

William & Mary Law Review

Volume 20 (1978-1979)
Issue 1

Article 4

October 1978

Constitutional Fair Use

Michael D. Brittin

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Repository Citation

Michael D. Brittin, *Constitutional Fair Use*, 20 Wm. & Mary L. Rev. 85 (1978),
<https://scholarship.law.wm.edu/wmlr/vol20/iss1/4>

Copyright c 1978 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

NOTES

CONSTITUTIONAL FAIR USE*

The first amendment commands that "Congress shall make no law . . . abridging the freedom of speech."¹ Notwithstanding this prohibition, the copyright clause of the Constitution empowers Congress to enact legislation granting authors, for a limited time, "the exclusive right to their writings."² The most recent exercise of this affirmative mandate is the Copyright Revision Act,³ which became effective January 1, 1978.⁴ The new Act, subject to certain limitations,⁵ grants the copyright owner exclusive rights to reproduce, adapt, publish, perform, and display his copyrighted work.⁶ The Act thereby sanctions a qualified abridgement of the freedom of speech.

A law imposing a limited restraint on speech is not necessarily unconstitutional. The first amendment does not give absolute protection to every utterance;⁷ its reference to "no law" has not been interpreted literally.⁸ Significant, though diminishing, limitations on the freedom of expression remain⁹ because some expressions con-

* The original draft of this paper won the 1978 Nathan Burkan Competition at the Marshall-Wythe School of Law, the College of William and Mary.

1. U.S. CONST. amend. I.

2. U.S. CONST. art. I, § 8, cl. 8. The clause, in its entirety, gives Congress 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."

3. Copyright Revision Act of 1976, 17 U.S.C.A. (1977).

4. All sections of the Copyright Revision Act of 1976 became effective January 1, 1978, except sections 118, 304(b) and chapter 8, which took effect on October 19, 1976.

5. Statutory limitations on the exclusive rights of authors may be grouped into two categories. The first category is the doctrine of fair use. See 17 U.S.C.A. § 107 (1977); text accompanying notes 47-64 *infra*. The second category contains a number of specific exemptions from copyright control. See Copyright Revision Act of 1976, 17 U.S.C.A. §§ 108-112 (1977). For a thorough treatment of the exemptions itemized in the new Act, see Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 BULL. COPYRIGHT SOC'Y 215 (1977).

6. Copyright Revision Act of 1976, 17 U.S.C.A. § 106 (1977); see H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 61, reprinted in [1976] U. S. CODE CONG. & AD. NEWS 5659, 5674.

7. See *Roth v. United States*, 354 U.S. 476, 482 (1957).

8. Despite Justice Black's arguments that "no law" should be interpreted as "no law," the Court has rejected such an interpretation of the first amendment. See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961) (Black, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Black, J., dissenting).

9. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, —, 97 S. Ct. 2691, 2708 (1977) (dictum) (first amendment protection of commercial speech does not extend to false, deceptive, or misleading advertising); *Miller v. California*, 413 U.S. 15, 23 (1973) (obscene material is

tribute nothing to the unfettered dialogue that the guarantee of free speech was meant to secure. Legislation affecting first amendment freedoms, however, is subject to a heavy burden of justification and must withstand strict judicial scrutiny.

Copyright law protects expression. A person who copyrights his speech obtains a limited monopoly on the expression of his ideas; other persons may not copy that expression unless the owner's permission is obtained and, in some instances, a royalty is paid. If a copyrighted expression is appropriated unlawfully, the owner's rights are enforceable judicially; the infringer may be liable for damages or may be enjoined¹⁰ from using the copyrighted material. The prohibition against copying an expression, however, does not extend to the idea itself;¹¹ ideas may not be copyrighted.¹² Copying a work does not preclude others from using it or from dealing with the same subject matter; rather, it precludes reproduction of a similar text.¹³ Copyright thus limits the freedom of speech to the extent that it prohibits "servile imitation"¹⁴ of a copyrighted expression.

If only verbatim copying were prohibited, there would be little need for inquiry into the relationship between copyright and the first amendment. Restrictions against reproduction of the expression of an idea, when use of the idea is unrestricted, would seem to

not protected by the first amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (defamatory statements concerning a public official published with actual malice are not protected constitutionally); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (lewd, profane, libelous, and insulting words are not protected by the first amendment). Laws punishing perjury and fraud are other accepted limitations on freedom of speech.

10. See Copyright Revision Act of 1976, 17 U.S.C.A. §§ 501-502, 504 (1977).

11. A leading case representing this fundamental principle is *Baker v. Selden*, 101 U.S. 99 (1879). See *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.") (footnote omitted). See also Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1570 (1963); Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 16 ASCAP COPYRIGHT L. SYMP. 30 (1968).

12. The new Act states that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ." Copyright Revision Act of 1976, 17 U.S.C.A. § 102(a) (1977). This rather expansive suggestion of the scope of copyright protection is followed by an important caveat: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* § 102(b).

13. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 14 (1967).

14. *Sayre v. Moore*, 102 Eng. Rep. 139, 139 n.(b) (K.B. 1785) (Lord Mansfield).

detract inappreciably from the substance of first amendment values. The problem, however, is not so easily dismissed. The line between an idea and its expression is not always distinct.¹⁵ Moreover, something more than the mere theft of literal text is protected by copyright; were it otherwise, "a plagiarist would escape by immaterial variations."¹⁶ Precisely how much more is protected is a recurring question in the law of copyright. Infringement is defined in copyright law as substantial similarity, lying somewhere between "complete and literal similarity"¹⁷ and complete dissimilarity.¹⁸ Within this ill-defined area of substantial similarity lies the greatest potential for conflict between the first amendment and copyright.¹⁹

In the last decade commentators began to explore this potential conflict between copyright and the first amendment.²⁰ Although lower federal courts increasingly have been sensitive to this issue,²¹

15. See note 113 *infra* & accompanying text.

16. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.), *cert. denied*, 282 U.S. 902 (1931).

17. 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 13.03[A], at 13-15 (1978).

18. See *id.* Courts and commentators have developed a number of tests to aid in making the difficult determination of substantial similarity. Compare *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931) (infringement exists if there are sufficiently similar "patterns" shared by the two works) with *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933) (infringement exists if the "audience" or an "ordinary observer" would get the same idea from the copy as they would from the original) and *W. H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82, 87 (6th Cir. 1928) (infringement exists if there is a sufficient quantity of "common errors"). Professor Nimmer discusses two types of substantial similarity: (1) comprehensive nonliteral similarity and (2) fragmented literal similarity. Comprehensive nonliteral similarity occurs "where the fundamental essence or structure of one work is duplicated in another [resulting in] comprehensive similarity but no word for word or other literal similarity." 3 NIMMER, *supra* note 17, § 13.03[A][1], at 13-16. Fragmented literal similarity is literal similarity which is not comprehensive. *Id.* § 13.03[A][2], at 13-27 through 13-28. See generally Fleming, *Substantial Similarity: Where Plots Really Thicken*, 19 ASCAP COPYRIGHT L. SYMP. 252 (1971); Sorensen & Sorensen, *Re-examining the Traditional Legal Test of Literal Similarity: A Proposal for Content Analysis*, 37 CORNELL L.Q. 638 (1952).

19. Goldstein, *Copyright and The First Amendment*, 70 COLUM. L. REV. 983, 984 (1970).

20. See, e.g., Goldstein, *supra* note 19; Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161 (1975); Perlman & Rhinelander, *William & Wilkins Co. v. United States: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355, 403-10; Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43 (1971).

21. See, e.g., *Wainwright Secs. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978) ("Some day [courts may be required] to

the Supreme Court has not identified the "constitutional parameters of copyright."²² This Note will identify the ways in which copyright law and the first amendment may conflict and attempt to provide a framework by which those conflicts, if in fact they exist, may be reconciled.

OBJECTIVES OF COPYRIGHT AND THE FIRST AMENDMENT

The First Amendment

The first amendment's guarantee of freedom of speech defies strict definition;²³ its limits have changed with the "felt necessities of time."²⁴ Through the years the right of free speech has expanded gradually,²⁵ a trend indicative of the Supreme Court's continued

distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment.'") (quoting Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1200 (1970)); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978) (although the defendant's use of a copy of the plaintiff's publication was not protected by the doctrine of fair use, the court held that an injunction against the defendant's use of that publication would violate the first amendment); *Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc.*, 364 F. Supp. 16, 22 (S.D.N.Y. 1973) ("While Congress may limit [first amendment] rights to prevent . . . copyright infringement . . ., such limitation must be drawn narrowly, so as . . . [to avoid] unnecessary impingement on the right of free speech."). A number of other courts, however, have refused to accept a first amendment defense in infringement cases. *See, e.g., United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974) (first amendment defense rejected because "no restraint [was] placed on the use of an idea or concept"); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376, 383 (D. Conn. 1972) ("free exercise does not include the wholesale appropriation of another's literary, artistic and musical works"); *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971) ("Defendants' First Amendment argument . . . can be dismissed as flying in the face of established law.") (citations omitted).

22. *Lee v. Runge*, 404 U.S. 887, 888 (1971) (Douglas, J., dissenting from the denial of certiorari). The Court, in *Smith v. California*, 375 U.S. 259 (1963), implicitly rejected an argument that copyright and the first amendment are fundamentally inconsistent. *See* 1 NIMMER, *supra* note 17, § 1.10[A], at 1-67 n.19; Sobel, *supra* note 20, at 68, 70. *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977) (5-4 decision), in which the Court noted, with apparent approval, that "Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.'" (citations omitted).

23. Scholars have long debated the meaning of the free speech guarantee. *See, e.g., Z. CHAFEE, FREE SPEECH IN THE UNITED STATES* (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); P. KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* (1962); A. MIEKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

24. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

25. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 148 (1967) ("The modern history of

solicitude for first amendment freedoms.

There is less disagreement that the guarantee of freedom of speech reflects "a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open."²⁶ The validity of ideas and opinions may be appraised and the truth discovered only when free expression exists.²⁷ The liberty to speak one's thoughts is a right valued "both as an end and as a means,"²⁸ it is a right indispensable both to a self-governing society and to the realization of individual fulfillment.²⁹

Copyright

Neither the new Copyright Revision Act nor its legislative history state the purpose of copyright. The Constitution is more helpful; it provides that Congress is empowered to enact legislation "[t]o promote the progress of science and useful arts."³⁰ Unfortunately, however, "[t]he history and background of the formulation and adoption of the . . . copyright clause is largely unrecorded."³¹ The clause was adopted in its present form without debate.³² James Madison, alone among the Framers to comment about copyright, relegated discussion of the clause to one paragraph in *The Federalist*.³³

the guarantee of freedom of speech . . . has been one of a search for the outer limits of that right."). In the last fifteen years the Court has increased the number of the categories of communication protected by the free speech guarantee. The first amendment now protects commercial speech, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); defamatory statements concerning public officials if published without malice, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); offensive language, *Cohen v. California*, 403 U.S. 15 (1971); and sexually explicit matter if not obscene, *Miller v. California*, 413 U.S. 15 (1973).

26. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.). See also *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jackson, J.); *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) (L. Hand, J.).

27. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

28. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

29. See *id.*

30. The meaning of this introductory phrase of the copyright clause rarely has been considered by the Court. For some examples, see *Goldstein v. California*, 412 U.S. 546 (1973); *Mazer v. Stein*, 347 U.S. 201 (1954); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

31. Perlman & Rhinelander, *supra* note 20, at 395. At the Constitutional Convention, the Committee on Detail, which drafted the copyright clause, left no records on the subject. See Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 112-14 (1929).

32. 1 NIMMER, *supra* note 17, § 1.01[A]; see 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 508-10 (rev. ed. 1937).

33. The paragraph reads:

Congress passed the first American copyright statute in 1790.³⁴ Its express purpose was identical to that of its English ancestor, the Statute of Anne: "An Act for the encouragement of learning."³⁵ This explicit statement of purpose has been confirmed repeatedly by courts and commentators. Copyright, then, is an expression of public policy based on "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors"³⁶

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

THE FEDERALIST No. 43 (J. Madison) (emphasis supplied).

34. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802). The new statute is the fourth major revision of the original Act, the others occurring in 1831, 1870, and 1909. Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, in 2 STUDIES ON COPYRIGHT 1101 (A. Fisher ed. 1963). The history of early American copyright legislation is reviewed in T. SOLBERG, COPYRIGHT IN CONGRESS 1789-1904, COPYRIGHT OFFICE BULL. No. 8 (1905), and in Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, in 2 STUDIES ON COPYRIGHT 1101 (A. Fisher ed. 1963). For more detailed histories of copyright law, see E. DRONE, COPYRIGHT (1879); L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

35. 8 Anne 1, c. 19 (1709). This statute has been characterized as "the paradigm for all subsequent copyright legislation in England and the United States." Goldstein, *supra* note 19, at 983-84. It was undoubtedly the source of the first American copyright act, *see* Seltzer, *supra* note 5, at 222, and most likely was the source of the copyright clause. *See* Patterson, *supra* note 20, at 1200. The development of copyright law in both the United States and England is succinctly summarized in KAPLAN, *supra* note 13, at 1-37. For a more detailed account of copyright development in England, *see* F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, at 74-260 (1952).

36. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Chief Justice Hughes once remarked that "the primary object in conferring the [copyright] monopoly lie[s] in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (emphasis supplied). This notion of the primacy of public welfare later was reaffirmed by Justice Douglas: "The copyright law . . . makes reward to the owner a secondary consideration." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (emphasis supplied). "Both quotations have a preeminence far beyond what the context in which they were fashioned would dictate." Perlman & Rhinelander, *supra* note 20, at 402. Unfortunately, the statements add confusion to the law of copyright by suggesting that the interests of the author and society are somehow opposed.

It is paradoxical to state that reward to an author is a secondary consideration when the copyright system is premised on the theory that economic incentive and protection of the author are necessary to secure the benefits for society that copyright can provide. By this theory, if protection for the author is reduced, the incentive to create works that promote the progress of science and useful arts is reduced concomitantly; consequently, the purpose of copyright is frustrated. Principled adherence to the copyright scheme requires that the inter-

In addition to proclaiming the purpose copyright is to serve, the Constitution also declares the means by which copyright is to attain its goal. Progress in the sciences and the useful arts is to be promoted *by securing* to authors, for a limited time,³⁷ the exclusive right to their writings. Copyright offers an incentive to create by protecting the creation, the ultimate beneficiary of which is society. Whether the promise of copyright protection adequately and effectively stimulates the progress of science and useful arts has been questioned thoughtfully,³⁸ but there is little evidence to either corroborate or contradict the claim that the copyright system is ineffective.³⁹ Nevertheless, a body of law which has existed for over two centuries, which is paralleled in almost every modern nation in the world,⁴⁰ which has not inhibited significantly the publication of books or journals of varied types and prices,⁴¹ and which has the express endorsement of Congress, is entitled to at least a presumption of validity.

Copyright and the first amendment share similar objectives. "The central function of copyright—to encourage the formation of,

ests of the author and society be viewed as complementary rather than conflicting. See text accompanying note 196 *infra*. See also note 33 *supra*.

37. The duration of statutory copyright protection is limited. See Copyright Revision Act of 1976, 17 U.S.C.A. §§ 302-304 (1977). For works created after January 1, 1978, the new Act provides copyright protection for the author's life, plus an additional fifty years after the author's death. *Id.* § 302(a). Thus, under the new statute, there is no threat of copyright in perpetuity as there was at common law. See 1 NIMMER, *supra* note 17, § 1.10[C], at 8 n.46.

38. See, e.g., Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). Professor Breyer's article sparked a written debate. See Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 U.C.L.A. L. REV. 1100 (1971); Breyer, *Copyright: A Rejoinder*, 20 U.C.L.A. L. REV. 75 (1972). See also Henry, *Copyright: Its Adequacy in Technological Societies*, 186 SCIENCE 993 (1974); Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966).

39. That copyright achieves its ends "is more a political hypothesis than an empirical certainty." Perlman & Rhineland, *supra* note 20, at 378. See also Seltzer, *supra* note 5, at 219.

40. Copyright laws of foreign countries are translated and collected in UNESCO, *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (1956) (supplemented annually). Provisions concerning fair use in the laws of other nations are reviewed in Latman, *Fair Use of Copyrighted Works*, in 2 STUDIES ON COPYRIGHT 781, 802-07 (A. Fisher ed. 1963).

41. See Seltzer, *supra* note 5, at 219. "At the very least, copyright cannot easily be seen to have inhibited the production either of new works of the intellect or of inexpensive books." *Id.* "There are in the United States some 429,000 books in print, with some 40,000 new books being published annually. . . . The Harvard University Library subscribes to 100,000 periodicals. . . . Paperback titles in print in 1976 numbered some 132,000, with some 13,000 new paperbacks being issued annually." *Id.* at 219 n.19 (citations omitted).

and public participation in, expression—suggests [its] consonance with first amendment precepts.”⁴² Although both seek the same end, copyright seeks by actively encouraging what the first amendment seeks by strictly discouraging. “While the First Amendment facilitates the flow of information by preventing government intervention, the copyright system encourages the development of information and its dissemination by providing incentives for publication. The conflict, if any, is in method not purpose.”⁴³

THE LAW OF FAIR USE

Before the relationship between copyright and the first amendment is analyzed further, a summary of the fair use doctrine is appropriate. Fair use is an equitable, affirmative defense to a claim of copyright infringement.⁴⁴ In that capacity it functions as “one of the most important and well-established limitations on the exclusive rights of copyright owners.”⁴⁵ The defense is asserted commonly by one who claims, in essence, to have made a reasonable use of copyrighted material. If the user persuades the court that the balance of equities is in his favor, the use may be excused as fair.⁴⁶ Insofar as the fair use doctrine is concerned principally with the rights of a user of copyrighted material rather than with the rights of a copyright owner, it is solicitous of first amendment values.

A discourse on “fair use” is handicapped by the difficulty inherent in defining the term. The new Copyright Revision Act, which gives statutory expression to the fair use doctrine for the first time,⁴⁷ offers no definition. Indeed, the legislative history of the Act asserts that “no generally applicable definition is possible [because] each

42. Goldstein, *supra* note 19, at 1001.

43. Perlman & Rhinelander, *supra* note 20, at 404.

44. See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5679 (Fair use “is an equitable rule of reason . . .”).

45. *Id.* at 5678.

46. Striking the proper balance was recognized as an exacting yet essential task by Lord Mansfield nearly 200 years ago:

We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Sayre v. Moore, 102 Eng. Rep. 139, 139 n.(b) (K.B. 1785).

47. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5678.

case raising the question must be decided on its own facts."⁴⁸ The Act lists a number of factors to be considered in determining whether the use of a work in a particular case is a fair use:

- (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

The fair use provision of the new copyright statute does nothing more than codify the common law of fair use. Congress admitted as much: "Section 107 is intended to restate the present judicial doc-

48. *Id.* at 5679.

49. Copyright Revision Act of 1976, 17 U.S.C.A. § 107 (1977). The Act virtually adopts the factors enumerated by Justice Story in the first American fair use case: "[W]e must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Folsom v. Marsh*, 9 F. 342, 348 (C.C.D. Mass. 1841) (No. 4901). Commentators differ as to the criteria relevant to the determination of fair use. See B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* 341 (2d ed. 1974) ("(1) The nature of the plaintiff's authorship and intention (e.g. greater protection for a work of imagination, like a poem, than for a reference book, meant to be used as a source). (2) The status and purpose of the user (as scholar, reviewer, compiler, or parodist). (3) The extent of the use, both quantitatively and qualitatively. (4) The effect of the use on the copyright owner's interests. Is the use competitive or noncompetitive? In either event, is it likely to diminish the value of the copyright? (5) The absence of intent to plagiarize, especially as evidenced by proper acknowledgment of the copyrighted source."); Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 53 (1955) ("(1) the type of use involved; (2) the intent with which it was made; (3) its effect on the original work; (4) the amount of the user's labor involved; (5) the benefit gained by him; (6) the nature of the works involved; (7) the amount of material used; and (8) its relative value."); Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S.C. L. REV. 153, 183 (1968) ("(1) the nature of plaintiff's material and his intention, (2) the type and purpose of the use involved, (3) the quantitative extent of material used, (4) the qualitative extent of material used, (5) the intent with which the material was used, (6) the effect on the original material, (7) the amount of the user's labor involved, (8) the benefit to the user, and (9) the manner by which the copying was accomplished."); Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954) ("(1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication."). It has been suggested that the most important factor to be considered is "whether the use tends to interfere with the sale of the copyrighted article." *Mura v. Columbia Broadcasting Sys., Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965) (citations omitted).

trine of fair use, not to change, narrow, or enlarge it in any way."⁵⁰ Thus, without any attempt to change an area of the law thoroughly mired in confusion and contradiction, Congress incorporated the entire body of judicially-made law concerning fair use.⁵¹

One is less inclined to reproach the draftsmen of section 107 in view of the failure of the courts and commentators to formulate a satisfactory definition of fair use. Whether fair use is a privileged infringement of copyright or, rather, a noninfringing use is the subject of some debate. Justice Story adopted the latter viewpoint, arguing that a fair use is a justifiable use which the law recognizes as no infringement of copyright.⁵² A leading commentator disagrees: "The effect of the fair use defense is to excuse otherwise infringing conduct"⁵³ This distinction is subtle and may be of no practical significance.⁵⁴ An often quoted definition perhaps derives its popularity from its avoidance of the issue: "Fair use [is] a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."⁵⁵

The proposition concerning fair use that is generally accepted is that "it is not easy to decide what is and what is not a fair use."⁵⁶

50. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680.

51. *See* Seltzer, *supra* note 5, at 230-31.

If the purpose of a statutory definition of fair use is to articulate a coherent rationale for public policy, to indicate the general principles that follow from such a policy, and to establish or to refine a standard that will help courts in dealing with particular determinations of what they have long agreed, along with Judge Learned Hand, are "the most troublesome in the whole law of copyright," then the treatment of the issue in the new Copyright Act is very nearly a total loss.

Id. (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939)).

52. *See* *Folsom v. Marsh*, 9 F. 342, 348-49 (C.C.D. Mass. 1841) (No. 4901).

53. Goldstein, *supra* note 19, at 1011. Professor Nimmer concurs:

[The] problem [of fair use] arises where it is established by admission or by the preponderance of the evidence that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity. The result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he has made of plaintiff's material is a 'fair use.' In this more meaningful sense fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial.

3 NIMMER, *supra* note 17, § 13.05, at 13-50; *see* text accompanying note 195 *infra*.

54. Cohen, *supra* note 46, at 48.

55. H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 125, at 260 (1944).

56. Cohen, *supra* note 46, at 52.

The question has been called "the most troublesome in the whole law of copyright."⁵⁷ The truthfulness of these characterizations is evidenced by the Supreme Court's division on the issue; twice the issue of fair use has been presented to the Supreme Court and in each case the lower court decision was affirmed, without opinion, by an equally divided Court.⁵⁸ "A single doctrine that has forced the Court to divide equally twice can claim some measure of difficulty."⁵⁹

With this lack of consensus about the definition of fair use, it is not surprising that authorities differ as to its purpose. Three primary rationales have been advanced for the fair use doctrine. The foremost justification is based on the constitutional purpose for granting copyright protection, to promote the progress of science and useful arts.⁶⁰ Closely related is the opinion that reasonable, customary, or necessary uses of copyrighted works must be allowed to advance the public welfare.⁶¹ A third justification for fair use is based on the theory of implied consent; a copyright owner impliedly

57. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). Referring to the issue of fair use, Justice Story commented: "This is one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases . . ." *Folsom v. Marsh*, 9 F. 342, 344 (C.C.D. Mass. 1841) (No. 4901). This view has been echoed frequently. See, e.g., *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970) (the boundaries of the fair use doctrine are "exceptionally elusive even for the law"); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) ("The doctrine is . . . so flexible as virtually to defy definition.").

58. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (Blackmun, J., abstained); *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub nom. Columbia Broadcasting Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958) (Douglas, J., abstained). The Court again declined to consider the issue of fair use in its most recent opportunity. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

59. *Perlman & Rhinelander*, *supra* note 20, at 379.

60. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). "To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.'" *Id.* (quoting *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)); see *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 375 (1975); *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957).

61. See, e.g., *Mura v. Columbia Broadcasting Sys., Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965); *Dodsley v. Kinnersley*, 27 Eng. Rep. 270, 271 (Ch. 1761); H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944). See also Rosenfield, *Customary Use as "Fair Use" in Copyright Law*, 25 BUFFALO L. REV. 119 (1975).

consents to uses of his work which are fair.⁶²

The fair use doctrine has been examined thoroughly elsewhere.⁶³ It is sufficient to note that although fair use is established as "a basic tenet of our copyright system,"⁶⁴ there is considerable uncertainty about the definition of fair use and its intended purpose. This confusion tends to divert attention from the most important consideration, the meaning of a judgment of fair use: no liability can be imposed for a fair use of copyrighted material.

THE DIMENSIONS OF THE CONFLICT

Conflict between copyright and the first amendment is perceived primarily in two instances. In the first, copyright is used not "to promote the progress of science and useful arts" but to impede the dissemination of information. In the second, the distinction between an idea and its expression is poorly defined, and a copyright proprietor, claiming the exclusive right to his expression, successfully can block access to his ideas as well. A review of the subtleties of these conflicts reveals that the perceived threat to the first amendment from the misuse of copyright is largely illusory; the second conflict, in which protection of the expression may preclude the use of the idea, poses more significant dangers.

*Misuse of Copyright: Rosemont Enterprises, Inc. v. Random House, Inc.*⁶⁵

Rosemont Enterprises was a Nevada corporation organized in late 1965. Its sole stockholders were Howard Hughes' attorney and two officers of the Hughes Tool Company. Rosemont obtained, by contract with Hughes, the exclusive right to publish Hughes' life story.⁶⁶

62. See, e.g., *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938); 3 NIMMER, *supra* note 17, § 13.05 ("It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author.").

63. See, e.g., H. BALL, *supra* note 55, §§ 124-128; 3 NIMMER, *supra* note 17, § 13.05; Cohen, *supra* note 49; Crossland, *supra* note 49; Latman, *supra* note 40; Seltzer, *supra* note 5, at 230-60; Yankwich, *supra* note 49; Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 73 (1965); Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73.

64. Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968).

65. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

66. *Id.* at 312 (Lumbard, C.J., concurring).

Soon thereafter, on May 20, 1966, Rosemont acquired the copyrights for a series of *Look* magazine articles about Hughes. These articles had been used in preparing a forthcoming Random House publication, *Howard Hughes—A Biography*. Random House was warned that Hughes objected to the biography and would "make trouble" if it were published.⁶⁷ On May 26, six days after obtaining the *Look* copyrights, Rosemont brought an action for copyright infringement against Random House.⁶⁸ Rosemont sought damages and an injunction restraining the publication, distribution, and sale of the Random House book.⁶⁹

That Random House had copied portions of the *Look* articles, the most authoritative reports ever written on Howard Hughes,⁷⁰ could not be denied. The Random House biography contained 250 words of direct quotation, about eighty words concededly paraphrased, and at least a dozen other instances of obvious paraphrase.⁷¹ In total, Rosemont itemized forty-one separate instances of copying and claimed a total appropriation of fourteen percent of the *Look* articles.⁷²

The district court found infringement and granted the injunctive relief sought by Rosemont.⁷³ Determinative of its decision was the court's finding that Random House's copying of the *Look* articles "was substantial in both the quantitative and qualitative sense."⁷⁴ The court refused to accept Random House's defense of fair use, reasoning that the defense "is limited to cases where [the] copyrighted material is used for purposes of criticism or comment or in

67. *Id.* at 305.

68. *Id.*

69. 256 F. Supp. 55, 58 (S.D.N.Y. 1966).

70. *See id.* at 59. The articles were so characterized by a senior Random House editor. *Id.*

71. *Id.* at 61.

72. *Id.* at 61-62. The *Look* articles contain roughly 13,500 words; the Random House biography is 304 pages comprised of approximately 116,000 words. *Id.* at 59-60.

73. *Id.* at 68.

74. *Id.* at 64. Also important to the court's decision were the purposes for which the copyrighted material was used and the defendant's lack of independent research. *Id.* at 66. The finding by the lower court is in striking contrast to that of the court of appeals, which noted that although some copying had occurred, "[a] mere reading of the *Look* articles . . . indicates that there is considerable doubt as to whether the copied and paraphrased matter constitutes a material and substantial portion of those articles." 366 F.2d at 306. This "mere reading" test employed by the appellate court is significantly less rigorous than the infringement analysis used by the district court. *See* 256 F. Supp. at 60. Both courts treated the claims of infringement and fair use as separate issues; the opinions reveal two different tests for infringement and two different conceptions of fair use.

scholarly works of scientific or educational value."⁷⁵ If the borrowing work does not fall into these categories, the right to assert fair use is limited severely.⁷⁶ The Random House biography did not qualify as a scholarly publication; on the contrary, it was a "lively, fast moving" account of the life of Howard Hughes, "designed for the popular market."⁷⁷

Within two months the decision of the district court was reversed and the injunction vacated.⁷⁸ The court of appeals accepted Random House's argument that the trial court erred, as a matter of law, by narrowly confining the fair use privilege "to scholarly works written and prepared for scholarly audiences."⁷⁹ The appellate court explained that a book need not be scholarly to commend itself to the attention of the public:

Whether an author . . . is motivated in part by a desire for commercial gain, or whether [his publication] is designed for the popular market . . . has no bearing on whether a public benefit may be derived from such a work All publications presumably are operated for profit [B]oth commercial and artistic elements are involved in almost every work.⁸⁰

The eminent reasonableness of this position has been confirmed by the commercial speech cases,⁸¹ in which the Supreme Court conceded that profit-motivated speech may be beneficial to the public. Recognition of this fact particularly is appropriate in the law of copyright, which is premised on the notion that an economic incen-

75. 256 F. Supp. at 66 (citations omitted). The court's position is not without support. Fair use traditionally was confined primarily "to cases where the material is appropriated either for purposes of criticism, comment, or scholarship; or where the appropriated work is used in a purely incidental manner in the borrowing work." Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 594 (1956) (footnotes omitted). "The defense of fair use is most universally recognized in connection with the function of criticism, and review." 3 NIMMER, *supra* note 17, § 13.05[B], at 13-57. Closely related is the recognition of the defense where the "defendant's work is used for educational, scientific, or historical purposes." *Id.* § 13.05[A][1]. See also Perlman & Rhinelander, *supra* note 20, at 389-90.

76. 256 F. Supp. at 66.

77. *Id.*

78. 366 F.2d 303, 311 (2d Cir. 1966).

79. *Id.* at 306.

80. *Id.* at 307 (citations omitted).

81. *E.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

tive often is necessary to stimulate the creation of works which advance the progress of science and the useful arts.⁸² The *Rosemont* decision added dimensions to the law of fair use by acknowledging that commercial speech is not necessarily bereft of value.

The court of appeals' opinion in *Rosemont* has received both critical acclaim⁸³ and strong criticism.⁸⁴ Chief Judge Lumbard's concurring opinion has caused controversy because of its interpretation of Howard Hughes' actual objectives. Judge Lumbard, joined by Judge Hays, focused on the suspicious sequence of events leading to the organization of Rosemont, its staffing by Hughes' employees, its acquisition of the exclusive right to publish Hughes' biography and the copyrights in the *Look* articles, and Rosemont's subsequent suit against Random House.⁸⁵ The implication of these facts was clear to Chief Judge Lumbard: the *Look* copyrights were purchased solely to bring the lawsuit against Random House.⁸⁶ "Hughes wanted nothing written about himself, the publication of which he could not control. The Rosemont Corporation was created to this end. The purchase of the *Look* copyright was a part of Hughes' plan to prevent the publication of a biography."⁸⁷

Chief Judge Lumbard's characterization of Hughes' conduct raises the spectre of censorship by suggesting that a copyright might be misused to restrict the dissemination of information and to suppress speech. Unfortunately, the veracity of his suggestion was never

82. See note 36 *supra* & accompanying text.

83. See KAPLAN, *supra* note 13, at 62 n.72; Schulman, *supra* note 64, at 833.

84. Perlman & Rhinelander, *supra* note 20, at 387-88 (The court used "too large a weapon for too small a prey."); Seltzer, *supra* note 5, at 254-55 (The "copying involved could be justified neither on First Amendment grounds nor on fair use grounds."); Sobel, *supra* note 20, at 76 (The *Rosemont* decision "rode roughshod over the copyright law and permitted what amounted to nothing less than wholesale theft."). The criticism centers primarily on the fact that the defendants were exonerated from liability, even though they availed themselves not only of the facts contained in the *Look* articles but also of the expression of those facts. For reasons advanced in the text accompanying notes 204-205 *infra*, a judgment in favor of Rosemont and a minimal damage award were warranted. Despite justified criticism of the court's opinion in *Rosemont*, the decision nevertheless contributed immensely to the law of copyright.

85. 366 F.2d at 313 (Lumbard, C.J., concurring).

86. *Id.*

87. *Id.* (footnote omitted). Chief Judge Lumbard reinforced his conclusion by noting that Rosemont purchased the copyrights of several other works about Hughes. The copyright to Adela Rogers St. Johns' article, *The Howard Hughes Story*, was acquired by Rosemont. *Id.* at n.5. Rosemont also bought an unpublished manuscript from an author who had been commissioned to write a Hughes' biography. *Id.* at 313.

addressed by the court. In general, a copyright proprietor could not accomplish such an end by virtue of his copyright.⁸⁸ Copyright protection extends only to an author's choice of words and style in expressing facts; it does not extend to the facts themselves, or, under the new Act, "to any idea, procedure, process, system, method of operation, concept, principle, or discovery"⁸⁹ Howard Hughes could have aggregated the copyrights of every article and book ever written about him. By virtue of such ownership, however, he could have prevented only the unlawful appropriation of *expression*.

"*The Wedding of Expressing and Idea*":⁹⁰ *Time Inc. v. Bernard Geis Associates*⁹¹

Time Inc., which had secured a copyright in the Zapruder film of the Kennedy assassination, brought an action for statutory copyright infringement against the author, Josiah Thompson, and the publisher, Bernard Geis Associates, of *Six Seconds in Dallas*. A study of the Kennedy assassination, the book challenges the lone-assassin conclusion reached by the Warren Commission. Thompson was convinced that the use of several frames from the Zapruder film was indispensable to the effective presentation of his book. Accordingly, he sought Time's permission to reprint specified frames. Repeated requests for permission brought repeated refusals. Bernard Geis finally offered Time a royalty equal to the profits received from publication of Thompson's book in exchange for a license to use the

88. *But see* Professor Goldstein's thoughtful article:

Implicit in the *statutory monopoly* is the copyright owner's right to withhold his expression from the public. A consequence of this basic right of the owner is his right to delimit the size and economic status of the audience to which the work shall be disseminated by specification of the number and price of the copies to be sold. As the public is restricted in its participation only to those copies authorized, its right to hear, to read, and to view may, at the author's instance, be sharply curtailed.

. . . The holder of an *enterprise monopoly* [an aggregation of copyrights] . . . has not only the negative power to withhold expression; he has an additional, affirmative power to provide for the broad dissemination of copyrighted material consistent in principle with his own social, political, and economic views.

Goldstein, *supra* note 19, at 989-90 (emphasis supplied).

89. Copyright Revision Act of 1976, 17 U.S.C.A. § 102(b) (1977); *see* notes 11-12 *supra* & accompanying text.

90. 1 NIMMER, *supra* note 17, § 1.10[C][2].

91. 293 F. Supp. 130 (S.D.N.Y. 1968).

desired frames.⁹² This offer also was refused. Thompson and Bernard Geis resolved to copy a number of frames despite the lack of Time's consent; significant parts of twenty-two copyrighted frames were reproduced in *Six Seconds in Dallas*.⁹³

In response to Time's charge of copyright infringement Thompson and Bernard Geis asserted the defense of fair use.⁹⁴ The court found that Time had complied with the requisite statutory formalities in registering the film at the Copyright Office,⁹⁵ that the Zapruder film was properly the subject of copyright,⁹⁶ and that the defendants had

92. *Id.* at 138.

93. *Id.* at 139. Perhaps in anticipation of an infringement action, the defendants did not reproduce the frame photographically. Instead, they hired an artist to make sketches of the frames. *Id.* at 138. The representations were so detailed and authentic that they were "in fact copies, . . . with no creativity or originality whatever." *Id.* at 139. Bernard Geis admitted as much in an introductory note to *Six Seconds in Dallas*, in which the reader is asked to compare the sketches with a photographic reproduction of one of the Zapruder frames; the comparison, it is asserted, will confirm that the sketches are so accurate that "their representation of the events is exact." *Id.*

94. *Id.* at 132.

95. *Id.* at 137.

96. *Id.* at 141-44. The court was persuaded that the Zapruder film displayed sufficient originality and creativity to distinguish it from mere fact and, therefore, concluded that it was copyrightable. "Zapruder selected the kind of camera . . . , the kind of film . . . , the kind of lens . . . , the area in which the pictures were to be taken, . . . and . . . the spot on which the camera would be operated." *Id.* at 143.

The question of the copyrightability of pictures was addressed by the Supreme Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (Holmes, J.). In holding that three chromolithographs were subject to copyright, the Court stated: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." *Id.* at 250; accord, *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (L. Hand, J.) ("No photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike."). The proposition that photographs are entitled to copyright protection is no longer questioned. See Copyright Revision Act of 1976, 17 U.S.C.A. § 102(a) (1977). See also 1 NIMMER, *supra* note 17, § 2.08[E]; Gorman, *supra* note 11, at 1596-1600.

Although photographs are copyrightable, it remains debatable whether a historical and evidentiary document such as the Zapruder film should be subject to copyright. The practical reality of copyright registration, however, dictates that a court focus on the scope of copyright protection and not on the propriety of that protection. In fiscal 1976, for example, the Copyright Office registered 410,969 copyrights, which is roughly 1,125 per calendar day. *Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30, 1976*. Patent laws require a pre-issuance evaluation by the patent office. Copyrights, to the contrary, are of necessity issued without an extensive examination. The volume of application for copyrights is so large that works are checked for little more than compliance with statutory formalities. "[T]he examiner does not and cannot investigate at large; he generally confines himself to

in fact copied some of the film. From these bare findings the court concluded: "[T]here is thus an infringement by [the] defendants unless the use of the copyrighted material in the [b]ook is a 'fair use' outside the limits of copyright protection."⁹⁷

Considering whether the defense of fair use was available to the defendants, the court recognized that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."⁹⁸ Equally important was the court's finding that there was "little, if any, injury to [the] plaintiff, the copyright owner"⁹⁹ because the market for the Zapruder film was not jeopardized.¹⁰⁰ These findings prompted the court to conclude that the balance of the equities favored the defendants.¹⁰¹

The *Bernard Geis* case prompted a vigorous warning from Professor Nimmer: "[a] grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use, and an emerging constitutional limitation on copyright contained in the First Amendment."¹⁰² This statement suggests that while "the Constitution is permissive"¹⁰³ with respect to congressional authority to extend copyright protection, it is not *wholly* permissive. At some point the Constitution itself limits the exclusive rights of authors. In Professor Nimmer's view, the first amendment limitation on copyright must be distinguished from fair use, a statutory construct which is based on whether "the defendants' work tends to diminish or prejudice the potential sale of the plaintiff's work."¹⁰⁴ Contrary to the fair use defense, the first amendment privilege "may be invoked despite the fact that the marketability of the copied work is . . . impaired."¹⁰⁵

Professor Nimmer, together with his disciple Lionel Sobel, be-

the application and the deposited copies" Kaplan, *The Registration of Copyright*, in 1 STUDIES ON COPYRIGHT 325, 361 (A. Fisher ed. 1963).

97. 293 F. Supp. at 144.

98. *Id.* at 146.

99. *Id.*

100. *Id.*

101. *Id.*

102. 1 NIMMER, *supra* note 17, § 1.10[D], at 1-85.

103. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972); *accord*, *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 298 (1907); *cf.* *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 698 (1834) (copyright is a statutory privilege).

104. 2 NIMMER, *supra* note 17, § 13.05, at 646.

105. 1 *id.* § 1.10[D], at 1-85.

lieves that the *Bernard Geis* case is irreconcilable as a fair use decision.¹⁰⁶ In Professor Nimmer's judgment, the court concluded incorrectly that the value of the copyright on the Zapruder film was not damaged. The court acknowledged, and then ignored, that Time had planned to use the film in a movie or a book; then without analysis, the court termed the effect of the defendants' use on those plans "speculative."¹⁰⁷ Considering that *Six Seconds in Dallas* contained copies of fifty-five percent of the frames of the Zapruder film depicting the actual shooting of President Kennedy,¹⁰⁸ it is reasonable to suppose that the book measurably satisfied the demand for a future work based on the Zapruder film. Certainly Time's allegation of harm to an invaluable corporate asset, in which it had invested \$150,000,¹⁰⁹ demanded a more thoughtful inquiry by the court.

Although criticizing the *Bernard Geis* decision because it was based on fair use, Professor Nimmer acknowledged, albeit begrudgingly, that the judgment for the defendants was defensible due to the free speech elements of the Zapruder film.¹¹⁰ Professor Nimmer's analysis deserves careful consideration because he identifies with precision and insight the circumstances in which there exists a potential for conflict between copyright and the first amendment.

The court in *Bernard Geis* never addressed directly the question of the defendants' need to use the Zapruder film in their book. Although it described the film as "an historic document and undoubtedly the most important photographic evidence" of the assassination,¹¹¹ the court asserted that Time "claim[ed] no copyright in the events at Dallas;" rather, it claimed "copyright in the particular form of expression of the Zapruder film."¹¹² As Professor Nimmer explained, to capture the idea of the film reproduction of its expression was necessary:

[I]n the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authorita-

106. *Id.* § 1.10[D]; Sobel, *supra* note 20, at 61.

107. 293 F. Supp. at 146.

108. The Zapruder film contains approximately 480 frames. Of these, "140 show the immediate events of the shooting and 40 are relevant to the shots themselves." *Id.* at 133. The defendant's book reproduced significant parts of 22 copyrighted frames. *Id.* at 139.

109. *Id.* at 134.

110. 1 NIMMER, *supra* note 17, § 1.10[D], at 1-86.

111. 293 F. Supp. at 131.

112. *Id.* at 143.

tive answers that it desperately sought; answers that no other source could supply with equal credibility [I]t was only the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue.¹¹³

The inability to reprint selected frames of the Zapruder film, of course, would not have precluded the defendants from writing about the Kennedy assassination. Nevertheless, in order for Thompson to present satisfactorily his theory of conspiracy, use of the film was essential. No writer, however skilled, can convey the idea of the Zapruder film as well as the film itself. The first amendment commands that access to and dissemination of ideas be uninhibited. Because of the unique nature of the Zapruder film, copyright protection of its *expression* threatened to impede access to its *idea*.

In *Bernard Geis*, the court was confronted with one of the most difficult sets of facts that can arise in a copyright infringement suit. The defendants' book about the Kennedy assassination clearly commended itself to the reading public, and the preparation of the book necessitated the use of certain frames of the Zapruder film. Yet the film's reproduction also caused a substantial likelihood of harm to the value of Time's copyright. This potential damage to marketability should have precluded a finding of fair use. Because the idea contained in the Zapruder film is inseparable from its expression, the first amendment required that the defendants' use of the film be permitted.¹¹⁴ This requirement implicates the delicate question: did the first amendment demand also that injury to the plaintiff's copyright go without remedy?

In distinguishing fair use from the "emerging constitutional limi-

113. 1 NIMMER, *supra* note 17, § 1.10[C], at 1-83. Professor Nimmer emphasized his point with another example that concerned copyright of the photographs of the My Lai massacre:

No amount of words describing the "idea" of the massacre could substitute for the public insight gained through the photographs. [Use of the] photographic expression, not merely the idea, [was] essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs.

Id. at 1-82.

114. *But cf.* Perlman & Rhinelander, *supra* note 20, at 389 (suggesting that the *Bernard Geis* controversy is capable of resolution "without raising the more difficult issues of constitutional dimensions"). To the contrary, the constitutional dimensions of the case must be recognized and addressed squarely.

tation on copyright contained in the First Amendment,"¹¹⁵ Professor Nimmer asserted:

Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The First Amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired.¹¹⁶

Professor Nimmer's regard for the first amendment is laudable; the troubling aspect of his statement is its implication that the first amendment, sensitive to the public interest in uninhibited debate, is indifferent to a demonstrable private injury. The first amendment is not so inflexible. If a conflict between public and private interests is irreconcilable, the interests of the public must prevail. The conflict between copyright and the first amendment, however, permits a middle course: judicial determination of a reasonable royalty.¹¹⁷

The search for a proper remedy in a case like *Bernard Geis* is impeded by the assumption of an infringement's inherent perniciousness.¹¹⁸ Moreover, traditional infringement remedies, such as injunctive relief, impoundment of infringing articles, and recovery of profits,¹¹⁹ are too strict to complement the first amendment. The

115. 1 NIMMER, *supra* note 17, § 1.10[D], at 1-85.

116. *Id.*

117. Credit for the concept of reasonable royalty goes, paradoxically, to Professor Nimmer. 1 NIMMER, *supra* note 17, § 1.10[C], at 1-84. It is unclear, however, whether Professor Nimmer would call for the award of a reasonable royalty in *Bernard Geis*. On the one hand, Professor Nimmer argues that the holding of fair use was untenable because of his belief that the value of Time's copyright was damaged by use of the Zapruder film, a conclusion that cannot be reconciled with his view that a finding of fair use is inappropriate if "the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work." *Id.* § 13.05. On the other hand, Professor Nimmer notes that the holding in *Bernard Geis* may be defensible if at all because of the "free speech elements" in the Zapruder film. *Id.* § 1.10[D], at 1-86. This opinion comports with his statement that "[t]he First Amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is . . . impaired." *Id.* at 1-85.

118. See Goldstein, *supra* note 19, at 1056. See also KAPLAN, *supra* note 13, at 78. "[W]hen copyright has gone wrong in recent times, it has been by taking itself too seriously, by foolish assumptions about the amount of originality open to man as an artificer, by sanctimonious pretensions about the iniquities of imitation." *Id.*

119. The new Act affords a variety of remedies for infringement, including injunctive relief, impoundment of infringing articles, actual damages, profits, statutory damages, and criminal penalties. Copyright Revision Act of 1976, 17 U.S.C.A. §§ 502-506 (1977). See generally 2 NIMMER, *supra* note 17, §§ 14.01 to 14.10; Strauss, *The Damage Provisions of the Copyright Law*, in 2 STUDIES ON COPYRIGHT 995 (A. Fisher ed. 1963); Strauss, *Remedies Other than Damages for Copyright Infringement*, in 2 STUDIES ON COPYRIGHT 1029 (A. Fisher ed. 1963).

use of the Zapruder film by the defendants in *Bernard Geis* elicits sympathy; a thief who takes only what he needs, particularly after asking first, is no ordinary pirate. Yet, use of the film added to the authenticity and appeal, and thus to the marketability, of *Six Seconds in Dallas*. Although one may be disinclined to contend that Time suffered a wrong, one may more willingly acknowledge the injury to the value of Time's copyright. In these circumstances the need is not for punishment but for equity. The award of a reasonable royalty¹²⁰ permits partial accommodation of the interests of both litigants without compromising first amendment concerns;¹²¹ it also pays adequate tribute to society's interest in a sound copyright system.

What is most disturbing about the *Bernard Geis* case is not the conclusion reached by the court but the way in which the court arrived at that conclusion. The court never identified expressly nor assessed systematically the competing interests and the underlying policies of copyright. These shortcomings are common in many fair use cases, resulting in inconsistent and unpredictable decisions. A court of equity must be free to seek fairness. What is needed in the law of copyright is not less flexibility but better-reasoned rules and principles to guide courts in their difficult task of achieving justice.

120. Fixing a reasonable royalty admittedly requires an ambitious calculation by the court, yet such awards are not uncommon in tort and antitrust litigation. The rule that precludes recovery of uncertain and speculative damages applies only when "the fact of damage is itself uncertain." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). Once harm is established, the inability of the claimant to furnish an exact measure of damage will not defeat the right of recovery. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). To insist on ascertainment of the damages with certainty once harm is shown "would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Damages are sufficiently certain "if a reasonable basis of computation is afforded, although the result be only approximate." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

Courts long have distinguished the fact of damage from the amount of damage. In general, uncertainty as to the fact of damage is fatal to recovery but uncertainty as to the amount is not. See C. MCCORMICK, *LAW OF DAMAGES* §§ 23, 26, 27 (1935). In *Bernard Geis*, despite the possibility of significant damage to the value of Time's copyright, the court found the defendants' use to be fair, leaving an injured party totally without relief.

121. Too large an award of damages, however, may have a chilling effect on the exercise of free speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *New York Times*, the Court declared that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

*Constitutional Fair Use: Meeropol v. Nizer*¹²²

Michael and Robert Meeropol, the sons of Ethel and Julius Rosenberg, brought an action against Louis Nizer, author of *The Implosion Conspiracy*, Doubleday & Company, Inc., the hardcover book's publisher, and Fawcett Publications, Inc., the paperback book's publisher.¹²³ The Meeropols alleged statutory copyright infringement of letters written by their parents and published in their copyrighted book, *Death House Letters of Ethel and Julius Rosenberg*.¹²⁴ In *The Implosion Conspiracy*, Nizer reprinted verbatim portions of twenty-eight copyrighted letters. The quoted excerpts totaled 1957 words, less than one percent of *The Implosion Conspiracy* and slightly less than three percent of *Death House Letters*.¹²⁵ The Meeropols sought a permanent injunction restraining the defendants from publishing and selling *The Implosion Conspiracy* and an impoundment of all unsold copies of the book.¹²⁶

At the district court, the defendants asserted the defense of fair use.¹²⁷ The court applied the fair use analysis outlined in *Rosemont*:

122. 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 727 (1978).

123. The initial complaint, filed June 19, 1973, in the United States District Court for the Southern District of New York, named only Nizer and Doubleday as defendants. Eight months later, on March 6, 1974, the Meeropols commenced a separate action against Fawcett Publications in the United States District Court for the District of Connecticut. In an unreported opinion, the federal district court for the Southern District of New York granted Fawcett's motion to stay the Connecticut action and intervene in the original action. *Meeropol v. Nizer*, No. 74-1587 (S.D.N.Y. April 3, 1974), *aff'd*, 505 F.2d 232, 234-35 (2d Cir. 1974).

124. 505 F.2d at 234 & n.1. The Meeropols also charged libel, invasion of privacy, and common law infringement of copyright. The libel and privacy claims were dismissed on a motion for summary judgment. 381 F. Supp. 29 (S.D.N.Y. 1974). The claim for common law copyright infringement was dismissed without discussion. 417 F. Supp. 1201 (S.D.N.Y. 1976). Both dismissals were affirmed. 560 F.2d 1061 (2d Cir. 1977).

125. 417 F. Supp. at 1206. More precisely, the quoted excerpts comprised .85% of *The Implosion Conspiracy*'s total of 228,900 words and 2.4% of *Death House Letters*' total of 80,000 words. *Id.*

126. *See* 361 F. Supp. 1063, 1066 (S.D.N.Y. 1973). At trial, the plaintiffs reduced their demands to seek only an injunction against the book's paperback publication and the sale of television or movie rights, and they requested impoundment of the hardbound copies remaining in the defendant's inventory. *Id.* at 1067.

127. *Id.* at 1065. Nizer and Doubleday also contended that the letters were in the public domain, that the Meeropols did not hold valid copyright, and that the action was barred by laches. *Id.* The defendants may be correct in their assertion that the Rosenberg letters were not and were never intended to be private correspondence. *Death House Letters* was published several days before the Rosenbergs were executed, specifically to generate funds and call attention to the alleged injustice of their conviction. *See* Petitioners' Brief for Certiorari at 4-5, *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) [hereinafter cited as *Petition* for

whether distribution of the allegedly infringing work is in the public interest and whether preparation of the work required use of the copyrighted materials.¹²⁸ The court found the first element of the *Rosemont* test satisfied because of "the continuing interest in and importance of the celebrated Rosenberg case" and because *The Implosion Conspiracy* was a valuable source contributing to the debate.¹²⁹ The second criterion was deemed satisfied because "resort to quotations of certain of the Rosenbergs' letters is important to any serious book on their trial."¹³⁰

Despite its conclusion that *The Implosion Conspiracy* adequately satisfied *Rosemont's* fair use criteria, the court denied the defendants' cross-motion to dismiss the complaint.¹³¹ Judgment was reserved on the question of infringement to allow the Meeropols to introduce additional evidence on the nature of the letters¹³² and the impact of their use on the value of *Death House Letters*. The court also expressed concern that Nizer had made only an insincere attempt to obtain permission to cite the letters, although both Nizer, a lawyer, and his publisher were aware of the potential copyright infringement.¹³³

At the second trial¹³⁴ on the expanded record, before Judge Gagliardi, the defendants again moved to dismiss the complaint. The Meeropols contended that summary judgment was inappropriate because material issues of fact existed concerning (1) whether the fair use doctrine applied to a book such as *The Implosion Conspiracy*, (2) the quantitative and qualitative significance of the copied material to Nizer's book, and (3) the effect of Nizer's use of the Rosenberg letters on the market for the copyrighted work, *Death*

Certiorari]. See also *Preface* to R. & M. MEEROPOL, *WE ARE YOUR SONS* at xii (1975) ("Our parents came to realize that their correspondence could be utilized as aids in the campaign to save them.").

128. 361 F. Supp. at 1068 (citing *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307).

129. *Id.* at 1068.

130. *Id.*

131. *Id.* at 1070. At the same time the court refused the Meeropols' request for temporary injunctive relief because they failed to establish a likelihood of success on the merits and because the balance of potential harm favored the defendants. *Id.*

132. *Id.* The court was unsure whether "letters stand on the same footing as 'historical facts', which are the product of research and in turn form the basis for subsequent works." *Id.*

133. *Id.*

134. 417 F. Supp. 1201 (S.D.N.Y. 1976) (Gagliardi, J.).

*House Letters.*¹³⁵

The court had little difficulty dismissing the Meeropols first argument. In the original trial Judge Tyler had found that *The Implosion Conspiracy*, "a serious, full and readable account" of the controversial Rosenberg-Sobell espionage case, was of considerable public interest.¹³⁶ Judge Tyler also noted that the sale of *The Implosion Conspiracy* "as a trade book for commercial gain" was insufficient reason to deny the defense of fair use.¹³⁷ Judge Gagliardi agreed, adding that a work may lack substantial scholarship and nevertheless be of interest to the public.¹³⁸ Therefore, the purpose of copyright, to promote the progress of science and useful arts, should be construed broadly.¹³⁹ To satisfy this purpose a work need only confer "some benefit to the public at large,"¹⁴⁰ a minimal standard easily surpassed by *The Implosion Conspiracy*.

More problematic to the court was the Meerpol's second contention, that use of the Rosenberg letters in the *The Implosion Conspiracy* was quantitatively and qualitatively substantial. The quoted excerpts constituted less than one percent of Nizer's book,

135. *Id.* at 1207.

136. 361 F. Supp. at 1068.

137. *Id.* The Meeropols challenged the earlier decision on both counts, claiming that the defendants could not avail themselves of the defense of fair use until the credibility of *The Implosion Conspiracy* as an historical work was established. 417 F. Supp. at 1208. Fourteen affidavits from various authorities on the Rosenberg trial were submitted to show that Nizer's book is "riddled with distortions and inaccuracies and thus [of] no historical value." *Id.*

A review critical of *The Implosion Conspiracy* was written by John Henry Faulk, a former client of Nizer's: "Mr. Louis Nizer, a distinguished New York trial lawyer, has written a book about one of this century's most controversial trials . . . I am sorry he did . . . [H]is book is so hopelessly flawed that it does a sad disservice to his talents as an attorney." Faulk, Book Review, 51 Tex. L. Rev. 1026, 1026 (1973). Nizer's book has received a large share of favorable comment as well. See, e.g., Wilkes, Book Review, 8 Ga. L. Rev. 279, 279 (1973) ("Nizer has produced a book which is not only a brilliant analysis of an important judicial proceeding but also a stunning human drama.").

It is worth remembering that the question before the court was not the quality of Nizer's book but his right to use the copyrighted letters. The district court in the second *Meeropol* opinion noted:

[P]laintiff's voluminous and vehement submission [of affidavits critical of *The Implosion Conspiracy*] gives the distinct impression that what is really desired is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair—an issue on which history alone must provide the final judgment . . .

417 F. Supp. at 1208.

138. *Id.* at 1208-09.

139. See *id.* at 1209.

140. *Id.*; see text accompanying notes 203-05 *infra*.

an amount which the court described as "more than insignificant."¹⁴¹ Use of the letters, moreover, may have been essential because the thoughts and feelings expressed by the Rosenbergs in their letters were inseparable from the letters themselves.¹⁴² Nevertheless, the court concluded that the letters did not form a major part of Nizer's work¹⁴³ and, therefore, that their use was not "qualitatively or quantitatively substantial in the context of the entire work."¹⁴⁴

The court briefly addressed the Meeropols' final argument, that *The Implosion Conspiracy* had damaged the market for the Rosenberg letters.¹⁴⁵ Although the court noted that "not one iota of evidence" had been produced to substantiate this claim, it conceded that the plaintiffs might be able to prove such damage at trial.¹⁴⁶ Moreover, harm to the copyright owner, in Judge Gagliardi's view is not decisive of the fair use question. "While the impairment of the commercial value of the copyrighted work is a factor to be considered, a copy may be sufficiently limited or otherwise privileged so as to be entitled to fair use protection."¹⁴⁷

The court granted summary judgment for the defendants, holding that fair use had been established as a matter of law. According to the court, the undisputed facts were so overwhelming "that a reasonable jury could [only] reach the conclusion that the copying . . . is . . . entitled to fair use protection."¹⁴⁸ The court, however, had acknowledged earlier in the opinion that the issue of the qualitative significance of the Rosenberg letters to *The Implosion Conspiracy*, a factual issue central to the fair use defense, was a point over which reasonable men may disagree.¹⁴⁹

On appeal, the Second Circuit¹⁵⁰ objected to Judge Gagliardi's application of fair use law: "It was error to hold that as a matter of law the fair use defense was available to [the] defendants when the *purpose* for which the letters were included in the book and the *effect* of the use of the copyrighted letters on their future market

141. 417 F. Supp. at 1212-13.

142. *Id.* at 1212.

143. *Id.* at 1213.

144. *Id.* at 1214.

145. *Id.* at 1209-10.

146. *Id.* at 1210.

147. *Id.*

148. *Id.* at 1214.

149. *Id.* at 1210-11.

150. 560 F.2d 1061 (2d Cir. 1977).

were in dispute.”¹⁵¹ In the court of appeals’ view, further examination of the reasons why Nizer used the letters in his book was necessary. If the letters were used predominately for scholarly or historical reasons,¹⁵² fair use properly would apply, but if Nizer quoted the letters primarily for commercial exploitation, fair use was inappropriate.¹⁵³ The lower court also erred in characterizing the issue of economic harm to the value of the copyright as merely “a factor to be considered”¹⁵⁴ in fair use cases. The court of appeals considered the potential damage to the copyright owner to be of “key” importance.¹⁵⁵ For example, Nizer’s use of the Rosenberg letters might affect the market for their republication or the sale of movie rights. Accordingly, the *Meeropol* infringement case was reversed and remanded for further judicial inquiry.¹⁵⁶

In the *Meeropol* litigation the laws of fair use and summary judgment are so interwoven that it is difficult to maintain a proper perspective of either. It is instructive to review and address separately the principal questions involved in the case. Would distribution of *The Implosion Conspiracy* serve the public interest? Did preparation of the book require some use of the Rosenberg letters? Did Nizer’s use of the letters threaten the value of the plaintiff’s copyright? Finally, did a genuine factual issue exist as to the resolution of any of these questions?

The public interest undoubtedly is served by the distribution of *The Implosion Conspiracy*. Abundant evidence demonstrates the continuing interest in the Rosenberg case.¹⁵⁷ It has been the subject

151. *Id.* at 1070 (emphasis supplied).

152. *See id.* at 1069.

153. *See id.* This conclusion is precisely the sort of refined judgment that the *Rosemont* court sought to avoid. *See* text accompanying note 80 *supra*.

154. 417 F. Supp. at 1210; *see* text accompanying note 147 *supra*.

155. 560 F.2d at 1070. This position has wide support in case law and commentary. *See, e.g.,* *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962); *Public Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914); 3 NIMMER, *supra* note 17, § 13.05[A][4]; *Rosenfield, supra* note 61, at 120; Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 596 (1956).

156. 560 F.2d at 1072. On October 13, 1977, the court of appeals recalled its mandate and stayed the reissuance pending action on a petition for certiorari filed by the defendants. The Supreme Court denied certiorari on January 9, 1978. 98 S. Ct. 727 (1978).

157. The Rosenberg trial has been called “the outstanding ‘political’ trial of this generation.” Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 COLUM. L.

of a large number of books both in this country¹⁵⁸ and throughout the world,¹⁵⁹ and the trial was featured recently in two television documentaries.¹⁶⁰ *The National Committee to Re-Open the Rosenberg Case* was formed in 1974, with offices in several major cities.¹⁶¹ There has been an extended legal battle to secure release of the government files on the case.¹⁶² Finally, the scope of interest in the Rosenberg case is evidenced by the sale of 125,000 copies of *The Implosion Conspiracy* during the first five months of its publication.¹⁶³

Preparation of *The Implosion Conspiracy*, concerning as it does the trial and post-conviction events of the Rosenberg-Sobell case, reasonably required some use of the Rosenberg letters. Discussion of the impact of the trial and the Rosenbergs' conviction on their relationship is not strictly necessary to the presentation of these events. Nonetheless, it is difficult to imagine how an author, desiring to comment on that relationship, could do so adequately without some use of the letters themselves. Just as the idea of the Zapruder film could not be conveyed fully except by reproducing the film

REV. 219, 219 (1954). See also J.E. Hoover, *The Crime of the Century*, READERS DIGEST, May 1957, at 158.

158. E.g., J. H. FAULK, *FEAR ON TRIAL* (1976); S. FINEBERG, *THE ROSENBERG CASE: FACT AND FICTION* (1953); V. GARDNER, *THE ROSENBERG STORY* (1954); A. GOLDSTEIN, *THE UNQUIET DEATH OF JULIUS & ETHEL ROSENBERG* (1975); R. & M. MEEROPOL, *WE ARE YOUR SONS* (1975); J. ROOT, *THE BETRAYERS* (1963); W. & M. SCHNEIR, *INVITATION TO AN INQUEST* (1965); M. P. SHARP, *WAS JUSTICE DONE?* (1956); J. WEXLEY, *THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG* (1955).

159. Books on the Rosenberg trial have been published in French, German, Hebrew, Italian, Polish, and Russian.

160. *The Trial of Julius and Ethel Rosenberg* was produced for ABC by Stanley Kramer and aired on January 28, 1974. For a review of the program, see the N.Y. Times, Jan. 29, 1974, at 66, col. 4. Alvin Goldstein's award-winning documentary, *The Unquiet Death of Julius and Ethel Rosenberg*, was produced for a public broadcasting station. *Id.*, Feb. 24, 1974, at 43, col. 1.

161. N.Y. Times, May 12, 1974, at 22, col. 1. The Committee was formed in New York City and had branch offices in Washington, D.C., Los Angeles, and Ann Arbor, Michigan. *Id.* The Committee sponsored a memorial observance which sold out Carnegie Hall. *Id.*, June 18, 1974, at 33, col. 3. The rally was held on the night of June 17, 1974. Tickets sold for three to fifty dollars, the proceeds going to the Committee for use in the nationwide campaign to clear the Rosenbergs' names. *Id.*

162. In July, 1973, Attorney General Elliot Richardson ordered the FBI to release its 25,000 page file on the Rosenberg case. N.Y. Times, Nov. 18, 1973, at 3, col. 1. A suit seeking compliance with that order, and the release of additional government records on the Rosenberg case, was filed under the Freedom of Information Act in 1975. *Id.*, July 15, 1975, at 20, col. 1.

163. See 361 F. Supp. at 1065.

itself,¹⁶⁴ the Rosenberg letters reveal emotions and drama that necessarily are lost by mere summary or description. The Rosenbergs' words provide the only true testimony of the feelings of two public figures who received international attention.¹⁶⁵ Indeed, both of the district court decisions in *Meeropol* recognized the importance of quoting portions of the letters in *The Implosion Conspiracy*.¹⁶⁶

Nizer's use of the letters did not threaten the value of the Meeropols' copyright in their parents' correspondence. The court of appeals suggested that *The Implosion Conspiracy* might "diminish or prejudice the potential sale" of the Rosenberg letters;¹⁶⁷ the facts suggest otherwise. *Death House Letters* and *The Implosion Conspiracy* are dissimilar books. The former is simply a compilation of letters written by the Rosenbergs,¹⁶⁸ whereas *The Implosion Conspiracy* is a study of the Rosenberg trial and its aftermath. The first quoted excerpt from a Rosenberg letter appears in chapter thirty-seven of Nizer's fifty-five chapter book, after the reader has completed more than eighty percent of *The Implosion Conspiracy*.¹⁶⁹ "No one seriously interested in reading the published correspondence of the Rosenbergs would consider purchasing *The Implosion Conspiracy*."¹⁷⁰

Thus, the facts in the *Meeropol* case decisively favor the defendants. The public has a demonstrated interest in the continued distribution of *The Implosion Conspiracy*; preparation of the book reasonably required use of some of the Rosenberg letters; finally, the use of the letters posed no conceivable harm to the value of the Meeropols' copyright. If, as suggested by Professor Nimmer, there

164. See text accompanying note 123 *supra*.

165. See, e.g., W. & M. SCHNEIR, INVITATION TO AN INQUEST 175-80 (1965). See also photographs numbered 23, 24, 25, 26, 28. *Id.*

166. The first *Meeropol* opinion stated that "resort to quotations of certain of the Rosenbergs' letters is important to any serious book on their trial." 361 F. Supp. at 1068. The second *Meeropol* opinion, in describing the letters as historical facts, implicitly reached the same conclusion. See 417 F. Supp. at 1211.

167. 560 F.2d at 1070. No sales of *Death House Letters* have occurred since June 30, 1956. Financial records establish that the total gross income from sales of the book was only \$12,000. Petition for Certiorari, *supra* note 127, at 4. These facts alone, however, are not persuasive. Copyrighted material does not necessarily lose its future market because it has been out of print for a long time. See 2 NIMMER, *supra* note 17, § 1305[B], at 13-58 n.51.

168. Petition for Certiorari, *supra* note 127, at 22-23.

169. See *id.* at 20. "In terms of lines of type, all of the excerpts could be reproduced on four pages of [Nizer's 495 page book]." *Id.* at 23.

170. *Id.*

is a point at which the Constitution limits the exclusive rights of copyright owners,¹⁷¹ that point was reached in *Meeropol v. Nizer*.

What has prolonged the *Meeropol* litigation is not the facts but the law. The infringement claim has been before three courts. Each court had its own understanding of fair use; each court applied different law. Judge Tyler recognized that public interest in *The Implosion Conspiracy* was an important concern, as was the author's need to use the copyrighted letters. He resolved these questions to his satisfaction but questioned the propriety of Nizer's conduct, which appeared less than commendable. Judge Gagliardi extensively reviewed the fair use doctrine and then formulated an analysis to fit the circumstances of the *Meeropol* case.¹⁷² His opinion asserts that public interest is "an extremely important consideration,"¹⁷³ as is the potential for misuse of copyright,¹⁷⁴ and that damage to the commercial value of *Death House Letters* is a factor to be considered but is not decisive.¹⁷⁵ The court of appeals concluded that harm to the copyright owner is a key consideration and emphasized the importance of determining the reason for using the let-

171. See note 102 & text accompanying notes 102-04 *supra*.

172. 417 F. Supp. at 1213; see text accompanying notes 136-49 *supra*.

173. 417 F. Supp. at 1207.

174. *Id.* at 1214 n.11. In their Brief for Certiorari, the Petitioners argued that the Meeropols' purpose in bringing the action was not to protect their copyright but to suppress, by means of their copyright, Nizer's book, which concluded that the Rosenbergs received a fair trial. See Petition for Certiorari, *supra* note 127, at 7-8. "[O]ther authors of books on the Rosenberg case [have] freely employed excerpts from the *Death House Letters* without any objections by [the Meeropols] and without the payment of any royalties. However, unlike Mr. Nizer, most of the authors . . . concluded that the Rosenbergs were innocent." *Id.* at 14 (citing V. GARDNER, *THE ROSENBERG STORY* (1954); W. & M. SCHNEIR, *INVITATION TO AN INQUEST* (1965); J. WEXLEY, *THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG* (1955)). The suggestion is that if Nizer also had found that the Rosenbergs were unjustly convicted, the Meeropols might never have brought the action. Petition for Certiorari, *supra* note 127, at 10. Judge Gagliardi observed:

[T]here is . . . an inherent danger that members of the family of a historical figure may use a copyright on his writings as a means of suppressing unfavorable information or comment about him by later writers rather than for the legitimate protection of their proprietary interest in his intellectual product.

. . . [T]he potential for misuse of the copyright laws with respect to letters of historical figures is an additional reason for construing the fair use doctrine liberally in cases like this one.

417 F. Supp. at 1214 n.11. The *Meeropol* litigation may have been prompted more by Nizer's opinion of the Rosenbergs' guilt than by his use of the copyrighted Rosenberg letters. For reasons expressed in the text accompanying notes 88-89 *supra*, copyright largely lacks the power of censorship.

175. 417 F. Supp. at 1210; see text accompanying note 147 *supra*.

ters.¹⁷⁶ This survey of the *Meeropol* litigation underscores Learned Hand's observation that the line dividing copyright infringement and fair use "will seem arbitrary."¹⁷⁷

FAIR USE RECONSIDERED

The *Rosemont*, *Bernard Geis*, and *Meeropol* cases demonstrate that courts remain troubled by the task of marking the boundaries of copyright protection. The confusion evident in fair use litigation reflects the uncertainty that exists concerning what fair use is and how it is to be measured. Even when there is agreement as to the factors that should control a claim of fair use, there is often disagreement as to the weight to be accorded the various criteria. Most disturbing is that the objective which fair use is designed to achieve rarely is identified or considered thoughtfully by the courts.

The principle to be derived from *Rosemont*, *Bernard Geis*, and *Meeropol* is that the scope of copyright protection is limited by the first amendment. This limitation divides infringement and fair use. If a use promotes progress in science and useful arts, is reasonably necessary, and threatens no harm to the value of the allegedly infringed copyright, that use is fair. Toleration of such a use is not discretionary; it is compelled by the guarantee of free speech, which demands an uninhibited flow of ideas and information.

What remains is to establish standards to govern the analysis of claims of fair use. Commentators¹⁷⁸ have wisely rejected a standard similar to that established in *New York Times Co. v. Sullivan*¹⁷⁹ and its progeny,¹⁸⁰ in which the Supreme Court held that, absent a showing of actual malice,¹⁸¹ defamatory speech concerning a public figure is protected by the first amendment. Extended to the law of copyright, this standard would require that, just as a public figure's

176. 560 F.2d at 1070.

177. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (L. Hand, J.). Copyright law still benefits from the contributions of Learned Hand. See Cracas, *Judge Learned Hand and the Law of Copyright*, 7 ASCAP COPYRIGHT L. SYMP. 55 (1956).

178. 1 NIMMER, *supra* note 17, § 1.10[A]; Goldstein, *supra* note 19, at 987-95; Sobel, *supra* note 20, at 63-79.

179. 376 U.S. 254 (1964).

180. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

181. In *New York Times* the Court defined actual malice as knowledge of falsity or reckless disregard of the truth. 376 U.S. at 280.

interest in his reputation or privacy occasionally must be subordinated to the first amendment, a copyright proprietor must tolerate certain uses of his property if they promote the public interest.

Several reasons militate against this analogy. First, the actual malice requirement of *New York Times* "is clearly inapposite to copyright doctrine."¹⁸² Intent to copy is not an element of copyright infringement.¹⁸³ Although some courts consider the user's motive relevant in fair use cases,¹⁸⁴ wiser courts have been reluctant to scrutinize the reason for a particular use. This reluctance recognizes the difficulty in attempting to determine whether copyrighted material was appropriated predominantly for commercial or for scholarly or historical reasons. Even if it could be determined

182. Goldstein, *supra* note 19, at 994.

183. See, e.g., *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282, 283 (8th Cir. 1939) ("[A]n intention to infringe the copyright [is not] essential under the Copyright Act."); *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960) ("If copying did in fact occur, it does not matter if it was done unconsciously and without intent to appropriate . . ."); *Metro Associated Servs. v. Webster City Graphic, Inc.*, 117 F. Supp. 224, 231 (N.D. Iowa 1953) ("Intention is immaterial if infringement appears.") (citations omitted); *Malsed v. Marshall Field & Co.*, 96 F. Supp. 372, 375 (W.D. Wash. 1951) ("[Copyright] infringement lies in the act of infringing, and not in the intention with which it is done.") (citations omitted). Lack of intent to infringe, however, may bear on the choice of remedy. See 3 NIMMER, *supra* note 17, § 13.08. See generally Latman & Tager, *Liability of Innocent Infringers of Copyrights*, in 2 STUDIES ON COPYRIGHT 1045 (A. Fisher ed. 1963).

In an infringement action a plaintiff must prove (1) "ownership of the copyright," and (2) "copying by the defendant." 3 NIMMER, *supra* note 17, § 13.01 (footnotes omitted). Ownership is dependent upon proof of the following facts:

- (1) Originality in the author; (2) copyrightability of the subject matter; (3) citizenship status of the author such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff the valid copyright claimant.

Id. § 1301[A] (footnotes omitted). Proof of most of the preceding elements of ownership is established by the plaintiff's copyright registration certificate, which constitutes prima facie evidence of the plaintiff's ownership. "[T]he only evidence required of the plaintiff to establish prima facie ownership in addition to the registration certificate is evidence of plaintiff's chain of title from the original copyright registrant." *Id.* (footnote omitted).

"[C]opying is ordinarily established indirectly by . . . proof of access and substantial similarity." *Id.* § 13.01[B]. "If . . . the similarity between plaintiffs [sic] and defendant's works is sufficiently striking and substantial the trier of fact may . . . infer copying notwithstanding the plaintiff's failure to prove access." *Id.* § 13.02[B] (footnote omitted).

184. See, e.g., *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 284 (5th Cir.), cert. denied, 398 U.S. 928 (1970); *Telex Corp. v. International Bus. Machs. Corp.*, 367 F. Supp. 258, 362 (N.D. Okla. 1973), rev'd on other grounds, 510 F.2d 894 (10th Cir. 1975), cert. denied, 432 U.S. 802 (1977); *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc.*, 105 F. Supp. 325, 333 (S.D.N.Y. 1952); *New York Tribune, Inc. v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

that copyrighted material was used predominantly for commercial reasons, it does not follow that the use is of little or no value to the public.¹⁸⁵ If copyright law works properly, inquiry into the intent of the user or the purpose of the plaintiff in bringing the action is unnecessary. Such concerns tend only to obscure the fundamental question: whether the use furthers or frustrates the purposes of copyright.

Second, copyright essentially is a property interest, whereas reputation and privacy have been characterized as liberty interests.¹⁸⁶ "The actual malice rule for libel and privacy [announced in *New York Times*] draws a line between permissible and impermissible injuries to another's personality."¹⁸⁷ Copyright, by comparison, requires that "a line be drawn between permitted and unpermitted uses of another's property."¹⁸⁸ Rights of liberty and property are both fundamental and demand equal and alert protection. There are, however, significant differences between a suit for copyright infringement and one for defamation or invasion of privacy. A public figure who has been defamed or whose privacy has been invaded has at least one remedy in addition to legal recourse—self-help.¹⁸⁹ He may reply to the charges against him by exercising his own right of free speech. This alternative, although not an adequate remedy in all cases, is unavailable to the copyright proprietor whose work has been appropriated. To obtain relief for injury to his property, the copyright proprietor can resort only to available judicial remedies.

Last and most importantly, a defamation suit presents a more serious threat to first amendment freedoms than a copyright infringement suit. The Alabama libel law in *New York Times*, like the state privacy statute in *Time, Inc. v. Hill*,¹⁹⁰ threatened the fully unfettered comment on matters of public interest required by the

185. See text accompanying note 80 *supra*.

186. See *Paul v. Davis*, 424 U.S. 693, 722-23 (1976) (Brennan, J., dissenting). The Court held, however, that defamation of the plaintiff by public officials did not deprive the plaintiff of a liberty or property interest protected by due process, *id.* at 712, because every defamation by a public official is not a deprivation of liberty. *Id.* at 702. But see Professor Van Alstyne's opinion that it would be equally logical to classify reputation as a property interest. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 479 n.97 (1977).

187. Goldstein, *supra* note 19, at 995.

188. *Id.*

189. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

190. 385 U.S. 374 (1967).

first amendment. In *New York Times* the Court expressed concern that "would-be critics of official conduct may be deterred from voicing their criticism" for fear of prosecution.¹⁹¹ The possibility of self-censorship¹⁹² struck at the heart of the first amendment. The Court decided, as Justice Powell later explained, that the first amendment protects "some falsehood in order to protect speech that matters."¹⁹³ Unlike the libel law challenged in *New York Times*, the copyright statute largely lacks the ability to silence opinion or to suppress the dissemination of facts and ideas. Copyright protects an author's expression; his ideas are free for all to use.¹⁹⁴

Fair Use and Infringement: A Suggested Analysis

To reform the fair use doctrine, the first step is to discard the notion that a fair use is a privileged or fair infringement.¹⁹⁵ The distinction that has been drawn between a noninfringing use and an excusable infringement has added only confusion to the law of copyright. This distinction suggests, erroneously, that different considerations are involved in the concepts of infringement and fair use, that a claim of infringement requires a peculiarly quantifiable analysis while fair use involves subtle policy determinations. Infringement and fair use are opposite ends of the spectrum of substantial similarity, a spectrum permeated by policy considerations that should govern every controversy.

The objective of copyright, to promote the progress of science and useful arts, is attained by offering an incentive to create, that incentive being protection for the creation. According to this theory, a reduction in copyright protection results in a disincentive; the public is then the loser. The copyright system thus equates the interests of society with the interests of the author; assigning primacy to either is improper.¹⁹⁶ Although the efficiency and utility of such a copyright system have been challenged,¹⁹⁷ until Congress is satisfied

191. 376 U.S. at 279.

192. Self-censorship would result from "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions." *Id.*

193. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341.

194. See cases and commentary collected in note 11 *supra*.

195. See note 53 *supra* & accompanying text.

196. See note 36 *supra* & accompanying text.

197. See commentary collected in note 38 *supra*. But see notes 40-41 *supra* & accompanying text, where it is suggested that the case for copyright is far from weak.

that copyright fails to achieve its objectives, the courts must apply copyright law with the conviction that its premises are sound.

Three questions should be addressed squarely in each infringement action.¹⁹⁸ The threshold question is whether the allegedly infringing work is entitled to the protections of the first amendment in that its distribution would serve the public interest.¹⁹⁹ This standard is not restrictive; only those expressions that are devoid of redeeming social value are not protected by the first amendment. Courts must recognize that any speech safeguarded by the first amendment also serves to advance the science and useful arts which copyright seeks to promote. Thus the protections afforded by copyright and by the first amendment are complementary, not conflicting. Recognizing the relationship between copyright and the first amendment, courts should be sensitive to the proper range of remedies in infringement actions: the more public interest in the allegedly infringing work, the greater the impropriety of injunctive relief.²⁰⁰

The next question is whether preparation of the allegedly infringing work reasonably required some use of the copyrighted materials.

198. Under present law, fair use is an affirmative defense; the burden of proving it rests on the defendant. See 3 NIMMER, *supra* note 17, § 13.05. A claim of infringement, by comparison, gives rise to a shifting burden of proof. See *id.* § 12.11[D] ("[W]here the plaintiff has made a strong prima facie case of copying by proving both access and a convincing number of similarities there is a high probability that copying . . . has in fact occurred so that at that point the burden of going forward with the evidence shifts to the defendant who must either negative the probability of copying by evidence of independent creation, or justify the copying by evidence of authority from or through the plaintiff.") (footnotes omitted).

The proposed analysis calls for an allocation of burdens between the litigants. The plaintiff must establish the likelihood of harm to his copyright; the defendant must show the public interest in his work and that preparation of his work reasonably required some use of the copyrighted material.

199. The degree of public interest a work commands must be determined primarily by an examination of the work itself, considering, in particular, what the work is about. Other indicators of public interest are the reputation of the author and sales data confirming the work's popularity or lack thereof.

200. "[T]he injunction, so far as it imposes prior restraint on speech and publication constitutes an impermissible restraint on First Amendment rights." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *accord*, *Near v. Minnesota*, 283 U.S. 697 (1931). Any prior restraint on expression carries "a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See also Goldstein, *supra* note 18, at 1029-35. "An award of monetary damages, which permits the infringing expression at a reasonable cost, is more tolerable from a first amendment point of view." *Id.* at 1030.

This inquiry encourages recognition that the distinction between an idea and the expression of an idea, central to the law of copyright, often is unclear.²⁰¹ It also is solicitous of copyright's goal to encourage and reward industry and creativity. Servile imitation²⁰²—copying for the sake of copying—does not promote the progress of science and useful arts and should be condemned. Once it is determined that a use is not reasonably necessary, that use should not be permitted without penalty. No social policy is advanced by tolerating theft of an author's expression when that expression is distinct from his ideas.

The final question is whether the allegedly infringing use endangers the present or potential value of the copyrighted work. This inquiry recognizes a third premise of copyright: economic incentive and protection are necessary to secure the public benefits that copyright provides. Adherence to the copyright system requires that harm to the value of a copyright must be compensated. To allow an injury to the value of copyrighted material is to sanction a disincentive, which eventually will discourage progress in the sciences and useful arts. The presence of numerous competing interests and the unusual difficulty of ascertaining injury and apportioning damages in copyright cases²⁰³ necessitates maintenance of a flexible approach to infringement remedies. There is a large middle ground between the award of an injunction and the absence of liability resulting from a finding of fair use, an area appropriate for carefully considered damage awards.

Application of this proposed infringement analysis to *Rosemont*, *Bernard Geis*, and *Meeropol* would yield a different result in each case than that reached by the court. In *Rosemont* the defendant's biography of Howard Hughes was of considerable public interest, and the use of the *Look* articles posed no appreciable danger to their

201. The *Bernard Geis* case demonstrates that the idea-expression dichotomy deserves special attention in infringement actions involving photographic works. See 1 NIMMER, *supra* note 17, § 1.10[C]. *Meeropol* emphasizes the need for tolerance of some reproduction of primary source materials, works unique for their originality, research value, and authority.

202. *Sayre v. Moore*, 102 Eng. Rep. 139, 139 n.(b) (K.B. 1785) (Lord Mansfield).

203. "Strictly and literally, it is true that the problem [of apportionment] is insoluble." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 48 (2d Cir. 1939) (L. Hand, J.), *aff'd*, 309 U.S. 390 (1940). See also *Orgel v. Clark Boardman Co.*, 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947); *Washingtonian Publishing Co. v. Pearson*, 140 F.2d 465 (D.C. Cir. 1944).

commercial value.²⁰⁴ The Random House biography, however, appropriated not only the facts of Hughes' life from the *Look* articles but also reproduced needlessly the expression of those facts. Because such a use was unnecessary, it should have been condemned and damages should have been awarded.²⁰⁵ In the *Bernard Geis* case the defendant's book about the Kennedy assassination elicited a great deal of public attention. Use of the Zapruder film was essential to convey the book's idea; but there was also a substantial likelihood of harm to the plaintiff's copyright. In such circumstances the proper remedy, sensitive to both the first amendment and to society's interest in a sound copyright system, is to award a reasonable royalty.²⁰⁶ In *Meeropol* Nizer's book on the Rosenberg trial demonstrably stirred the continuing interest in that controversial case. Resort to the Rosenberg letters was reasonably necessary,²⁰⁷ and their use did not threaten harm to the value of the Meeropols' copyright.²⁰⁸ A finding of fair use was in order.²⁰⁹

The problem of copyright infringement cannot be reduced to precise calculation. Charged with the public interest, it requires the most delicate sort of balancing. The proposed infringement²¹⁰ analy-

204. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309-11 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

205. *But see* note 121 *supra*.

206. See text accompanying note 117 *supra*.

207. *Meeropol v. Nizer*, 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973), *rev'd on other grounds*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 727 (1978).

208. See text accompanying note 167 *supra*.

209. The *Meeropol* litigation, in the courts for over five years, also illustrates the need for a prompt award of summary judgment in certain infringement actions. Summary relief is appropriate particularly at an early stage in libel or invasion of privacy claims against publications involving matters of public interest and concern. See generally *Dombrowski v. Pfister*, 380 U.S. 479, 486-89 (1965); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). In such cases, to avoid a chilling effect on the defendant's freedom of speech, summary judgment is granted as soon as it is evident that the plaintiff cannot establish the actual malice required by *New York Times*. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970). See also *Rendleman, Chapters of the Civil Jury*, 65 Ky. L.J. 769, 781-87 (1977). A similar standard should be fashioned for actions of copyright infringement. When the court is convinced that the allegedly infringing work poses no substantial threat to the value of the plaintiff's copyright, summary judgment should be granted.

210. Compare the proposed analysis with the test for fair use formulated by the court in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967):

Whether the [fair use] privilege may justifiably be applied to particular materials turns initially on the nature of the materials, *e.g.*, whether their distribution would serve the *public interest* in the free dissemination of information and

sis would not alleviate all difficulties. Courts still would have to make formidable judgments concerning the reasonable necessity of a use and the degree of harm to the copyright owner. Nonetheless, because the analysis requires consideration of the fundamental policies underlying the law of copyright, it promises decisions that better approximate copyright's objectives. Moreover, because it is based on policy, the analysis will be sufficiently flexible and self-correcting to deal with the infinite variety of circumstances that confront courts in infringement cases.

CONCLUSION

The conflict between copyright and the first amendment is more imagined than real. Like noble adversaries at the law that "[s]trive mightily, but eat and drink as friend,"²¹¹ copyright and the first amendment seek the same end; they differ, though, in their means of achieving that end. Copyright yields to the first amendment by refusing to extend its protection to an idea. On occasion, however, the line between the expression of an idea and the idea itself is less than distinct, and in these instances copyright of the expression threatens to bar access to the idea as well. In such cases copyright must yield to the command of the first amendment; some reproduction of the copyrighted materials must be permitted. The first amendment does not dictate, however, that damage to a copyright go fully without a remedy.

The law of copyright must reject the distinction that has been drawn between a noninfringing use and a privileged infringement. The distinction adds only confusion and erroneously implies that different considerations are involved in the search for infringement than in fair use. The question of fair use is identical to the question of infringement. The notion that fair use claims its own niche in copyright law and is accompanied by its own peculiar problems must be discarded.

whether their preparation *requires* some use of prior materials dealing with the same subject matter.

Id. at 307 (emphasis supplied). The chief distinction is that the *Rosemont* test fails to include the question of harm to the value of the allegedly infringed copyright. Additionally, the second element of the *Rosemont* analysis, that of necessity of the use, was not applied by the court and, consequently, has been overlooked generally. Had the court considered whether the Random House biography required use of the *Look* articles, it might have reached a different conclusion. See text accompanying note 207 *supra*.

211. W. SHAKESPEARE, *THE TAMING OF THE SHREW*, Act I, sc. III.

Although a court of equity perhaps cannot avoid being influenced by the conduct of the parties, consideration of intent is misplaced in the law of copyright. Inquiry into the intent of the plaintiff in bringing an infringement action, or into the conduct and purpose of the defendant in using the copyrighted material, tends only to obscure the fundamental question: whether the use furthers or frustrates the ends of copyright.

Studies on whether copyright serves its objectives are needed. Commentators today more frequently are challenging the copyright system; despite the lack of a solid empirical foundation, the logic of their criticisms often is convincing. Copyright is premised on the conviction that the incentive of copyright protection is the best way to promote progress in the sciences and useful arts. How well does the copyright incentive work? In what areas of creative endeavor is copyright law more influential than others? These questions may not be readily quantifiable, but the inquiry commends itself to those who desire to evaluate and to better understand the basis of laws.

If copyright law is to progress, its objectives and justifications must continually be remembered. The search for substantial similarity is difficult. Plagiarists do not lack cleverness; this the law has acknowledged with its sophisticated formulas for discovering an illicit copy.²¹² Although these formulas ensure that the plagiarist will not easily escape detection, they fail to answer the question of infringement, which involves questions of policy that are not reducible to mechanics. Justice Holmes, referring to the danger of carrying preconceived notions into the complicated arena of constitutional adjudication, admonished that "[t]o rest upon a formula is a slumber that, prolonged, means death."²¹³

MICHAEL D. BRITTIN

212. See note 18 *supra*.

213. O. W. HOLMES, *Ideals and Doubts*, in COLLECTED LEGAL PAPERS 303, 306 (1920).