *Central Hudson Gas & Electric Corp. v. Public Service Commission* test for evaluating restrictions on commercial speech.⁵⁸ Justice Thomas suggested that, at least in some circumstances, any distinction between commercial and non-commercial speech should be abolished,⁵⁹ and Justice Scalia indicated that he might be persuaded to make such a ruling in the future.⁶⁰ Given the recent changes on the Court, it is entirely possible

54. Volokh, *supra* note 26, at 732. Cases in the 1990s contributing to this expansion include *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

55. 517 U.S. 484.

56. 478 U.S. 328 (1986).

57. *44 Liquormart*, 517 U.S. at 510.

58. In *Central Hudson*, the Court adopted a four-part analysis of commercial speech restrictions. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

59. *44 Liquormart*, 517 U.S. at 518–28.

60. *Id.* at 517–18.

that the Court will subject at least some commercial speech regulations to greater First Amendment scrutiny.

A higher level of review, if it comes about, will likely have much more significant consequences for trademark protection than for copyright. Copyright has its own constitutional authority, and the Court in *Eldred* made clear that the IP clause confers immunity from First Amendment analysis, at least when copyright law takes its “traditional” form. Trademark protection, by contrast, is based on Congress’ power to regulate interstate commerce and should be given no more weight than any other restrictions on commercial speech.

Yet, trademark law often has not taken the First Amendment seriously because, courts have suggested, it restricts only deceptive commercial speech that lacks serious First Amendment value.⁶¹ And the Supreme Court has indeed indicated that deceptive commercial speech may be treated differently for First Amendment purposes.⁶² But even if characterizing trademark law in such a manner exempts traditional trademark protection,⁶³ it is not likely to answer

61. See *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002) (noting that “trademark law permissibly regulates misleading commercial speech”); see also *World Wrestling Fed’n Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 430 (W.D. Pa. 2003) (same).

62. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 n.22 (1984).

Though false and misleading commercial speech could be deemed to represent a category of unprotected speech, the rationale for doing so would be essentially the same as that involved in the libel area, viz, there is no constitutional value in false statements of fact. Moreover, since a commercial advertiser usually seeks to disseminate information about a specific product or service he himself provides and presumably knows more about than anyone else, there is a minimal danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.

Id. (internal citations and quotations omitted).

63. Eugene Volokh suggests that there is a potential distinction to be drawn between dilution laws and the types of advertising bans that the Court has struck down in its modern commercial speech cases. He suggests that those advertising laws restrict communication of factual information (i.e., the price of pharmaceuticals), while dilution laws restrict the use of trademarks as “part of the nonfactual (image-building, attention-grabbing, or simply amusing) component of the promotion.” Volokh, *supra* note 26, at 733. Though he makes clear that, as applied to noncommercial speech, such a distinction would not get dilution laws off the hook, the prospect of trademark proponents advancing such an argument is deeply ironic. For many years, commentators have argued that expansive trademark protection encourages and rewards inefficient advertising expenditures. Advertising, they argue, very often lacks serious informational value, and instead serves only a persuasive function that provides little or no

satisfactorily any objections to more recent doctrinal developments. Trademark law now targets a good deal of speech that is not deceptive. Consequently, at least some of modern trademark law would have to be judged like any other commercial speech regulation. And in *Central Hudson*, the Court stated that although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from “regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.”⁶⁴ Protection against dilution, for example, would seem to fall squarely within that area of concern—it prohibits the non-misleading use of particular words to pursue a clearly nonspeech-related commercial policy.⁶⁵

Additionally, trademark owners now frequently assert their rights against uses that, at the very least, blur the line between commercial and non-commercial uses.⁶⁶ Unlike uses of a mark in connection with specific products or services, these uses comment on or transform the mark for some expressive purpose. Such uses are difficult to categorize as commercial or non-commercial, but to the extent they

consumer benefit. See, e.g., Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999). Supporters of trademark protection have consistently rejected such arguments, claiming that advertising promotes social welfare because it predominantly provides information to consumers and may signal quality. See, e.g., WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 173–74 (2003); Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 J. POL. ECON. 796 (1986) (arguing that advertising investment alone can signal product quality even when the informational content of the ads is nothing). Thus, it would be quite ironic for supporters of trademark protection to resist First Amendment defenses by claiming that dilution protection does not restrict communication of information, but only of nonfactual content.

64. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 556 n.9 (1980).

65. The same difficulties apply, probably to an even greater extent, to the right of publicity and of trade secret protection, which traditionally have not required evidence of confusion or deception. The right of publicity targets unauthorized commercial uses of an individual’s identity, without regard to whether such uses cause any confusion. Likewise, several recent cases that impose restraints on third-party disclosure of trade secrets raise serious concerns that *Eldred* seems to leave open. See, e.g., Bruce Japsen, *Paper Barred from Using Data*, CHI. TRIB., Jan. 7, 2006 (discussing injunction entered by California Superior Court barring a local newspaper from publishing information about a company’s clinical trials involving an experimental blood substitute, which the paper had acquired pursuant to the California Public Records Act).

66. See, for example, cases cited *supra* note 32.

are non-commercial and not deceptive, the conflict seems even greater.

Few courts have attempted to categorize these types of uses. Those that have generally have turned to the Supreme Court's factors in *Bolger v. Youngs Drug Products Corp.*, considering: (1) whether the communication is an advertisement; (2) whether it refers to a specific product or service; and (3) whether the speaker has an economic motivation for the speech.⁶⁷ Under this test, a variety of uses that have been condemned by courts might be protected. Take, for example, the parody advertisement that the defendants in *Anheuser-Busch, Inc. v. Balducci Publications* ran on the back of their humor magazine.⁶⁸ There, the "Michelob Oily" ad was not a real advertisement, and referred to the Michelob product only for its parodic effect. The speaker surely was economically motivated, in much the same way that newspaper publishers and the producers of *Saturday Night Live* are commercially motivated. Yet, the ad also is clearly distinguishable from the situation that was trademark law's traditional concern: uses by a competitor of a mark similar to the plaintiff's for the purpose of identifying the source of the defendant's own products or services.

If the Supreme Court does begin to require greater scrutiny of trademark protection, courts will be forced to analyze cases like *Anheuser-Busch v. Balducci* in much different ways than they traditionally have. In addition to having to categorize the speech at issue, for example, courts will be constrained by *Cohen v. California*, which reasoned that restricting the ability to use particular words runs "a substantial risk of suppressing ideas in the process."⁶⁹ Perhaps the commercial speech cases can be distinguished in some instances or First Amendment concerns can be overcome in other ways,⁷⁰ but subjecting trademark protection to greater scrutiny will at least require courts to engage the issue specifically.

67. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

68. See *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769 (8th Cir. 1994), cert. denied, 513 U.S. 1112 (1995).

69. *Cohen v. California*, 403 U.S. 15, 26 (1971).

70. See Volokh, *supra* note 26, at 733.

IV. CONCLUSION

As I said near the beginning of this Article, my thesis is a modest one. I cannot predict that the Roberts Court will begin an IP/First Amendment revolution. But while the Rehnquist Court was not particularly concerned about the impact of intellectual protections on free speech, it left the door open to greater scrutiny. Given some of the recent developments within and without intellectual property law, courts that are more concerned about a conflict may reconsider their traditional reluctance to address the issue.