NOTES

FAIR USE PROTECTION FOR NEWS REPORTING: WHERE DOES THE FIRST AMENDMENT STAND?*

INTRODUCTION

In *Smith v. California*,[1] a litigant argued[2] that copyright and the right of free speech are fundamentally inconsistent, and that "[c]onsequently, either all copyright law is invalid as an unconstitutional impingement on the rights of Free Speech and Press . . . . or else any material that is copyrighted is thereby removed from the realm of Free Speech."[3] This absolutist approach has never been considered by courts. Courts have seldom delineated the respective claims of copyright and the first amendment.[4]

This Note examines copyright and the first amendment as they relate to news reporting. It argues that this is a sensitive area where copyright protection may be sacrificed for a free press even when use of a copyrighted work is not protected by the fair use doctrine. This approach eradicates the chance of an exclusive right being conferred upon one reporting a historical event first, and enhances the freedom to acquire information in the news dissemination process so that the right to publish is compromised in only the most extreme circumstances.

Part I of the Note describes the public interest protection within the copyright statute for news reporting and emphasizes instances where the idea-

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1. 375 U.S. 259 (1963) (defendant convicted under state obscenity law for selling The Tropic of Cancer).

2. M. Nimmer, Nimmer On Copyright, § 1.10 [A], at 1-68 (1984) (citing Brief of Respondent at 8, *Smith*, 375 U.S. 259).

3. Id. See Sobel, Copyright and the First Amendment: A Gathering Storm? 19 Amer. Soc. of Composers, Artists & Pub. 43, 80 (1971). The literal meaning of the first amendment has never been the law. Most constitutional scholars doubt that the majority of the framers of the Constitution intended the first amendment to be an absolute prohibition on all government actions that might in any way curtail freedom of the press. The exact meaning of the first amendment has been vigorously debated for nearly two hundred years. W. Overbeck & R. Pullen, Major Principles of Media Law 35 (1982).

Some commentators believe that because the Copyright Clause, the first Copyright Act, and the first amendment were contemporaneous, it is clear that the Founding Fathers intended the Copyright Act and the first amendment to have entirely separate spheres of influence. Nimmer, supra note 2, at 1-67.

4. Id. See Rosemont Enterprises, Inc. v. Random House, 256 F. Supp. 55 (S.D.N.Y.), rev'd, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968); Keep Thomson Governor Committee v. Citizens for Gallen Committee, 457 F. Supp. 957, 960 (D.N.H. 1978).

expression dichotomy and the fair use doctrine are sufficient to safeguard the public interest. Part II discusses first amendment protection of a free press, balanced against copyright protection. It examines court decisions which balance free press and other nonspeech interests. Part III asserts that news reporting, distinguishable from other kinds of uses protected by fair use, is an area where copyright is more likely to be outweighed by the first amendment values of a free press.

Freedom of expression, a constitutional guarantee secured by the first amendment, has long been safeguarded by the judiciary.[5] The Supreme Court has described it as a protection "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[6]

> The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the first amendment to the constitution. It is for this reason that the first amendment protects not only the dissemination but also the receipt of information and ideas.[7]

Indeed, the "American privilege to speak one's mind"[8] has resulted in a multiplicity of voices that has been called the Democratic Dialogue.

Copyright also has a constitutional basis. In Article I, Section 8, Congress is granted the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[9] Legal scholars have interpreted this clause to contain two premises: (1) that the public will benefit from the creative activities of authors; and, (2) that an author's copyright monopoly will stimulate authors to realize fully their creative capacity.[10] The first premise supports "the spirit of the First Amendment . . . to the extent that courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest."[11] Yet, the second premise, which confers upon the copyright owner a monopoly on the financial rewards of her work, supports the view that limitations imposed by the copyright law and liberties espoused by the first amendment may conflict.[12]

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5. New York Times v. Sullivan, 376 U.S. 254, 269 (1964). See Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Dennis v. United States, 341 U.S. 494 (1951); Brandenburg v. Ohio, 395 U.S. 444 (1969); Keyishian v. Board of Regents of The University of The State of New York, 385 U.S. 589 (1967); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Branti v. Finkel, 445 U.S. 507 (1980); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

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

7. Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J. dissenting).

8. Bridges v. California, 314 U.S. 252, 270 (1941).

9. U S. Const. art. I, § 8, cl. 8.

10. See generally Nimmer, § 1, at supra note 2; A. Latman and R. Gorman, Copyright for the Eighties, ch. 1 (1981).

11. *Rosemont*, 366 F.2d at 311 (Lumbard, J. concurring with Hays, J.).

12. Unlike the first amendment, the underlying philosophy behind copyright also has an

While the rationale for obtaining profit from one's labor in a copyrighted work may be the same as generating profit from any other business (e.g., from producing consumer goods, or from providing services), copyrights also often create monopolistic controls on knowledge, an abridgement of expression, and a major annoyance to newsgatherers, librarians, educators, and scientific researchers.[13] The copyright statute protects private interests, but they are of a different nature than the public interests the first amendment protects.

The Copyright Act,[14] does contain provisions which protect public interests as well. For example, the protection afforded a copyright holder has never extended to history.[15]

> The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain . . . . [A]bsent wholesale usurpation of another's expression, claims of copyright infringement where works of history are at issue are rarely successful.[16]

Additionally, the protection given to an author's copyrighted work extends only to the expression of ideas, and not to the ideas themselves.[17] This principle attempts to reconcile the competing interests of the copyright clause: rewarding an individual's creativity while at the same time permitting the public to enjoy the benefits of using the same subject matter.[18] Furthermore, these public benefits are fostered by the noncopyrightability of works of the United States government,[19] the duration limitation on copyright ownership,[20] and

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economic basis, "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 884 (S.D. Fla. 1978) (quoting *Mazer*, 347 U.S. at 219), aff'd, 626 F.2d 1171 (5th Cir. 1980).

13. Overbeck & Pullen, supra note 3, at 132.

14. The 1976 Copyright Act, Title 17 U.S.C., 90 Stat. 2541 et. seq., Public Law 94-553 (effective Jan., 1978).

15. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980).

16. Id.

17. 17 U.S.C. § 102(b) (Supp. 1981); see Sid and Marty Krofft Television Productions, Inc. v. Mc Donald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) (citing *Mazer*, 347 U.S. at 217-18 and Baker v. Seldon, 101 U.S. 99, 102-03 (1879)).

18. See Copyright Clause, text accompanying note 9 supra.

19. Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise. 17 U.S.C. § 105 (1982). A 'work of the United States Government' officer or employee of the United States Government as part of that person's official duties. 17 U.S.C. § 101 (1982).

20. 17 U.S.C. § 302 (1976) establishes the length of the basic copyright: from creation of

the fair use doctrine.[21] The financial reward guaranteed a copyright holder is thus balanced against these public concerns.

Despite the existence of several provisions in the Copyright Act that support public use of copyrighted works, the fair use doctrine has been characterized as the total embodiment of those rights guaranteed by the first amendment.[22] Courts reconcile the competing interests of free expression and public usage by the fair use doctrine, seldom reaching first amendment defenses.[23] Courts allude to, but seldom articulate, instances where the first amendment may protect use of a copyrighted work even when such use is not "fair" within the meaning of the fair use doctrine.[24]

I
PUBLIC INTEREST PROTECTION WITHIN THE COPYRIGHT STATUTE

A. Idea-Expression Dichotomy

The idea-expression dichotomy generally provides a workable balance between copyright protection and a free press.[25] Section 102(b) of the 1976 Copyright Act makes it clear that copyright protection does not extend to ideas.[26] Copyright protects the author's expression of ideas, not the ideas themselves.[27] One may use an author's individual expression only with the author's permission. For example, a book published by one author dealing with Detroit inner-city life will be different from a book published by another author on the same subject. The authors' creative expression will be protected by the Copyright Act, while the idea the authors chose to write about, Detroit

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the work if it is published after January 1, 1978, subsisting for the author's life plus fifty years. The 1976 Act also ended the perpetual common law copyright. 17 U.S.C. § 303 (1976).

The duration limitation is closely tied to the goal of copyright, for the incentive that copyright provides diminishes over time. However, the need for use of the work in the public interest may occur even before the work's copyright terminates. Note, Copyright Infringement and the First Amendment, 79 Colum. L. Rev. 320, 322 (1979).

21. See text accompanying notes 47-80 infra.

22. *Keep Thomson Governor*, 457 F. Supp. at 960 (citing Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir.), cert. denied, 434 U.S. 1014 (1977)).

23. Id.; *Triangle*, 626 F.2d at 1178; Suid v. Newsweek Magazine, 503 F.Supp. 146 (D.D.C. 1980).

24. See Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. 1067, 1073 (S.D.N.Y. 1983), rev'd, 723 F.2d 195 (2d Cir. 1984), rev'd, — U.S. —, 53 U.S.L.W. 4562 (1985); Roy Export Co. Establishment of Vaduz, Leichtenstein v. Columbia Broadcasting, Inc., 672 F.2d 1095, 1100 (2d Cir. 1982).

25. *Triangle*, 626 F.2d at 1179 (Brown, J., concurring in part and dissenting in part); see *Marty Krofft*, 562 F.2d at 1170:

> [T]he impact, if any, of the first amendment on copyright has not been discussed by the Court. We believe this silence stems not from neglect but from the fact that the idea-expression dichotomy already serves to accomodate the competing interests of copyright and the first amendment.

(Footnote omitted).

26. 17 U.S.C. § 102(b)(Supp. 1981); see *Triangle*, 626 F.2d at 1179.

27. Werlin v. Reader's Digest Ass'n, Inc., 528 F. Supp. 451, 461-62 (S.D.N.Y. 1981).

inner-city life, is not. If the second author chose to use excerpts from the first author's book, she could do so only with the latter's permission.

Similarly, no one may claim originality as to facts [28] or discoveries.[29] This favors free dissemination of news by promoting open discussion of public and private affairs.[30] Claims of copyright infringement where works of history,[31] accounts of current events, or discussion of government affairs are at issue are rarely successful, unless it is clear that one author has totally usurped another author's expression.

Nevertheless, the line which separates an author's idea from her expression is difficult to draw. No litmus test exists to clearly delineate between an author's contribution to a literary or artistic work by her own mode of individual expression, and the idea the author conveys through her expression. Although an author is seldom allowed to claim monopoly over an idea, her creative expression may embellish or bring forth characters, plot, or a reporting style so original that the idea itself would be copyrightable as a form of artistic expression. For example, the Walt Disney character of Donald Duck, or the character of Jessica Fletcher on CBS's *Murder She Wrote* may be considered copyrightable ideas.

On the other hand, an author's expression of an issue or historical event may be so invaluable to the public that courts will allow use of the expression without the owner's permission. In such a case, courts might look to the amount of copyrighted work an alleged infringer used, to determine if an author's *expression* was used; and if it was used, then the amount of expression would be weighed against its value to the public to determine whether the particular use should be considered an infringement. Courts generally conclude that verbatim reproduction or close paraphrasing of a work constitutes copyright infringement.[32] The intention of the alleged infringer may control the outcome. Where the amount used is so great that it is apparent that the use was not purely incidental to news reporting, or some other public purpose, the

28. "Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an 'author' in either the constitutional or statutory sense." Nimmer, supra note 2, § 2.11 [A], at 2-158 (footnotes omitted) (quoted in Brief for Defendants, at 36 n. 20, Harper & Row v. The Nation, 723 F.2d 195 (2d Cir.)).

29. 17 U.S.C. § 102(b) (1982).

30. See *Hoehling*, 618 F.2d at 978; see also *Keep Thomson Governor*, 457 F. Supp at 960.

31. See *Hoehling*, 618 F.2d at 974:

> A grant of copyright in a published work secures for its author a limited monopoly over the expression it contains. The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypotheses. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain.

32. *Suid*, 503 F. Supp. at 148.

infringement would appear to be intentional. In *Roy Export Company v. Columbia Broadcasting Company*,[33] for example, the Court of Appeals for the Second Circuit held a television network liable for copyright infringement because the network showed, on a news show, compilations consisting of entire excerpts of Charlie Chaplin films.[34] The apparent intention was capital gain to the network, rather than the public interest purpose of informing the public.[35] In dicta, however, the Second Circuit implied that in some rare circumstances, where the "informational value" cannot be separated from an author's expression, both may be used by the public.[36]

There are certain areas of creativity where a work's expression is important in communicating ideas to the public.[37] A critic or reviewer, for example, "would often have difficulty writing pungent and effective analysis without abstracting some material from her subject's work."[38] Often the visual impact of a graphic work in a news article will make such a unique contribution that "[no] amount of words describing the idea of the [photograph or etching can] substitute for the public insight gained through the [actual picture]."[39] Additionally, in an artist's sculpture or painting, an idea and its expression may be one and the same with the expression providing nothing new or additional over the idea.[40] Protecting the expression in such circumstances would in ef-

33. 672 F.2d 1095 (2d Cir.), cert. denied, 459 US. 826 (1982).

34. Id. See also Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982)(educational cooperative's large scale video-tape reproduction of copyrighted works originally broadcast and taken from television airways constitutes copyright infringement); Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 463 F. Supp. 902 (S.D.N.Y. 1978), aff'd, 621 F.2d 57 (2d Cir. 1980) (network's broadcast of portions of a student-produced film biography of a champion wrestler was an infringement).

35. *Roy Export*, 672 F.2d at 1098-99 (imposing compensatory damages for use of film).

36. Id. at 1099, 1100.

37. Nimmer, supra note 2, § 1.10[C], at 1-82.

38. See Note, supra note 20, at 325; cf. *Marty Krofft*, 562 F.2d at 1167 ("[N]ear identity may be required in some cases . . . . because the expression of those works and the idea of those works are indistinguishable."); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971)("When the 'idea' and its 'expression' are . . . inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law.").

39. Nimmer, supra note 2, § 1.10[C], at 1-83. Nimmer further observes:

> It has been said that "a work of art cannot be described; it can only be experienced." This is obviously true, as anyone who attempts to describe the "idea" of the Mona Lisa or of Michelangelo's Moses must realize. To the extent that a meaningful democratic dialogue depends upon access to graphic works generally, including photographs as well as works of art, it must be said that little is contributed by the idea divorced from its expression.

Id. at 1-82. Compare *Bernard Geis*, 293 F. Supp. 130.

40. *Marty Krofft*, 562 F.2d at 1168:

> [T]he expression of a jeweled bee pin contains nothing new over the idea of a jeweled bee pin. . . .[T]he idea of a plaster statute of a nude will probably coincide with the expression of that idea when an inexpensive manufacturing process is used. There will be no separately distinguishable features in the statute's expression over the idea of a plaster nude statute.

fect confer upon the copyright owner a monopoly over the idea.[41] Thus, when the idea and its expression are inseparable, or when it is necessary to use one author's work in another piece, copying the expression may not be barred.

These examples indicate that a copyright owner's monopoly does not always bar copying in the public interest. The 1976 Copyright Act permits copying an author's expression, or the complete reproduction of copyrighted works, for several uses, including certain scholarly, educational, or archival purposes.[42] In these situations, the idea-expression dichotomy collapses to permit copying of an author's expression. For example, photocopying of entire works for educational purposes is often permitted. A simple balance, where ideas fall on the free speech side of the scale and specific forms or arrangements of ideas fall on the copyright side[43] of the scale, is therefore not applicable in every case. Conflicts between interests protected by the first amendment and by the copyright law can also be resolved by application of the fair use doctrine.[44]

B. The Fair Use Doctrine

Fair use is said to be a "privilege to use the copyrighted material in a reasonable manner without [the copyright owner's] consent, notwithstanding the monopoly granted to the owner."[45]

The judicially developed doctrine of fair use allows "courts to avoid rigid application of [the rights guaranteed owners by] the copyright statute when, on occasion, [protection of these rights] would stifle the very creativity [the copyright statute was] designed to foster."[46] This " 'rule of reason' [was] fashioned by Judges to balance the author's right to compensation for [her] work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other."[47] Although the fair use doctrine is now set forth in the new statute[48], resolving a fair use claim "depends on an examination of facts in each case [and] cannot be determined by resort to any

41. Id. See note 38 supra.

42. See 17 U.S.C. § 108 (Supp. 1982) (Limitations on exclusive rights: Reproduction by libraries and archives); 17 U.S.C. § 110 (Supp. 1981) (Limitations on exclusive rights: Ephemeral recordings).

43. "On the copyright side [of the scale], economic encouragement for creators must be preserved and the privacy of unpublished works recognized." Nimmer, supra note 2, § 1.10[B], at 1-72.

44. 17 U.S.C. § 107 (Supp. 1982). See notes 48 and 49 and accompanying text infra.

45. *Rosemont*, 366 F.2d at 306 (quoting Ball, Law of Copyright and Literary Property 260 (1944)).

46. *Iowa State*, 621 F.2d at 60. The 1909 Copyright Act, 17 U.S.C. § 1-32 (rev'd 1976), did not include a fair use provision.

47. *Triangle*, 626 F.2d at 1174 (citing A. Latman, Fair Use of Copyrighted Works 5 (Senate Committee on Judiciary Study No. 141960)).

48. 17 U.S.C. § 107 (1982) reads as follows:

> Notwithstanding the provisions of section 106, 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

arbitrary rules or fixed criteria."[49]

The fair use doctrine evolved in three phases.[50] Phase I, the traditional fair use era (1841 to 1960), primarily protected scholarly uses, such as criticism and parody, and incidental uses.[51] *Time, Inc. v. Bernard Geis Associates*[52] in 1968, marked the beginning of Phase II, the expansion of fair use. Courts began to view fair use as a public interest exception to copyright protection. After *Bernard Geis*, using portions of a copyrighted work for news reporting or classroom discussion, without an author's permission, was usually allowed because of the public benefit derived from such uses. Phase III further broadened the scope of fair use by allowing wholesale copying with new technological devices. The 1973 case, *Williams and Wilkins Co. v. United States*,[53] exemplifies this era. The Supreme Court there held that photocopying of entire copyrighted articles in medical journals, by a government medical research institute and its library, was fair use as long as the nonprofit institute was devoted to the advancement and dissemination of knowledge.[54] Recently, *Sony Corporation of America v. Universal City Studios, Inc.*[55] allowed whole-

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

49. *Iowa State*, 621 F.2d at 60 (citing Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, reprinted in 1976 U.S. Code Cong. & Ad. News 5679:

> The amount of copyrighted material that may be used without ranging beyond the boundaries of fair use varies. Compare Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided court, 420 U.S. 376 (1975) (systematic photocopying of entire articles held a fair use) with Henry Holt & Co. ex rel. Felderman v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938)(use of three sentences of a book in an advertising pamphlet held not a fair use).

50. A. Latman, Remarks to Copyright Course: Lecture on Fair Use, New York University School of Law (Nov. 1983)[hereinafter Latman Remarks]; see A. Latman, The Copyright Law: Howell's Copyright Law Revised and the 1976 Act, 203-20 (5th Ed. 1979).

51. Latman Remarks, supra note 50. See Folsom v. Marsh, 9 Fed. Cas. 342, 348, No. 4901 (C.C.D. Mass. 1841); Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941); Loew's Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955), aff'd sub. nom. Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U.S. 43 (1958).

52. *Bernard Geis*, 293 F. Supp. 130.

53. 487 F.2d 1345 (Ct. Cl. 1973), aff'd per curiam by an equally divided Court, 420 U.S. 376 (1975).

54. Id. The Institution restricted copying on an indiviual request to a single copy of a single article of less than 50 pages. 487 F.2d at 1348. There would be no economic injury to the publisher from such copying. Id. at 1362.

55. — U.S. —, 104 S. Ct. 774 (1984); compare Pacific and Southern Co. Inc. v. Duncan, 744 F.2d 1490 (11th Cir. 1984)(court disallowed videotaping of news broadcasts by a news clipping service which sold the tapes to subjects of the news reports).

sale copying of television programs with home video tape recorders.[56]

Courts are reluctant to disallow reproduction of entire works by new technological devices. Where the copyright owner's rights have been sacrificed under the guise of fair use, the public interest factor remains the heart of the courts' rationale. Indeed, while public interest is the reason the fair use doctrine was developed, it has never explicitly or directly been a criterion in determining whether a use is fair.[57]

C. *Fair Use and News Reporting*

Generally, fair use of a copyrighted work in news reporting is not an infringement of copyright.[58] However, use that may be vital to the dissemination of news and information may not be considered "fair" under the ad hoc balancing of the courts. Furthermore, fair use protection is not always available whenever the defense is invoked for "public interest" uses.[59] In these instances, proponents of the public interest use may argue that while the use of the copyrighted work falls outside the ambit of fair use protection, it should still be protected by the first amendment. [60]

In most cases, the first amendment issue is never reached. However, legal scholars believe that in certain situations the first amendment should prevail over copyright concerns.[61] There is not yet a judicial consensus on whether the first amendment rights of free press are subsumed under the doctrine of fair use, or whether the first amendment can be considered a separate defense to a claim of copyright infringement.[62] Courts will only consider the first amendment implications in cases where the use is in the public interest but fair

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56. *Sony*,— U.S. at —, 104 S.Ct. at 778.

57. Latman Remarks, supra note 50; Sobel, supra note 3 at 79-80; Latman & Gorman, supra note 10 at 473.

58. 17 U.S.C. § 107 (Supp. 1982).

59. "The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of public importance." Latman & Gorman, supra note 10, at 475 (quoting *Iowa State*, 621 F.2d at 61).

60. See *Triangle*, 445 F.Supp. at 881-82; *Wainwright*, 558 F.2d at 95.

61. See *Triangle*, 626 F.2d at 1182 n.4.

62. Latman & Gorman, supra note 10, at 474. See *Triangle*, 626 F.2d at 1184 (Tate, J., concurring):

> [W]ith proper application of the fair use principle, it is difficult to visualize the rare occasions when the first amendment may entitle quotation from or reproduction of copyrighted material not otherwise available for fair use. I am, for instance, inclined to agree that . . . because fair use adequately served the interest of free expression, no additional first amendment protection [should be] extended.

Id. See also *Wainwright*, 558 F.2d at 95 ("Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine.").

It is also of some significance to note that "the two cases which have touched on the area of First Amendment-Copyright Clause relations had no holding that the First Amendment allowed infringement which the doctrine of fair use was held not to permit." Walt Disney Productions v. Air Pirates, 345 F. Supp. 108, 116 (N.D. Cal. 1972), rev'd. and remanded in relevant part, 581 F.2d 751 (1978), cert. denied sub nom. O'Neill v. Walt Disney Productions, 439 U.S. 1132 (1979).

use and idea-expression fail to provide defenses to copyright infringement.[63]

II
REACHING THE FIRST AMENDMENT ISSUE

A. Speech Interests v. Other Interests

The first amendment says that "Congress shall make no law. . . abridging the freedom . . . of the press. . . ."[64] Americans have long fought to preserve the invaluable rights and liberties espoused by these words. They have been construed to mean not only the freedom to publish the news, but to publish it ". . . without censorship, . . . or prior restraints . . ."[65] However, in cases involving conflicts between copyright holders and the press, first amendment protection is a defense of last resort. This is because ". . . the right of free speech is not absolute and must be analyzed in light of other legitimate interests."[66] A delicate balance is used to determine which interest deserves greater protection under the particular circumstances presented.[67] Despite this balancing test,[68] restraints on a free press are the exception.[69] The publication of truthful information about matters of public importance is entitled to judicial protection even though the state has a legitimate interest in not having the information published. Once the information reaches the press, the press is usually free to publish it.

B. Speech Interests v. State Interests

In the area of national defense, where there is a stated need for secrecy, freedom of the press has usually prevailed. In *New York Times v. United States*,[70] the United States government sought to prevent the New York Times and the Washington Post from publishing the Pentagon Papers, classified doc-

63. Schnapper v. Foley, 667 F.2d 102, 116 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982); see *Marty Krofft*, 562 F.2d at 1171 ("There may be certain rare instances when first amendment considerations will operate to limit copyright protection"); *Triangle*, 626 F.2d at 1184(Tate, J. concurring)(Under limited circumstances, a first amendment privilege may and should exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts or expressions.).

64. U.S. Const. amend. I.

65. New York Times v. United States, 403 U.S. 713, 717 (1971) (Black, J. concurring) [hereinafter Pentagon Papers Case].

66. *Triangle*, 626 F.2d at 1181 (Brown, J. concurring in part and dissenting in part).

67. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 106 (1979) (Rehnquist, J. concurring).

68. In the past, courts used ad hoc balancing which ". . . would weigh the interest in free speech as against the nonspeech interest in a given case." This approach was found to be "unsatisfactory." Nimmer, supra note 2, Sect. 1-10(A), at 1-65. Currently, courts employ "definitional balancing", which while balancing speech and nonspeech interests, does so in order to define what constitutes speech within the meaning of the first amendment. See id., at 1-66 for a more thorough discussion.

69. L. Tribe, Constitutional Law 728 (1982) [hereinafter Tribe]. The United States Supreme Court has spoken of prior restraints as exceptional. See Pentagon Papers Case, supra note 65; Sobel, supra note 3, at 66.

70. 403 U.S. 713.

uments dealing with the United States' involvement in Vietnam. "The government's claim was that publication of the documents would prolong the war by providing the enemy with helpful information and would embarass the United States in the conduct of its diplomacy."[71]

The Supreme Court held for the press, concluding that,"[i]n the absence of governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the area of national defense and international affairs may lie in an enlightened citizenry, in an informed and critical public opinion, which alone can protect the values of democratic government."[72]

In *Nebraska Press Association v. Stuart*[73], the United States Supreme Court confronted a conflict between a state's interest in assuring criminal defendants a fair trial and the first amendment guarantee of a free press. *Nebraska Press* involved the brutal slaying of a family which had attracted a substantial amount of publicity. The Supreme Court found that the impact of the publicity on prospective jurors was too speculative to justify abridging the fundamental liberties of the press.[74]

The Court was also "concerned with protecting the communications media from burdens incompatible with the first amendment" regarding invasion of privacy.[75] In *Cox Broadcasting Corp. v. Cohn*[76], for example, it was held that a state may not hold reporters liable for the publication of a rape victim's name obtained from judicial records.[77] The court concluded that "[t]he commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are . . . events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[78] Moreover, even if reporting matters of public importance is inaccurate, constitutional protections of free expression preclude redress for such false reports absent proof that the publisher knew of their falsity or acted in "reckless disregard" for the truth.[79]

The magnitude of the nonspeech interests in these cases illuminate the importance of a free press. The crucial determinant in balancing freedom of the press against nonspeech interests is the overriding need of the public to be

71. Tribe, supra note 69, at 729.

72. *Pentagon Papers Case*, 403 U.S. at 728 (Stewart, J., concurring).

73. 427 U.S. 539 (1976).

74. Id. at 569; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (absent an overriding interest articulated in findings, the trial of a criminal case is open to the public); see Gannett Co. Inc. v. DePasquale, 443 U.S. 368 (1979); Tribe, supra note 69, at 625; cf. Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (application for stay of Louisiana trial court's order restricting media coverage of trial granted by Justice Powell).

75. Hill, Defamation and Privacy Under the First Amendment, 76 Col. L. Rev. 1205, 1207 (1976).

76. 420 U.S. 469 (1975).

77. Id. at 491.

78. Id. at 492.

79. 376 U.S. at 279-80.

informed. "Nowhere . . . are the guarantees of freedom of speech and the press . . . more ironclad, than in the spread of information involving public affairs."[80]

C. *Free Press Interests v. Copyright Interests*

Balancing freedom of the press against another speech interest,[81] copyright, involves a different kind of analysis. The dissemination of news protected by the free press guarantee, would be severely curtailed if no protection were afforded to the process by which news is assembled.[82] The press must assemble and disseminate information lawfully. Consequently, it must adhere to copyright laws. But if copyright laws abridge liberties guaranteed by a free press, should those laws defer to the first amendment, absent exceptional circumstances?

Since several provisions of the copyright law were designed to protect first amendment interests,[83] courts find it difficult to determine exactly when they should go beyond these statutory protections to reach broader constitutional protection.[84] News reporting is one area where copyright protection should be minimal. Factual[85] and historical information are ". . . not the creation of the writer, . . . [the producer, the publisher, or the network] but . . . a report of matters that ordinarily are *publici juris* . . . the history of the

80. New York Times, Nov. 18, 1983, col 2, at A1.

81. It can be said that the Copyright Act and the first amendment both were designed to protect "speech interests" as opposed to the nonspeech interests protected by other constitutional provisions. Both advocate a marketplace for sharing and stimulating ideas, creativity and craftmanship in both the written and spoken word, in a variety of media.

82. Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J. dissenting).

83. See text accompanying notes 17 through 24 infra.

84. This is especially true since many litigants evoke the first amendment defense in a somewhat frivolous manner, as a last hope in cases where lack of a first amendment defense is fairly clear. See *Air Pirates*, 345 F. Supp. at 108, where the court denied a first amendment defense for the appropriation of Walt Disney characters in pornographic comic books. Obviously in this case, the defendants could have created their own cartoons to relay their pornographic messages and had no need to use Walt Disney characters under the first amendment. The court stated that "[i]t can scarcely be maintained that there are *no* other means available to defendants to convey the message they have, nor even is it clear that other means are not available within the chosen genre of comics and cartoons." Id. at 115. Also, in *Roy Export*, 672 F.2d at 1099, the defendants, under a first amendment rationale, attempted to defend unauthorized broadcasts of Charlie Chaplin's motion pictures. Yet, the court would not allow a first amendment defense because Chaplin's death itself was newsworthy, not the films he made. Id. at 1100. Moreover, in Robert Stigwood Group Ltd. v. T. O'Reilly, 346 F. Supp. 376, 382-83 (D. Conn. 1972), the defendants performed unauthorized productions of Jesus Christ Superstar. They contended that their performances were protected by the free exercise clause of the first amendment. The court implied, however, in dicta that this, too, was a bogus defense. See also *Encyclopedia Britannica*, 542 F. Supp. at 1181 (The court did not allow defendants'a fair use defense in the verbatim copying of several works.); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979) (Defendants who copied a Dallas Cowboy's poster unsuccessfully argued prior restraint as a defense.).

85. Predominantly factual works are singled out for particularly thin copyright protection. Kepner-Tregoe, Inc. v. Carabio, 203 USPQ 124 (E.D. Mich. 1979).

day."[86] The Framers of the Constitution did not intend "to confer upon one who happens to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."[87] Because all people should have access to news, the subsequent use of news coverage is one area in which invoking first amendment protection should be given great weight, even where the assembling and dissemination of that news are violative of other statutory constraints. For example, news stories or photography may be copyrighted, but that copyright does not restrict reporters other than those that own the copyright, from reporting or summarizing the events contained in the coyrighted articles or from using pictures similar to those copyrighted.

III
BALANCING SPEECH INTERESTS

In a broad sense, ". . . the spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest . . . ."[88] Yet, no court has concluded that in balancing copyright interests against free press interests, the latter should always prevail. Such a rule would undercut the premise of both interests: to encourage dissemination of ideas; and to stimulate circulation of information to the public.

Nonetheless, the speech interests in news reporting should outweigh speech interests of copyright holders as the Copyright Act was not intended to inhibit press activities by prescribing a limited use of copyrighted words.[89] Open discussion of "public affairs and public officials" is protected by the first amendment. Prohibiting such rights truncates much-needed discussion,[90] even if such discussion involves copyrighted works. Hence, news reporting is one area where it may be in the public interest to deny absolute copyright protection, and where a "constitutional limitation on copyright" would be well-founded.[91]

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86. International News Service v. The Associated Press, 248 U.S. 215, 234 (1918).

87. *Rosemont*, 366 F.2d at 311 (Lumbard, J., concurring).

88. Id. The fact that an article covers a newsworthy subject or event does not automatically eliminate the author's rights in his literary property as there are limits to how much a news article may legitimately take from a copyrighted work. *Harper & Row*, 723 F.2d at 213 (Meskill, J. dissenting).

89. 723 F.2d at 209.

90. *Sullivan*, 376 U.S. at 296-97 (Black, J. concurring).

91. See *Wainwright*, 558 F.2d at 95 (quoting Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press? 17 UCLA L. Rev. 1180, 1200 (1970)); *Schnapper*, 667 F.2d at 108-9 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5672). See also *Triangle*, 626 F.2d at 1184 (Tate, J. concurring).

> I would wait until squarely faced with the attempted prohibition of a use of a copyrighted expression not protected by fair use but necessary for the adequate expression of thought. In such a case, the proposed use might . . . neither reduce the value of the plaintiff's copyright nor exploit his expression (the values sought to be advanced

In *Harper & Row Publishers, Inc. v. Nation Enterprises*,[92] the Court of Appeals for the Second Circuit attempted to establish a workable rule, limiting copyright monopoly in news reporting. The Second Circuit held that "[w]here information concerning important matters of state is accompanied by a minimal borrowing of expression, the economic impact of which is dubious at best, the copyright holder's monopoly must not be permitted to prevail over a journalist's communication."[93]

In *Harper & Row*, the defendant, The Nation Magazine, published an article containing excerpts and information from former president Gerald Ford's memoirs at the same time that President Ford was being considered for the republican party's 1980 Presidential nomination.[94] The article, 2250 words in length, summarized the factual highlights and announced the expected publication date of Ford's memoirs, an autobiography[95] entitled *A Time To Heal*. In his negotiations with Harper & Row, Ford had agreed not to disseminate to the media[96] any information pertaining to his memoirs because the publishers had entered into an exclusive licensing agreement with Time Magazine and the Reader's Digest to print advance excerpts. Since The Nation article was published before the Time and Reader's Digest excerpts, Harper & Row sued The Nation for breach of contract.[97] After a non-jury trial, the United States District Court for the Southern District of New York[98] held The Nation liable for $12,500 in damages for copyright infringement.[99]

Harper & Row sued The Nation despite the well-established practice of newspapers publishing news articles about soon-to-be-published books, even

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by copyright protection), and it would then be appropriate to consider this factor in weighing this sensitive First Amendment issue concerning fundamental values of a free society.

Id. Accord *Rosemont*, 366 F.2d at 311 (Lumbard, C.J. concurring with Hays, J.).

92. 723 F.2d 195. The public interest in maintaining a free press is seldom articulated in first amendment terms. In *Williams & Wilkins*, 487 F.2d at 1354, for example, compensation was sought for government photocopying of copyrighted medical journals. The Court relied on a public interest rationale, stating it was ". . . convinced that medicine and medical research will be injured by holding these particular practices to be an infringement." In addition, ". . . there may well have been an unarticulated public interest in immunizing activity where the personal, individual focus of the library user is present." Latman & Gorman, supra note 10, at 474-75.

93. 723 F.2d 208. But see *Meeropol*, 560 F.2d at 1068 ("The line which must be drawn between fair use and copyright infringement depends on an examination of the facts in each case. It cannot be determined by resort to any arbitrary rules or fixed criteria.").

94. Brief of Defendant-Appellants-Cross Appellees, Harper & Row Publishers, Inc. v. Nation Enterprises, Nos. 83-7327, 83-7277, at 1-2 [hereinafter Brief of Defendants].

95. ". . . The book included depictions of Ford's childhood, his extensive career in Congress, his family life, his perceptions of a number of public figures, and the number of paths he followed after serving as President." *Harper & Row*, 723 F.2d at 198.

96. Id.

97. *Harper & Row*, 501 F. Supp. 848 (S.D.N.Y. 1980) (state law claims dismissed as preempted by the Copyright Act, 17 U.S.C. § 301).

98. 557 F. Supp. 1067 (S.D.N.Y. 1983) (Owen, J.).

99. The opinion of the court consists of six and one-half pages of text, but cites only one case: an 1841 decision. Brief of Defendants, supra note 94, at 2.

though the books were to be serialized in another periodical.[100] Such news articles combine aspects of book reviews and news.[101] Book reviews introduce an author's work to the public and should be safeguarded from claims of copyright infringement by the first amendment. The reasons supporting an author's freedom to write and publish works require a similar freedom of prepublication circulation among book reviewers.[102]

The Second Circuit reversed, holding for the defendant, under the Copyright Act.[103] The court based its decision on the doctrine of fair use, although the publication of the article rests within the core of first amendment values. Defining The Nation article as a news story, and the material reported therein as newsworthy, the court found that using copyrighted material for reporting purposes weighs heavily in favor of a finding of fair use.[104]

In its opinion, the Second Circuit recognized the essential need to strike a definitional balance between the first amendment and the Copyright Act[105] stating, "[n]owhere could the need to construe the concept of copyrightability in accord with First Amendment freedoms be more important than in the instant case."[106] The court held that the first amendment should protect the defendant's use even if copyright protection were not available. To allow a statute "to impede the harvest of knowledge so necessary to a democratic state would be detrimental to American society."[107]

Despite its rationale, the *Harper & Row* court failed to establish a worka-

100. Brief of the New York Times Co., Scientific American, Inc., the New York Review of Books, The Progressive, Inc., and the Reporters Committee for Freedom of the Press, Amicus Curiae, Nos. 83-7237, 83-7277 (June 1983), at 4 [hereinafter Brief of New York Times]; see New York Times, March 27, 1976, at 9, col. 1; New York Times, Sept. 23, 1976, at 1, col.6.

> When the press learns of newsworthy material contained in a soon to be published book about controversial public events, the decision to publish an article is as routine as it is when newsworthy information comes from other sources . . . . The journalistic imperative is not only to publish a story but to do so as promptly as possible.

Brief of New York Times, at 3. See The Nation, April 7, 1979, at 365, col. 1.

101. The plaintiff in the *Harper & Row* case attempted to show that the information contained in the disputed article was not "news." See 501 F. Supp. at 851; Brief of Defendants, supra note 94 at 23. The District Court also supported this proposition, holding that the article was not ". . . such news, 'hot' or otherwise, as to permit use of author Ford's copyrighted material." 557 F. Supp. at 1072. In its reversal of the lower court opinion, however, the Second Circuit Court of Appeals stated that neither the statutory language nor relevant case law indicates that so-called stale news is not considered news. *Harper & Row*, 723 F.2d at 207. Further, the Appellate Panel said judges should not delve into questions of newsworthiness as long as there exists an informational purpose. Margolick, The Nation Ruling: News and the Public Domain, New York Times, Nov. 18, 1983, at B4, col. 1.

102. Estate of Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 244 N.E. 250, 296 N.Y.S. 2d 771, 782-83 (1968).

103. *Harper & Row*, 723 F.2d at 209.

104. Id. at 208. The Court also weighed other factors used in a fair use analysis: amount and substantiality (the Nation article used no more copyrightable material than was appropriate to report the news and generate political comment); effect on marketability (the article had at most a speculative economic impact on the copyrighted work's market).

105. Id. at 204.

106. Id.

107. Id. at 205, 208.

ble first amendment standard to be followed by courts in subsequent cases. Instead of establishing a well-defined principle, the Second Circuit, like other courts, molded fair use factors to fit the perspectives of their judicial panel.

The malleability of the fair use doctrine is well-illustrated by the Supreme Court's recent reversal of the Second Circuit ruling in *Harper & Row*.[108] In a majority opinion written by Justice O'Connor, the Court protected the copyright owner's economic interest through a very narrow definition of the scope of fair use.[109] The Court refused to extend fair use protection to uses of works prior to publication, warning that to do so would destroy the financial incentives of authors. The fact that the author was a public figure does not deprive him of such copyright protection, Justice O'Connor added. In his dissenting opinion, Justice Brennan, joined by Justices White and Marshall, said most of what the magazine quotes was information, not protected expression, and characterized the majority opinion as a clear curtailment of journalists' free use of knowledge and ideas.

The scope of fair use protection in journalism primarily has been shaped by two cases : *Rosemont Enterprises v. Random House, Inc.*[110] and *Time, Inc. v. Bernard Geis Associates*.[111] These two cases are often cited to support fair use protection of information dissemination. *Bernard Geis* involves the delivery of news to the public, while first amendment liberties in *Rosemont* were less seriously threatened. The court in *Rosemont* decided a dispute between two authors who wished to write about the same subject. Since there is no judicial consensus regarding fair use or first amendment protection for writings, or other artistic works, the courts were inconsistent in analyzing the two cases. The *Rosemont* defendants were protected by a public interest or first amendment rationale; *Bernard Geis* defendants, however, won on a fair use analysis. These landmark decisions show the failure of federal courts to distinguish the public interest/fair use rationale from the public interest/first amendment rationale. Clearly, no court has gone so far as to say that an author who uses another's copyrighted work has no first amendment protection. Therefore, depending on use, the absence of fair use protection under the statute, does not preclude a first amendment defense.

Rosemont involved the unauthorized use of a series of copyrighted articles about Howard Hughes in Look Magazine owned by one author and used by another author who wished to write about Howard Hughes.[112] Hughes had formed Rosemont Enterprises, Inc. to acquire the copyrights in the articles in an attempt to prevent Random House from publishing his biography. Prior to

108. — U.S. —, 53 U.S.L.W. 4562 (1985). The Supreme Court decision was published after this Note went to press. The backwards step taken by the majority in its analysis of the scope of fair use underscores the arguments set forth herein.

109. Id.

110. 256 F. Supp. 55 (S.D.N.Y.), rev'd, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

111. 293 F. Supp. 130 (S.D.N.Y. 1968).

112. *Rosemont*, 366 F.2d at 304.

the formation of Rosemont, Random House had engaged a writer to draft the ". . . [b]iography of [Mr.] Hughes who by reason of his remarkable exploits and achievements, primarily in the aviation and motion picture fields, had become quite a public figure despite a publicized passion for personal anonymity."[113] The Court of Appeals for the Second Circuit held the defendants were protected by the fair use doctrine, but espoused that protection in public interest terms.[114]

Bernard Geis involved the unauthorized copying of the photographs of the assassination of John F. Kennedy.[115] Life Magazine owned the copyright to the film from which the photographs were taken and sued the defendants, the writer and publisher of a study of Kennedy's assassination which contained sketches of the photographs.[116] Allowing the owner a monopoly in the only photographs taken of this historic event would abridge the public's first amendment interest in having the fullest information available on the assassination. The Southern District Court of New York based its decision for the defendants on the fair use principles articulated in *Rosemont*.[117] There,

> [t]he Court took a somewhat liberal view of the fair use principle. Judge Moore emphasized the factor of "public interest in the free dissemination of information" and found that the "public benefit" to be derived from the challenged work was in no way affected by any motive of defendant for commercial gain.[118]

The courts in these cases, and other fair use cases, fit the fair use doctrine to the facts at their discretion, without distinguishing between the fair use defense and the first amendment privilege. Since the "scope and extent of fair use falls within the discretion of the Congress" and "the limitations of the first amendment are imposed upon Congress itself", the ambit of these two limitations is totally different.[119] In other words, fair use is proscribed by Congress, and defined by legislative intent (which is vague because the statute lists factors without indication of exactly what they mean).[120] First amendment freedoms, however, cannot be usurped by the whims of legislators.

Fair use generally protects copying of a work when the work's marketa-

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113. Id. at 305.

114. Nimmer, supra note 2, at 1-88 (citing *Rosemont*, 366 F.2d at 306-9); compare the District Court's opinion which emphasized that an author cannot utilize the ". . . fruits of another's labor . . ." in lieu of independent research. 256 F. Supp. at 65. The Second Circuit Court of Appeals disagreed as a matter of law. Cf. *Hoehling*, 618 F.2d 972 (which approves *Rosemont*, but emphasizes the necessary similarity of the plots of the two works). See Nimmer, supra note 2, at 1-88. The Court in *Hoehling* cites *Rosemont* for the proposition that a second author may make significant use of a prior work, so long as he does not bodily appropriate the expression of another. *Hoehling*, 618 F.2d at 980.

115. 293 F. Supp. at 131-32.

116. Id. at 132.

117. Id. at 145.

118. Id. (citing *Rosemont*, 366 F.2d at 307).

119. Nimmer, supra note 2, at 1-87.

120. Id.

bility is not materially lessened. The amount and substantiality of the material used without permission, and the effect of such use on the market are two factors courts consider in deciding fair use cases. They have been codified in Section 107 of the 1976 Copyright Act. Another factor in Section 107 pertains to uses which include news reporting. Balancing all these factors, it seems that the first amendment privilege can be enforced even though it appears that the market appeal of the copied work may be injured despite a minimal amount of copying.

Since so many factors come into play in such circumstances (e.g., How much is a minimal amount? Does a minimal amount vary according to medium? Is a minimal amount for a commercially exploited product different if that product's author is a novice?), courts are reluctant to define the parameters of fair use protection not only for journalists, but for any copyright owner. Unfortunately, this failure to define a workable standard leaves the journalistic community without notice as to what it can and cannot do. Such uncertainity may have a chilling effect on journalists, since the constraints upon the journalist's reporting will be entirely left to the discretion of the judiciary.

CONCLUSION

Traditional fair use is being replaced by a broader conceptualization of the doctrine due to a need for increased access to news and information through the electronic media. Whereas the old Copyright Act allowed the copyright holder to maintain a monopoly, the 1976 Act is pro-user. Today, use of a copyright holder's work is almost taken for granted. There is a massive amount of photocopying within educational institutions, as well as widespread home video taping. Yet, the legislature has lagged behind technological changes in photocopying, home video recording, computers, cable television, and other forms of telecommunications. The fair use provision, originally fashioned by courts, has finally been drafted into the Copyright Act, but the statute merely alludes to the public interest aspect of its protection. Such ambiguity is neither pro-user nor pro-owner. The absence of a standard system or license whereby the press can compensate copyright owners (or be put on notice as to just how much material they can use without an owner's consent) may thwart news reporting. It may also abuse owner's rights if courts tend to hold in favor of journalists.

Whether the fair use doctrine protects first amendment interests or not, the legislature must make journalists aware of when they can use these defenses. More specifically, journalists should be put on notice as to whether the fair use doctrine can be construed to encompass first amendment rights; if not, its factors should be formulated as clear guidelines or rules for the journalistic community. "To some extent this may inevitably mean that the author's power to grant exclusive licenses in certain areas will have to be modified."[121]

121. Id. at 1-92.

Indeed, this has already happened in the compulsory licensing provisions applied to areas like cable television and jukeboxes. Perhaps the legislature should articulate examples, similar to those in the Act's compulsory licensing scheme, which clearly delineate how much of a copyrighted work can be used without an author's permission, and establish a scheme for compensating authors. For example, one could use material by paying a small fee to a collection entity. Availability of information to the public would not be sacrificed, and the copyright owner would be compensated. Further, this would allow a newsclipping service to quickly and efficiently provide its patrons with news or other information without an author's permission.

Additionally, the legislature should describe cases or situations where certain use of a work would be permissible without compensating the owner. For example, a reporter could be allowed to quote up to 1,000 words from a soon-to-be published source in a book review article without seeking the author's permission as long as the book review is 3,000 words or more. All journalists could be allowed to use 200 words of any other work which would enhance their news or feature story as long as the owner of the work used is given the appropriate credit. Too many restraints on news reporting in an age of rapid electronic access might delay reporting.

Journalists who attempt to adhere to numerous inconsistent court decisions may forego reporting vital information or may disregard restrictions imposed by inconsistent fair use holdings in the interest of getting newsworthy events to the public.

Unless the legislature sets some clearer standard, fair use will continue to be a malleable concept, allowing the varying personalities of judicial panels to shift their views of what is and is not fair use according to their politics. The protection afforded by the doctrine is left up to judicial discretion. A conservative Supreme Court, for example, ruling in favor of free enterprise, might give the copyright owner's monopoly greater weight than the public interest protections the fair use doctrine were intended to allow. Further, such a Court also would have the discretion of ruling that all first amendment defenses are encompassed in the doctrine. Hence, basic first amendment protections would be unavailable to journalist-defendants in cases where copyright and free press interests are balanced.

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