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Copyright And The First Amendment: Freedom or Monopoly of Expression?

Henry S. Hoberman*

As early as 1969, one commentator described the conflict between the freedom of expression guaranteed by the first amendment and the limited monopoly of expression contained in the copyright clause as "a gathering storm."¹ Now, nearly two decades later, the tempest has never materialized. The legal community has been eager to herald the storm² but unwilling to accommodate its wrath. To date, the clash between free speech and copyright has resulted in only one judicial exoneration of an alleged copyright infringer on explicit first amendment grounds;³ courts have systematically rejected first

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1. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPY-
RIGHT L. SYMP. (ASCAP) 43 (1971).

2. Since 1969, at least 56 federal cases have referred to the inherent conflict between the free speech and copyright interest. No fewer than 15 law review articles have addressed the issue. See, e.g., Francione, *Facing The Nation: The Standards For Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Lloyd & Mayeda, *Copyright Fair Use, The First Amendment, and New Communications Technologies: The Impact of Betamax*, 38 FED. COMM. L.J. 59 (1986); Shipley & Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. REV. 125 (1984); Comment, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425 (1984); Comment, *Copyright and the First Amendment: Where Lies The Public Interest?*, 59 TUL. L. REV. 135 (1984); Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565 (1984).

3. See *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd.*, 626 F.2d 1171 (5th Cir. 1980). In *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986), the court was unable "to find any case in which the United States Supreme Court, or indeed any other federal court, has invalidated any section of the Copyright Act on first amendment grounds." *Id.*

amendment claims in copyright cases.⁴

Instead, courts and legislators have fashioned a variety of limitations on copyright law to resolve cases pitting first amendment concerns against copyright interests. These limitations include the doctrine of fair use,⁵ the dichotomy between idea and expression,⁶ and the compulsory licensing scheme.⁷

This article postulates that the widespread use of such exceptions to copyright suggests an implicit, often unarticulated, judicial response to the tension between the first amendment and the copyright clause. Continued reliance on a variety of patchwork, inchoate exceptions to resolve conflicts of constitutional proportions is steadily eroding the credibility of copyright law.⁸ Accordingly, this article proposes the formulation of a principled first amendment privilege to supplant the current piecemeal approach.

I. A CONFLICT OF CONSTITUTIONAL PROPORTIONS

A. *The Inherent Paradox*

The United States Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . ."⁹ The economic philosophy underlying the clause is the belief that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . ."¹⁰ Accordingly, Congress has enacted copyright legislation granting copyright holders the right to exclude others from using their copyrighted work.¹¹ Section 106 of the 1976 Act gives the copyright owner the exclusive right to authorize reproduction, prepare derivative works, dis-

4. See, e.g., *H.C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418 F. Supp. 620, 624 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F. Supp. 376, 382-84 (D. Conn. 1972), *rev'd*, 530 F.2d 1096 (2d Cir. 1976), *cert. denied*, 429 U.S. 848 (1976); *Walt Disney Prod. v. Air Pirates*, 345 F. Supp. 108, 115-16 (N.D. Cal. 1972), *aff'd in part and rev'd in part*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

5. See *infra* pp. 577-88.

6. See *infra* pp. 588-92.

7. See *infra* pp. 592-94.

8. One commentator concluded that "[t]he copyright system is in real trouble today," and warned that a collapse might be imminent. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME L. REV. 790, 804-05 (1975); accord B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 120-21 (1967).

9. U.S. CONST. art. I, § 8, cl. 8.

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

11. The original copyright statute was enacted in 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790), and extensively amended: 1831, Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); 1870, Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870); 1909, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909); and most recently, 1976, Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), codified at 17 U.S.C. §§ 101-810 (1983).

tribute copies, and perform or display his or her work publicly.¹²

In contrast, the first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press"¹³ Over the past two decades, the Supreme Court has interpreted the guarantee of free speech broadly, developing a constitutional doctrine designed to protect the right of the public both to disseminate and receive information.¹⁴ In the landmark case of *N.Y. Times Co. v. Sullivan*,¹⁵ for example, the Supreme Court concluded that "[t]he interest of the public . . . outweighs the interest of . . . any other individual. The protection of the public requires not merely discussion, but information."¹⁶ By providing the copyright holder with a veritable monopoly on the use of copyrighted expression, Congress has contravened this important tenet of the first amendment.¹⁷ It has created a private censor with the power to withhold or restrict information from a public otherwise constitutionally entitled to know.¹⁸

12. 17 U.S.C. § 106 (1982).

13. U.S. CONST. amend. I.

14. See, e.g., *Board of Educ. v. PICO*, 457 U.S. 853 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). See generally Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

The first amendment right of access has been applied in a variety of contexts. In *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (June 9, 1986) No. 85-502, for example, the Court of Appeals for the D.C. Circuit held that the Federal Communications Commission's "must-carry" rules requiring cable systems to carry local broadcast stations upon their request and without compensation prevented cable subscribers from receiving important information from cable networks. The court cited *Red Lion* for the proposition that "the interests of viewers should be considered 'paramount' in the first amendment calculus." *Id.* at 1453. The court concluded that the "must-carry" rules contravened first amendment principles by preventing cable subscribers from receiving network information and entertainment programming services rather than programming carried by local broadcast stations.

15. 376 U.S. 254 (1964).

16. *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 678 (1942)).

17. See *Rosemont Enters., Inc. v. Random House*, 366 F.2d 303, 311, (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (Lumbard, J., concurring) ("The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed" *Id.*).

18. See *supra* note 14. The case of *Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733 (9th Cir. 1986), *reh'g denied*, 789 F.2d 1319 (9th Cir. 1986), illustrates the sweeping implications of the developing conflict between intellectual property rights and the first amendment.

The United States Olympic Committee [hereinafter U.S.O.C.] brought suit under the

The following hypothetical scenario illustrates the magnitude of the problem:

An amateur photographer captures the aborted liftoff of the space shuttle Challenger on film. The fortuitous angle of the photographer's camera provides the only known footage of the crew cabin's descent to earth and explosion upon impact. The photographer copyrights the film and sells the rights to a corporation that pledges to withhold the film from the public to "protect" the families of the crew members. The author of a new book on the Challenger mission obtains a copy of the film from the photographer and develops a novel theory of foreign sabotage based on the information contained in the film footage. Despite repeated attempts to obtain permission to use the frames from the copyright holder, permission is denied.¹⁹

Under current law, the author has three alternatives:

- (1) use the film footage in derogation of the copyright and rely on a fair use defense at a protracted and expensive trial;
- (2) substitute inferior, noninfringing facsimiles of relevant frames and sacrifice the clarity of the original film; or
- (3) publish the book without the substantiation contained in the film footage and emasculate the theory.

For obvious reasons, none of these alternatives is acceptable to the would-be author. Faced with a Hobson's choice of grand proportions, the author is unable to communicate new and potentially significant insights on a public issue with impunity. But the dilemma has much broader implications: the ultimate danger may be to an unsuspecting public whose constitutional right of access stands threatened by a statutory wolf in sheep's clothing.²⁰

Amateur Sport Act of 1978 to enjoin the use of the word "Olympic" by San Francisco Arts & Athletics [hereinafter S.F.A.A.]. 781 F.2d at 735. The S.F.A.A. proposed using the term "Olympic" in a competitive games event for the most skilled gay and lesbian athletes called the "Gay Olympic Games." *Id.*

The Appellate Court for the Ninth Circuit affirmed the lower court's grant of an injunction. *Id.* at 739. The court reasoned that the first amendment was not violated by permitting restriction of the term "Olympic" by the U.S.O.C. because the term was considered a property interest. *Id.* at 737.

Although rehearing was denied, 789 F.2d 1319 (9th Cir. 1986), Judge Kozinski's dissent discussing potential first amendment problems is instructive. Judge Kozinski challenged Congress' grant to the U.S.O.C. of exclusive possession of the word "Olympic." *Id.* at 1320. He argued that public detriment would result by allowing the continued withdrawal of terms from common, necessitous public use. *Id.* at 1321. Finally, Judge Kozinski concluded that the exclusivity of the U.S.O.C.'s possession of the term, coupled with the subjective assessment of groups permitted to use the term, raised serious first amendment concerns deserving of closer scrutiny by the majority. *Id.* at 1326.

19. These facts are loosely derived from the case of *Time, Inc. v. Bernard Geis and Associates*, 293 F. Supp 130 (S.D.N.Y. 1968). The dispute in that case involved the copying of several frames from the famous Zapruder film of the assassination of President Kennedy in a book questioning the Warren Commission's report on the shooting. The *Time* court ultimately resolved the dispute in favor of the infringer by using the fair use doctrine, but the court did not explicitly rely on the first amendment and provided little guidance for similar disputes in the future. See discussion *infra* page 582.

20. It is ironic that the copyright laws were enacted, among other reasons, to promote wider public access to creative works, and that they now operate in many instances to stifle creativity and impede the free flow of information. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 579 (1985) (Brennan, J., dissenting).

B. The Issue of Primacy

The clash between the public's right of access to information and the provisions of the copyright clause naturally gives rise to questions of primacy; these questions should be resolved in favor of the first amendment. A long line of cases holds that copyright protection is solely a creature of statute,²¹ nothing more than a privilege or franchise.²² This conclusion flows from the permissive grant of authority in article I, section 8, and is buttressed by legislative history characterizing the grant of copyright as a positive rather than natural right.²³ By way of contrast, freedom of speech is a natural right guaranteed by the Constitution. Its directive is mandatory, not permissive, and its origin as a constitutional right commands stricter, more attentive judicial scrutiny.²⁴

Further, to the extent that the copyright clause and the first amendment are in conflict, the first amendment must prevail because of its stature as an "amendment" to the Constitution.²⁵ The framers intended the limitations in the Bill of Rights to modify the broad grants of power given Congress in the original body of the Constitution.²⁶ According to Justice Douglas:

[t]he framers of the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by

21. See Rosenfield, *supra* note 8, at 792.

22. *Id.*

23. The House Committee's Report on the Copyright Law of 1909 concluded: The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909). See also 43 CONG. REC. 3765 (1909) ("there is no property right in writings") (statement of House floor manager). Cf. Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161 (1975) (concluding that copyright is not a natural right but merely a statutorily-created privilege).

24. See Emerson, *supra* note 14, at 926-29.

25. Sobel, *supra* note 1, at 64.

26. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1182 (1970), stating:

[W]e must likewise recognize that the first amendment is an amendment, hence superseding anything inconsistent with it which may be found in the main body of the Constitution. This, of course, includes the copyright clause. In any event, even were the original Constitution and the Bill of Rights to be viewed as a single instrument, the copyright clause may not be read as independent of and uncontrolled by the first amendment. . . . Any other conclusion would, of course, render the first amendment, as well as the remainder of the Bill of Rights, meaningless.

Id.

the original constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas.²⁷

If the copyright clause is subordinate to the first amendment, is the clause itself permissible? Since it is well established that an express repeal is necessary to invalidate a prior provision of the Constitution,²⁸ it appears that the copyright clause was intended to coexist with the first amendment.²⁹ Moreover, the Constitution and the first ten amendments were prepared by the same men³⁰ and ratified within a few years of one another,³¹ suggesting an intentional policy of coexistence. Nonetheless, the coexistence of a clause which permits monopoly of expression and an amendment which guarantees freedom of expression will always be tempestuous.³²

II. ATTEMPTS TO RECONCILE THE CONFLICT

Courts and legislators have invented a host of palliatives to avoid confronting the conflict, including the doctrine of fair use, the distinction between idea and expression, and the compulsory licensing scheme. These efforts have failed primarily because they have ignored their obvious roots in the tension between the copyright clause and the first amendment. The result is a tortuous body of law which relies on unworkable exceptions to copyright law to protect essential free speech rights.

27. *Lee v. Runge*, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting). Justice Douglas, however, concludes that the conflict between the first amendment and the copyright clause should not be construed "so patently." *Id.* at 893 (Douglas, J., dissenting).

28. *See Sobel, supra* note 1, at 68.

29. An argument was once made to the Supreme Court that the copyright clause and the first amendment were in conflict, but could nevertheless stand together. The argument was made by the City Attorney of Los Angeles in a case involving a conviction for exhibiting and distributing an allegedly obscene book—*THE TROPIC OF CANCER*. *See Smith v. California*, 375 U.S. 259 (1963). He concluded that the framers could not have intended to create two separate and distinct rights—one a property right, the other a free speech right. Once writings have been reduced to property (by the law of copyright), they are no longer protected by the first amendment. The Supreme Court never ruled on the merits of the argument because, prior to rendering a decision, the California Supreme Court held that *THE TROPIC OF CANCER* was not obscene as a matter of law. *See Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963). *See generally* Sobel, *supra* note 1, at 68-70.

30. The Constitution was completed in 1787 and the Bill of Rights in 1789. Eleven states ratified the Constitution by 1788; all thirteen by 1790. The Bill of Rights was submitted to the states in 1789 and ratified by 1791. N. DOWLING & G. GUNTHER, *CONSTITUTIONAL LAW* 10 (7th ed. 1965).

31. *Id.* In fact, the very first copyright law was enacted only a few months after the Bill of Rights had been submitted to the states for approval. Act of May 31, 1790, ch. 15, § 124 (*repealed* 1831).

32. *See Sobel, supra* note 1, at 43.

A. *Fair Use*

1. Fair Use Before Betamax

Of the many judicial constructs used to sidestep the clash between free speech and monopoly of speech, none has been as popular or as influential as the doctrine of fair use. Fair use allows the potential infringer to use copyrighted material without the consent of the copyright owner in certain circumstances.

The doctrine originated in the United States with the case of *Folsom v. Marsh*,³³ an infringement action based on a work about the life and papers of George Washington. Justice Story, finding copyright infringement, enumerated a number of factors to determine whether the allegedly infringing work constituted "a fair and bona fide abridgment of an original work . . ."³⁴ Courts, he concluded, should consider the nature of the use, the quantity and value of material used and the degree to which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work.³⁵ He pointed out, however, that a precise definition of fair use³⁶ was virtually inconceivable and that the doctrine must be applied on a case-by-case basis.³⁷

When Congress codified the fair use doctrine in section 107 of the Copyright Act of 1976, it opted for a statutory scheme quite similar to Justice Story's approach. Instead of attempting to define the elusive concept of "fair use," Congress enumerated four factors to be considered in an *ad hoc* determination of fair use.³⁸ The list was designed to allow for continued judicial development of the doctrine and to provide suggested criteria for evaluating the independent equities of

33. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). See also Annotation, *Extent of Doctrine of "Fair Use" under Federal Copyright Act*, 23 A.L.R. 3d (1969).

34. *Id.* at 345.

35. *Id.* at 348.

36. The specific term "fair use" did not appear until *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136).

37. *Folsom*, 9 F. Cas. at 345. For example, in *Dallas Cowboys Cheerleaders v. Scoreboard Posters*, 600 F.2d 1184 (5th Cir. 1979), the court held that despite the existence of a plausible fair use defense, the district court did not abuse its discretion in issuing a preliminary injunction to restrain distribution of defendant's poster. The poster portrayed former members of the professional football cheerleader's team in a state of partial nudity. The public likelihood of confusion created a possibility of irreparable harm, and thus the required elements for an injunction had been met.

38. Congress' first enumerated limitation on the rights of copyright owners was expressed in section 107. The statute reads:

each case.³⁹ Courts applying fair use have consistently broadened its scope, extending its protection to cases involving historical biography,⁴⁰ commercial speech,⁴¹ photocopying,⁴² directories,⁴³ textbooks,⁴⁴ tests,⁴⁵ news,⁴⁶ criticism,⁴⁷ and parody.⁴⁸ Most recently, the

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 purpose;
- (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.

17 U.S.C. § 107 (1982).

39. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

40. *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

41. In *Consumers Union*, the Second Circuit broadened the fair use doctrine to cover commercial speech. The court held that the New Regina Corporation could use quotes from a *Consumer Reports* article favorably rating its vacuum cleaner without infringing the publisher's copyright. The court noted that while Regina's use of the *Consumer Reports*' statement was undoubtedly commercial, it conveyed to consumers "useful information which is protected by the first amendment." *Consumers Union v. General Signal Corp.*, 724 F.2d 1040, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). *But see* *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984) (rejecting first amendment defense of "video tape clipping service" that sold video cassettes of news programs to consumers based on commercial purpose); Note, *Consumers Union of United States, Inc. v. General Signal Corp.: Commercial Free Speech and the Fair Use Doctrine of Copyright*, 16 LOY. U. CHI. L.J. 85 (Fall 1984) (arguing that the decision in *Consumers Union* threatens the future of copyright law by permitting nearly any activity to qualify as a fair use).

42. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam*, 420 U.S. 376 (1975) (by an equally divided court).

43. *G.R. Leonard & Co. v. Stack*, 386 F.2d 38 (7th Cir. 1967). *See, e.g.*, *Dow Jones & Co. v. Board of Trade of the City of Chicago*, 546 F. Supp. 113 (S.D.N.Y. 1982) (indexes) (fair use doctrine upheld); *Key Maps v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (fire maps) (use of maps by fire marshalls within fair use doctrine); *New York Times Co. v. Roxbury Data Interface*, 434 F. Supp. 217 (D.N.J. 1977) (personal name index to the "New York Times Index" not protected by fair use).

44. *See, e.g.*, *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (photos of articles in medical journals a fair use since defendants, federal nonprofit institutions, were devoted solely to the advancement of medical knowledge); *see also* Annotation, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R. 3d 139 (1969). *But see, e.g.*, *Meredith Corp. v. Harper & Row Publ.*, 378 F. Supp. 686 (1974) (fair use doctrine inapplicable where there was clear and convincing proof of plagiarism of child psychology textbook); *Orgel v. Clark Boardman Co.*, 301 F.2d 119 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962) (fair use defense rejected where infringement was based on finding that one important section of law treatise was "strikingly similar" to copyrighted work).

45. *See, e.g.*, *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874 (2d Cir. 1941). For cases where no fair use was found, *see* *Association of Am. Medical Colleges v. Mikajitan*, 571 F. Supp. 144 (E.D. Pa. 1983); *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981).

46. *See, e.g.*, *Italian Book Corp. v. American Broadcasting Co.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (defendant broadcaster's use of plaintiff's copyrighted music privileged under the fair use doctrine); *H.C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418

Supreme Court ruled that fair use protects home videotaping of television transmission for time-shifting purposes.⁴⁹

Despite widespread acceptance by the courts, fair use remains an enigmatic judicial construct. Often deemed "the most troublesome [concept] in [the] whole law of copyright,"⁵⁰ it continues to flourish even as it resists definition. Nearly a century and a half after Justice Story's admonition that the concept defies precise definition,⁵¹ legislators, administrators, judges, and commentators have uniformly balked at attempts to define a fair use.⁵²

Courts have also struggled to apply the four factors codified in sec-

F. Supp. 620 (S.D.N.Y. 1976); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968). In *Time*, the court held that "[a] news event may not be copyrighted . . ." *Id.* at 143.

For news cases rejecting fair use exception, see *Update Art v. Maariv Israfi Newspaper*, 635 F. Supp. 228 (S.D.N.Y. 1986) (copying of a graphic by newspaper not within fair use defense); *Pacific and Southern Co. v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983) (station's copyright in television news feature, with proscription against copying by service for resale to customers, did not violate service's first amendment rights, and service's "use" of the broadcast tapes was not fair use); *Iowa State Univ. Research Foundation v. American Broadcasting Co.*, 671 F.2d 57 (2d Cir. 1980) (defendant network's copying and broadcasting of parts of a student-produced film biography of a champion wrestler was not fair use).

47. See *Maxtone-Graham v. Burtshell*, 631 F. Supp. 1432 (S.D.N.Y. 1986); *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43, *reh'g denied*, 356 U.S. 934 (1958).

48. See, e.g., *Hustler Magazine v. Moral Majority*, 796 F.2d 1148 (9th Cir. 1986); *Fisher v. Dees*, 784 F.2d 432 (9th Cir. 1986); *Elsmere Music v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980); *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). *But see Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Prod.*, 479 F. Supp. 351 (N.D. Ga. 1979) (no parody found of a musical production and defendants not entitled to rely on fair use defense); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (defense of fair use not available where copying was more exact than required for a parody; first amendment not a ban to liability); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975) (use of copyrighted material not protected under fair use as a parody of original work).

49. *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417 (1984). See *infra* pp. 584-85. *But see Encyclopaedia Britannica Educ. Corp. v. C.N. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (large-scale video tape reproduction by County Board of Education of copyrighted works originally broadcast and taken from television airways did not constitute fair use).

50. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). When faced with the application of the fair use doctrine, courts often begin by recanting the *Dellar* court's statement. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

51. See *supra* note 37. In *Martin-Luther King, Jr. Center for Social Change v. American Heritage Products*, 508 F. Supp. 854 (N.D. Ga. 1981), the court noted there was no "set formula" as to whether a use was "fair."

52. In 1961, the Register of Copyright conceded that "the term [fair use] eludes precise definition." HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT

tion 107.⁵³ As a result of Congress' desire not to interfere with the evolving common law doctrine, the contours of the factors are loosely drawn and confusing. Each factor has become a body of law unto itself, forcing courts to undertake the arduous task of integrating statutory language, legislative history, and judicial interpretation for each separate factor.⁵⁴ Moreover, in making a fair use determination, courts are free to eschew any of the factors on the list or add new factors. Such discretion makes the application of section 107 inconsistent and often unmanageable.⁵⁵

Much of the uncertainty in the area of fair use ultimately stems from a misunderstanding of its *raison d'être*. Courts applying the doctrine have traditionally justified its existence by invoking the article I, section 8 goal of "promot[ing] the Progress of Science and useful Arts."⁵⁶ Invariably, this analysis has culminated in some

OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961).

For a sampling of the extensive efforts of commentators to define fair use, see 3 NIMMER ON COPYRIGHT § 13.05 (1978) (a definition based on the economic interests of the copyright holder); Casson, *Fair Use: The Advisability of Statutory Enactment*, 13 IDEA 240 (1969) (based on equitable principles); Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73 (1969) (based on purpose of use and nature of copyrighted work).

For an example of judicial attempts to define the concept, see *Rosemont Enters., Inc. v. Random House*, 366 F.2d 303, 306 (1966) ("fair use" is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright].") *Id.* (quoting BAU, COPYRIGHT AND LITERARY PROPERTY 260 (1944)). Cf. *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1174 (5th Cir. 1980) (applying the *Rosemont* formulation while asserting that "no definition of fair use that is workable . . . has ever evolved" *Id.*).

53. The weight to be accorded each factor is unclear, although most commentators agree that factor four, measuring economic harm, is the most important. Congress itself said, "with certain special exceptions[,] . . . use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. REP. NO. 473, 94th Cong., 1st Sess. 65 (1975). See also M. NIMMER, COPYRIGHT, § 13.05 [A][4] (1978); Seltzer, *Exemptions and Fair Use in Copyright: The Exclusive Right Tensions in the New Copyright*, 24 BULL. COPYRIGHT SOC'Y 215, 245 (1977); B. RINGON & P. GITLIN, COPYRIGHTS 31 (1965). But see Walker, *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735, 743 (1983) (arguing that the factors have equal weight and that courts will emphasize the factor which has been accentuated by the litigants). Cf. *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976) (finding use of letters written by Julius and Ethel Rosenberg to be fair use despite financial injury to their children).

If, as the weight of authority seems to suggest, factor four is the most significant, the statutory fair use inquiry may be constitutionally suspect because it relies on monetary factors to condition the exercise of free speech rights. See *infra* pp. 581-86.

54. See generally Walker, *supra* note 53, at 745-46.

55. This flexibility has resulted in some courts applying only one factor (see, e.g., *Triangle Publications*, 445 F. Supp. 875 (S.D. Fla. 1978)), while one commentator has identified as many as eight distinct factors. See Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 53 (1955).

56. See *supra* note 9.

articulation of a broad public interest underlying fair use.⁵⁷ For purposes of the rule of reason approach contemplated by proponents of the doctrine, this justification provides little guidance. The exact nature and scope of the public interest remain unsettled, which may explain the difficulty courts have encountered in attempting to define fair use and apply Congress' four-part formulation.

A recent line of lower court cases may resolve much of the ambiguity by suggesting that the amorphous "public interest" underlying fair use derives at least partly from the first amendment interest in access to information.⁵⁸ In *Rosemont Enterprises, Inc. v. Random House, Inc.*,⁵⁹ the Second Circuit Court of Appeals considered a preliminary injunction barring the publication and distribution of a biography of Howard Hughes. *Rosemont Enterprises, Inc.*⁶⁰ was the copyright owner of a series of articles about Howard Hughes that had appeared in *Look* magazine in 1954. When the biography quoted

57. The court's discussion of the purpose of fair use in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), is illustrative:

In the words of Article I, Section 8, of the Constitution, copyright protection is designed 'To promote the Progress of Science and Useful Arts,' and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry.

Id. at 543-44 (citations omitted).

In *Harry Fox Agency v. Mills Music*, 720 F.2d 733 (2d Cir. 1983), the court recognized limits to the fair use defense "to vindicate the public interest in the need for access to information contained in copyrighted works and in the promotion of a multiplicity of voices in society." This view was followed in *Financial Information v. Moody's Investors Service*, 751 F.2d 501 (2d Cir. 1984).

58. This line of cases includes, but is not limited to, *Triangle Publications v. Knight-Ridder Newspapers*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980); *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 604 F.2d 200 (2d Cir. 1979); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (by an equally divided Court); *Marvin Worth Prods. v. Superior Films*, 319 F. Supp. 1269 (S.D.N.Y. 1970); *Berlin v. E. C. Publications*, 329 F.2d 541 (2d Cir. 1962), *cert. denied*, 379 U.S. 822 (1964); *H.C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418 F. Supp. 620 (S.D.N.Y. 1976); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1379 (S.D.N.Y. 1975); *Rohauer v. Killiam Shows, Inc.*, 397 F. Supp. 723 (S.D.N.Y. 1976); *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2d Cir. 1976); *Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968); and *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

59. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

60. *Rosemont* was owned by Hughes. *See id.* at 312-13 (Lumbard, C.J., concurring).

some 256 words from the articles,⁶¹ the corporation sued for infringement. The Second Circuit vacated the preliminary injunction on the basis of fair use. It rejected the district court's conclusion that commercial motives on the part of the defendant prevented application of the fair use doctrine.⁶² Concluding that commercial motive is irrelevant where the public interest is substantial, the court stated that the "public interest in free dissemination of information"⁶³ outweighs the "copyright holder's interest in a maximum financial return."⁶⁴

Like *Rosemont*, the case of *Time, Inc. v. Bernard Geis Associates*⁶⁵ involved an infringement action based on the publication of a book that "borrowed" copyrighted material central to its thesis. In 1963, Time, Inc. bought the rights to the famed Zapruder film of the assassination of President Kennedy and eventually published parts of the film in *Life* magazine (a division of *Time*). Four years later, the defendant, a former consultant for *Life*, used charcoal copies of exact frames from the film to substantiate theories about the assassination set forth in his book, *Six Seconds in Dallas*. Time, Inc. brought suit for infringement. After noting that the *Rosemont* court's view of fair use had been too "liberal,"⁶⁶ the *Time* court held that the defendant's reproduction constituted fair use. Following *Rosemont*, the court determined that the "public interest in having the fullest information available on the murder of President Kennedy" eclipsed the "slight" injury to the plaintiff.⁶⁷

The case of *Triangle Publication, Inc. v. Knight-Ridder Newspapers, Inc.*⁶⁸ advanced the *Rosemont* and *Time* cases one step further. Both *Rosemont* and *Time* were predicated on the public interest in

61. The articles contained some 13,500 words, the biography approximately 116,000. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 294 (1979).

62. *Rosemont Enters. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y. 1966).

63. *Rosemont*, 366 F.2d at 307.

64. *Id.* Chief Judge Lumbard concurred. He stated that the "spirit" of the first amendment applied to copyright. *Id.* at 311. Ironically, *Rosemont* may have been wrongly decided. The decision has been criticized by many commentators. See Denicola, *supra* note 61, at 295; Sobel, *supra* note 1, at 59-61; Seltzer, *supra* note 53, at 254. While the diminution of value may have been speculative, these commentators note that section 107(4) provides that the effect of the use on the potential market may be considered. More commonly, however, *Rosemont* has been criticized for failing to distinguish first amendment doctrine from fair use concerns. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1200-04 (1970). See also Comment, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158, 1177.

65. 293 F. Supp. 130 (S.D.N.Y. 1968).

66. *Id.* at 145.

67. *Id.* at 146. Like *Rosemont*, the *Time* decision has been met with criticism. Most commentators argue that *Time* is inconsistent with the traditional concept of fair use because it ignored the potential economic harm to the plaintiff. See, e.g., Sobel, *supra* note 1, at 59-61.

68. 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980).

dissemination of information, but they incorporated this first amendment principle into the fair use analysis. The *Triangle* court fashioned a separate first amendment privilege where fair use did not apply. The defendant, seeking to introduce a new television programming guide as a supplement to its newspaper, reproduced the cover of *T.V. Guide* in its advertisements. The publisher of *T.V. Guide* sued for infringement. Contrary to *Rosemont*, the lower court in *Triangle* adopted a *per se* rule eliminating commercial use from the fair use doctrine, and rejected the defendant's argument that the purpose of its use, comparative advertising, was a protected form of criticism. Dismissing all of the defendant's fair use arguments, the court proceeded to consider the first amendment implications of the use and concluded that the first amendment was properly at issue. The court ultimately determined that the first amendment constituted a valid defense in and of itself.⁶⁹

On appeal, the Fifth Circuit never reached the first amendment issue. Instead, the court concluded that the reproduction was protected by traditional notions of fair use.⁷⁰ Rejecting the district court's *per se* rule against fair use for commercial gain, the court found that the public benefit from truthful, comparative advertising outweighed the defendant's commercial profit. After reviewing the other statutory factors, the court highlighted the significance of the "de minimus" economic harm to the plaintiff and upheld the lower court's determination of noninfringement.⁷¹ Judge Brown, concurring with the majority on the issue of fair use, issued a lengthy dissent to its refusal to address the conflict between the first amendment and the copyright clause.⁷²

The district court opinion in *Triangle* represents the only explicit judicial acceptance of a first amendment privilege to date. Yet its ef-

69. *Id.* The court never explained its rationale for invoking the first amendment, although it apparently was influenced by emerging principles of commercial speech. See *Triangle Publication*, 445 F. Supp. at 882-83. See generally Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS. vol. 4 at 22 (1981).

70. *Triangle Publication*, 626 F.2d at 1176. In a concurring opinion, Judge Tate stated that he would agree with the district court's first amendment application if the fair use defense had not properly excused the defendant's reproduction of the magazine cover. *Id.* at 1184 (Tate, J., concurring).

71. *Id.* at 1177.

72. Judge Brown pointed out that the idea-expression dichotomy (see *infra* pp. 590-94) has generally served to resolve the tension between copyright law and free speech. He noted, however, that a legitimate conflict may arise from the use of certain visual works in which idea and expression are merged. *Id.* at 1182. See also *infra* pp. 588-92.

fect on copyright law and the fair use doctrine is speculative for several reasons. It is unclear whether the appellate decision was meant to undercut the first amendment analysis of the lower court or simply to gloss over it entirely. The court itself provided no guidance on this issue. Moreover, the district court's explication of the fledgling first amendment privilege was scant at best. The court never explained its rationale for applying the first amendment or attempted to develop guidelines for the new privilege. Leaven's assessment of the opinion as a "hasty conclusion . . . reflect[ing] an eagerness to resolve a novel question"⁷³ is essentially accurate. It appears that the majority was intrigued with the conflict between the first amendment and copyright law and was determined to address the issue at all costs.

2. Betamax and Beyond

The Supreme Court reentered the fair use fracas with a landmark decision four years after the *Triangle* case. *Universal City Studios, Inc. v. Sony Corp. of America* ("*Betamax*")⁷⁴ has been termed "the first definitive Supreme Court opinion on fair use."⁷⁵ The case may be more accurately described as the first Supreme Court opinion that elevates the first amendment to a position of prominence in the fair use analysis. Accordingly, the decision has significant implications for the development and acceptance of any first amendment privilege to copyright law.

In *Betamax*, the Court was faced with the issue of whether manufacturers, retailers, and marketers of video cassette recorders ("VCR's") could be held contributorily liable for copyright infringement arising from the taping of copyrighted programs by VCR owners for private, noncommercial use. The majority described its task as weighing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the other. . . ."⁷⁶ In attempting to strike the delicate balance, the Court did not explicitly invoke first amendment principles. Rather, it chose the fair use doctrine to vindicate the use of VCR's for "time shifting" purposes, i.e., recording a broadcast program and playing it back at a later time. Justice Stevens' majority opinion applied the statutory fair use test and determined that the copyright holders were unable to bear their burden of proof of infringement.⁷⁷

73. Leavens, *supra* note 69, at 22.

74. 464 U.S. 417 (1984).

75. Lloyd & Mayeda, *supra* note 2, at 78.

76. *Betamax*, 464 U.S. at 429.

77. In a five to four decision, the majority applied the fair use doctrine as follows.

Nonetheless, the first amendment figured prominently in the Court's fair use analysis. Citing its 1983 decision in *Community Television of Southern California v. Godfreid*,⁷⁸ the Court recognized the "public interest in making public broadcasting more available"⁷⁹ as a significant factor in the fair use calculus.⁸⁰ Justice Stevens observed that "the purpose of this [time shifting] served the public interest by providing greater access to television programming. [This] interest . . . is consistent with the [f]irst [a]mendment policy of providing the fullest possible access to information through the public airways."⁸¹ The majority also characterized its decision as protecting "the public interest in access to that article of commerce [VCR's],"⁸² and rejected a compulsory licensing scheme proposed by copyright owners that would have restricted the public's access to VCR's.⁸³

On the heels of its *Betamax* ruling, the Supreme Court decided the *Nation* case at the end of its 1985 term.⁸⁴ The case involved President Gerald Ford's memoirs which had been sold to Harper & Row and Reader's Digest, Inc. ("publishers"). *Time* magazine agreed to pay the publishers \$12,500 in advance and \$12,500 at the time of publication for prepublication excerpts. Shortly before the article in *Time* was scheduled to be released, an editor of *The Nation* magazine obtained a copy of the manuscript and hastily drafted a 2250-word article. The article was published in *The Nation* prior to the scheduled release of the *Time* piece, and ultimately prompted *Time* to cancel its article and default on its remaining installment payment to the publishers. The publishers brought suit against Nation Enterprises for copyright infringement.

The district court held that the defendant had violated the plain-

First, the Court noted that time shifting is a private, noncommercial activity with little, if any, realistic damage to the copyright holders. The Court concluded that the copyright holders were unable to prove a likelihood of harm from time shifting to the market for their copyrighted works. Second, the majority applied a balancing test and found that time shifting is socially beneficial. Third, the Court held that the manufacturer of the Betamax VCR could only be held contributorily liable for copyright infringement if the product is not capable of substantial noninfringing uses. *Id.* at 447-57.

78. 459 U.S. 498, 508 n.12 (1983).

79. *Betamax*, 464 U.S. at 454.

80. *Id.* at 425 (citing *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 94 n.2 (1973) (footnote omitted)).

81. *Id.* (Justice Stevens gave his full support to the District Court's findings and conclusions).

82. *Betamax*, 464 U.S. at 440.

83. *Id.* at 441 n.21.

84. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

tiff's right of first publication.⁸⁵ The Second Circuit Court of Appeals reversed, finding that *The Nation* had copied facts, public documents and statements by third parties that were not copyrightable. The court also determined that the use of 300 or so words copied verbatim from Ford's manuscript was protected by the fair use doctrine.

The Second Circuit was apparently swayed by the fact that the purpose of the alleged infringement was "news reporting" and that the subject matter was "potentially significant" information.⁸⁶ The court's characterization of the importance of the subject matter is particularly instructive:

Nowhere could the need to construe the concept of copyrightability in accord with [f]irst [a]mendment freedoms be more important than in the instant case. Here we are presented with an article describing political events of major significance, involving a former President of the United States. The paraphrasings concern the very essence of news and of history.⁸⁷

In a six-to-three decision, the Supreme Court reversed and found that the defendant had "arrogated to itself the right of first publication, an important marketable subsidiary right."⁸⁸ The Court explicitly rejected the defense that the first amendment protects the use of the copyrighted information where the defendant's purpose is to convey information "of high public concern." Declining to create what it labeled a "public figure exception" to copyright law,⁸⁹ the Court concluded that *The Nation's* copying was not fair use and cited the clear evidence of harm illustrated by *Time's* refusal to pay the \$12,500 previously agreed upon.⁹⁰

Commentators have wrongly concluded that the *Nation* decision imposes limitations on the first amendment implications of the *Betamax* holding.⁹¹ Justice O'Connor's decision rejecting the first

85. Harper & Row Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067 (S.D.N.Y. 1984).

86. Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195 (2d Cir. 1983).

87. *Id.* at 204.

88. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

89. This public figure/public concern language harks back to *Rosenbloom*. See *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). It is interesting, if not enlightening, that a debate ordinarily associated with traditional libel cases finds its way into the Court's fair use analysis. See *infra* note 163. This may suggest that copyright law has begun to dovetail with first amendment analysis in more thoughtful and expansive ways.

90. *Nation*, 471 U.S. at 567.

91. See, e.g., Lloyd & Mayeta, *supra* note 2, at 100. Compare Note, *Harper & Row Publishers, Inc. v. Nation Enterprises: Pirating Unpublished Copyright Works: Does the Fair Use Doctrine Vindicate First Amendment Rights?*, 19 J. MARSHALL L. REV. 501 (Winter 1986) (authored by Stacey Daniels) [hereinafter *Pirating*] with Note, *Copyright And The First Amendment: Nurturing The Seeds For Harvest*, 65 NEB. L. REV. 631 (1986) (authored by Greg A. Perry) [hereinafter *Nurturing*]. Daniels argues that the *Nation* Court overemphasized the fact that Ford's memoirs were unpublished and that President Ford was entitled to his first publication rights. See *Pirating, supra* at 515. Although the Court stated that these factors should not be controlling, Daniels asserts that the factors were influential in the Court's holding that infringement of an

amendment defense in *Nation* was influenced by two fact-specific considerations. First, there was no significant benefit to the public from the defendant's conduct, since the material published by *The Nation* would have been released to the public within days by *Time*. The Court noted that "[w]here an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by preempting the right of publication."⁹² The opinion suggests that the outcome might have been different if the public would have been deprived of the information in question, or the release of the information would have been significantly delayed.⁹³

Second, Victor Navasky, editor of *The Nation*, never attempted to secure permission for the publication of the copyrighted material prior to infringement. The Court was apparently influenced by the lack of necessity for "circumventing the copyright scheme" evidenced by Navasky's failure to so much as contact the copyright holder.⁹⁴

In dissent, Justice Brennan, joined by Justices White and Marshall, championed the public's right of access to information and concluded that the majority had too narrowly construed the fair use criteria. Regrettably, and perhaps with an eye toward attracting fellow dissenters, Justice Brennan chose to present his discussion of first amendment issues within the paradigm of fair use. Citing such landmark Supreme Court cases as *New York Times v. Sullivan*,⁹⁵ *Zacchini v. Scripps Howard Broadcasting Co.*,⁹⁶ *Lee v. Runge*,⁹⁷ and *Garrison v. Louisiana*,⁹⁸ he observed that our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, leaves no room for statutory mo-

unpublished work does not constitute fair use. *Id.* at 509-10. Daniels concludes that the Court's broad holding ultimately will deny first amendment protection to unpublished works and that the dissemination of ideas will be curtailed. *Id.* at 520-21. Perry, on the other hand, agrees with the Court that the first amendment does not require a "public figure exception" to copyright law. See *Nurturing*, *supra* at 644. Perry argues that the idea expression dichotomy and the fair use doctrine adequately protect first amendment interests, *id.* at 644, and concludes that the Court properly rejected the fair use defense. *Id.* at 652-53.

92. *Nation*, 471 U.S. at 557.

93. The Court stated that copyright could not "sanction abuse of the copyright owner's monopoly as the instrument to suppress facts." *Id.* at 559.

94. *Id.* at 557.

95. 376 U.S. 254 (1964).

96. 433 U.S. 562 (1977).

97. 404 U.S. 887 (1971).

98. 379 U.S. 64 (1964).

nopoly over information and ideas.”⁹⁹ Rather than explore the ramifications of this bold assertion, Justice Brennan and his fellow dissenters retreated to the comfortable and familiar confines of fair use, finding that the majority decision was flawed by the narrowness of its fair use analysis rather than its treatment of the first amendment defense.¹⁰⁰

Although the Supreme Court stopped short of endorsing a first amendment privilege, both the *Betamax* and *Nation* decisions are important developments in copyright jurisprudence. They represent the culmination of a line of cases, beginning with *Rosemont*, that elevates the first amendment to a position of prominence in copyright law. These cases may reshape the doctrine of fair use and the law of copyright by confirming that the public interest underlying the fair use doctrine is actually the public interest in gaining access to ideas. Together they suggest a desirable alternative to a doctrine rife with problems—the creation of a clearly defined first amendment privilege. In the interim, fair use will remain a popular judicial tool without any definition, workable statutory structure, or articulable *raison d’etre*.¹⁰¹

B. *The Idea-Expression Dichotomy*

Copyright law attempts to draw a distinction between ideas and their expression. Only the expressions of ideas are copyrightable; the ideas themselves, however creative, remain in the public domain.¹⁰² Traditionally, courts and commentators have used the distinction as another method to allay fears of a clash between free speech and copyright.

The concept that ideas are public property rather than personal property is an ancient one. Professor Nimmer dates this concept back to the First Century A.D., when Seneca stated that “ideas are common property.”¹⁰³ Despite the antiquity of the concept, jurists have found it difficult to articulate a workable formula for distinguishing between ideas and their expression. The most renowned attempt is Learned Hand’s abstractions test:

99. *Nation*, 471 U.S. at 582 (1985) (Brennan, J., dissenting) (citations omitted) (quoting, in part, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

100. *Id.* at 590 (Brennan, J., dissenting).

101. See, e.g., L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 32-33 (1978). Seltzer’s characterization of fair use as a “nearly total loss” is representative of scholarly comment lamenting the ambiguity of fair use.

102. 17 U.S.C. § 102(b) (1970) provides: “In no case does copyright protection for an original work of authorship extend to any idea . . .” *Id.* See also H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976).

103. Nimmer, *supra* note 52, at 715 n.5 (quoting *Epistles* 12:11). See also Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735 (1967).

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.¹⁰⁴

While valiant and perhaps useful as a conceptual framework, Hand's test contributes little to an understanding of the idea-expression dichotomy. It fails to indicate exactly where, along the continuum of abstractions, the line should be drawn between idea and expression. Further, it leaves the principal terms undefined and ambiguous. Indeed, Hand later abandoned his formulation for exactly these reasons, explaining that a precise rule defining "idea" and "expression" was untenable and that the determination must "inevitably be *ad hoc*."¹⁰⁵

Despite its deficiencies, the idea-expression distinction has been particularly popular as a judicial tool for alleviating perceived tension between first amendment and copyright interests. Many courts have used the distinction to deny first amendment claims by simply stating the proposition that ideas are not copyrightable and summarily dismissing the apparent conflict without elaboration.¹⁰⁶ In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,¹⁰⁷ for example, the defendants asserted that the first amendment insulated them from liability for their unauthorized use of plaintiff's "McDonaldland" characters. The Ninth Circuit rejected the defendants' claim, and concluded that "the defendants . . . had many ways to express the idea of a fantasyland with characters, but chose [instead] to copy the expression of plaintiffs'. The first amendment will not protect such imitation."¹⁰⁸ Similarly, the Second Circuit, in *Wainright Securities, Inc. v. Wall Street Transcript Corp.*,¹⁰⁹ relied on the distinction to resolve a potential conflict between the free press guarantee

104. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (citations omitted). In the *Nichols* case, the writer of the play "Abie's Irish Rose" brought an infringement action against the producer of a motion picture entitled "The Cohens and the Kellys." Both works had similar plots, involving the relationship between an Irish father and a Jewish father and the complications of their children's ensuing marriage. The issue was whether the defendant's film appropriated expression or merely ideas from the play. The court, finding that the defendant borrowed only the plaintiff's theme, held that the use had not infringed the plaintiff's copyright. *Id.* at 122.

105. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

106. *See, e.g., Nichols*, 45 F.2d at 121.

107. 562 F.2d 1157, 1169-71 (9th Cir. 1977).

108. *Id.* at 1171.

109. 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

and the copyright clause. The Wall Street Journal, sued for publishing abstracts of plaintiffs' copyrighted financial reprints, argued that publication of the abstracts was privileged as an exercise of the freedom of the press. Rejecting the first amendment claim, the court noted that a news event is an uncopyrightable idea although the particular arrangement of words used to describe that event is protectable.¹¹⁰

Such characteristic ruminations by courts eager to dismiss the first amendment problem are troublesome for several reasons. As in the "fair use" area, judges have uniformly failed to define the principal terms. Although most courts gloss over the problem entirely, some resort to providing a synonym or analogue for the word "idea". Words such as "theme" or "plot" are routinely used to define "idea,"¹¹¹ but these terms are merely examples of ideas rather than definitions.¹¹² Professor Nimmer's efforts in this regard are illustrative. Paradoxically, he advocates "definitional balancing" in the idea-expression mode but never attempts to provide a definition.¹¹³ Instead, he relies on Learned Hand's flawed abstractions test¹¹⁴ and Professor Chafee's "pattern" test, a mere variant on the Hand formulation.¹¹⁵

Judicial analyses have also failed to acknowledge that idea and expression often merge, becoming virtually indistinguishable. This problem is particularly acute in the area of graphic works, where the visual impact of a photograph, for example, may be inseparable from the idea.¹¹⁶ Nimmer, carving out a first amendment exception to his

110. *Id.* at 95-97.

111. See Gershon, *Contractual Protection for Literary or Dramatic Material: When, Where, and How Much?*, 27 S. CAL. L. REV. 290, 291 (1954), cited in Libott, *supra* note 103, at 739 n.26.

112. This technique is analogous to the obscenity area, where courts have been able to provide examples of obscenity without defining the term. This paradoxical situation gave rise to the now infamous proclamation of Justice Stewart: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

113. See Nimmer, *supra* note 26, at 1189-90.

114. See *supra* note 103 and accompanying text. The many unsuccessful attempts to clarify the meaning of "idea" and "expression" prompted one commentator to remark: "While the word 'idea' is common coin in copyright case and comment, its value and metallic content remain either purely speculative or wildly inconsistent." Libott, *supra* note 103, at 738.

115. Professor Chafee attempted to identify the level of abstraction which would constitute the line between idea and expression. He found that "[copyright] covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945). As Nimmer himself concedes, Chafee's test is utterly useless for nonfictional works. Nimmer, *supra* note 26, at 1189. For fictional works, it suffers from the same line-drawing deficiency as the Learned Hand test (which was ultimately abandoned by its creator). See *supra* note 103 and accompanying text.

116. The wedding of idea and expression is not limited to the content of graphic works, as the case of *Meeropol v. Nizer* indicates. See *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976), *rev'd*, 569 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013

definitional balancing approach for graphic works, provides the poignant example of photographs of the My Lai massacre.¹¹⁷ He explains that "[n]o amount of words describing the 'idea'¹¹⁸ of the massacre could substitute for . . . the photographs."¹¹⁹ Similarly, one would be hard pressed to divorce the ideas of the Mona Lisa, or the Pieta, or the Thinker, from their artistic expression.

Finally, both case and comment have ignored the situation in which no degree of creativity or effort can substitute for the duplication of the particular expression of another. The reproduction of the frames from the Zapruder film in the *Time* case¹²⁰ is one example. The defendant had a constitutional right to express his views on the Warren Commission Report. The absence of the Zapruder film would have prevented him from adequately formulating his theories. Since both the Commission and the defendant relied extensively on the film, denying the author the right to duplicate critical frames would have effectively denied the author the right to accurately convey his ideas to the public.¹²¹

As in the area of fair use, the confusing legal analysis in the idea-expression area is, to some degree, a product of the underlying tension between the copyright clause and the first amendment. Courts

(1978). In *Meeropol*, the children of Julius and Ethel Rosenberg sought to prevent publication of *The Implosion Conspiracy*, an account of the espionage trial of their parents. The book contained portions of letters written by the Rosenbergs while awaiting execution. Emphasizing the importance of the borrowed expression, the district court denied a preliminary injunction against publication on the basis of Nizer's fair use defense, and eventually granted summary judgment to the defendant on the infringement issue. The Second Circuit reversed, holding that factual disputes as to the purpose of the use and its economic impact prevented summary judgment. Nonetheless, *Meeropol* has been viewed as a case in which the idea and expression (of the letters) were merged to the point of inseparability. See Denicola, *supra* note 61, at 308-09.

117. Nimmer, *supra* note 26, at 1197. He labels the problem "the wedding of expression and idea." *Id.* Nimmer's hypothesis that idea and expression may be inseparable was discussed in *Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1981).

118. Note that Nimmer uses the word "idea" in quotation marks. Learned Hand, in his famous abstractions passage, used the same technique. Libott suggests that commentators often embellish the word "idea" with quotation marks because they are unable to define it. See Libott, *supra* note 102, at 738.

119. Nimmer, *supra* note 26, at 1197. See also *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 (9th Cir. 1977) (concluding that graphic expressions of newsworthy events may ultimately be accorded first amendment protection).

120. See discussion *supra* p. 582.

121. Limiting the author's use in *Time* to mere descriptions of each frame would have been unacceptable. The visual images of President Kennedy's assassination conveyed particular information (such as specific angles and facial expressions) which would have been impossible to achieve in literary form.

struggle to square a constitutional amendment protecting pluralistic expression with a system of copyright law sanctioning monopoly of expression. Regrettably, this inherent paradox translates into doctrinal confusion. The result is an inflexible and unrealistic judicial tool saddled with an insurmountable line-drawing problem.

C. *The Compulsory Licensing Scheme*

Compulsory licensing is another method by which jurists and legislators purport to satisfy the conflict between free speech rights and copyright law. Under the compulsory licensing scheme, Congress grants the public a right to use a copyrighted work in derogation of the author's exclusivity. In return, the user must compensate the author and preserve the integrity of the original composition.¹²² In this way, the licensing provision is said to "maintain incentives for creation while facilitating the free flow of communication."¹²³

Although compulsory licensing has been extended to juke box transmissions and cable television, its modest roots began with the now famous piano rolls of *White-Smith Music Publishing Co. v. Apollo*.¹²⁴ The Court in *White-Smith* narrowly construed the term "writings" in the copyright clause to exclude perforated piano rolls. Noting that the rolls were not visually perceptible, the Court found them to be a part of a mechanical process rather than a tangible form of expression, and denied copyright protection.¹²⁵ The Copyright Act of 1909, attempting to counteract what Congress viewed as a disincentive to artistic creativity, codified a compulsory license provision for musical compositions.¹²⁶

Paralleling its approach in *White-Smith*, the Court, in *Fortnightly Corp. v. United Artists Television, Inc.*,¹²⁷ held that cable companies may properly retransmit television programs without infringing the copyright of the original owner. In *Teleprompter v. C.B.S., Inc.*,¹²⁸ the Court extended the reach of the *Fortnightly* decision to protect

122. 17 U.S.C. § 115(a) (1976); see H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53, 109 (1976). The statutory provision for compulsory licensing "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under compulsory license, but without allowing the music to be perverted, distorted, or travestied." *Id.*

123. Comment, *Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity*, 34 U. MIAMI L. REV. 1043, 1071 (1980).

124. 209 U.S. 1 (1908).

125. *Id.* at 10.

126. The Copyright Act of 1909, ch. 320 § 1(e), 35 Stat. 1075, (1909) (codified as amended at 17 U.S.C. § 1 (1983)), established a system of compulsory licensing for the creation and distribution of phonorecords of copyrighted music. See also H.R. REP. No. 2222, 60th Cong., 2d Sess. 52 (1909).

127. 392 U.S. 390 (1968).

128. 415 U.S. 394 (1974).

the importation of distant signals into a new community via cable. Ostensibly, the purpose of these decisions was to facilitate the development of the incipient cable industry, but critics responded bitterly. Just as *White-Smith* had been perceived as limiting the expansion of musical creativity, *Fortnightly* was roundly criticized as a disincentive for broadcasters.¹²⁹ Reduced protection was said to discourage broadcasters and their producers from creating television programs which might ultimately be "pirated" by cable companies.¹³⁰

Acknowledging the seriousness of these charges, the Federal Communications Commission, in 1972, exercised its ancillary jurisdiction over cable to require cable transmitters to obtain the copyright holder's permission before rebroadcasting protected programs.¹³¹ The result was predictable: broadcasters overwhelmingly withheld their consent and the number of retransmissions inevitably declined. In the Copyright Act of 1976, Congress attempted to resolve the issue in the same way it responded to the dilemma of unprotected piano composers in the Act of 1909. It set up a compulsory licensing scheme which confers automatic permission for program retransmission and, at the same time, requires the payment of compensation to the copyright holder.¹³²

Problems with the compulsory licensing mechanism, as with fair use and the idea-expression distinction, can be traced in part to the tension between free speech and copyright law. If the statutory provision is indeed intended to "facilitat[e] the free flow of communication,"¹³³ then its justification is securely grounded in an established first amendment right—the public right to gain access to information.¹³⁴ By requiring speakers to pay for the use of information, the compulsory licensing scheme effectively taxes the exercise of a constitutional right.

Of course, the first amendment has not been construed as absolute.¹³⁵ However, the idea of a government sanctioning burdensome

129. See generally Comment, *supra* note 123, at 1072.

130. See Cable Television Report and Order, 36 F.C.C. 2d 143 (1972).

131. *Id.*

132. Comment, *supra* note 123, at 1072.

133. Comment, *supra* note 123, at 1071.

134. See *supra* note 14. See also A. MEIKLEJOHN, POLITICAL FREEDOM 2028 (1965); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 989-90 (1970).

135. See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). Justice Harlan's majority opinion sustained the state's denial of Bar admission to an applicant who had refused to answer questions about Communist Party membership. Justice Harlan, rejecting Justice Black's absolutist approach, concluded that:

The First and Fourth Amendments are [not] "absolute." . . . Throughout its

taxes on free speech is repugnant to the very notions of lively and robust debate which underlie the first amendment.¹³⁶ Information is not a commodity for ransom, but a resource for societal progress and personal edification. Viewed in this light, compulsory licensing is objectionable when the tax on free speech rights becomes so onerous that it prevents a speaker from communicating with an audience.

III. THE FIRST AMENDMENT PRIVILEGE

Although assertions of a first amendment privilege traditionally have been rejected in copyright cases,¹³⁷ the need for such a privilege has become abundantly clear. Courts can no longer rely on a variety of flawed exceptions to copyright law to ensure the free flow of information in today's technologically-oriented world.¹³⁸

Indeed, in two decisions rejecting first amendment defenses on the facts, the courts have noted that the first amendment might require the creation of an independent privilege in certain circumstances.¹³⁹ In *Wainwright Securities, Inc. v. Wall St. Transcript Corp.*,¹⁴⁰ the Second Circuit acknowledged that "[s]omeday legitimate in-depth news coverage of copyrighted small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment.'"¹⁴¹ Likewise, in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, the Ninth Circuit found that "[t]here may be certain rare instances when first amendment considerations will operate to limit copyright protection for graphic expressions of newsworthy events."¹⁴² Coupled with the Supreme Court's recent decisions in *Betamax* and *Nation*, these

history this Court has consistently recognized at least two ways in which Constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of Constitutional protection. [Citations omitted.] On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass . . . [citations omitted].

136. See generally Emerson, *supra* note 14.

137. See *supra* note 4. Denicola suggests that courts have rejected a first amendment privilege merely because the privilege has been raised in inappropriate situations. Denicola, *supra* note 61, at 304.

138. See generally *Copyright and Commercial Exploitation: The Need for a "Hot News" Exception in the Information Age*, 4 COMM. LAW. 3 (1986).

139. See *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

140. *Id.*

141. 558 F.2d at 95.

142. 562 F.2d at 1171.

statements suggest that courts may finally be willing to accept a limited first amendment privilege to copyright law.

The creation of a constitutionally-mandated privilege to protect valued first amendment rights is not unprecedented.¹⁴³ The Fair Report privilege of libel law is a useful model. This privilege covers fair and accurate reports of official actions and governmental proceedings and, in most jurisdictions, reports of public, nongovernmental meetings dealing with matters of public concern.¹⁴⁴ Although the Fair Report privilege is largely a rule of state common law, it is now commonly understood to have an overriding constitutional dimension.¹⁴⁵ According to the *Restatement (Second) of Torts*, "an action cannot be constitutionally maintained, either for defamation or for invasion of the right of privacy," if a report of public proceedings is accurate and fair.¹⁴⁶ Thus, in *Cox Broadcasting Corp. v. Cohen*,¹⁴⁷ the Supreme Court applied the Fair Report privilege to preclude liability for the publication of a rape victim's name obtained from court records. In *Landmark Communications Inc. v. Virginia*,¹⁴⁸ the Court extended *Cox Broadcasting* to a report of a closed judicial criminal proceeding, vacating the conviction of a Virginia newspaper for publishing an article accurately describing a pending inquiry into alleged judicial misconduct. The decision in *Landmark Communications, Inc.* suggests that the first amendment value in publishing governmental information overrides the reputational or privacy interests of the accused.¹⁴⁹

The first amendment and the common law have combined to create qualified privileges in other situations as well. The Fair Comment privilege insulates published opinions from legal actions. The comment must be recognizable as opinion, supporting facts must be stated or widely known, and the topic must be one of public interest.¹⁵⁰ Both Prosser¹⁵¹ and the Supreme Court¹⁵² have recognized

143. See generally B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 369 (1985).

144. *Id.* at 370.

145. *Id.* at 373.

146. RESTATEMENT (SECOND) OF TORTS, § 611, comment b (1977); accord Soble, *Defamation and the First Amendment: The Case for Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979).

147. 420 U.S. 469 (1975).

148. 435 U.S. 829 (1978).

149. 435 U.S. at 841-42. See also *Medico v. Time, Inc.*, 643 F.2d 134 (3rd Cir.), cert. denied, 454 U.S. 836 (1981).

150. B. SANFORD, *supra* note 143, at 24.

151. W. PROSSER & P. KEETON, ON THE LAW OF TORTS, 826-32 (5th ed. 1984).

152. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275-76 (1971).

that the Fair Comment privilege is no longer solely a creature of common law but is constitutionally-mandated by the first amendment. Similarly, the so-called "Public Interest" privilege protects speech from one public officer to another in the discharge of an official duty, and from private citizens to proper authorities for the prevention or detection of a crime.¹⁵³ Finally, conditional privileges have been recognized for the publication of defamatory matter by a publisher to defend his own reputation against defamation¹⁵⁴ and to protect another person's safety.¹⁵⁵ The common thread tying together these privileges is the principle that the social value of speech often outweighs any harm it might cause.¹⁵⁶

Anticipating the development of a similar first amendment privilege in the copyright area, several commentators have attempted to define the scope of a new privilege.¹⁵⁷ Nimmer has proposed both a privilege for speech in which idea and expression merge, and a compulsory licensing scheme to effectuate the privilege.¹⁵⁸ Denicola, citing *Wainwright* and *McDonald's Corp.*, has suggested a two-tier approach that considers the necessity of the infringing use and, to a lesser degree, the public interest in the copyrighted information.¹⁵⁹ Finally, one student has concluded that the privilege should require denial of punitive or injunctive relief to the copyright holder, but allow compensatory damages.¹⁶⁰

For various reasons, these well-intentioned proposals are not workable. Nimmer's compulsory licensing scheme suffers from the same fatal defect as the statutory licensing scheme.¹⁶¹ It recognizes the primacy of the first amendment but sanctions a potentially "chilling" governmental tax on the exercise of free speech rights.¹⁶² Denicola's formulation is an improvement, but its use of a "public interest" test is troublesome. By inviting courts to decide what constitutes a matter of significant public interest, it injects an overly subjective determination into the first amendment privilege which may result in a denial of constitutional rights.¹⁶³ An analogous scheme in the libel

153. W. PROSSER, *supra* note 151, at 830-31.

154. W. PROSSER, *supra* note 151, at 825-26.

155. W. PROSSER, *supra* note 151, at 825-28.

156. B. SANFORD, *supra* note 143, at 413.

157. See Comment, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320, 339 (1979); Denicola, *supra* note 61, at 305-07; Comment, *supra* note 64, at 1159; Nimmer, *supra* note 26, at 1196-1200.

158. Nimmer, *supra* note 26, at 1196-1200; see also Note, *Copyright, Free Speech and the Visual Arts*, 93 YALE L.J. 1565 (1984) (proposing expansion of the fair use doctrine to include visual arts based upon a first amendment rationale).

159. Denicola, *supra* note 61, at 305-07.

160. Comment, *supra* note 64, at 1159.

161. See *supra* pp. 592-94.

162. *Id.*

163. See, e.g., *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974),

area was ultimately rejected by the Supreme Court for these reasons in *Gertz v. Robert Welch, Inc.*¹⁶⁴ The final proposal, a privilege allowing compensatory damages but rejecting greater damages, is really not a privilege at all. The "chilling effect"¹⁶⁵ on a speaker who must pay monetary damages for the proper exercise of first amendment rights cannot withstand constitutional scrutiny.¹⁶⁶

Any proposal for a first amendment privilege, then, must be carefully tailored to avoid these difficulties and, at the same time, sufficiently protective of first amendment rights. A three-part inquiry is suggested. The first amendment should protect unconsented use of copyrighted material when the alleged infringer can show (1) necessity, (2) originality, and (3) advancement of first amendment interests. Once the alleged infringer makes out a *prima facie* case for a first amendment privilege by satisfying each prong, the burden of proof shifts to the copyright holder to rebut the presumption of privilege.

The first prong, requiring the alleged infringer to demonstrate necessity, recognizes that copyright and the first amendment were meant to coexist.¹⁶⁷ It also ensures that a first amendment privilege attaches only where copyright and free speech concerns patently conflict. Under this "necessity" standard, an alleged infringer seeking to

rev'd on other grounds, 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977). *Rohauer* involved the unauthorized use of the silent film "The Son of the Sheik." The court, following *Rosemont*, found that neither "the enduring fame of Rudolph Valentino [n]or the intrinsic literary and historical merit of 'The Son of the Sheik' (whatever it may be) serves any public interest . . ." *Id.* at 733. The court's reasoning is instructive more for its subjective, value-laden determination of "public interest" than for its substance.

164. 418 U.S. 323 (1974). *Gertz* effectively overruled *Rosenbloom*. See *supra* note 89. In *Rosenbloom*, a plurality of the Court extended the first amendment protections announced in *N.Y. Times v. Sullivan Co.*, 376 U.S. 254 (1964) (actual malice standard applies to libel actions brought by public figures against the press), to "all discussion and communication involving matters of public or general concern." 403 U.S. at 44 (1971). Justice Marshall dissented from the plurality and commented on the dangers of the approach: "Courts, including this one, are not anointed with any extraordinary prescience . . . to somehow pass on the legitimacy of interest in a particular event or subject." *Id.* at 79 (Marshall, J., dissenting) (citations omitted). His position ultimately prevailed when the Court abandoned the *Rosenbloom* "public concern" test in *Gertz*. 418 U.S. at 346.

165. The "chilling effect" doctrine of constitutional law is implicated whenever a law or practice has the effect of seriously discouraging the exercise of a constitutional right. See *North Carolina v. Pearce*, 395 U.S. 711 (1969).

166. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which relied partially on the "chilling effect" doctrine to invalidate a Florida statute which granted political candidates the right to equal space to reply to editorial criticism.

167. See *supra* p. 579.

invoke the privilege must demonstrate an inability to convey his or her message effectively without resorting to the copyrighted material. The existence of alternative, noninfringing methods of expression,¹⁶⁸ while instructive, is not determinative; if the copyrighted material is necessary to allow the speaker to convey an accurate and efficacious message,¹⁶⁹ the speaker has satisfied the burden of proving necessity.¹⁷⁰

The second part of the inquiry requires the alleged infringer to establish the originality¹⁷¹ of the speech at issue. Under this tenet, the speaker must demonstrate that the work constitutes his *own* contribution to the marketplace of ideas. The purpose of this test is two-fold. First, it is meant to differentiate between free speech and commercial exploitation.¹⁷² If the speaker desires to appropriate expression solely for the purpose of commercial gain and not to present his own ideas, a court should reject the first amendment defense. Second, it assures that the ideas originate with the alleged infringer rather than with the copyright holder. This encourages the expansion of the marketplace of ideas rather than the repackaging and remarketing of old ideas.

The last prong of the inquiry is the most difficult to quantify. It requires the alleged infringer to show that the speech at issue is protected by the first amendment and furthers the principles underlying freedom of expression. These principles include, but are not limited to, the contribution of the speech to: the robust, uninhibited, and wide open debate of public issues;¹⁷³ the advancement of knowledge and truth;¹⁷⁴ the public's understanding of the activities of its elected

168. Paraphrasing, for example, may be available as an alternative non-infringing method, but may be unsatisfactory to the alleged infringer.

169. An "accurate and efficacious" expression is distinguishable from a less effective expression accomplished without infringement. The author has a right to the former under the proposed first amendment privilege. *See, e.g.,* *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), where the author's message would have been possible but relatively ineffective without use of the copyrighted Zapruder film.

170. This prong would operate, for example, to exclude the speech at issue in the *Nation* case. In that case, publication by *Time* magazine was imminent and the *Nation's* editors never attempted to secure permission for publication. These factors would militate against a finding of necessity under the proposed privilege.

171. Originality in this context is contemplated to parallel the originality requirement of statutory copyright. Accordingly, consideration of creativity or inventiveness is inappropriate because of its subjective nature. The only inquiry is whether the work or main idea owes its creation or origin to the author. *See* *Batlin & Son, Inc. v. Jeffrey Snyder and Etna Prods. Co.*, 536 F.2d 486, 490 (2d Cir. 1976).

172. The distinction between exploitation and the exercise of free speech rights in the use of copyrighted expression is extremely difficult to make, but necessary. Commercial benefit by itself, however, should *not* be the touchstone because even a legitimate use which is protected by the first amendment may bring financial benefits to the user.

173. 376 U.S. at 254, 270 (1964).

174. *See generally* J. MILL, ON LIBERTY (1859).

officials and the operation of its government;¹⁷⁵ and the development of individual liberty, i.e., meaningful choice, self-development, and self-realization.¹⁷⁶ This provision is meant to incorporate emerging principles of first amendment doctrine into copyright law, and to ensure that free speech interests are properly at issue. It may operate to exclude, for example, an unwarranted invasion of privacy or publication of private facts.¹⁷⁷

Logistically, the proposed privilege mirrors other established first amendment privileges. Like the Fair Report privilege, the defendant bears the initial burden of proof to clearly establish the three factors. The existence of the privilege is a question of law for the court, unless facts are in dispute that require resolution by a jury.¹⁷⁸ Once the defendant shows that the speech is *prima facie* privileged, the burden shifts to the plaintiff to rebut the presumption of privilege.

This "shift" in the burden of proof¹⁷⁹ is compelled by the recognition that the proposed privilege is grounded in a constitutional right. The burden of proof component is modeled after a similar shift in the burden of proof in the Fair Report analysis. Once a defendant claiming the Fair Report privilege establishes a *prima facie* case of privilege, the burden shifts to the plaintiff to demonstrate that the privilege was lost due to inaccuracy or unfairness.¹⁸⁰

Revisiting the Challenger scenario may help to explain the application of the new privilege.¹⁸¹ The author publishes the new book replete with the sabotage theory and is sued by the copyright holder. The author claims that the publication is privileged and offers evidence of necessity, originality, and the advancement of first amendment interests. First, the author argues that the use of the film is "necessary" because the footage is the only existing documentation of

175. See generally R. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

176. See generally Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981); see also R. EMERSON, *supra* note 175. Cf. Baker, *Property and its Relationship to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 775-85 (1986).

177. The last prong is the most difficult because it appears to invite judicial balancing in the *Rosenbloom* mode. See *supra* note 164. This prong is not a *Rosenbloom* "public interest" test. Courts should not engage in value-laden analyses to determine the social utility of information, but should merely consider (1) whether the information is protected by the first amendment, and (2) whether any first amendment interest has been furthered by the speech at issue.

178. See W. PROSSER, *supra* note 151, at 835.

179. Of course, the ultimate burden of proof does not "shift" because the burden of persuasion remains on the plaintiff throughout the litigation.

180. See RESTATEMENT (SECOND) OF TORTS, §§ 613(1)(h), 619(2) (1977).

181. See *supra* p. 574.

the cabin's descent and ultimate explosion. The angle and degree of descent provide evidence of sabotage that is important to the author's theory. Although the author could theoretically describe the film narratively or use drawings of the frames, the actual footage is necessary to allow the author to convey the new theory in an "accurate and efficacious" manner. Second, the author contends that the theory is "original" and is not copied from any other source. Finally, the author asserts that the theory is precisely the kind of speech that the first amendment was intended to protect. It contributes to the debate on a vital public issue, advances the twin goals of knowledge and truth, and calls into question the performance of public officials in their elected capacity.

Once the court is satisfied that the evidence establishes a *prima facie* case of privilege, the burden of proof shifts to the copyright holder to rebut the showing of privilege. In this case, the copyright holder may aver that the author's use of the film is unfair because it will cause the families of the crew members anguish and grief. Concluding that the public's interest in access to information overrides the family's privacy interest,¹⁸² the court finds that the author's use of the film of the Challenger mission is privileged and that the infringement action brought by the copyright holder should be dismissed.

IV. CONCLUSION

Individual cases like the Challenger scenario will present novel and not-so-novel difficulties for courts applying and interpreting the new first amendment privilege. The three-part approach proposed in this article, requiring a showing of necessity, originality, and advancement of first amendment interests, is intended to be a thought-provoking model for a fledgling constitutional privilege. Even in its incipiency, the proposed first amendment privilege to copyright law is preferable to its predecessors in its ability to resolve the clash between the disparate interests of copyright and the first amendment.

182. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); see also B. SANFORD, *supra* note 143, at 413.