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A First Amendment Exception to Copyright for Exigent Circumstances*

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INTRODUCTION

Conflict between the first amendment and the Copyright Act is inevitable. Courts, however, have managed to dodge the first amendment question in copyright cases. In nearly every case the dodging has been accomplished by differentiating uncopyrightable ideas from protected expression and by using the doctrine of fair use.¹ The idea/expression dichotomy has always been a part of copyright.² Until 1976 the doctrine of fair use, however, was purely judicially created.³ But in 1976 this concept was also codified in the new Copyright Act.⁴

Commentators who have examined the dilemma of copyright and the first amendment agree that either: there is no clash between the first amendment and copyright law;⁵ or, if there is a conflict, the

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1. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enter.*, 723 F.2d 195 (2d Cir. 1983), cert. granted, 104 S. Ct. 2655 (1984); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Rosemont Enter. Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

2. See 17 U.S.C. § 102(b) (1982). See also *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954); *Baker v. Selden*, 101 U.S. 99, 102-03 (1879).

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

4. 17 U.S.C. § 107 (1982).

5. See *infra* notes 43-64 and accompanying text. See also Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 18 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 241, 250-52 (1979) [hereinafter cited as Denicola, *Copyright and Free Speech*]; Goldwag, *Copyright Infringement and the First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1, 8 (1983) [hereinafter cited as Goldwag, *Copyright Infringement*]; Note, *Copyright: Unfair Use in Fair Competition—A Search*

fair use doctrine satisfies any requirements of the first amendment.⁶ Courts have generally agreed with the commentators.⁷

There are, of course, notable exceptions among the courts and commentators, but none have conceptualized the entire problem.⁸ This Article will show that there is a situation creating a clash between the first amendment and copyright law which requires a solution. It involves the exigent circumstances of a daily newspaper or news broadcast and it occurs when there is no time to arrange for a license or purchase of a copyrighted work before its use is necessitated by the public interest requirements of the first amendment. The following scenario illustrates the problem:

The editor or broadcaster is under a deadline. He receives, by whatever means, a picture equivalent to those in the My Lai massacre or the Zapruder film.⁹ His news sense says this must appear in the paper or on television. Then he notices a copyright notice on the back of the photograph or attached to the film can. He attempts to contact the owner of the copyright, but, to no avail. The clock continues to run as facts about the story behind the picture or film become available, making the story more and more important. The editor or broadcaster is in a quandary. Run the picture and he is liable for infringement, refuse to run the picture and he has failed in his duty to protect the public interest.

Although courts have repeatedly made allowances for exigent circumstances in news gathering,¹⁰ no case has been decided on point when a copyright is also involved. As the United States Supreme Court has recognized, when the public interest under the first amendment is at stake, it is important that the government not create a "chilling effect" by subjecting it to the whims of a judge's interpretation of a statute.¹¹ This is especially apparent if the judge

for a Logical Rationale for the Protection of Investigative News Reporting, 30 OKLA. L. REV. 214, 233 (1977) [hereinafter cited as Note, *Copyright: Unfair Use*].

6. See *infra* notes 65-84 and accompanying text. See also Rosenfield, *The Constitutional Dimension of "Fair Use" In Copyright Law*, 50 NOTRE DAME LAW. 790, 791 (1975) [hereinafter cited as Rosenfield, *Fair Use*]; Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 BULL. COPYRIGHT SOC'Y OF THE U.S.A. 215, 251 (1977).

7. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984); *Harper & Row, Publishers, Inc. v. Nation Enter.* 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978).

8. See *infra* notes 18-42 and accompanying text.

9. See *infra* notes 48-53 and accompanying text.

10. See, e.g., *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

11. See, e.g., *Baird v. State Bar of Az.*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

is required to interpret doctrines as amorphous as the idea/expression dichotomy or fair use to protect the first amendment. As stated, courts deciding copyright cases have generally shunned basing their decision on first amendment grounds, choosing rather a "stretching" of copyright principles to find an exception to copyright protection.¹² Perhaps this is a symptom of the situation in which the traditional defenders of first amendment rights—the press—are as interested in protecting their *own* copyrights as those they might accuse of violating the first amendment via the copyright law.¹³ The danger of stretching copyright principles is that these cases can be used as precedent for decisions not involving a valid public interest.¹⁴ This could lead to an unnecessary usurpation of copyright protections.

To accomplish the goals of this Article, first, a probe of the scope of the problem and the reasons dictating an exception to the copyright law under the public interest requirements of the first amendment is in order. Next, an examination of the idea/expression dichotomy and the fair use doctrine will be undertaken. Then, to show the need for a separate exception to copyright protections this Article will examine cases that have taken the copyright scheme to its limits in an attempt to protect the public interest, including the

12. Ironically, the only copyright cases where the first amendment has been recognized is in the "commercial speech" area. See *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983); *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978). In a dissent from a refusal by the Second Circuit to rehear the *Consumers Union* case, Judge Oakes said the three-judge panel's decision "missapplies the doctrine of commercial free speech and takes the heart out of the 'fair use' doctrine . . ." 730 F.2d 47, 48 (1984) (Oakes, J., dissenting). He went on to say that "the use of 'commercial free speech' to justify a fair use defense to copyright infringement stands either the copyright law or the First Amendment on its head. . . . Doing so in the name of the First Amendment, I fear, cheapens that Amendment's coin." *Id.* at 50. Although this crack in the court's usual refusal to recognize any first amendment exception to copyright laws may be used eventually by media defendants to argue for a complete first amendment exception to copyright laws, the commercial speech question is outside the scope of this Article and will not be addressed.

13. A survey of the Congressional reports concerning the copyright revision showed there was no argument made in favor of a first amendment exception to the copyright law for the media. Robert Evans, vice president and general counsel of C.B.S., Inc. spoke against provisions in the then proposed act that would have allowed infringement by educational institutions of C.B.S. news programs. *Omnibus Copyright Revision: Hearings on H.R. 2223 Before the Subcommittee on Courts Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 683-90 (1975)* (statement of Robert V. Evans, Vice President and General Counsel, C.B.S., Inc.).

14. This was part of the argument used by Harper & Row in their petition for a writ of certiorari to the United States Supreme Court. They said "the limitations on what is protectable will not be limited to cases in which copyrighted material has been used by the news media." Petition for a Writ of Certiorari at 17, *Harper & Row, Publishers, Inc. v. Nation Enter., cert. granted*, 104 S. Ct. 2655 (1984) [hereinafter cited as *Petition, Nation*] [copy on file in the offices of California Western Law Review].

most recent and far reaching case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁵ The United States Supreme Court recently granted a review of the *Nation* decision.¹⁶ This could lead to a solution to this problem, but a decision is not expected until early 1985.¹⁷ Finally, this Article will propose a solution.

I. THE PROBLEM

The United States Supreme Court has repeatedly recognized the inherent problems of a reporter working under a deadline.¹⁸ In one case, even though the Court eventually found against the media defendant, Justice Blackmun stated that,¹⁹ "[A] reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources."²⁰ It is logical, therefore, to find that the same exigent circumstances exception should also apply to the use of copyrighted materials when a newspaper or broadcaster is under deadline pressures.

A chilling effect on the media will occur if an exception is not granted for the limited use of copyrighted materials under deadline pressures, when the use of such materials is necessitated by the public interest. The United States Supreme Court has recognized factual circumstances and remedied laws that have had a chilling effect on the public interest under the first amendment.²¹ This is another example of a situation requiring such a remedy.

In order to narrow the problem, the situations must be defined in which the public interest under the first amendment would require use of copyrighted materials so that the proposed exception does not undermine the protections afforded authors under the copyright law.

Some commentators and courts have at least recognized the contradiction between copyright law and the public interest under the first amendment.²² Professor Melville Nimmer believes there is a

15. 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

16. *Id.*

17. Telephone interview with Edward A. Miller, attorney for the petitioners, (June 4, 1984).

18. See *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

19. In the *Wolston* case, although Justice Rehnquist found against the media defendant in a libel action, the Court's decision was based in part on the fact that the author of the libelous article was a historian who had more time to check his facts than a reporter working on a daily deadline. 443 U.S. at 171 (1979) (Blackman, J., concurring).

20. *Id.*

21. See, e.g., *Baird v. State Bar of Az.*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

22. See, e.g., 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10 (1978) [hereinafter

general failure to perceive the problem.²³ He states "It cannot be denied that the copyright laws do in some degree abridge freedom of speech, and if the First Amendment were literally construed, copyright would be unconstitutional."²⁴ But Professor Nimmer goes on to say, "No one can responsibly adhere to the position that the First Amendment must be literally construed so as to invalidate all laws which in any degree abridge speech."²⁵

The contradiction begins with the Constitution. The Constitution expressly gives Congress the power to maintain a copyright law to "promote the progress of science and useful arts."²⁶ Copyright law originated in England as a basis for controlling censorship.²⁷ But by the time of the adoption of the the Statute of Anne, considered the first copyright statute, copyright was no longer used for censorship.²⁸ A new basis for copyright was assumed, and recently the United States Supreme Court reiterated the rationale:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.²⁹

Given the constitutional copyright authority, there are many approaches to the meaning of the Framers' first amendment to the Constitution which states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press"³⁰ Some have stated that the amendment is an "absolute," that is, when the Framers said "no law" they meant no law,³¹ while others advocate a "balancing" to determine what is protected under the first amendment and what is not.³² One of the foremost think-

cited as 1 NIMMER]; Rosenfield, *Fair Use*, *supra* note 6; Goldstein, *Copyright and the First Amendment* 70 COLUM. L. REV. 983 (1970) [hereinafter cited as Goldstein, *Copyright*].

23. 1 NIMMER, *supra* note 22, at 1-62.

24. *Id.* at 1-64.

25. *Id.* at 1-65.

26. U.S. CONST. art. I, sec. 8, cl. 8.

27. See Goldstein, *Copyright*, *supra* note 22, at 983-84.

28. *Id.*

29. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 782 (1984).

30. U.S. CONST. amend. I.

31. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962).

32. See *Konigsberg v. State Bar*, 366 U.S. 36, 49-56 (1961). In this decision Justice Harlan detailed his balancing approach. For an analysis of this approach, see Meiklejohn, *The First Amendment is an Absolute*, SUP. CT. REV. 245, 251-52 (1961) [hereinafter cited as Meiklejohn, *The First Amendment*].

ers on the first amendment, Alexander Meiklejohn, siding with a modified absolutist approach, elucidates the needed solution the best:

We are looking for a principle which is not in conflict with any other provision of the Constitution, a principle which, as it now stands, is "absolute" in the sense of being "not open to exceptions," but a principle which also is subject to interpretation, to change, or to abolition, as the necessities of a precarious world may require.³³

Meiklejohn has interpreted the first amendment as not an individual's right to speak, but, rather, a community's right to hear.³⁴ Free speech and free press under the first amendment have a vital social importance. "If citizens are to exercise their obligations in democratic society, it is essential that the channels of communication be opened."³⁵ This notion has been generally termed the "marketplace of ideas." That is, all ideas should be tested in open dialog and debate.³⁶ Thus, there is a public interest at stake under the first amendment whenever there is a restriction on the free flow of information. Copyright can serve to restrict the free flow of information, thereby depriving the public of the tools necessary to function properly in the democratic society.

Some restrictions on freedom of speech have been repeatedly upheld. Justice Holmes has stated that the first amendment does not protect someone who shouts "fire" in a theater causing a panic,³⁷ and Justice Harlan has enumerated a list containing, libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of a crime, complicity by encouragement, and conspiracy, as not being protected by the amendment.³⁸ Is copyright, by virtue of its constitutional basis, excluded from the ambit of the first amendment?

Professor Nimmer states that because the first amendment is an amendment, it supersedes anything inconsistent in the main body of the Constitution.³⁹ When the public interest under the first amendment is involved the copyright law must give way.⁴⁰

Thus, the conflict on a superficial basis is apparent. Copyright

33. Meiklejohn, *The First Amendment*, *supra* note 32, at 253.

34. A. MEIKLEJOHN, *POLITICAL FREEDOM* 26-28 (1965).

35. J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 5 (1979).

36. *Id.* at 4.

37. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

38. *Konigsberg*, 366 U.S. 36, 49 n.10.

39. 1 NIMMER, *supra* note 22, at 1-63, 1-64.

40. *See Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1178-84 (5th Cir. 1980) (Brown, J., concurring and dissenting); *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. 809, 812 (BNA) (N.D. Cal. 1979). *See also Denicola, Copyright and Free Speech*, *supra* note 5, at 266. Denicola said, "When the objectives of free speech

law could restrict the free flow of information which, in the public interest, is required under the first amendment. It is argued, however, by many, that the conflict is easily reconciled, either, by the copyright maxim that only *expression* is copyrightable not *ideas*,⁴¹ and the dissemination of ideas is what satisfies the public interest, or, by fair use.⁴²

II. THE IDEA/EXPRESSION DICHOTOMY

The first aspect of the copyright scheme to be examined, and urged by courts and commentators as protection for the first amendment, is the idea/expression dichotomy found in the copyright code. It is argued, that as long as the distinction can be made between expression and ideas, the public interest under the first amendment will be satisfied because the public will still have access to the *ideas*.⁴³ As one commentator has aptly expressed the theory "a line can be established between the first amendment rights and copyright by separating the substance (fact or ideas) from the expression (pattern, development, language, style, etc.) of the 'writing' and protecting the latter while permitting free use of the former."⁴⁴

But Professor Nimmer illustrates a problem where the expression and idea are so "wedded" it is impossible to separate them in order to determine what is protected.⁴⁵ This situation arises primarily in the area of copyrighted photographs. For example, the pictures of the My Lai massacre. The actual photograph is the expression and therefore protected under copyright laws. But Professor Nimmer suggests it would be impossible to satisfactorily describe the *idea* of the photographs in any way that would satisfy the public's right to know without the pictures themselves.⁴⁶ Therefore, says Professor Nimmer, "it would seem that the speech interest outweighs the copyright interest."⁴⁷ The likelihood of this predicament arising under exigent circumstances is acute. An editor or producer could find himself faced with a decision, under deadline pressures, as to whether he should use such a photograph, even knowing that the photograph was copyrighted in the public interest.

The Nimmer scenerio has been addressed by one court in *Time*,

require access to the expression of another, the property interest created by copyright law must yield, regardless of the economic impact." *Id.*

41. 17 U.S.C. § 102(b) (1982). *See also* *Mazer v. Stein*, 347 U.S. 201 217-18 (1954); *Baker v. Selden*, 101 U.S. 99, 102-03 (1879).

42. *See infra* notes 65-84 and accompanying text.

43. *See supra* note 5.

44. Note, *Copyright, Unfair Use*, *supra* note 5, at 233.

45. 1 NIMMER, *supra* note 22, at 1-81.

46. *Id.* at 1-83.

47. *Id.*

Inc. v. Bernard Geis Associates.⁴⁸ The dispute in that case concerned the copying of several frames from the famous Zapruder film, an amateur filming of the assassination of President Kennedy, in a book questioning the Warren Commission report on the shooting.⁴⁹ Soon after the assassination, Time, Inc. paid Abraham Zapruder \$150,000 for the film and proceeded to publish frames of the film in *Life* magazine.

When the Warren Commission was appointed to investigate the assassination, *Life* consented to the use of the film by the government for their investigation.⁵⁰ The film was considered very valuable for this purpose.⁵¹ Researchers had access to the film at the National Archives where all the documents used by the Warren Commission were deposited. The author of the infringing book was a consultant to *Life* at one time. There was a dispute as to where he obtained the slides to make the copies used in the book.⁵² The author and his publisher had made several attempts to obtain permission to use the photographs from Time, Inc., but had been refused.⁵³

The court called the fair use question "the most difficult issue in the case."⁵⁴ Although it did not mention the first amendment, the court found the use of the film copies fair use, saying: "In determining the issue of fair use, the balance seems to be in favor of defendants. There is a *public interest* in having the fullest information available on the murder of President Kennedy."⁵⁵

The decision in *Geis* has been criticized because of the allegedly faulty reasoning of the court in finding there was no economic injury to the plaintiff by the copying of the film frames.⁵⁶ The court said, "The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the theory of Thompson [the book's author] and its explanation, supported by Zapruder's pictures."⁵⁷ Professor Nimmer argues that the decision can only be supported, "not on the ground of fair use, but rather because of the previously described free speech elements inherent in the film."⁵⁸

48. 293 F. Supp. 130 (S.D.N.Y. 1968).

49. *Id.* at 133.

50. *Id.* at 134.

51. *Id.*

52. *Id.* at 135.

53. *Id.* at 137.

54. *Id.* at 144.

55. *Id.* at 146 (emphasis added).

56. 1 NIMMER, *supra* note 22, at 1-86, 1-88. See also Denicola, *Copyright and Free Speech*, *supra* note 5, at 265; Goldwag, *Copyright Infringement*, *supra* note 5, at 17.

57. *Geis*, 293 F. Supp. at 146.

58. 1 NIMMER, *supra* note 22, at 1-87. See also Goldwag, *Copyright Infringement*, *supra* note 5, at 17.

Professor Nimmer criticizes the reasoning that the Zapruder film could still be used by the plaintiff, Time, Inc., for future motion pictures. He uses a time honored example of how infringement can take place from one medium to another (i.e., from a book to a movie) as an analogy to show that the economic harm to Time, Inc. was not just "speculative," as the *Geis* court said, but rather a harm without question.⁵⁹

The rationale of the court, however, seems the better reasoning, especially in light of recent cases that have expanded the doctrine of fair use.⁶⁰ Professor Nimmer made his argument in a section of his treatise in which he argues for a limited first amendment exception to copyrighted photographs with a compulsory license approach.⁶¹ He seems to have strained the argument in this situation by failing to address the fact that only 22 "partials" of frames⁶² were used in the book.⁶³ It is hard to believe that the book would affect the sales of a movie made by Time, Inc. showing the entire film or even another book about the assassination, as Professor Nimmer asserts. It is more reasonable to accept Judge Wyatt's assumption that the book would *enhance* sales of any film by the plaintiff.⁶⁴ Besides the dilemma illustrated by Professor Nimmer, there are other problems in the idea/expression area. The problem, illustrated along with others, add to the lack of predictability in the area, exacerbating the problem for newspapers and broadcasters deciding to use copyrighted materials under deadline pressures.

III. THE FAIR USE DOCTRINE

According to the latest pronouncement from the United States Supreme Court, once a copyright has been infringed a defendant may still invoke the defense of fair use, making the infringement excusable.⁶⁵ This doctrine has been called the "right of reasonable access to copyrighted materials."⁶⁶ The Court of Appeals for the Second Circuit has termed the doctrine the "most troublesome in the whole law of copyright."⁶⁷ Commentators disagree as to whether the doctrine is constitutionally mandated or merely a sub-

59. 1 NIMMER, *supra* note 22, at 1-87.

60. *See infra* notes 128-49 and accompanying text.

61. 1 NIMMER, *supra* note 22, at 1-84, 1-85.

62. The book utilized charcoal sketches that were derivative works and therefore an infringement, but complete frames were not reproduced.

63. *Geis*, 293 F. Supp. at 139.

64. *Id.* at 146.

65. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 784 (1984). The Court said: "anyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use." *Id.*

66. Rosenfield, *Fair Use*, *supra* note 6, at 791.

67. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (1939).

stantive rule of copyright,⁶⁸ but many courts and commentators state boldly that the concept rectifies any clash between the first amendment and copyright law.⁶⁹

Although the doctrine was recently included in the copyright law revision⁷⁰ it began in the courts. In *Folsom v. Marsh*,⁷¹ the first case fully adopting the doctrine, Justice Story stated that "This is one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion."⁷² The infringement in *Folsom*, or piracy as they called it then, was of a book entitled *The Writings of George Washington*.⁷³ Former Chief Justice Marshall was a part owner of the copyright on the book.⁷⁴ It consisted of correspondence, addresses, messages, and other papers of President Washington. The defendants' book contained 388 pages taken verbatim from plaintiff's. Justice Story enunciated a test for what he called the "fair and bona fide abridgement of an original work," that was not piracy.⁷⁵ "We 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."⁷⁶ Much of this test has been incorporated in the present codification of the fair use doctrine.⁷⁷

Although Justice Story expressed sympathy for the defendants,

68. See Rosenfield, *Fair Use*, *supra* note 6, at 791. Rosenfield said:

Fair use—the right of reasonable access to copyrighted materials—has constitutional protection both directly and under the penumbra of the first and ninth amendments. This constitutional dimension protects the right of reasonable access to our cultural, educational, scientific, historical, technical, and intellectual heritage.

Id. But see Denicola, *Copyright and Free Speech*, *supra* note 5, at 261. Denicola said: The ability of fair use doctrine to reconcile copyright law with free speech has led some to conclude that the doctrine is in essence a constitutional one, with its contours determined by the first amendment. This conclusion is unnecessary and perhaps unwise. The fair use doctrine simply immunizes from liability certain invasions of statutorily created property rights. That it may operate in some instances to avoid potential conflicts between those property rights and the interests protected by the first amendment need not elevate the doctrine to constitutional status.

Id. (footnotes omitted).

69. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 206 (2d Cir. 1983). See also Goldwag, *Copyright Infringement*, *supra* note 5, at 13.

70. 17 U.S.C. § 107 (1982).

71. Although some portions of the fair use doctrine appeared before the *Folsom* case, *Folsom* is generally considered the first case to fully detail the doctrine. *Time, Inc. v. Bernard Geis Assoc.* 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

72. 9 F. Cas. at 344.

73. *Id.* at 345.

74. *Id.*

75. *Id.*

76. *Id.* at 348.

77. See Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction*, in *FAIR USE AND FREE INQUIRY* 3, 10 (J.S. Lawrence & B. Timberg, eds. 1980).

he found that their copying was so great that it could not be protected by fair use. He affirmed the recommendation of the master and granted an injunction against the distribution of the defendants' book.⁷⁸ The courts have continuously upheld this doctrine, including modifications, to cope with technological changes.⁷⁹ But as Justice Story said in *Folsom*: "what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points . . . which can well arise for judicial discussion."⁸⁰

The current statutory scheme used for fair use heeds Justice Story's warning and does not attempt to define the doctrine. Rather, the code sets out some of the types of infringements in which fair use could be invoked⁸¹ and the factors that "shall" be considered when determining whether it is available.⁸² The codification was not meant to change the judicial doctrine of fair use but merely to restate what is already the law.⁸³

One of the criteria enunciated in the statute is the effect of the infringing use on the potential market value of the copyrighted work. This factor is considered the most important to the determination of fair use.⁸⁴ It also has the greatest potential for eliminating fair use as a protection of the first amendment. It is very likely that the use of copyrighted materials in exigent circumstances will impair the commerciality of the copyrighted work. Nevertheless, as will be shown, this limited infringement is necessary to preserve the fundamentals of the first amendment. Some courts have sought to alleviate this potential first amendment problem by stretching the copyright scheme to its farthest reaches.

78. *Folsom*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901).

79. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984).

80. *Folsom*, 9 F. Cas. at 345.

81. These uses include, "criticism, comment, news reporting, teaching (including multiple copies for classrooms), scholarship, or research . . ." 17 U.S.C. § 107 (1982).

82. The factors include,

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

83. As stated in the House Report, "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680.

84. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1978) [hereinafter referred to as 3 NIMMER].

IV. THE FAR REACHES OF FIRST AMENDMENT PROTECTION UNDER THE COPYRIGHT SCHEME

*Harper & Row, Publishers, Inc. v. Nation Enterprises*⁸⁵ illustrates the utilization of both the idea/expression dichotomy and the fair use doctrine carried to the limits of the copyright scheme in an effort to protect the public interest under the first amendment. The decision, by the authoritative Second Circuit, concerned the unauthorized publication of a former President's memoirs by a weekly magazine. The arbitrary nature of copyright decisions when the public interest is involved is shown by the district court's finding of infringement, its award of damages, and the subsequent reversal by the appellate court. It is therefore instructive to trace the history of the case.

Former President Ford, with the assistance of a professional writer, Trevor Armbrister, completed the first draft of his book in February, 1979. Two months later, Ford's publishers licensed exclusive rights to *Time* magazine to print pre-publication excerpts. But in March, 1979, an unidentified person brought a copy of the draft to Victor Navasky, editor of *The Nation*.⁸⁶ This magazine is one of America's oldest continuously published weekly magazines,⁸⁷ devoted primarily to news and politics.⁸⁸ According to the district court, "believing that the draft contained 'a real hot news story' concerning Ford's pardon of former President Nixon, as well as lesser news," Navasky spent overnight or perhaps the next twenty-four hour period *quoting and paraphrasing* from a number of sections of the memoirs. Navasky added no comment of his own. "He did not check the material," said the district court.⁸⁹ The article was published on April 3, 1979.

As a result of this publication, *Time* magazine refused to publish its pre-publication excerpts and did not pay the second \$12,500 due upon such publication.⁹⁰ The portions of the memoirs dealing with the pardon of Nixon were quoted and paraphrased extensively by Navasky in *The Nation* and were the material that *Time* magazine had wanted to print.⁹¹

In the district court, Judge Owen rejected the defendant's first

85. 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

86. *Id.* at 198.

87. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 557 F. Supp. 1067, 1069 (S.D.N.Y. 1983).

88. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 198 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

89. *Nation*, 557 F. Supp. at 1069 (emphasis added) (ironically, after finding the article infringed on plaintiff's copyright and caused economic loss, the court published the article in the appendix of the opinion).

90. *Nation*, 723 F.2d at 199.

91. *Nation*, 557 F. Supp. at 1072 n.10.

amendment argument by saying: "While there may be a circumstance in which the First Amendment provides a defendant with greater protection than the fair use doctrine, this is not, in my judgment, one of them."⁹² Judge Owen did not examine whether the material used was copyrightable, and rejected defendant's plea that any copyright infringement was protected by fair use because it was "news."⁹³ In an unprecedented theory, Judge Owens said *The Nation* article was not news because it did not contain "hot news," despite the expert opinions of three journalists that it was news. In addition, the court indulged in some hindsight analysis to determine whether the article was news sufficient to be fair use.⁹⁴

The appeals court repudiated Judge Owen's news analysis. Writing for the majority, Judge Kaufman said:

The court [referring to the district court], in short, substituted its own views concerning the quality of the journalism in *The Nation* article, and then determined that it was not news because it was not good or genuine news. There is no indication in either the statutory language or the case law that determination of fair use should turn on the question of how well a given purpose was performed. Indeed, this Court has eschewed judicial evaluation of quality in fair use analysis.⁹⁵

A. *Idea/Expression Dichotomy Under Nation*

The main thrust of the opinion of the appellate court, however, was not a rejection of the news standard. The court decided the bulk of the copied materials were not copyrightable under the idea/expression dichotomy. Judge Kaufman set the tone for what was to follow with this soliloquy:

Almost ten years ago, this nation endured a grave threat to its domestic political life. The report of a burglary at Democratic National Headquarters in the Watergate complex of Washington, D.C. led to a historic constitutional confrontation. The President, suspected of involvement in covering up the crime and its partisan origins, pitted his will against the resolve of a Congress endeavoring to discover the true facts. The citizens of this country watched with awe as revelation after revelation led finally to the first resignation of a President of the United States. This singular event was followed by another equally unprecedented act. Richard M. Nixon, not yet indicted for the commission of any crimes, was pardoned for any offenses by his successor in office, President Gerald Ford. Reverberations from those shocks to the nation's constitution are still being felt, and

92. *Id.* at 1070 n.4.

93. *Id.* at 1070.

94. *Id.* at 1071.

95. *Nation*, 723 F.2d at 207 (citations omitted).

this case is another of those repercussions.⁹⁶

Judge Kaufman proceeded to destroy the plaintiff's case for copyright infringement. He was able to find that all of the copied material lacked copyrightability, except 300 words, which he easily knocked out with fair use.⁹⁷

In the carefully drafted opinion, Judge Kaufman, dissected the magazine article from *The Nation*. First, he pointed out that ideas or facts are not protected by copyright.⁹⁸ He delineated in the opinion that "neither news events, nor facts of a biographical nature is deserving of the protection of the Act."⁹⁹ Then Judge Kaufman detailed the crux of his argument, saying that although the distinction between idea and expression "is not always easy to draw . . . in this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic."¹⁰⁰

Judge Kaufman admitted that "some" of the direct quotations used by *The Nation* article were copyrightable,¹⁰¹ but he characterized the paraphrasing, generally considered a form of copying,¹⁰² as merely "paraphrasings of disparate facts."¹⁰³ But instead of sticking to the *facts* distinction, Judge Kaufman also said this is not infringement because *The Nation* article didn't copy a "whole," that is, the whole book or a whole chapter.¹⁰⁴ Judge Kaufman offers no authority for his distinction.¹⁰⁵ The distinction is necessary, says Judge Kaufman, to prevent "a clash with the First Amendment."¹⁰⁶

Although Judge Kaufman, on several occasions, made reference to the requirements of the first amendment, he was careful not to base the *holding* on a first amendment exception to copyright.¹⁰⁷ The first amendment, however, is continuously lurking in the back-

96. *Id.* at 197.

97. *Id.* at 206-09.

98. *Id.* at 202. See also *supra* notes 43-64 and accompanying text.

99. *Nation*, 723 F.2d at 202 (citations omitted). See also *supra* notes 48-64 and accompanying text; and see *infra* notes 131-49 and accompanying text.

100. *Nation*, 723 F.2d at 203.

101. *Id.* But when the quotes were from other people, Judge Kaufman excluded them from his list of copyrightable words.

102. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

103. *Nation*, 723 F.2d at 203 (emphasis added).

104. *Id.* This theory by Judge Kaufman was first enunciated in the case of *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

105. See *Nation*, 723 F.2d at 212-17 (Meskill, J., dissenting).

106. *Id.* at 204.

107. Telephone interview with Andrew L. Deutsch, attorney for defendant (Apr. 23, 1984). In discussing whether the Supreme Court would grant certiorari to the plaintiffs, Deutsch said he would be "surprised" if it happened. Attorneys for Harper & Row, however, seem to disagree. They said, "In its analysis both of copyrightability and of fair use, the majority found the First Amendment considerations prevailed over copyright considerations." Petition, *Nation*, *supra* note 14, at 9-10.

ground, forming an integral part of the opinion. As Judge Kaufman said, "Nowhere could the need to construe the concept of copyrightability in accord with First Amendment freedoms be more important than in the instant case."¹⁰⁸

Essentially, Judge Kaufman has established a doctrine that the concept of protectable "expression" will be construed most narrowly when there are first amendment considerations involved.¹⁰⁹ The court also expounded two other concepts that would serve to protect the public interest under the first amendment.

First, the court discussed the district court's finding that President Ford's expression of his "state of mind" was copyrightable. Judge Kaufman called the theory "novel" and says "it seems to defy common sense."¹¹⁰ Judge Kaufman believed the state of mind recollection of Ford represented "facts" not expression. He stated,

That conception of the law is tantamount to permitting a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting the work's entire contents are thereby made his alone by virtue of copyright. The Copyright Act was not intended to provide such a private monopoly of fact at the expense of the public's need to be informed.¹¹¹

The court relied heavily for this analysis on *Hoehling v. Universal City Studios, Inc.*¹¹² Also, a Second Circuit case, written by Judge Kaufman, then Chief Justice of the Second Circuit, *Hoehling*, was a much easier case in which to comprehend the idea/expression dichotomy.

The case concerned a book on the Hindenburg dirigible disaster and the theory that sabotage was involved. The alleged infringers were the author of a book based on the theory but written in a more "literary" style, and the makers of a subsequent movie based on the book.¹¹³

Judge Kaufman began that opinion by stating, "protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis."¹¹⁴ He explained that the rationale for the doctrine is that "knowledge is best served when

108. *Nation*, 723 F.2d at 204.

109. Harper & Row has argued that this is a completely new concept. Petition, *Nation*, *supra* note 14, at 9-10.

110. *Nation*, 723 F.2d at 205.

111. *Id.* (citations omitted).

112. 618 F.2d 972 (2d Cir. 1980).

113. *Id.* at 976.

114. *Id.* at 974.

history is the common property of all"¹¹⁵

In addition, the court expressly rejected the theory of cases in other circuits that the labor and resultant revelations from research are copyrightable.¹¹⁶ The court in *Nation* reiterated this principle in the news area. The majority said that the essence of news is the reporting of facts and information without adding commentary or original research. They went on to say a court should not judge what is news, but rather whether a claim of news reporting was false.¹¹⁷

The state of mind analysis, however, was dictum because the *Nation* article copied the portion of the Ford manuscript "verbatim." According to Judge Kaufman, because it was verbatim, "the literal words are unquestionably copyrightable."¹¹⁸ Presumably then, under Judge Kaufman's scheme, had *The Nation* paraphrased the sections on Ford's state of mind there would be no infringement because the facts were not copyrightable.¹¹⁹ Judge Kaufman did not address the question of the result, if the paraphrasing amounted to "wholesale appropriation," which he has established as the test for infringement in these type of cases.¹²⁰ Would the public interest in knowing the "state of mind" of a public official in "crucial political decisions," win out over the author's copyright interest if there was wholesale appropriation? These type of questions would have a "chilling effect" on the media when deciding whether to use a news-worthy copyrighted piece of property.

Second, Judge Kaufman excluded portions of the memoirs used in the article from copyrightability, because he believed they were in the public domain. He stated that when President Ford testified before a congressional panel concerning the Nixon pardon, it put the information in the public domain.¹²¹ This was, according to the court, because the testimony was included in a government report and government documents are not copyrightable.¹²² No mention

115. *Id.* Harper & Row has argued that this is a complete new set of definitions for what is protectable under the copyright laws. Petition, *Nation*, *supra* note 14, at 10.

116. *Hoehling*, 618 F.2d at 974. See also 1 NIMMER, *supra* note 22, at 2-165-68.

117. *Nation*, 723 F.2d at 207.

118. *Id.* at 204.

119. *Id.* at 205 n.14. In his dissent, Judge Meskill argued that the articulation of President Ford's state of mind was copyrightable. The majority agreed that the expression was protected. What the majority and the dissent disagreed on was whether the material, utilized by *The Nation*, was facts of the state of mind or merely paraphrasing which would constitute an infringement. The majority held a much narrower view of what was paraphrasing than did the dissent. *Id.* at 205 n.14, 212-13.

120. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980).

121. Harper & Row contend, "Ford's story was not based on government documents or information which Ford had sequestered from public view." Petition, *Nation*, *supra* note 14, at 9.

122. 17 U.S.C. § 105 (1982).

was made of whether the government report was used verbatim in the Ford book. If it was not taken verbatim from the report, then even under Judge Kaufman's formula this would be a "compilation" that he admits would be copyrightable.¹²³ That is, a compilation of public domain material in a selective way can constitute a protectable work.¹²⁴

This manifests another peculiar problem, concerning the issue of what part of a "compilation" is protectable? Judge Kaufman is on one end of the continuum, believing only a "wholesale usurpation" of a compilation of nonprotectable facts, would constitute an infringement. This is especially true when historical or public interest facts are involved, according to Judge Kaufman. But other courts¹²⁵ and Professor Nimmer would find an infringement more readily; especially when the selection and arrangement of the facts are copied.¹²⁶ This creates additional uncertainty compounding the "chilling effect" on any media person under a deadline.

Thus, through the use of various theories and doctrines under the rubric of the idea/expression doctrine making them noncopyrightable, the court was able to reduce the 2,250 mostly copied words of the article to 300 that were protectable.¹²⁷ Judge Kaufman also had an answer as to why these 300 words were not actionable. The answer was fair use.

B. Fair Use Under Nation

As stated earlier, the appellate court rejected the district court's finding that "hot news" was necessary for fair use.¹²⁸ The court then went on to make its own finding that the *Nation* article was "either news or of recent history."¹²⁹

Judge Kaufman's opinion then repudiated the district court's analysis step by step through the four part test for fair use under the copyright statute.¹³⁰ The court distinguished the case of *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,¹³¹ which

123. *Nation*, 723 F.2d at 202 n.8.

124. A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

17 U.S.C. § 101 (1982).

125. See *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554 (D.C. 1981).

126. 1 NIMMER, *supra* note 22, at 2-164-65. See also *Nation*, 723 F.2d at 212-17 (Meskill, J., dissenting).

127. *Nation*, 723 F.2d at 206.

128. See *supra* note 95 and accompanying text.

129. *Nation*, 723 F.2d at 207.

130. See *supra* note 82.

131. 558 F.2d 91 (2d Cir. 1977).

found against the media defendant, and relied instead on *Rosemont Enterprises, Inc. v. Random House, Inc.*¹³²

It is instructive to look at these two cases, along with a similar Second Circuit case, to illustrate the lack of protection a newspaper or broadcaster would have if either used copyrighted material in the public interest. It is instructive for two reasons. First, the Second Circuit is the leading circuit on these types of questions. Second, and most importantly, these three cases, along with *Nation* and *Hoehling*, demonstrate the lack of predictability in the area and the disparate factors that may influence a case one way or another. Because the copyright section on fair use is mandatory in its command to consider the four factors detailed in the statute,¹³³ it provides a good framework for consideration of these cases.

The first factor is whether the purpose and character of the use is commercial or nonprofit.¹³⁴ This is an important factor to a newspaper or broadcaster under a deadline because most of these media are operated as commercial enterprises. Therefore, these potential defendants could be precluded from a fair use defense due to their commercial nature and despite their purpose of serving the public interest. This problem has been made especially critical with the most recent United States Supreme Court decision on fair use,¹³⁵ in which the Court said the use of copying for a commercial or profit-making purpose is "presumptively" unfair.¹³⁶ This tips the balancing away from the granting of fair use in this type of case.

The *Nation* court, however, pointed out that the Second Circuit has held copying for commercial purposes is not conclusively excluded from a fair use defense.¹³⁷ The court relied on *Rosemont Enterprises, Inc. v. Random House, Inc.*¹³⁸ In that case, the accused infringer used portions of a *Look* magazine article when writing a biography on aviation and movie mogul Howard Hughes. The case was not brought by *Look* magazine, but rather by a company controlled by Hughes himself, which had bought the copyright from *Look's* parent company.¹³⁹

The *Look* article was published in 1954 and the book utilizing portions of the article was not published until 1966. *Look* had done nothing more with the article since it was published and apparently

132. 366 F.2d 303 (2d Cir. 1966).

133. The code reads in pertinent part, "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" 17 U.S.C. § 107 (1982) (emphasis added).

134. *Id.* § 107(1).

135. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984)

136. *Id.* at 792.

137. *Nation*, 723 F.2d at 208.

138. 366 F.2d 303 (2d Cir. 1966).

139. *Id.* at 305.

did not plan to bring any infringement action after learning of the defendant's book.¹⁴⁰ But even before acquiring the copyright, Hughes threatened the defendants that if they published the book there would be "trouble."¹⁴¹ Thus it appeared that the real purpose of the infringement action, seeking an injunction, was for censorship of the biography.¹⁴² This was the crucial factor in the court's decision.¹⁴³ However, instead of deciding the case on first amendment grounds, that is, the allowance of an injunction would have granted a license to censor information in the public interest, the court indulged in a "stretching" of the fair use doctrine.

First, the court pointed out that the amount of copying was "insubstantial" and that the defendant utilized much of his own research for the book.¹⁴⁴ The court also alluded to a first amendment consideration that sometimes copyright protection must "subordinate" to a greater public interest.¹⁴⁵ Under this general rubric, the court said it was customary for biographies to utilize and quote earlier works, and an author should not be precluded from saving time by relying on prior works.

Second, the court addressed the issue whether fair use was available despite the commercial nature of the biography. The majority¹⁴⁶ stated that the commercial factor was irrelevant if there was a public benefit involved. This case, the first to stretch the fair use concept in a way that is now commonplace in the Second Circuit, was decided in 1966. This was before the codification of the fair use doctrine and the specific, *mandatory* enunciation that the commercial nature would be a factor in fair use. Congress could have made an exception to this factor when the public interest is involved.¹⁴⁷ This is particularly important with the recent Supreme Court pronouncement that a commercial use is presumptively unfair.¹⁴⁸

In addition, although the court in *Nation* relied on *Rosemont* it failed to heed the *Rosemont* court's admonition. The court in *Rosemont* expressly stated that extensive verbatim copying or *paraphrasing*, as was done in the *Nation* article, is *not* fair use.¹⁴⁹ One should also remember that this case was probably decided because

140. *Id.*

141. *Id.*

142. *Id.* at 311-13 (Lumbard, C.J., concurring).

143. *Id.*

144. *Id.* at 306.

145. *Id.* at 307.

146. Although all three judges supported the majority decision by Judge Moore, Judge Lumbard wrote a separate concurring opinion with whom Judge Hays subscribed detailing the theory that censorship was involved in the case. *Id.* at 311-13.

147. But the House Report said the section was intended to maintain the status quo. *See supra* note 83.

148. *See supra* notes 135-34 and accompanying text.

149. *Rosemont*, 366 F.2d at 310.

the threat of censorship was involved.¹⁵⁰ If not construed on those narrow grounds, then, at most, the *Rosemont* court's rationale only carves out an exception under fair use for *biographies* in the public interest. This will seldom create comfort for the deadline infringing newspaper or broadcaster.

The second factor is the "nature" of the copyrighted work.¹⁵¹ The court in *Nation* adopted the reasoning they used for the idea/expression dichotomy.¹⁵² They said that since the infringing article was factual there is limited protection.¹⁵³ Using this argument is specious, since the narrow protection reasoning was used to narrow the copyrightable amount of the infringing article to 300 words. If those 300 words are what the court is considering under fair use, they have already decided they deserve protection. In other words, under the court's own reasoning, narrow protection for public interest information goes to the copyrightability of the words copied, not necessarily the "nature" of the work.¹⁵⁴ But the court in *Nation* seems to say that this fair use factor must be considered in light of whether the infringing portions are copied in the public interest.

The court in *Nation* blends this second factor with the third factor to be considered for fair use, "the amount and *substantiality* of the portion used in relation to the copyrighted work as a whole."¹⁵⁵ The court distinguished the district court's use of *Wainwright Securities Inc. v. Wall Street Transcript Corp.*¹⁵⁶ In this Second Circuit case, the court found against the media defendant. The decisive factor in the words of the court was that the defendant was "chiseling for personal profit."¹⁵⁷

The defendant in *Wainwright* could hardly be considered to have taken a "substantial" part of the copyrighted work when it reported in the defendant's newspaper only the bottom line of what the plaintiff's stock research reports were saying. Although other financial newspapers utilized plaintiff's work much like the defendants did in *Wainwright*,¹⁵⁸ the transgressions of the *Wainwright* defendants were that they advertised that they provided the latest information from many financial reports,¹⁵⁹ and they provided the reports regularly, unlike other publications. The final conclusion of the court in *Wainwright*, granting an injunction, however, was correct. The

150. See *supra* notes 141-42 and accompanying text.

151. 17 U.S.C. § 107(2) (1982).

152. *Nation*, 723 F.2d at 208.

153. *Id.*

154. See Petition, *Nation*, *supra* note 14, at 17.

155. 17 U.S.C. § 107(3) (1982) (emphasis added).

156. 558 F.2d 91 (2d Cir. 1977).

157. *Id.* at 97.

158. *Id.* at 95 n.2.

159. *Id.* at 96.

court was forced to grapple with the problem that the plaintiff really wanted some publicity about their product in order to establish their prominence in the field, but not enough that it wrecked the value of the commodity to their subscribers.

The problem with the *Wainwright* decision is that the parts copied could be easily construed as just taking the facts, just as the court decided in *Nation*.¹⁶⁰ Only one or two paragraphs would be utilized by the defendants from each page of the copyrighted financial report.¹⁶¹ The court based its decision on the fact that the material taken represented “a substantial investment of time, money and labor,”¹⁶² plus the lack of independent analysis or research by the defendants.¹⁶³ It is arguable whether the amount of time and money put into the copyrighted work should have any bearing on whether the infringer’s product should be considered fair use.¹⁶⁴

One other rationale used by the *Wainwright* court is important to the problem presented by this Article. That is, the court’s interpretation of what is news. The court in *Wainwright* rejected the defendant’s claim of a news coverage exception to copyright. The court said the defendant’s infringement was “not legitimate coverage of a news event.”¹⁶⁵ The court in *Nation* eschewed the *Wainwright* approach. The justices in their decision said that the role of the court under fair use is not to decide what is “news” but, rather, whether a claim of news reporting is false.¹⁶⁶

Finally, the fourth factor is consideration of the economic impact both presently and potentially on the copyrighted work by the infringing item. As stated, this factor is considered the most important.¹⁶⁷ Once again the court in the *Nation* case relied on their idea/expression analysis to discount any economic impact. This is despite the loss by President Ford of the \$12,500 when *Time* magazine refused to run the excerpts after the article appeared in *The*

160. *See id.* at 96 n.3, where the court gives excerpts from both the plaintiff’s and the defendant’s publications.

161. *Id.*

162. *Id.* at 96.

163. *Id.*

164. The Supreme Court in *Sony*, however, lends some credence to the *Wainwright* holding under their analysis of factor two, the nature of the copyrighted item. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S.Ct. 774, 792 (1984). One of the reasons the Court found the copying of programs on home video recorder was a fair use was that they were merely “time-shifting” to watch a program offered for free to the public at a different time. *Id.* The *Wainwright* publication was not offered for free. *Wainwright*, 558 F.2d at 93.

165. *Wainwright*, 558 F.2d at 96.

166. *Nation*, 723 F.2d at 207. The *Nation* court distinguished *Wainwright* by finding the infringement in *Wainwright* was of expression, not just facts and the defendant used the plaintiff’s reports on a regular basis not just one time as in *The Nation* article.

167. *See supra* note 84 and accompanying text.

Nation.¹⁶⁸ The Second Circuit said that the facts did not support the proposition that the 300 words they found copyrightable caused *Time* to cancel their contract.¹⁶⁹

The *Nation* court's rationale can be contrasted to an earlier Second Circuit decision where the court refused to uphold a summary judgment because of the possibility of economic impairment.¹⁷⁰ In *Meerpol v. Nizer*,¹⁷¹ the defendant reproduced twenty-eight copyrighted letters, which had been out of print for twenty years. The court said it was error to determine as a matter of law that there was no financial impact. The court said a movie based on the letters may have been possible.¹⁷² Thus, there is a wide discrepancy between the *Meerpol* court's finding of potential economic impairment, therefore no fair use, and the *Nation* case where the plaintiff had already lost \$12,500 as a result of publication by the infringer, but fair use was found.

These cases illustrate that although fair use is a "balancing" doctrine there is little consistency to the decisions even within the important Second Circuit. The most that can be said is that public information will be given greater deference, as in the *Nation* case, unless found not to be news as in *Wainwright* or as in the district court's decision in *Nation*. There seems to be added protection for biographies as in *Rosemont* but probably only if there is a threat of censorship involved. Other Second Circuit cases have found actionable infringement because of prior dealings between the plaintiff and defendant before the infringement.¹⁷³ Some cases allow substantial copying without infringement, as in *Nation*, while others find small amounts of copying, when the "heart" of the matter was copied, an infringement, as in *Wainwright*.

There is one certainty in all these cases. That is, no court has accepted any first amendment exception to copyright law. The courts would rather stretch the copyright scheme to accommodate an infringement ostensibly in the public interest. The problem with this solution is two-fold. First, the stretching cases can be used as precedent for nonpublic interest cases, causing improper decisions, and second, there is no predictability for a newspaper or broadcaster who has to decide whether a copyrighted item should be used

168. *Nation*, 557 F. Supp. at 1072.

169. *Nation*, 723 F.2d at 208.

170. *Meerpol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

171. *Id.* at 1069-70.

172. *Id.* at 1070-71.

173. *Roy Export Co. Establishment of Vaduz v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982); *Iowa State Univ. v. American Broadcasting Sys.*, 621 F.2d 57 (2d Cir. 1980).

in the public interest. What is needed is a first amendment based exception to the Copyright Act.

V. THE SOLUTION

The solution can be easy. Newspapers or broadcasters under deadline pressures, would be granted a limited exemption from infringement actions for use of copyrighted materials during the *initial* phase of a news story. There should be two qualifications. First, in order to be granted the exemption, the media would be required to carry the copyright notice during the use. Second, some form of compulsory licensing would be required.¹⁷⁴

There are problems with this approach that need to be examined. First, however, a look at what authority and justifications can be found for such a solution.

A. Authority and Justifications

Several commentators have recommended some form of an exception to copyright infringement under the first amendment.¹⁷⁵ Most argue that whenever the “public interest” is involved, the copyright interest must yield.¹⁷⁶ As shown by this Article, the scope of the copyright scheme and the willingness of the courts to expand the “protecting” doctrines, allow for the public interest requirements of the first amendment. The problem detailed by this Article, however, could not and should not be solved by a stretching of copyright principles. The reason is two-fold. First, stretching leads to a lack of predictability, resulting in a chilling effect on the media.¹⁷⁷ Second, in order to stretch the copyright scheme far enough to accommodate this problem would require an undermining of the Copyright Act. This is because the solution requires a *complete* usurpation of the copyrighted work regardless of the *economic* consequences to the holder of the copyright.

A paradigm based on Supreme Court decisions in the libel/pri-

174. See 1 NIMMER, *supra*, note 22, at 1-85. Professor Nimmer offers a compulsory licensing for the wedded idea/expression problem. See *supra* notes 45-64 and accompanying text. But Professor Nimmer would only offer this solution when a “photograph” has not appeared in any publication for a month. The problem presented in this Article is opposite to that addressed by Professor Nimmer, in that this problem concerns using copyrighted material immediately.

175. See Goldstein, *Copyright, supra* note 22, at 267; Rosenfield, *Fair Use, supra* note 6, at 803.

176. Goldstein, *Copyright and the First, supra* note 22, at 988 (recommending an “accommodation” scheme); Denicola, *Copyright and Free Speech, supra* note 5, at 267 (advocates an independent first amendment exception operating as an “external limitation on the scope of the property interest”); Rosenfield, *Fair Use, supra*, note 6, at 803 (a balance in favor of public rights).

177. See *supra* note 21 and accompanying text.

vacy field has been suggested as a first amendment exception.¹⁷⁸ This idea has been criticized,¹⁷⁹ but does point out that the Supreme Court has protected the "public interest" when clashing with private interests including a loss of reputation.¹⁸⁰ A clash with a copyright would only involve a "proprietary" interest which should rationally make the Court more inclined to accept such a solution by analogy.¹⁸¹

B. Problems with the Solution

As always the problem with any legislative or judicial doctrine is the definitions. These warrant discussion. First, the question of what deadline pressures would necessitate invoking the exception. In most cases, this requirement should be limited to *daily* newspapers or *daily* broadcasters who receive the copyrighted item in the same twenty-four hour period that the item is to be printed or broadcast. This period could be lengthened with a good faith showing by the newspaper or broadcaster that they attempted to obtain a license from the holder of the copyright, but, were unable to reach the person.¹⁸²

Although the *Nation* case would be a candidate for this exception, it may not be available for two reasons. First, *The Nation* is a weekly publication, and second, Navasky, editor of *The Nation*, apparently made no attempt to contact President Ford or his publisher about the publishing rights.¹⁸³ Navasky might argue, correctly, that Ford or his publisher would refuse such a license and

178. Note, *Constitutional Fair Use*, 20 WM. & MARY L. REV. 85, 115-16 (1978); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 65 (1971); Goldstein, *Copyright*, *supra* note 22, at 994.

179. See, Goldwag, *Copyright Infringement*, *supra* note 5, at 21 n.89.

180. *Times v. Sullivan*, 376 U.S. 254 (1964).

181. *But cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In the *Zacchini* case the Court found a right of publicity for a circus act and that the right was infringed when broadcast in its entirety on a night news broadcast. The Court rejected first amendment arguments of the broadcaster defendant. *Id.* at 578. The Court seemed to base their opinion on the fact that the entire act was broadcast and analogized to copyright and patent law. *Id.* at 579-82 (Powell, J., dissenting).

If the Supreme Court was to adhere to the "entirety" reasoning, the solution offered here would not set well with the Court. But in the *Sony* case the Court found video taping of *entire* programs in the home was fair use. 104 S. Ct. 774, 784.

182. In two Second Circuit cases, first amendment and fair use defenses were rejected, apparently because the defendants had prior dealings with the plaintiffs, in other words, they had a chance to obtain a license but did not, and still used the copyrighted items. *Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., Inc.*, 621 F.2d 57 (2d Cir. 1980). Under the solution proposed, these defendants would not be allowed an exception to copyright because of their prior dealings unless there was an attempt at censorship involved.

183. *Harper & Row Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 199 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

it would be fruitless to contact them. Thus, since Navasky knew the memoirs would be published anyway, his only “public interest” argument is, that he would be denied a “scoop.”¹⁸⁴

Alternatively, Navasky might fashion an argument around a *Rosemont* rationale, that the copyright was causing censorship. But the argument would be specious, as he knew the memoirs would eventually be published.¹⁸⁵ A newspaper or broadcaster on deadline would have no time to ascertain whether the copyrighted item they intend to publish will be available in a “timely” way for the news story.

The second definitional problem is what is the “initial phase” of a news story. Simply, the exception would be limited to use of the copyrighted material for one time.¹⁸⁶

The final problem is the most delicate; what is a legitimate news story that would invoke the exception? Any story deemed worthy of space in a newspaper or for broadcast time could be construed as newsworthy. Therefore, the test should be judged by “external” factors, not the determination by the internal subjective judgments of the newspaper or broadcaster. But the standard should be judged on the basis of information and events at the time of the decision to use the copyrighted material not with hindsight of what was actually newsworthy. Expert testimony might be helpful on this prong of the test to determine whether the decision was made in accordance with general journalistic standards of what news is in *furtherance* of the public interest.

There is little chance this determination will not reflect the *eventual* merits of a story and the judiciary prejudices. The scheme, however, promotes unpredictability and some comfort to a newspaper or broadcaster to know they will be judged on their decision by journalistic standards, not the whims of a judge interpreting copyright doctrines.

In addition, this paradigm, provides a narrow first amendment protection which is necessary without undermining copyright protections. The copyright owner, although impaired initially will

184. A “scoop” in newspaper terms is beating the competition to the story, that is, publishing or broadcasting before anyone else. It is a time honored tradition of the journalism profession, but inherent with dangers. The media know the risks of trying to be first—error in the story. A good example is the reporting by C.B.S.’s Dan Rather that President Reagan’s press secretary, Jim Brady, was dead on the day the President was shot when he wasn’t, and in fact, he recovered. If the only justification a newspaper or broadcaster has for running a copyrighted item is for a “scoop,” that is, they know the copyrighted item will be published by an authorized outlet in a timely fashion it can be argued they should not fall under this exception.

185. *Nation*, 723 F.2d at 198. See also *Petition, Nation*, *supra* note 14, at 19.

186. One time use would include all the issues of a single daily run of a newspaper or the editions of a station’s news broadcasts during a twenty-four hour period.

have his property returned, if you will, after a one time use for the public interest which may even enhance its value.

CONCLUSION

Imagine once again the scenerio envisioned in the introduction of this Article.¹⁸⁷ The editor or broadcaster has run the pictures apparently in violation of the copyright and will be liable for damages. Knowing this, we cannot expect the editor or broadcaster to take the chance; thus, there is a chilling effect which hinders the marketplace of ideas which is guaranteed by the first amendment.

If, however, an exception under the first amendment is granted the public interest will be satisfied. But, then, under the thesis of this Article, the newspaper or broadcaster pays a compulsory license to the copyright holder and can begin negotiating for future use. Thus, the tenents of the copyright statute and the first amendment have both been met.

187. The use of the My Lai and Zapruder examples should not suggest that only those that fall under Professor Nimmer's scheme of the idea and expression being "wedded" would be included under the proposed solution. Photographs are the most likely candidate under the solution. One can, however, imagine situations where prose or the text of a speech might require use of the expression and the ideas to convey fully in compliance with the public interest under the first amendment.