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Modern Technology and the Conflict between Copyright and Free Speech: The Application of Copyright Law to Television Newscasts

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MODERN TECHNOLOGY AND THE CONFLICT BETWEEN COPYRIGHT AND FREE SPEECH: THE APPLICATION OF COPYRIGHT LAW TO TELEVISION NEWSCASTS

I. INTRODUCTION

The First Amendment's free speech guarantee encompasses the right of access to the unhindered flow of information and ideas.[1] At

1. *See* Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853,

the same time, the Constitution's Copyright Clause enables Congress to grant authors exclusive rights to their writings.[2] An author's ability to control the use of his or her work may initially seem to conflict with the public's right of access to information and ideas, but copyright's internal limitations adequately accommodate this free speech interest when properly applied.

Technological advances, however, often make a proper application of copyright principles elusive, which may result in serious threats to the underlying public interest. The application of copyright law to television newscasts illustrates the difficulties posed by modern technology and the potential threat to free speech interests. The failure to recognize the importance of public access to these newscasts has enabled broadcasters to control access under the guise of copyright protection.

By analyzing the application of copyright law to television newscasts, this Note discusses the conflict which technology produces between copyright law and the First Amendment. An overview of copyright law is provided in Part II, followed by a discussion of the interests underlying copyright law and the First Amendment in Part III. Part IV explores the ability of copyright law to accommodate free speech interests and the necessity of a First Amendment defense. Part V then illustrates the problems encountered when copyright is applied to modern technologies, and Part VI concludes that in such a case, emphasis of free speech interests is necessary for a proper application of copyright law.

II. OVERVIEW OF COPYRIGHT LAW

A. *Constitutional Origins*

The Copyright Clause of the United States Constitution provides the foundation for Congress' power to grant copyright protection to authors. Under this clause, Congress is given the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times

866-67 (1982).

2. U.S. CONST. art. I, § 8, cl. 8.

to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3]

The Supreme Court has recognized that this clause constitutes both a grant of power and a limitation on that power in that Congress may only grant such rights to further the stated purpose behind the clause, namely the promotion of science and useful arts.[4] The promotion of science and art is therefore not merely a desired byproduct of copyright law, but is in fact a constitutional requirement.[5] Accordingly, the rights granted to authors must further this public interest.

B. The 1976 Copyright Act

The most recent general revision of federal copyright law occurred in 1976.[6] An analysis of several important sections of this Act is necessary to provide an understanding of the nature of copyright law.

1. The Subject Matter and Scope of Copyright

The Act states that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[7]

Fixation is satisfied if the work is embodied in a copy which is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[8] In addition, the fixation requirement is met if fixation occurs simultaneously with the transmission of the work.[9] This definition

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3. *Id.*

4. *See* Graham v. John Deere Co., 383 U.S. 1, 5 (1966).

5. *See* Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1498 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

6. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 5659, 5660.

7. 17 U.S.C. § 102(a) (1988).

8. 17 U.S.C. § 101 (1988).

9. *Id.*

was designed to deal with the status of live broadcasts[10] and makes clear that such broadcasts may be subject to copyright protection so long as a copy of more than transient duration is simultaneously made with the transmission of that broadcast.

The Act also makes clear that only those portions of a work which are original are copyrightable, as indicated by the term "original works of authorship."[11] This requirement is not only statutory in nature, but is in fact a constitutional requirement embodied in the Copyright Clause itself.[12] The courts, however, have not applied a very stringent standard to the requirement of originality.[13] Indeed, the Supreme Court has made clear that only a "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually non-existent" will fail the test.[14]

The Act also states that "[i]n no case does copyright protection . . . 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."[15] The essence of this provision is that the use of an author's idea cannot constitute a copyright infringement unless the specific form of expression used to convey that idea is duplicated.[16] As explained below, this idea/expression dichotomy protects free speech interests.

Succintly summarized, a work qualifies for copyright protection when it is fixed in a manner in which its preservation is more than transitory. Furthermore, only the author's original expression of ideas or facts contained in the work is copyrightable.

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10. H.R. REP. NO. 1476, *supra* note 6, at 52, *reprinted in* 1976 U.S.C.C.A.N. at 5665.
11. 17 U.S.C. § 102(a) (1988).
12. *See* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1288 (1991).
13. *Id.* at 1294.
14. *Id.*
15. 17 U.S.C. § 102(b) (1988).
16. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 556 (1985).

2. The Author's Rights

Once a work qualifies for copyright protection, the author is given the exclusive rights to do the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.[17]

These rights define the author's ability to control the use of his work and are generally classified as the rights of reproduction, adaptation, publication, performance, and display.[18] These exclusive rights are, however, subject to limitations set out in sections 107 through 120.[19] The most important limitations are those imposed by the fair use doctrine.

3. The Fair Use Doctrine

Section 107 of the Copyright Act states that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."[20] Because it is an equitable rule of reason, the fair use doctrine must be applied on a case-by-case basis.[21] The Act does, however, list four factors to

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17. 17 U.S.C. § 106 (1988).
18. H.R. REP. NO. 1476, *supra* note 6, at 61, *reprinted in* 1976 U.S.C.C.A.N. at 5674.
19. 17 U.S.C.A. § 106 (Supp. 1992).
20. 17 U.S.C. § 107 (1988).
21. H.R. REP. NO. 1476, *supra* note 6, at 66, *reprinted in* 1976 U.S.C.C.A.N. at

guide a court deciding whether a challenged use is a fair one.[22] The factors are:

> (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.[23]

When considering the first factor—the purpose and character of the use—a common inquiry involves whether the challenged use is commercial in nature.[24] The use of a copyrighted work for commercial purposes raises a rebuttable presumption of unfair use.[25] Conversely, a non-commercial use creates a rebuttable presumption of fair use.[26]

As for the second factor—the nature of the copyrighted work—courts often consider whether the work is factual or creative in nature.[27] Factual works are afforded lesser protection due to the "greater need to disseminate factual works than works of fiction or fantasy."[28] Accordingly, the use of a factual work is more likely to be found a fair use than the corresponding use of a creative work.

When considering the third factor—the amount and substantiality of the portion used—"the Supreme Court has directed a qualitative evaluation of the copying of the copyrighted work."[29] The mere fact

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5680.

22. H.R. REP. NO. 1476, *supra* note 6, at 65, *reprinted in*, 1976 U.S.C.C.A.N. at 5679.

23. 17 U.S.C. § 107 (1988).

24. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448-49 (1984).

25. *Id.* at 449.

26. *Id.*

27. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 563 (1985).

28. *Id.*

29. Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 844 (11th Cir. 1990).

that an insubstantial portion of a work has been used is irrelevant if an essential portion of the protected work is copied.[30]

The final factor—the effect on the work's market value—is considered the most important of the four factors.[31] This is because impairment of the economic incentive granted to the copyright owner would undermine the very purpose for which such incentives are provided.[32] A use which threatens the marketability of the original work would lessen the author's incentive to produce the work in the first place. Accordingly, such a use is likely to be an unfair one.[33]

In sum, an author is given the exclusive right to control the use of original works which are fixed in some tangible medium of expression. Such rights are, however, subject to the limitations that (1) only an author's expressions are protected, and (2) a fair use of such works will not be considered a copyright infringement.

III. THE NATURE OF THE UNDERLYING INTERESTS

A. *The Interests Served by Copyright Law*

Copyright protection serves two purposes: (1) to provide the author with an economic incentive to publish ideas, and (2) to benefit the public through increased dissemination of those ideas.[34] Professor Patterson has articulated this concept by characterizing copyright as both proprietary and regulatory in nature.[35] He states that

> [c]opyright's basis as a proprietary concept is that it enables one to protect his or her own creations. Its regulatory basis is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society.[36]

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30. *Id.*; *see also Harper & Row*, 471 U.S. at 565.
31. *Harper & Row*, 471 U.S. at 566-67.
32. *Id.*
33. *Id.*
34. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
35. L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 5 (1987).
36. *Id.*

The proprietary concept is easy to recognize. An author would have little reason to create and publish a body of work which another could freely copy and sell. Such a scenario would deprive the author of potential profits, thereby discouraging the author's endeavor. As the Supreme Court has explained, "[t]he rights conferred by copyright are designed to assure [authors] a fair return for their labors."[37] This assurance, however, should not be misinterpreted as a private benefit primarily designed to reward the author.[38] Instead, it must be emphasized that copyright is essentially an economic incentive to stimulate the creative faculties of authors, not a gratuitous property grant on the part of Congress in appreciation of an author's creative efforts.[39]

The primary purpose of copyright is the promotion of learning through the increased flow of information and ideas. This is achieved through the economic incentives that copyright provides to authors. As the Supreme Court has observed, the incentives provided by copyright "must ultimately serve the cause of promoting the broad public availability of literature, music and the other arts."[40] This public interest is closely related to the free speech interests protected by the First Amendment.

B. Free Speech Interests

One goal of the First Amendment's guarantee of free speech is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[41] Furthermore, the public's right to receive suitable access to these ideas is crucial to ensuring that this goal is accomplished.[42]

There are three justifications behind the First Amendment's free speech guarantee.[43] The first justification is that free speech is neces-

37. *Harper & Row*, 471 U.S. at 546.

38. *See Sony Corp.*, 464 U.S. at 429.

39. *See Harper & Row*, 471 U.S. at 589 (Brennan, J., dissenting); *see also* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1289-90 (1991).

40. *Sony Corp.*, 464 U.S. at 432.

41. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

42. *Id.*

43. *See* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees*

sary in a self-governing, democratic society.[44] The idea behind this proposition is that free speech is "indispensable to the discovery and spread of political truth."[45]

The second justification is that free speech is an ultimate goal of a free society.[46] In other words, "freedom of speech is an end in itself because the very nature of man is such that he can realize self-fulfillment only if he is free to express himself."[47]

The third justification is that free speech serves as a safety valve for the expression of grievances.[48] The importance of allowing for the free expression of grievances is that "men are less inclined to resort to violence to achieve given ends if they are free to pursue such ends through meaningful, non-violent forms of expression."[49]

The First Amendment, therefore, serves functions vital to the existence of our democratic society. Any attempt to restrict its guarantee of access to the flow of information is not taken lightly. Since copyright law appears to restrict this First Amendment guarantee, it must be carefully analyzed. As discussed below, however, copyright's internal constraints prevent copyright law from abridging First Amendment guarantees.

IV. HARMONIZING COPYRIGHT LAW AND THE FIRST AMENDMENT

At first glance, the restrictions on access to creative works imposed by copyright law seem inconsistent with the protections provided by the First Amendment. Professor Nimmer articulated this inconsistency by asking, "[i]s [copyright] not precisely a 'law' made by Congress which abridges the 'freedom of speech' . . . in that it punishes

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of Free Speech and Press?, 17 UCLA L. REV. 1180, 1187 (1969-70).

44. *Id.* at 1187-88.

45. Whitney v. California, 274 U.S. 357, 375 (1927).

46. Nimmer, *supra* note 43, at 1188.

47. *Id.*

48. *Id.*

49. *Id.*

expressions of speech . . . when such expressions consist of the unauthorized use of material protected by copyright?"[50]

Although it appears to abridge this constitutional guarantee, copyright contains important internal limitations which alleviate this conflict.[51] Some commentators, however, have suggested a need for a First Amendment defense to copyright infringement in those situations where copyright's limitations are inadequate.

This section demonstrates how the idea/expression dichotomy and the fair use doctrine protect free speech interests. It then concludes that a separate First Amendment defense is unnecessary if these doctrines are properly applied.

A. *The Idea/Expression Dichotomy Protects Free Speech Interests*

Recall that under the idea/expression dichotomy, ideas contained in an author's work are not subject to copyright protection.[52] Only the use of an author's idea in the author's form of expression can give rise to a copyright infringement.[53] By essentially declaring ideas to be free game, this requirement minimizes any concern that the goals of the free speech doctrine will be undermined. It must be remembered that the First Amendment guarantees access to the marketplace of *ideas*.[54] This interest is in no way undermined by preventing the use of an author's expression, as long as his ideas can be used.[55] In other words, "[i]t is exposure to ideas, and not to their particular expression that is vital if self-governing people are to make informed decisions."[56]

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50. *Id.* at 1181.

51. *See* David E. Shipley, *Conflicts Between Copyright and the First Amendment After* Harper & Row, Publishers v. Nation Enterprises, 1986 B.Y.U. L. REV. 983, 984 (1986).

52. *See supra* text accompanying notes 15-16; Harper & Row, Publishers, v. Nation Enters., 471 U.S. 539, 556 (1985).

53. *Id.*

54. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

55. *See* Nimmer, *supra* note 43, at 1191-92.

56. *Id.*

It is clear, then, that the idea/expression dichotomy allows for the coexistence of copyright law and the First Amendment. As discussed below, however, there may be certain situations in which a work's idea and expression are so intertwined that the idea/expression dichotomy is an inadequate safeguard of First Amendment interests.

B. The Fair Use Doctrine as a Safeguard of Free Speech

The fair use doctrine is an additional limitation on copyright's potential for undermining First Amendment interests. As codified in section 107 of the Copyright Act, the doctrine permits the use of an author's work, including the author's form of expression, so long as it is used in a "reasonable manner."[57] Furthermore, as an equitable doctrine, what constitutes a fair use of a copyrighted work is decided on a case-by-case basis.[58]

This doctrine further accommodates First Amendment interests by permitting certain uses which are consistent with free speech values but which ordinarily would be an infringement of copyright. For example, public interest is served when an otherwise infringing use encourages dissemination of ideas. This public interest should be considered when assessing the character and nature of the use.[59] Although the fair use inquiry would not end here, the fair use doctrine is a "substantive rule of copyright law that can on occasion reduce the inherent tension between free speech and property rights in expression."[60]

C. A First Amendment Defense?

A proper application of the idea/expression dichotomy and the fair use doctrine should eliminate any need for a First Amendment defense.[61] However, as noted above, there may be certain circumstances

57. *See* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 293-94 (1979).

58. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 560 (1985).

59. *See* Denicola, *supra* note 57, at 297.

60. *Id.* at 299.

61. *See* Shipley, *supra* note 51, at 995.

in which the idea/expression dichotomy and the fair use doctrine fail to satisfy their roles as safeguards of free speech concerns. Thus, while the argument for a First Amendment defense concedes the limited instances in which it is necessary, it stresses the need to remedy the potential conflict.[62]

The facts presented in *Time Inc. v. Bernard Geis Associates*[63] illustrate the debate concerning a First Amendment defense to a copyright suit. The case involved the alleged infringement of Time's copyright in the Zapruder film of President Kennedy's assassination.[64] Because the defendant's request to reprint portions of the film was denied, sketches of relevant frames were included in the defendant's book.[65] The court determined that these sketches were "in fact copies . . . with no creativity or originality whatever."[66] The defendant's use of the film constituted a fair use, however, because of the public interest in access to information concerning President Kennedy's assassination and because the use had little or no effect on the market for the film.[67]

Professor Nimmer criticizes the court's decision that the sketches constituted a fair use and argues that the case illustrates the need for a First Amendment defense.[68] He first points out that this is a classic case where the idea and expression are so intertwined that separating the two is impractical.[69] Under the idea/expression dichotomy, while Time cannot claim copyright to the facts surrounding the assassination, the photographs themselves are so revealing of those surrounding events that "it was the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue."[70]

Professor Nimmer further argues that since the defendant's use did threaten the potential market value of the film, the court's finding of

62. *See* Nimmer, *supra* note 43, at 1197; Denicola, *supra* note 57, at 299-300.
63. 293 F. Supp. 130 (S.D.N.Y. 1968).
64. *Id.* at 133-34.
65. *Id.* at 138-39.
66. *Id.* at 139.
67. *Id.* at 146.
68. Nimmer, *supra* note 43, at 1200-01.
69. *Id.* at 1198.
70. *Id.*

fair use was therefore erroneous.[71] Accordingly, because of the public interest in access to the information revealed in the film, a First Amendment defense is appropriate.

Applied properly, however, copyright law does adequately protect threatened free speech interests.[72] In an analysis of the *Time* case in light of the Supreme Court's decision in *Harper & Row, Publishers v. Nation Enterprises*[73] and the enactment of the 1976 Copyright Act, Professor Shipley concludes that the Supreme Court's application of the Act provides an adequate framework for protecting free speech interests.[74]

In *Harper & Row*, the Court acknowledged that the idea/expression dichotomy limits an author's ability to control the flow of information.[75] The Court also pointed out that the scope of copyright protection is narrower for works "that are of greatest importance to the public."[76] Given this recognition that free speech policies underlie the idea/expression dichotomy, Professor Shipley argues that the court in *Time* could have concluded that the defendant's use of the Zapruder film's expression was minimal and was therefore outweighed by the free speech concerns.[77]

Furthermore, Professor Shipley argues that the *Harper & Row* Court analyzed the fair use doctrine flexibly and balanced the needs of both the public and of authors.[78] Based on this interpretation, he posits that the Court today would characterize the defendant's use of the Zapruder film as a fair use.[79]

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71. *Id.* at 1201.

72. Indeed, rarely has a court held a First Amendment defense necessary. *See* Patterson, *supra* note 35, at 3; Shipley, *supra* note 51, at 983.

73. 471 U.S. 539 (1985).

74. Shipley, *supra* note 51, at 1024.

75. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 556 (1985).

76. *Id.* at 559.

77. Shipley, *supra* note 51, at 1030-31.

78. *Id.* at 1033-34.

79. *Id.* at 1039. After applying the four factors listed in § 107 to the *Time* case, Professor Shipley concluded that

> in view of the uncertain impact of the copying on the market for or value of the film, the fact that the frames had already been published, the factual nature of the work, and copyright's policy favoring the dissemination of ideas and information, it

Despite the fact that copyright law embodies free speech interests, there is merit to Professor Nimmer's warning that a failure to distinguish between the statutory privilege of fair use and a constitutional limitation imposed by the First Amendment is dangerous.[80] As he states, "[t]he scope and extent of fair use falls within the discretion of Congress. The limitations of the First Amendment are imposed upon Congress itself."[81] Similarly, it seems reasonable to assert that the flexible nature of the fair use doctrine could lead to judicial abuse thereby allowing the author's interest to override the public interest.

Nevertheless, the previous discussion reveals that the fair use doctrine and recent Supreme Court analysis of copyright law provide sufficient assurance that copyright law will be applied in a manner that incorporates the First Amendment's free speech protections. The difficult task occurs at the district court level, where a proper application of this framework is necessary for the protection of free speech values. As discussed below, this often becomes particularly difficult when copyright law is applied to modern technologies.

V. THE CONFLICT CREATED BY TECHNOLOGY

Although copyright law may theoretically accommodate the public interest in access to information and an author's private interest in the control of his creative work, modern technology renders its application problematic. The legislative history of the 1976 Copyright Act reveals the impact created by modern technology:

> [S]ignificant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communication satellites, and laser

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was reasonable for the court . . . to conclude that the fair use equities favored the defendants.

Id.

80. Nimmer, *supra* note 43, at 1200.

81. *Id.*

> technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.[82]

The impact of such technologies and the difficulties encountered when attempting to balance the interests of authors and the public are readily apparent when copyright law is applied to the broadcast news media. Furthermore, the importance which such broadcasts have as a means of disseminating information justifies a careful analysis of the extent to which copyright accommodates this public interest.

A. Copyright Law and Television Newscasts

An analysis of the result reached by the Court of Appeals for the Eleventh Circuit in *Pacific and Southern Co. v. Duncan*[83] illustrates the challenges presented by modern broadcast technology and the undesirable results produced by an incorrect application of copyright law. *Duncan* involved a claim by a television station (WXIA) that the defendant, a video news clipping company, violated the station's copyright in its newscasts by videotaping and selling them to subjects of the newscasts.[84]

WXIA sought damages for infringement of its copyright and an injunction preventing the defendant from recording future broadcasts.[85] Although the district court found that the newscasts were copyrightable and the defendant had not made fair use of the material, it denied the injunction on the grounds that (1) the defendant's sales did not threaten WXIA's creativity, (2) an injunction would threaten First Amendment values, and (3) WXIA abandoned a portion of its copyright when it erased the videotape.[86]

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82. H.R. REP. NO. 1476, *supra* note 6, at 47, *reprinted in* 1976 U.S.C.C.A.N. at 5680.

83. 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

84. *Id.* at 1493. WXIA also videotaped these broadcasts but erased them after seven days. Although these tapes were not marketed, they would usually be sold upon request. Such sales, however, were a small portion of the station's profits. *Id.*

85. *Id.* at 1494.

86. *Id.*

The appellate court agreed that the defendant's sale of the videotapes was not a fair use, but held that the requested injunction was appropriate.[87] Considering the four factors listed under section 107,[88] the fact that the defendant's use was "unabashedly commercial" and not productive or creative in nature heavily influenced the decision.[89] Similarly, the effect on the potential market for the work weighed against the defendant because although WXIA did not actively market its videotapes, its ability to do so was adversely affected by the defendant's use.[90]

The amount and substantiality of the portion of the work used clearly weighed against the defendant because the entire work was copied and sold.[91] Finally, the nature of the use was the only factor in the defendant's favor, given the importance of the news to society.[92] Nevertheless, the court held that the equities favored a finding of unfair use on the part of the defendant.[93]

The court then rejected a First Amendment defense on the grounds that there was no conflict with the First Amendment because the public already had access to the newscasts, and the defendant did not provide any access that WXIA could not provide.[94] The court also rejected the defendant's argument that the copyright did not further the ends of the Copyright Clause because the public did benefit from the limited access that WXIA provided.[95]

Finally, in granting WXIA's requested injunction, the court disagreed with the district court's reasons for not doing so on the

87. *Id.* at 1495. The appellate court rejected the fair use claim for different reasons than the district court. Without considering the four factors listed under § 107, the district court rejected the fair use defense on the grounds that the defendant's use was not inherently productive or creative. The appellate court held that consideration of the four factors was mandated by the Copyright Act. *Id.*

88. *See supra* text accompanying notes 20-33.

89. Duncan, 744 F.2d at 1496.

90. *Id.*

91. *Id.* at 1497.

92. *Id.*

93. *Id.*

94. *Id.* at 1498.

95. *Id.* at 1498-99.

grounds that: (1) the fact that the post-broadcast market was relatively unimportant as a creative incentive was not enough standing alone to deny the injunction, (2) the "modest" furtherance of First Amendment rights accomplished by the defendant's activities did not prevent an injunction, and (3) destruction of the videotape did not demonstrate an attempt to abandon the copyright.[96] On remand, the district court issued an injunction preventing the defendant from copying or selling copies of WXIA's future newscasts in whole or in part.[97]

B. Identifying the Problem

It is clear that the *Duncan* court favored the copyright owner's interest over the broader public interest. The problem created by this outcome, however, is not readily apparent. The result seems justified when focusing on the identity of the parties: a television station versus a company which profits from the sale of the station's newscasts. Yet this tendency to focus on the identity of the litigants is precisely why courts commonly fail to recognize that copyright is primarily designed to benefit the public.[98]

The first flaw can be attributed not to the court's resolution of the case, but instead to a deficiency in the Copyright Act itself. The elimination of publication as a requirement for copyright protection threatens the assurance that once a copyrighted work is produced, the public will have access to that work.[99] Prior to the 1976 Copyright Act, publication served as a tradeoff between author and public: the author was granted statutory protection for his work provided that he published the work. In turn, publication ensured that the public would have the benefit of access to the work.[100]

Duncan, however, illustrates how this reciprocity is destroyed given the absence of the publication requirement and the unique characteristics of broadcast technology: a television station was granted

96. *Id.* at 1499-1500.
97. Pacific & S. Co. v. Duncan, 792 F.2d 1013, 1014 (11th Cir. 1986).
98. *See* Patterson, *supra* note 35, at 60.
99. *Id.* at 55.
100. *Id.* at 54.

copyright protection of its newscasts with no corresponding assurance that the public would have continued access to the information revealed in those newscasts. Indeed, because WXIA destroyed the videotapes after seven days, the ability to control the use of the newscasts outlasted any ability on the part of the public to view the information they contained. This result enables the copyright owner to control the learning aspect of copyright by controlling access to the work,[101] and is contrary to the primary purpose that copyright is intended to serve—public benefit.

Despite the problems presented by the elimination of publication as a requirement for copyright protection, a correct application of copyright principles could adequately protect free speech interests. Recognition that copyright protection only extends to a copyright owner's original expression and that this principle is based on the importance of the dissemination of ideas and information would greatly reduce a television station's ability to control access to news broadcasts given their factual content. Furthermore, a fundamental understanding that the fair use doctrine and the Copyright Clause embody free speech concerns would reduce the likelihood that these concerns are overlooked. It is through emphasis of these free speech values that the conflict between copyright and the First Amendment can be resolved.

VI. RESOLVING THE CONFLICT

A. Emphasizing Free Speech Values

The Eleventh Circuit's reexamination of the issue in *Cable News Network, Inc. v. Video Monitoring Services of America, Inc.*[102] represents a sound approach to the problems encountered when copyright is applied to television newscasts and illustrates the undesirability of the result reached in *Duncan*. The court's willingness to give greater rec-

101. *Id.* at 56.

102. 940 F.2d 1471 (11th Cir.), *vacated, reh'g granted*, 949 F.2d 378 (11th Cir. 1991), *and appeal dismissed*, 959 F.2d 188 (11th Cir. 1992). Because the decision has been vacated, it is not used as authority, but instead as illustrative of a proper application of copyright law to television newscasts.

ognition to the free speech values at stake was largely a result of the Supreme Court's unanimous decision in *Feist Publications v. Rural Telephone Service Co.*[103] Accordingly, a brief look at *Fiest* is warranted.

In *Feist*, a telephone company alleged that Feist infringed its copyright in a telephone directory by copying the directory for the purpose of assembling its own.[104] The Court thus had to determine the scope of copyright protection in a factual compilation given the conflicting propositions that while facts are not copyrightable, compilations are.[105] The Court first emphasized that the reason facts are not copyrightable is that originality is a constitutional requirement for copyright protection, and "[n]o one may claim originality to facts."[106] This is because facts are a part of the "public domain."[107]

Furthermore, because only expressions are copyrightable, the Court declared that "only the compiler's selection and arrangement may be protected; the raw facts may be copied at will."[108] In recognition of the fact that the primary purpose of copyright is not to reward authors for their labor, but to benefit the public, the Court stated that "[t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[109]

In *Cable News Network*, the Court of Appeals for the Eleventh Circuit addressed a copyright claim similar to that faced in *Duncan*.[110] Guided by the teachings of *Feist*, however, the court reached a contrary and more appropriate result.[111] The district court had granted CNN a preliminary injunction preventing VMS, a video monitoring service, from copying or selling any part of CNN's pro-

103. 111 S. Ct. 1282 (1991).
104. *Id.* at 1286-87.
105. *Id.* at 1287.
106. *Id.* at 1287-88.
107. *Id.* at 1290.
108. *Id.*
109. *Id.*
110. Cable News Network, Inc. v. Video Monitoring Servs. of Am., Inc., 940 F.2d 1471, 1476-77 (11th Cir.), *vacated, reh'g granted*, 949 F.2d 378 (11th Cir. 1991), *and appeal dismissed*, 959 F.2d 188 (11th Cir. 1992).
111. *Id.* at 1478.

gramming.[112] The court of appeals, however, held that the district court misapplied the law, and therefore reversed the grant of the preliminary injunction and remanded the case to the district court.[113]

The court first addressed the propriety of affording copyright protection for future works. It pointed out that such works could not receive protection since a future work could not be "fixed" as required by section 101.[114] Furthermore, granting such relief on equitable grounds would conflict with the Supreme Court's recognition in *Feist* that copyright is not primarily designed to reward authors, but is instead primarily intended to benefit the public.[115]

The denial of protection for future works was deemed important for two reasons. First, allowing such protection would enable claimants to avoid registration of their copyright, a requirement which assures public access to unpublished materials since a copy of the work is made available when the copyright is registered.[116] Second, because such works may not meet the originality requirement, protection of future works "would allow copyright claimants to use the legal system to secure copyright protection for public domain materials."[117]

The court then turned to the scope of copyright protection available for unregistered existing works. Although CNN did register a single segment of its programming, the district court granted a broad injunction protecting all of CNN's transmissions,[118] and a copy of the registered segment was not required.[119]

The court of appeals noted that the injunction granted by the district court was overbroad because it included materials intended to be in the public domain, thereby restricting the dissemination of factual

112. *Id.* at 1475.
113. *Id.* at 1486.
114. *Id.* at 1480-81.
115. *Id.* at 1481.
116. *Id.* The Copyright Act requires that the owner register his copyright before a suit for copyright infringement can be instituted. 17 U.S.C. § 411(a) (1988). Furthermore, a deposit of a copy of the work is necessary to obtain such registration. 17 U.S.C. § 408(a) (1988).
117. *Cable News Network*, 940 F.2d at 1481.
118. *Id.* at 1479-80.
119. *Id.* at 1476.

material.[120] A review of the registration and the copy of the program deposited was therefore necessary to "balance the rights of the copyright owner fairly against the rights of the public."[121]

The court then declared that the relief granted would have been overbroad even if CNN had registered a claim of copyright in its typical broadcast day.[122] Because most newscasts consist of a collection of pre-existing facts, the "copyright would be in the nature of a compilation which would include many segments, usually pre-recorded, as to which [CNN] would have no claim of copyright."[123] Under the teachings of *Feist* then, the "selection, coordination, and arrangement of these materials . . . may make the newscast as a whole an original work . . . copyrightable only as a compilation."[124]

The court accounted for the result reached in *Duncan* by noting that "[f]requently, the court is presented with a 'good guy' copyright owner and a 'bad guy' . . . copyist. As a result, in affording relief, the interest of the public in the free flow and availability of ideas is often overlooked."[125]

This emphasis on the public interest associated with copyright law and the First Amendment is necessary to ensure a proper application of copyright law. The reasoning employed in *Cable News Network* could indicate a shift toward greater recognition of this free speech interest. Furthermore, the need to emphasize free speech values, a district court is obligated to see that justice is done between the parties. A court must also see that the incentives provided through copyright are not eliminated by overemphasis of the public interest. The accomplishment of this task in light of a decision such as that reached in *Cable News Network* is set forth below.

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120. *Id.* at 1483.
121. *Id.*
122. *Id.* at 1484.
123. *Id.* at 1484-85.
124. *Id.* at 1485.
125. *Id.* at 1483.

B. *Applying the Law*

This section is intended to examine the practical effect of the teachings of *Cable News Network* by formulating an appropriate response at the district court level. First, an injunction may not be granted preventing the copying of future works. Second, the registration requirement and the requirement that a copy of the work is deposited and examined by the court must be followed in order to ensure that (1) the public will have access to the materials copyrighted, and (2) protection will not be extended to unoriginal materials which are rightfully in the public domain.[126] Thus, only materials in existence, and for which a copyright has been registered, may be the subject of an injunction.

The more difficult task is providing adequate protection for registered works while ensuring that public access to the important facts contained in newscasts is not unduly burdened. The originality requirement and the idea/expression dichotomy provide little, if any protection to such broadcasts. Because newscasts are factual compilations, only an original selection or arrangement of the facts will be protected.[127]

If this originality requirement is met, the facts contained in the broadcasts can be freely copied.[128] As with the Zapruder film, however, the visual element is often crucial for an adequate conveyance of the facts. In such a case, the free speech policies underlying the idea/expression dichotomy should be emphasized. Furthermore, copyright protection should be denied when the amount of expression copied is minimal compared to the benefit of public access.[129]

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126. As the court noted in *Cable News Network*, it is not significant that CNN does provide the public with access to videotapes of its programs, for there is no statutory requirement that it retain copies of its tapes or provide such access. Conceivably, the broadcaster could destroy the tapes, thereby preventing any opportunity for the public to view the copyrighted material. Such a scenario necessitates adherence to the registration requirements. *Id.* at 1483-84.

127. Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (1991).

128. *Id.*

129. *See supra* text accompanying note 77.

There may be situations in which a broadcaster's program is sufficiently original and the information contained in the program need not be visually conveyed.[130] In such a case, the fair use doctrine may still protect the defendant's use of the work. Courts should consider the benefit to the public when considering the nature of the use, and the factual content of the program when considering the nature of the copyrighted work.

The economic aspect of the fair use doctrine needs closer examination in the broadcast news scenario. Although the effect on the potential market value of the copyrighted work is an important consideration, recall that the basis for this importance is the need to protect an author's economic incentive to produce a work.[131] It seems doubtful, however, that the post-broadcast market is a strong incentive for CNN to produce its broadcasts. The more likely source of such incentive would seem to be the financial gain obtained from advertisers. If so, the defendant's use does not adversely affect the broadcaster's initial motivation for creating its programs, and it is doubtful that competition in the post-broadcast market would result in the termination of such programs.

Furthermore, if it were shown that CNN's motivations for producing its works were not based on its ability to gain financially from the post-broadcast market, then providing protection in this context would be contrary to the constitutional mandate that copyright protection must promote learning.

The amount of copyright protection afforded to news broadcasts should therefore be very slim, if not virtually non-existent. This result should not seem surprising. The Supreme Court has recognized that "the copyright in a factual compilation is thin."[132] Given the impor-

130. For example, in *Cable News Network*, the program which CNN did register for copyright protection was its *Crossfire* show, which typically involves a panel of guests debating current issues. It seems reasonable, given the fact the CNN determines the format of the show and selects which guests will appear, that such a show would be considered an original work. Furthermore, it seems doubtful that any information revealed by the participants of the show would need to be visually conveyed.

131. *See supra* text accompanying notes 31-33.

132. Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1289 (1991); *see also* Dale P. Olson, *Thin Copyrights*, 95 W. VA. L. REV. 147 (1992).

tance of the information conveyed in newscasts to free speech values, and given the fact that the value of such information may be reduced without the ability to view a newscast, it only seems appropriate that copyright in a newscast is especially thin.

VII. CONCLUSION

Applied properly, copyright law not only accommodates, but also furthers free speech interests embodied in the First Amendment. Both are aimed at the promotion of learning as a means of maintaining a well-informed democratic society. Copyright accomplishes this goal by encouraging the dissemination of ideas and information, and the First Amendment assures the public unhindered access to the ideas and information disseminated.

As evidenced by the application of copyright law to television newscasts, technological advances often produce novel situations in which the public interest underlying copyright is easily overlooked. In these cases, courts must be careful not to allow the identity of the parties to outweigh this public interest as the primary consideration when determining the appropriate relief. To do so would not only undermine an important interest sought to be furthered by copyright law, but would also ignore constitutional rights guaranteed by the First Amendment.

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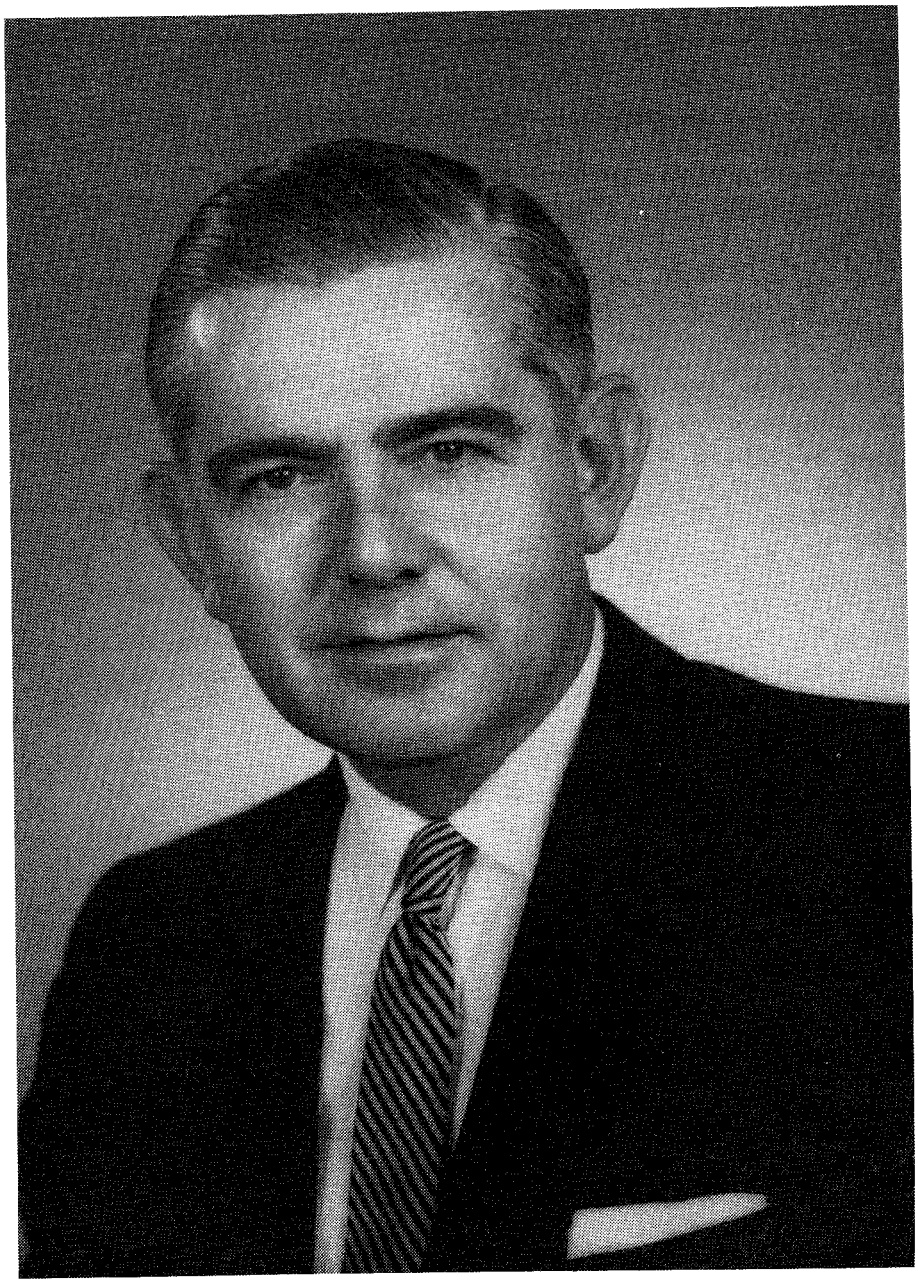

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