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COPYRIGHT LAW—VIDEOTAPING LIVE TELEVISION NEWS BROADCASTS FOR COMMERCIAL PURPOSES—*WXIA-TV v. Duncan*, 8 Media L. Rep. (BNA) 2075 (N.D.Ga. June 28, 1982)

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COPYRIGHT LAW—VIDEOTAPING LIVE TELEVISION NEWS BROADCASTS FOR COMMERCIAL PURPOSES—*WXIA-TV v. Duncan*, 8 MEDIA L. REP. (BNA) 2075 (N.D.Ga. June 28, 1982).

I. INTRODUCTION

A new area of copyright concern has been created with the advent of videotape recording and the verbatim reproduction of television programs.¹ Until recently, videotape technology was used almost exclusively within the communications industry.² As the equipment became more compact, less expensive, and easier to operate, however, it entered the consumer market, bringing with it additional legal issues.³ Widespread access to a capability formerly possessed by only a few has raised new questions concerning the rights to programming which can be copied by the videotape process. Public attention has most recently been drawn to the *Sony Betamax* case,⁴ which deals with the non-commercial home use of entertainment programming.⁵ The decision in the *Sony* case, however, leaves unresolved many of the copyright problems created by videotaping.⁶

*WXIA-TV v. Duncan*⁷ addressed the copyright problems brought about by videotaping a local news broadcast for commercial purposes.⁸ *Duncan* is but one of many possible variations on the *Sony* theme and it has the potential for establishing the criteria for

1. HOUSE COMMITTEE ON THE JUDICIARY H.R. REP. NO. 83, 90th Cong., 1st Sess. 32 (1967). See also H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680 and NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 79 (Libr. of Cong. ed. 1979).

2. S. MAHONEY, N. DE MARTINO, & R. STENGEL, KEEPING PACE WITH THE NEW TELEVISION 157 (1980).

3. *Universal City Studios v. Sony Corp.*, 480 F. Supp. 429, 435 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 457 U.S. 1116 (1982), 52 U.S.L.W. 4090 (U.S. Jan 17, 1984).

4. *Id.*

5. 659 F.2d at 969.

6. Examples include the videotaping of news for commercial and non-commercial use; the videotaping of entertainment and non-entertainment materials distributed by pay cable for commercial use.

7. 8 MEDIA L. REP. (BNA) 2075 (N.D. Ga. June 28, 1982).

8. *Id.* at 2076.

analyzing one of the unresolved copyright issues spawned by videotape technology in the area of television news.

The defendant, Carolyn Duncan, operates TV News Clips, a business which regularly monitors and records local television news programs.⁹ Subsequently, she offers the clips for sale to the subjects of the newscasts.¹⁰ On March 11, 1981, Ms. Duncan made an off-the-air¹¹ videotape recording of a WXIA-TV news story entitled "Fitness Trail,"¹² which she later sold to a client.¹³

Shortly thereafter, plaintiff, WXIA-TV, brought suit in the Federal District Court for the Northern District of Georgia and sought an injunction against defendant, TV News Clips, to prevent sale and distribution of videotape copies of its copyrighted newscasts.¹⁴ Plaintiff maintained that the unauthorized copying of its telecast constituted a violation of copyright¹⁵ and that the sale of those copies impinged on WXIA-TV's market for sale of clips to the subjects of news stories.¹⁶ Defendant contended that its business activities fell within the "fair use" exception¹⁷ to the copyright laws.¹⁸

Plaintiff's motion and defendant's cross motion for summary judgment were denied by the court.¹⁹ The court held that the lack of factual information necessary to make a determination of fair use²⁰ made summary judgment untenable. Specifically, the court lacked data on the extent of the television station's existing and planned market for the sale of clips of its news stories.²¹

9. *Id.*

10. *Id.*

11. "Off-the-air" is defined as the direct transmission of a radio signal from the transmitter of the broadcaster to a television or radio receiver. The signal is transmitted through the air and no hard wires connect the transmission facility with the receiver. The signal is received nearly simultaneously with broadcast. This is the method used by television broadcasters. Cable operators pick up the off-the-air signals of broadcasters and retransmit those signals by hard wire (cable) to their subscribers. D. PEMBER, *MASS MEDIA LAW* 471 (2d ed. 1981).

12. *WXIA-TV v. Duncan*, 8 *MEDIA L. REP.* (BNA) at 2076.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 2078-79.

17. *See infra* text accompanying notes 37-41. The Copyright Act of 1976 provides a "fair use" defense to copyright infringement which states in 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— . . . (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (Supp. V 1981).

18. 8 *MEDIA L. REP.* (BNA) at 2076.

19. *Id.* at 2080.

20. *Id.*

21. *Id.* at 2076, 2080.

In denying the motions, the court focused on the actual and potential market for the sale of videotape television news stories.²² Although the court thought it imperative to be able to define the markets of the clipping service and the television station in order to determine if there was any prejudice to the copyright holder's market,²³ a more novel issue was also raised. The court questioned whether WXIA-TV, in light of its duties as a public trustee, could maintain its requisite journalistic integrity and still exploit a market for the sale of video clips among the subjects of its news stories.²⁴ The court noted that dealings in this secondary market could suggest a lack of impartiality or staging of the news by the television station which would violate its public trust.²⁵

This casenote will first examine the legal history which provides the setting for current videotape copyright issues. Existing videotape decisions will be surveyed to demonstrate that, until now, courts and commentators have had to deal only with the videotaping of entertainment programming. The application of fair use analysis in *Duncan* then will be examined to illustrate that the court has taken note of the significance of the difference in content in news programming. Next, the legal characteristics of broadcast news will be explained in order to decide whether those characteristics which distinguish this case should be the basis for an analysis different from that used by courts in the previous copyright cases.²⁶ Finally, the casenote will consider whether the approach suggested in *Duncan* should be applied in future news broadcast cases.

II. THE LEGAL SETTING

A. *Historical Setting of Copyright Law*

Copyright law in the United States is derived from the Copyright Clause of the Constitution: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"²⁷

The purpose of the copyright clause is to advance the dissemi-

22. *Id.* at 2078.

23. *Id.*

24. *Id.* at 2078 n.9. *See infra* text accompanying notes 95-101 (explaining that a broadcaster holds its license as a public trustee and is obligated to operate in the public interest and to present news which is not staged or distorted).

25. 8 MEDIA L. REP. (BNA) at 2078 n.9.

26. *See infra* text accompanying notes 84-88.

27. U.S. CONST. art. I, § 8, cl. 8.

nation of information for the benefit of society.²⁸ The framers of the Constitution chose an economic mechanism to achieve that purpose.²⁹ The Supreme Court's analysis of the copyright clause has focused on the built-in economic motivation of temporary monopoly.³⁰ The economic philosophy on which the clause is based is the belief that the prospect of personal gain will induce authors and inventors to use their talents to advance the public welfare.³¹

Congress has embodied this constitutional power in the Copyright Act of 1976.³² Section 106 of the Act provides that "the owner of copyright . . . has the exclusive rights . . . to reproduce the copyrighted work . . . [and] to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership. . . ."³³ Works that may be afforded copyright protection under section 106 are listed in the Act and include all original works, fixed in a tangible form, including motion pictures or other audiovisual works.³⁴ The violation of any of the copyright holder's exclusive rights, as set out in section 106 of the Act, constitutes copyright infringement³⁵ and is the basis for an action.³⁶

28. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 8 (1978).

29. *Id.*

30. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

31. *Id.* The Court elaborated: "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Id.*

32. Pub. L. No. 94-553, 90 Stat. 2451 (codified at 17 U.S.C. §§ 101-810 (Supp. V 1981)).

33. 17 U.S.C. § 106(1), (3) (Supp. V 1981).

34. 17 U.S.C. § 102(a)(6) (Supp. V 1981). The work in dispute in *WXIA-TV v. Duncan* is an audiovisual work as defined in 17 U.S.C. § 101 (Supp. V 1981): "'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or . . . electronic equipment, together with accompanying sounds . . . regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." *Id.* As explained in § 102(a), the two fundamental criteria required for copyright protection are originality and fixation in tangible form. *Id.* Fixation is defined in § 101 which states:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. A work . . . is "fixed" . . . if a fixation of the work is being made simultaneously with its transmission.

Id. In his treatise, I M. NIMMER, NIMMER ON COPYRIGHT 1-49 (rev. ed. 1981), Professor Nimmer traces the root of this section of the Act: "If the word 'writings' [in the copyright clause of the Constitution] is to be given any meaning whatsoever, it must, at the very least, denote 'some material form, capable of identification and having a more or less permanent endurance.'" *Id.* (quoting *Canadian Admiral Corp. v. Rediffusion, Inc.* Can. Exch., 382, 383 (1954)).

35. 17 U.S.C. § 501(a) (Supp. V 1981).

36. *Id.* § 501(b).

B. *Fair Use*

Copyright law, however, grants only a limited monopoly and the Act specifies certain limitations on the exclusive rights enunciated in section 106.³⁷ In cases involving videotaping of copyrighted program material, the courts have dealt principally with the defense embodied in section 107 of the Act: "Limitations on exclusive rights: Fair use." That section states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching. . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁸

The question of copyright infringement arises when the user copies from an original to the extent that the copy bears a substantial similarity to the original work.³⁹ Fair use, then, is a privilege accorded to persons who do not own the copyright, to use copyrighted material in a reasonable manner without the consent of the owner,

37. See *supra* text accompanying note 33.

38. 17 U.S.C. § 107 (Supp. V 1981). The concept of fair use in the United States was developed in case law and originally appeared in *Folsom v. Marsh*, 9 F. Cas. 342, 27 (C.C.D. Mass. 1841) (No. 4901). The doctrine was first included in a federal copyright statute when Congress enacted the Copyright Act of 1976 without altering the common law doctrine. D. JOHNSTON, *COPYRIGHT HANDBOOK* 131 (2d ed. 1982).

39. 3 M. NIMMER, *NIMMER ON COPYRIGHT* 13-56 (rev. ed. 1981) describes the circumstances in which fair use is a defense:

That problem arises where it is established . . . that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity. The result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he has made of plaintiff's material is a 'fair use.' . . . Here 'fair use' is a defense . . . despite the fact that the similarity is substantial.

Id.

despite the owner's statutory monopoly.⁴⁰ It has been suggested that the most serviceable characterization of fair use is that it is a "use necessary for the furtherance of knowledge, literature and the arts and does not deprive the creator of the work of an appropriately expected economic reward."⁴¹

The legislative history of the Copyright Act indicates an intent to keep the statutory fair use provisions broad enough to be adaptable to technological advancements.⁴² This is especially significant in the videotaping cases where one of the characteristics of the medium is that all copies are verbatim and therefore automatically overstep the threshold of substantial similarity.⁴³

The Copyright Act of 1976 has made special provisions only for certain express types of off-the-air videotaping activities: the taping of audiovisual news programs by libraries and archives⁴⁴ and the taping of certain other audiovisual works by noncommercial broadcasting entities.⁴⁵ These statutory provisions, and the narrow holdings of the videotape cases which have been decided to date,⁴⁶ comprise the body of existing law in this field, leaving many questions unresolved.⁴⁷ The cases prior to *Duncan* presented the videotaping problem in the context of entertainment programming. Consequently, it is necessary to determine whether previous analyses

40. BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944) (quoted in *Rosemont Enters. v. Random House*, 366 F.2d 303, 306 (2d Cir. 1966)). For example, if an excerpt from a copyrighted work is used in a book review or a professor's lecture where the copier is engaged in creating an original work, fair use may be found. 3 M. NIMMER *supra* note 39 at 13-59. But, a reproduction which is substantially similar and intended to serve the same purpose as the original would not be considered a fair use. *Id.* at 13-59, 13-64.

41. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 31 (1978). *See also* *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980).

42. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 83, 90th Cong., 1st Sess. 32 (1967). *See also* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680.

43. Users who videotape copyrighted works in their entirety, adding nothing of their own creativity, are faced with this situation. The Second Circuit has noted that substantial and verbatim copying has usually precluded a finding of fair use. *Rosemont Enterprises v. Random House*, 366 F.2d 303, 310 (2d Cir. 1966).

44. 17 U.S.C. § 108(f)(3) (Supp. V 1981). This section indicates that the Act is not to "be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program" *Id.*

45. *Id.* § 118(d)(3). The Act provides for such activities as off-the-air videotaping of copyrighted program material by public school systems and non-commercial television stations for classroom use. *Id.*

46. *See infra* text accompanying notes 48-62.

47. *See supra* note 6.

and decisions are applicable to the videotaping issue when it arises in the context of taping television news for commercial use.

C. *The Videotape Copyright Cases*

In the earliest videotaping case, *Walt Disney Productions v. Alaska Television Network*,⁴⁸ a federal district court held that off-the-air videotaping of copyrighted entertainment programs in their entirety for later transmission by a remote cable system to its subscribers was a copyright infringement.⁴⁹ Commentators interpreted this holding as the formulation of a rule that off-the-air videotaping undertaken for commercial purposes necessarily constitutes copyright infringement.⁵⁰

Ten years later, a television commercial was the subject matter at issue in *Bruzzone v. Miller Brewing Co.*⁵¹ The commercial was taped off-the-air and six frames of the resulting videotape were used by the copier for commercial purposes in his market research business.⁵² The court found that deriving profit from the use of a small portion of the work did not render the use unfair, especially in light of the fact that the use did not compete with the copyrighted work and did not diminish the value of the original.⁵³

Off-the-air videotaping of copyrighted sports programming was held to constitute copyright infringement in *New Boston Television, Inc. v. Entertainment Sports Programming*.⁵⁴ In that case cable operators transmitted highlights of baseball and hockey games excerpted from plaintiff's copyrighted broadcasts to their own cable custom-

48. 310 F. Supp. 1073 (W.D. Wash. 1969).

49. *Id.* at 1075.

50. 3 M. NIMMER *supra* note 39 at 13-94 states that, "it is clearly an act of copyright infringement to reproduce a copyrighted work off the air for commercial purposes either by audio tape or video tape." (citing *Walt Disney Prods. v. Alaska Television Network*, 310 F.Supp. 1073 (W.D. Wash. 1969) and *New Boston Television v. Entertainment Sports Programming*, 1981-83 COPYRIGHT L. REP. (CCH) ¶ 25,293 (D. Mass. 1981)). Edward B. Samuels has written: "Video recording for commercial purposes, particularly distribution of copies, would clearly constitute infringement of a copyrighted work." Samuels, *Copyright and the New Communications Technologies*, 25 N.Y.L. SCH. L. REV. 905, 915 (1980). Another author has conceded that users of copyrighted materials videotaped off-the-air would have to qualify under the fair use doctrine in order not to violate the Copyright Act. *Copyright: No Fair Use Excuse for Sony's Home Videorecording Infringement*, 21 WASHBURN L.J. 679, 682-83 (1982).

51. 202 U.S. P.Q. (BNA) 809, 1978-81 COPYRIGHT L. REP. (CCH) ¶ 25,105 (N.D. Cal. 1979).

52. *Id.* at 810, 1978-81 COPYRIGHT L. REP. (CCH) ¶ 25,105, at 15,584-86.

53. *Id.* at 811-12, 1978-81 COPYRIGHT L. REP. (CCH) ¶ 25,105, at 15,587.

54. 1981-83 COPYRIGHT L. REP. (CCH) ¶ 25,293 (D. Mass. 1981).

ers.⁵⁵ The issue of whether the potential markets of the copyright owner were prejudiced was essential to the court's grant of a preliminary injunction.⁵⁶ Although the plaintiff television station had not attempted to market game highlights to cable systems, the court found that that was not a sufficient basis to permit the defendant to appropriate the copyrighted programming and effectively preclude the plaintiff from entering that market. It reasoned that copyright owners were free to determine when they will exploit their copyright in the various markets.⁵⁷

In 1981, the Court of Appeals for the Ninth Circuit in *Universal City Studios v. Sony Corp. of America*, the *Sony Betamax* case,⁵⁸ held that off-the-air home videotaping of copyrighted entertainment programming for non-commercial home use constitutes an infringement of copyright.⁵⁹ The Supreme Court reversed.⁶⁰

The highly organized and systematic practice of making off-the-air videotapes of copyrighted educational audiovisual materials for nonprofit educational use by a school district was not a fair use according to the court in *Encyclopedia Britannica Educational Corp. v. Crooks*.⁶¹ There, the court relied upon the showing that the unauthorized videotaping was the cause of actual, as well as potential, harm to the copyright holder's market.⁶²

The history of the videotape cases indicates that the market factor has thus far been determinative of the outcome of the fair use defense. While the cases to date have concerned the videotaping of entertainment, sports, advertising, and educational programs for commercial and non-commercial uses, *Duncan* presents the videotaping question in a new context. For the first time, a court has had to deal with off-the-air videotaping of news for commercial use.⁶³

The cases and commentators are able to offer little guidance in developing an analytical approach to the problem raised in *Duncan*⁶⁴ because there are special legal characteristics of broadcast news that distinguish it from the types of programming previously

55. *Id.* at 16,625, 16,627.

56. *Id.* at 16,627.

57. *Id.*

58. 480 F.Supp. 429 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 457 U.S. 1116 (1982).

59. 659 F.2d at 977.

60. 52 U.S.L.W. 4090 (U.S. Jan. 17, 1984).

61. 542 F.Supp. 1156, 1185 (W.D.N.Y. 1982).

62. *id.* at 1170-71.

63. 8 MEDIA L. REP. (BNA) 2075 (N.D. Ga. June 28, 1982).

64. The commentators have not yet considered the unique issues inherent in the

litigated.⁶⁵ As noted above, in enacting the Copyright Act of 1976, Congress declined to act on most videotaping issues⁶⁶ and the Final Report to Congress of the National Commission on New Technological Uses of Copyrighted Works (CONTU) also sidestepped the issue.⁶⁷

III. THE APPLICATION OF FAIR USE ANALYSIS IN *WXIA-TV v. DUNCAN*

A. *Fair Use: The Market Factor*

In *Duncan*, the court established that plaintiff's news program was properly registered⁶⁸ and that the material contained in the "Fitness Trail" story was copyrightable.⁶⁹ The court then considered application of fair use standards to the facts of the case, stating that the last of the four fair use factors set forth in the Act, the effect on potential markets of the copyrighted work,⁷⁰ was the most important.⁷¹ The court stated that it would postpone analysis of the other fair use factors until trial on the merits.⁷²

The court's major concern with regard to the market factor was *WXIA-TV's* allegation that it had both primary and secondary markets for the sale of its news and that TV News Clips' operation paralleled and prejudiced the secondary market.⁷³ The primary market consisted of the advertisers who sponsored the news program and

nature of copyrighted news and their analyses deal only with content devoid of the special characteristics of news. *See supra* note 50.

65. *See infra* text accompanying notes 84-87.

66. Only two limited instances of videotape copying are mentioned in the Act. *See supra* notes 44-45 and accompanying text.

67. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 79 (Libr. of Cong. ed. 1979) (stating that "the issues involved in off-the-air videotaping were essentially matters requiring public policy decisions and should be left for the courts to decide.").

68. 8 MEDIA L. REP. (BNA) at 2077.

69. *Id.* at 2077-78.

70. 17 U.S.C. § 107(4) (Supp. V 1981) states that the fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work." *Id.* The section also indicates that there may be other determinative factors in addition to those listed in the Act. *Id.* The Second Circuit, in *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), stated the proposition simply: "A key issue in fair use cases is whether defendant's use tends to diminish or prejudice the potential sale of plaintiff's work." *Id.* at 1070.

71. 8 MEDIA L. REP. (BNA) at 2078. *See also* *Triangle Publications v. Knight Ridder Newspapers*, 445 F.Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171, 1175, 1177; 3 M. NIMMER *supra* note 39 at 13-64; L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 32 (1978) (stating that the fourth fair use factor is the most important.)

72. 8 MEDIA L. REP. (BNA) at 2080.

73. *Id.* at 2079 n.10.

the secondary market was made up of the subjects and entities in the news stories.⁷⁴

The court stated that evidence of the extent of WXIA-TV's actual or planned participation in the secondary market was necessary to enable application of a functional test for fair use.⁷⁵ This functional test is meant to determine whether a user's copy serves the same function and therefore can fulfill the demand for the copyright holder's original work.⁷⁶ If it is shown that the copy is a reasonable substitute for the original, then under the functional test, the defense of fair use is unavailing as the user's copy may harm the market for the original.⁷⁷ Lacking the necessary information, the court was unable to decide whether TV News Clips had prejudiced a pre-existing or anticipated market of the plaintiff.⁷⁸

B. *Fair Use: The Nature of the Copyrighted Material*

In addition to proposing use of the functional test for determining the effect on the market, the court expressed serious reservations regarding the propriety of a television station cultivating a market for the sale of video news clips among the subjects of its newscasts.⁷⁹ These doubts arose both from an awareness of the need for a broadcaster to maintain a reputation for journalistic integrity in order to attract sponsors and the obligations of a broadcaster to serve the public interest.⁸⁰ The court speculated that "[i]f there are certain inherent boundaries, arising from the peculiar nature of broadcast news, on Plaintiff's use of its news stories, and if Defendant's use lies outside those boundaries, then it may be impossible for Plaintiff's

74. *Id.* at 2078-79 n.9.

75. *Id.* at 2079.

76. *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). As explained in 3 M. NIMMER, *supra* note 39, at 13-67 to 13-69, if plaintiff is a publisher of sheet music and defendant engages in the unauthorized publication of plaintiff's lyrics in a magazine, the use is a non-infringing fair use as the function it serves is different from that of the original. Plaintiff's sheet music is intended to be used for musical performances while defendant's use is a literary presentation. The magazine article cannot fulfill the same function as the sheet music. But if defendant reproduced song sheets, it would be an infringement as the song sheets can be used for musical presentation in the same way as the original. *Id.*

77. *Iowa State Univ. v. American Broadcasting Cos.*, 621 F.2d 57, 61-62 (2d Cir. 1980); *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Productions*, 479 F.Supp. 351, 361 (N.D. Ga. 1979); *Roy Export Co. Establishment v. Columbia Broadcasting Sys.*, 503 F.Supp. 1137, 1145 (S.D.N.Y. 1980); 3 M. NIMMER *supra* note 39, at 13-66, 13-67, 13-70.

78. 8 MEDIA L. REP. (BNA) at 2080 n.11.

79. *Id.* at 2078.

80. *Id.* at 2078-79 n.9.

and Defendant's purposes to overlap."⁸¹ By recognizing the "peculiar nature of broadcast news," the court has implied that the second fair use factor, "the nature of the copyrighted work," may be a major concern when broadcast news programming is videotaped.⁸² The court implied that when program content is not vested with public interest, the market factor is logically the weightiest consideration in a videotape copyright case.⁸³ When a news program is at issue, however, the court indicated the nature of the work can justifiably modify the analysis of the market factor. Although the *Duncan* court did not explicitly acknowledge reliance upon the second factor, its underlying rationale broke new ground in the analysis of videotape copyright cases.

IV. BROADCAST NEWS: THE UNIQUE ASPECT OF *WXIA-TV v. DUNCAN*

Any comprehensive analysis of the videotaping of news must take into account two key aspects of broadcast news: the nature of copyright protection accorded to news and the public interest characteristic of the news. The copyright protection afforded news is different from that afforded other materials because, unlike other materials, the news itself cannot be copyrighted.⁸⁴ The first author to report an event does not have a monopoly on the coverage of that event. Instead, only the form of expression and the literary quality of a news report may be accorded copyright protection.⁸⁵ The

81. *Id.* at 2079 n.10.

82. *See supra* text accompanying note 38.

83. 8 MEDIA L. REP. (BNA) at 2078. On that basis, copyright protection was afforded to producers of entertainment and sports programming for broadcast television because they had potential markets for their product on cable television. *Walt Disney Prods. v. Alaska Television Network*, 310 F.Supp. 1073, 1075 (W.D. Wash. 1969); *New Boston Television v. Entertainment Sports Programming*, 1981-83 COPYRIGHT L. REP. (CCH) ¶ 25,293 (D.Mass. 1981). The decisions in *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F.Supp. 243 (W.D.N.Y. 1978), 542 F.Supp. 1156 (W.D.N.Y. 1982) and *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. (BNA) 809, 1978-1981 COPYRIGHT L. REP. ¶ 25,105 (N.D. Cal. 1979) dealt with the effects of the activities of users on the existing primary market of the copyright holder for advertising and educational materials. *Universal City Studios v. Sony Corp.*, 480 F.Supp. 429 (C.D. Cal. 1979) *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 457 U.S. 1116, concerned the harm caused to plaintiffs' primary market for the sale of entertainment programs to theaters and television networks by the entry of defendants into the secondary market for home videorecording in which plaintiff did not participate.

84. *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 143 (S.D.N.Y. 1968).

85. *See Chicago Record-Herald v. Tribune Ass'n.*, 275 F. 797, 798 (7th Cir. 1921); *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 143 (S.D.N.Y. 1968); I M. NIMMER *supra* note 34, at 2-158 to 2-160.

holder of a copyright in a news program thus has only partial copyright protection.

The news, whether broadcast or conveyed in print, also is set apart because of its public interest characteristic and the essential role of the free press in our democracy.⁸⁶ There is a strong interest in unlimited access to the news in order to keep the public informed. Because of this, fair use may be found when there is a "public interest in having the fullest information available."⁸⁷ To assure that the news is a reliable source of information, there is also a need for the exercise of journalistic integrity.⁸⁸

The uniqueness of broadcast journalism stems from the philosophy of broadcast regulation in the United States. Regulation of broadcasting, including allocation of frequencies within the radio spectrum, was instituted in 1927⁸⁹ to end the chaos prevailing in the industry.⁹⁰ As the spectrum of radio frequencies is finite,⁹¹ not all who apply for licenses to broadcast can be accommodated.⁹² Therefore, the Federal Radio Commission, the predecessor to the Federal Communications Commission (FCC), concluded that this scarcity of frequencies necessitated that licenses be awarded only to the competing applicants demonstrating responsiveness to the public "convenience, interest or necessity."⁹³

As a public trustee, the broadcaster's obligation is to inform the public fairly and impartially.⁹⁴ The broadcaster's latitude of journalistic freedom is circumscribed by that public responsibility.⁹⁵ Operating in the public interest requires, for example, that broadcasters devote air time to matters of public significance and that news reports be journalistically balanced.⁹⁶ In broadcast journalism, unlike

86. *New York Times v. United States*, 403 U.S. 713, 717 (1971).

87. *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968).

88. *In re CBS Program "Hunger in America"*, 20 F.C.C.2d 143, 152 (1969).

89. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, *repealed by* The Communications Act of 1934, Pub. L. No. 416 § 602, 48 Stat. 1102.

90. *Red Lion Broadcasting v. F.C.C.* 395 U.S. 367, 375 (1969).

91. The radio spectrum and the frequencies which comprise the spectrum are limited because the airwaves are capable of carrying only a certain number of signals. D. PEMBER, *MASS MEDIA LAW* 423 (2d ed. 1981).

92. *Columbia Broadcasting sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

93. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 376-77 (1969) (quoting Radio Act of 1927 § 4, 44 Stat. 1163).

94. *Columbia Broadcasting sys. v. Democratic Nat'l Comm.* 412 U.S. 94, 117 (1973).

95. *Id.* at 110.

96. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 377 (quoting *Great Lakes Broadcasting*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993, *cert.*

print journalism, the interest at stake is not the broadcaster's right to speak, but the right of the public to be informed.⁹⁷ It follows that broadcasters violate their public trust if they distort or stage the news.⁹⁸

It was the problem of staging and distortion that the court in *Duncan* anticipated in considering whether a television station could create a market for the sale of souvenir news clips in an attempt to generate additional revenue.⁹⁹ The court suggested that the entry of a television station into the secondary market created the potential for abuse of its public trust¹⁰⁰ through the production of stories about the subjects and entities who were likely to buy videotape clips.¹⁰¹

Ideally, a decision in a case involving the videotaping of news will take into account the copyright considerations and the unique aspects of broadcasting: the public interest in widespread dissemination of impartial news reports. An ideal decision will also recognize the need for flexibility in dealing with new technologies and the fact that news is accorded only partial copyright protection.

In deciding *WXIA-TV v. Duncan* on the merits, the court confronts three possible resolutions to the issue: That the use by TV News Clips constituted a copyright infringement;¹⁰² that the use was

dismissed, 281 U.S. 706 (1930)). The enforcement mechanism lies in the power of the government to grant or deny requests for license renewals and construction permits. 47 U.S.C. § 307 (Supp. V 1981 & West 1983), 47 C.F.R. § 73.3591 (1982).

97. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 390 (1969); *Columbia Broadcasting sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102, 112-13 (1973).

98. *In re CBS Program "Hunger in America,"* 20 F.C.C. 2d 143, 150 (1969) (stating that the F.C.C. can investigate if there is "material indication of extrinsic evidence of staging or distortion," quoting from Letter to ABC, 16 F.C.C. 2d 650 (1969)). See also *National Org. for Women v. F.C.C.*, 555 F.2d 1002, 1010 (D.C. Cir. 1977) (stating that "the licensee's news judgment will not be questioned unless there is extrinsic evidence of deliberate distortion or news staging . . . or unless the licensee consistently fails to report news events of public importance that could not in good faith be ignored.").

99. 8 MEDIA L. REP. (BNA) at 2078-79 n.9.

100. Although the *Duncan* court did not name the specific abuses of public trust which it considered likely, a list of possible abuses stemming from the production of stories about likely clip customers can be formulated from a survey of broadcasters' trusteeship responsibilities. Abuses might include diminishing journalistic integrity, lessening of impartiality, decreasing amounts of time devoted to matters of public significance and the undermining of journalistic balance. See *supra* text accompanying notes 94-98. Staging and distortion of the news are logical outcomes of a decision to produce news stories for the purpose of generating clip sales among the subjects and entities in the stories.

101. *Id.* at 2079 n.10.

102. This holding would be consistent with previous copyright decisions in *Universal City Studios v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981); *Encyclopedia Britannica*

not an infringement as WXIA-TV is precluded from entering the secondary market;¹⁰³ or that the use did not constitute an infringement as copyright protection is not afforded to the secondary market for news broadcasts.¹⁰⁴ A finding of infringement, while protecting plaintiff's secondary market, would ignore the public interest in widespread dissemination of the news¹⁰⁵ by cutting off a distributor to the secondary market. The finding of infringement would also reflect an unwarranted rigidity in that it would fail to accommodate a videotape technology,¹⁰⁶ which is capable only of producing copies bearing substantial similarity to the original.¹⁰⁷ The question would still remain whether the television station's monopolistic activity in the secondary market would lead eventually to abuse of its public trusteeship responsibilities.¹⁰⁸

By postulating that the unique qualities of broadcast journalism may prevent television stations from exploiting the secondary market, the court indicated a predisposition to a finding for the defendant based upon the conclusion that public interest considerations would preclude WXIA-TV's entry into the secondary market.¹⁰⁹ Forbidding a broadcaster's entry into this secondary market in order to permit unlimited videotape copying and promote the public interest, is a severe measure and would make public trusteeship unnecessarily burdensome.¹¹⁰

Application of this mechanism as a means to guarantee responsible trusteeship and stifle opportunities for abuse also would require a distinct departure from current practice. At present, broadcasters are not prohibited from developing secondary markets for the sale of

Educ. Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982); Walt Disney Productions v. Alaska Television Network, 310 F.Supp. 1073 (W.D. Wash. 1969) and New Boston Television v. Entertainment Sports Programming, 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293 (D. Mass. 1981).

103. This holding is suggested by the court in the instant case, 8 MEDIA L. REP. (BNA) at 2079 n.10.

104. A similar decision in *Bruzzone v. Miller Co.*, 202 U.S.P.Q. (BNA) 809, 1978-81 COPYRIGHT L. REP. ¶ 25,105 (N.D. Cal. 1979) was based on a finding that the copy of a small portion of the original did not serve the same function or decrease the value of the copyrighted work.

105. *New York Times v. United States*, 403 U.S. 713, 717 (1971); *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968).

106. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5680.

107. See *supra* notes 39, 43.

108. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973).

109. 8 MEDIA L. REP. (BNA) at 2079 n.10.

110. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. at 110.

videotape clips of their stories. This is exemplified by the fact that WXIA-TV, without any reservation as to its propriety or legality, has been able to assert its position in the secondary market.¹¹¹ Further, *In re CBS Program "Hunger in America"*¹¹² and *National Organization for Women v. F.C.C.*¹¹³ indicate that the FCC will inquire into allegations of distortion and staging only in the most extreme situations.¹¹⁴ The current standard in broadcast journalism has been protected and maintained by the exercise of the news judgment of the broadcaster which generally is questioned by the FCC only when trusteeship responsibilities are flagrantly or consistently flouted.¹¹⁵ Since the current standard provides adequate protection without resort to severe constraints, it is unnecessary to deny the broadcaster's entry into the secondary market as a means of alleviating concern about the reliability of broadcast news.

An approach that would withhold copyright protection from the holder's secondary market also presents a problem in that failure to protect an established or potential market of a plaintiff in a videotaping case is inconsistent with the application of orthodox fair use analysis.¹¹⁶ Traditionally, when the use parallels or prejudices the copyright holder's actual or potential market, infringement has been found.¹¹⁷ Orthodox fair use analysis, however, may be altered in certain circumstances.

The copyright clause is designed to encourage the dissemination of information and ideas¹¹⁸ while public policy dictates full access to undistorted news reporting.¹¹⁹ Videotape technology is capable of serving those goals by increasing the availability of news stories. But videotaping, because of its limited ability only to make verbatim copies, is also in conflict with copyright law.¹²⁰ Verbatim copying by videotape captures not only the news, it appropriates the author's form of expression which may be protected by copyright law.¹²¹ When a copyright problem such as this is created by the use of a new

111. Plaintiff's Brief in Support of Motion for Summary Judgment at 2.

112. 20 F.C.C. 2d 143, 150 (1969).

113. 555 F.2d 1002, 1010 (D.C. Cir. 1977).

114. *See supra* note 98.

115. *Id.* *See also* *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. at 110 (explaining that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.").

116. *See supra* text accompanying notes 37-43, 48-62.

117. 3 M. NIMMER *supra* note 37, at 13-66 to 13-67.

118. *See supra* text accompanying notes 27-28.

119. *See supra* text accompanying notes 86-88.

120. *See supra* text accompanying notes 39-43.

121. *See supra* text accompanying note 85.

technology, Congress has authorized the application of judicial innovation.¹²² The legislative history of the fair use doctrine, as embodied in the Copyright Act of 1976, illustrates the intention of Congress to grant courts the freedom to adapt the doctrine on a case-by-case basis when the copyright issues arise from the use of technological innovations.¹²³ This intent was confirmed at the time of passage when it was declared that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."¹²⁴ Thus, orthodox fair use analysis may be altered when the copyright issues arise due to the use of a new technology. Since the peculiar qualities of videotape technology have given rise to the copyright issue in *Duncan*, the court essentially has Congressional approval to fashion a decision not rooted in orthodox fair use rationale.¹²⁵

When the issue presented is the copying of news, there is added justification for modifying fair use analysis by giving less weight to the fourth, or market, factor and giving more than traditional emphasis to the second factor, the nature of the copyrighted material. The justification for the shift lies in the fact that, unlike entertainment programming, news is vested with unique qualities which include a strong public interest and that, in any event, only partial copyright protection can be afforded to any news story.¹²⁶

The concept of fair use embodies the balancing of the public interest and the interest of the copyright holder, which were established in the Copyright Clause of the Constitution.¹²⁷ Viewed as a dual risk approach, each "determination of fair use . . . will decide whether the [copyright holder's] expectation of economic reward was or was not appropriate, and such a determination ought to coincide with a simultaneous judgment about whether society's expectation of

122. See *supra* note 42 and accompanying text.

123. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 83, 90th Cong. 1st Sess. 32 (1967).

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

125. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 83, 90th Cong. 1st Sess. 32 (1967).

We endorse the purpose and general scope of . . . the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Id.

126. See *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 143 (S.D.N.Y. 1968).

127. See *supra* text accompanying note 27.

denial of access was or was not appropriate.”¹²⁸ Due to the magnitude of the public interest in the widest possible dissemination of information, the balance is tipped in favor of the user when the content of the broadcast is news. It is for this reason that the “scope of fair use is greater when informational type works, as opposed to more creative products, are involved.”¹²⁹ This means that the relative importance of the second fair use factor, the nature of the copyrighted work, is far greater when news is at issue than when entertainment programming is in question.¹³⁰ Consideration of the nature of the work, then, will justifiably modify an analysis of the market effect.

By giving added recognition to the nature of the copyrighted work, the court in *Duncan* may find a fair use which will allow the plaintiff and defendant to operate in the same market. Such a decision will accommodate the public interest, permit the broadcaster to exploit the secondary market, and will responsibly acknowledge the realities and limitations of videotape technology. The secondary market will be open to as many distributors as choose to compete. This will allow for widespread dissemination of the news and should curb any tendency by the television station to distort or stage the news in order to stimulate clip sales. The benefits to the station of that kind of manipulation would be less significant in the situation in which total revenues from clip sales are shared among competitors. The opening of the secondary market will also recognize a legitimate use of videotape technology by those who are not broadcasters and lack the capability or intent to disturb the broadcasters’ primary market.

V. CONCLUSION

The short history of videotape copyright cases consists of decisions based primarily on the fair use market factor and deal with creative entertainment programs not vested with a public interest.¹³¹ Where there has been any prejudice to an existing or potential market by a user, an infringement has been found.¹³²

Duncan raised the videotaping issue in the context of news and the court indicated that the previously employed analysis was inca-

128. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 30-31 (1978).

129. *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, 972 (1981).

130. *Id.*

131. *See supra* text accompanying notes 46-60.

132. *Id.*

pable of resolving the unique concerns of broadcast journalism.¹³³ The news itself is not copyrightable; there is a public interest in making news widely available; and public trusteeship requires the broadcaster to air impartial reports on important issues. The court suggested that these distinguishing features made it necessary in this instance to give emphasis to another fair use factor, the nature of the copyrighted material.¹³⁴

While the plaintiff, WXIA-TV, sought protection for its secondary market in sales of news clips to the subjects of its news stories, the court questioned whether the nature of broadcast journalism did not preclude the television station from making such sales. There would be no incentive to plan deliberately news stories about likely customers for clips if the television station could not add to its revenues in this manner.¹³⁵ The *Duncan* court suggested a two step approach. The first step it is to determine whether the broadcaster can operate legitimately in the secondary market. The second step is traditional market factor analysis in which the user will have a fair use if the owner does not have a potential secondary market at stake.¹³⁶

While it is desirable that the law take cognizance of the realities and the pervasiveness of videotape technology, as directed in the legislative history of the Copyright Act of 1976, the solution proposed by the court is unduly harsh on the copyright holder. Thoughtful consideration of broadcast regulations shows that it is unnecessary to prevent a broadcaster from entering a secondary market in order to maintain current journalistic standards.¹³⁷

If the courts consider the second fair use factor, "the nature of the copyrighted work," in addition to the market factor, a more fitting outcome can be achieved. The special characteristics of broadcast news, the need for widespread dissemination, and prohibition against distortion are best served by a finding of fair use. All current markets for the distribution of WXIA-TV's news stories, including WXIA-TV's secondary market, can be preserved if the market factor alone is not determinative. The rewards of intentional staging of news stories are minimized when the plaintiff has to share the fruits of the market with defendant and other prospective com-

133. 8 MEDIA L. REP. (BNA) at 2078-79.

134. *Id.* at 2079 n.10.

135. *Id.* at 2078 n.9.

136. *Id.* at 2079 n.10.

137. *See supra* note 111-115 and accompanying text.

petitors. This holding will move the law one step closer to defining correctly the parameters of legitimate videotaping activity.

Joan C. Steiger

AUTHOR'S NOTE: The merits of *WXIA-TV v. Duncan* were decided on October 13, 1983. The court held that the verbatim copying and sale of the "Fitness Trail" segment by Ms. Duncan constituted infringement of WXIA-TV's copyright in that news feature story. Defendant Duncan's fair use defense failed as her use was not an "inherently productive or creative use" within the meaning of section 107. The court, however, found no basis on which to grant WXIA-TV's request for injunctive relief. The court noted that the television station abandons its copyright by destroying tapes of news broadcasts one week after air date and maintenance of copyright protection in the secondary market is not needed to provide a creative incentive to WXIA-TV. The court stated, in addition, that Ms. Duncan's copying and sales could represent a modest social benefit since the news broadcasts of WXIA-TV are "infused with a high degree of public interest," although her activity "does not substantially further public dissemination or perpetuation of news accounts."

At trial, the plaintiff, WXIA-TV, did not assert prejudice to its secondary market and actual damages were found to be de minimis. Judgment was entered for the plaintiff in the amount of \$35. *WXIA-TV v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983).