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Conflicts between Copyright and the First Amendment after Harper & Row, Publishers v. Nation Enterprises

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The relationship between copyright and the first amendment has been discussed repeatedly in the past fifteen years. A free speech privilege has been asserted as a defense in many copyright infringement actions,[1] and the topic has been the subject of lively academic debate.[2] Although no court has held an infringement claim to be defeated by a first amendment defense,[3] considerable attention has been paid to the potential

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1. *See, e.g.*, Lee v. Runge, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting from denial of certiorari); Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1498 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187-88 (5th Cir. 1979); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1169-71 (9th Cir. 1977); Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Triangle Publications v. Knight-Ridder Newspapers, 445 F. Supp. 875, 881-84 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171, 1178 (5th Cir. 1980); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 382-84 (D. Conn. 1972); McGraw-Hill, Inc. v. Worth Publishers, 335 F. Supp. 415, 422 (S.D.N.Y. 1971).

2. *See, e.g.*, Crowley, *A First Amendment Exception to Copyright for Exigent Circumstances*, 21 CAL. W.L. REV. 437 (1985); Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Goldwag, *Copyright Infringement and the First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1 (1981); Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS., Autumn 1981, at 3; Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 UCLA L. REV. 1180 (1970); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975); Sobel, *Copyright and the First Amendment: A Gathering Storm?* 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Walker, *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 La. L. Rev. 735 (1983); Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984) [hereinafter TULANE Comment]; Comment, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158 [hereinafter WISCONSIN Comment]; Note, *Constitutional Fair Use*, 20 WM. & MARY L. REV. 85 (1978).

3. Roy Export Co. v. Columbia Broadcasting Sys., 672 F.2d 1095, 1099 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); Triangle Publications v. Knight-Ridder Newspapers,

conflict between copyright and free speech interests. Commentators have speculated that in some situations copyright protection could impermissibly abridge the first amendment.[4] The United States Supreme Court's decision in *Harper & Row, Publishers v. Nation Enterprises,*[5] in which the Court refused to create a "public figure exception" to copyright, finally resolves some of the questions about the interplay between copyright and free speech principles, but will not cease speculation about the need for a first amendment exception to copyright.

This article analyzes *Nation Enterprises* and discusses its impact on the relationship between copyright and free speech interests. It asserts that the Copyright Act and the first amendment are effectively accommodated by the Supreme Court's conception of copyright as the engine of free expression, its approach to the fair use doctrine, and its recognition of the idea/expression dichotomy. This thesis is defended by reexamining the decision in *Time Inc. v. Bernard Geis Associates*[6] in light of *Nation Enterprises.* This article concludes that as a consequence of *Nation Enterprises* there is no need to define an independent first amendment or public interest defense because copyright's existing internal structure already limits its application to a constitutionally permissible sphere.

I. The Nature of the "Conflict"

The Copyright Act[7] is based on the Constitution's patent and copyright clause empowering Congress "[t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] Copyright is designed to en-

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626 F.2d 1171, 1172 (5th Cir. 1980).

4. *See, e.g.,* Denicola, *supra* note 2; Nimmer, *supra* note 2. *But see* Perlman & Rhinelander, Williams & Wilkins Co. v. United States: *Photocopying, Copyright, and the Judicial Process,* 1975 Sup. Ct. Rev. 355, 359; Tulane Comment, *supra* note 2.

5. 471 U.S. 529 (1985). For purposes of clarity, this case will be cited both in the notes and text as *Nation Enterprises;* when the journal in question is referred to, it will be called *The Nation.*

6. 293 F. Supp. 130 (S.D.N.Y. 1968). *See infra* text accompanying notes 281-372. First amendment challenges to the rights of copyright owners are becoming more frequent and this article asserts that all claims can be resolved by applying settled principles of copyright law and without recognizing a "constitutional" defense. *Contra* Denicola, *supra* note 2, at 284, 289, 315-16.

7. 17 U.S.C. §§ 101-810 (1982 & Supp. I 1983) (Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541).

8. U.S. Const. art. I, § 8, cl. 8.

courage the creation and dissemination of ideas and information. This is achieved by giving authors an economic incentive to write by granting them exclusive rights in their works.[9] This limited monopoly over original expression consists of a bundle of exclusive rights which enable the copyright owner to prohibit others from making certain uses of his work.[10] In this respect, copyright appears to clash with the first amendment, which states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[11] A constitutionally based statute thus apparently authorizes the abridgment of a constitutionally protected right by prohibiting another's use of a copyright owner's expression. Arguably, then, the Act is unconstitutional since the free speech guarantee is an amendment which supersedes prior inconsistent constitutional text. Further, the copyright clause does not empower Congress to enact laws inconsistent with other constitutional provisions.[12]

Notwithstanding these arguments, as well as debate sparked by two leading commentators[13] and questions raised by Justice Douglas,[14] the copyright law is constitutional. An absolute ap-

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9. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984). The law's economic premise is that individuals will not produce writings without a promise of reward. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954): "The economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); TULANE Comment, *supra* note 2, at 135.

10. 17 U.S.C. § 106 (1982 & Supp. I 1983). For instance, the owner of a copyright in a literary work can prohibit others from copying or paraphrasing his original expression and from adapting his work for a play or movie. *Id.* at § 106(1) & (3) (exclusive rights over reproduction and the preparation of derivative works). Copyright does not, however, protect against the independent creation of a similar work. It is concerned with unauthorized "copying" of the protected expression in the copyrighted work. *Mazer*, 347 U.S. at 218. Moreover, when the limited period of exclusive control expires, however, the public has unrestrained access to the work. *Sony*, 464 U.S. at 429.

11. U.S. CONST. amend. I; *see* Crowley, *supra* note 2, at 440-43; Goldwag, *supra* note 2, at 2-3.

12. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10[A] (1981); *see also* Crowley, *supra* note 2, at 441-43; Nimmer, *supra* note 2, at 1181-83.

13. Goldstein, *supra* note 2; Nimmer, *supra* note 2; *see also* Goldwag, *supra* note 2, at 3 n.8.

14. Lee v. Runge, 404 U.S. 887 (1971) (Douglas, J., dissenting from denial of certiorari).

> Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas . . . . The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus

proach to the first amendment is not the law. Literal application of the first amendment would mean that perjury, obscenity and mail fraud were constitutionally protected.[15] Because the initial copyright legislation and the first amendment were contemporaneous, it is unlikely that the framers saw any conflict.[16] In fact, Madison wrote that, with respect to copyright protection for authors, "[t]he public good fully coincides . . . with the claims of individuals."[17] The courts also are aware of this harmony. They recognize that the first amendment removes obstacles to the flow of ideas and thus protects the public's right to receive information and express ideas.[18] Copyright benefits the public in a similar manner by promoting the progress of science and the arts, encouraging the creation and dissemination of ideas and information, and providing incentives to stimulate the flow of information.[19] Further, the rights and interests of the public are paramount in the copyright scheme and have priority over the concerns of authors.[20] "The central function of copyright—to en-

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> obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.

Id. at 892-93. In his dissent, Justice Douglas ignores the principle that copyright protection has never been extended to information and ideas.

15. Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 383 (D. Conn. 1972); Nimmer, *supra* note 2, at 1182-83. The first amendment does not protect every utterance and its reference to "no law" has not been applied literally by the Supreme Court. *See, e.g.,* Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961); Roth v. United States, 354 U.S. 476, 482 (1957). A variety of limitations on expression have been upheld. *See, e.g.,* Friedman v. Roger, 440 U.S. 1, 15-16 (1979) (regulation of commercial speech upheld); Bates v. State Bar, 433 U.S. 350, 383-84 (1977) (protection for commercial speech not absolute); Miller v. California, 413 U.S. 15 (1973) (obscene material not protected).

16. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124; Goldwag, *supra* note 2, at 3 n.7. The fact that there have been federal copyright statutes for almost two hundred years naturally does not insulate the law from a constitutional challenge. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 77-78 (1938); Rosenfield, *supra* note 2, at 792-93.

17. THE FEDERALIST No. 43, at 217 (J. Madison) (Bantam ed. 1982).

18. *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); New York Times Co. v. United States, 403 U.S. 713, 714-30 (1971); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 4-5 (1979); Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age,* 75 NW. U.L. REV. 193, 227-28 (1980).

19. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression."); Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984); *see also* Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1498-99 & n.14 (11th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985).

20. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection,* 1983 SUP. CT. REV. 509, 510 & n.7; *see also Sony,* 464 U.S. at 429 (quoting United States v. Paramount Pictures, 334 U.S. 131, 158

courage the formation of, and public participation in, expression—suggests [its] consonance with first amendment precepts."[21] Both seek to create a "market-place of ideas."[22]

It is often difficult to balance the interests of authors in controlling and exploiting their writings against society's interest in fostering creativity and the free flow of ideas and information.[23] Fortunately, there are several established limitations on the scope of copyright protection which serve the Act's ultimate purpose of advancing public interests while enabling this limited monopoly to operate in a fashion consistent with first amendment values.[24]

A. Copyrightability: The Distinction Between Protected Expression and Unprotected Facts, Ideas, and Information

One of copyright's fundamental principles is that "protection is given only to the expression of the idea—not the idea itself."[25] Copyright does not grant rights in ideas, news events, historical or biographical facts; it only applies to the author's manner of expression.[26] This long established principle is easier

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(1948)).

21. Goldstein, *supra* note 2, at 1001. There is no conflict in purpose, only in method. Perlman & Rhinelander, *supra* note 4, at 404; Note, *supra* note 2, at 92. The first amendment prohibits Congress from abridging speech while the copyright clause affirmatively grants Congress the power to encourage and protect writings—the tangible manifestations of individual expression. Both recognize the importance of individual expression. Student Work, *Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity*, 34 U. MIAMI L. REV. 1043, 1044 (1980) (authored by Jacqueline Shapiro).

22. *Red Lion*, 395 U.S. at 390. *Cf.* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 556-58 (1985); *id.* at 581-82 (Brennan J., dissenting).

23. *See Sony*, 464 U.S. at 429.

24. The idea/expression dichotomy, fair use, and several other limitations minimize copyright's potential to clash with free speech interests. Goldwag, *supra* note 2, at 3-13. The immediate effect of copyright is to secure a reward for an author's labors, but the law's ultimate aim is to stimulate creativity for the benefit of the public. United States v. Paramount Pictures, 334 U.S. 131, 158 (1948). *See also Sony*, 464 U.S. at 429; Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Abrams, *supra* note 20, at 510.

25. *Mazer*, 347 U.S. at 217; *see also* Baker v. Selden, 101 U.S. 99, 103 (1879). This principle is at the essence of copyright.

26. HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. No. 1476, 94th Cong., 2d Sess. 56, 57 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659 [hereinafter H. REP.]. *See also* 17 U.S.C. § 102(b) (1982 & Supp. I 1983); International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918), and cases cited in 3 M. NIMMER, *supra* note 2, at 5-9.

to state than to apply,[27] and any attempt to draw the line between a work's unprotected components and the author's copyrightable expression results in a demarcation that "will seem arbitrary" regardless of where it is placed.[28] Notwithstanding this difficulty,[29] the idea/expression dichotomy is codified at section 102(b) of the Act:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[30]

This means that although a copyrighted work will be infringed by its reproduction in whole or in any substantial part, and by its imitation or simulation if there is substantial similarity of protected expression,[31] the law does not preclude the use

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27. *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 582-83 (1985) (Brennan, J., dissenting); *see also* Note, *supra* note 2, at 87. The dichotomy is a fragile and evanescent distinction of degree. Denicola, *supra* note 2, at 290-91 & n.51.

28. Nichols v. Universal Pictures, 45 F.2d 119, 122 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

29. In essence, an author will argue that his rights cannot be limited to precluding only verbatim copying or paraphrasing while an alleged infringer will assert that he copied only unprotectible elements from the work. *See, e.g.*, Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); Smith v. Weinstein, 578 F. Supp. 1297 (S.D.N.Y. 1984) (discussing similarities between plaintiff's screenplay and defendants' movie *Stir Crazy*—no infringement despite thematic similarities because plaintiff did not show that the respective treatments, details, scenes, and characterizations were similar). Learned Hand's often quoted and utilized "abstractions test" illustrates the problems involved in reconciling the opposing arguments.

> Upon any work, and especially upon a play, 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 play 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 playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols, 45 F.2d at 121 (citing Holmes v. Hurst, 174 U.S. 82, 86 (1899)).

30. 17 U.S.C. § 102(b) (1982 & Supp. I 1983); H. REP., *supra* note 26, at 56-57.

31. H. REP., *supra* note 26, at 61 (discussing the scope of section 106(1)—the author's right to control reproduction of his work). Copyright is not limited to the literal text, word for word. Paraphrasing is actionable. *Nichols*, 45 F.2d at 121. Copyright does not, however, prohibit independent creation. Rather it prohibits copying. A. LATMAN, THE COPYRIGHT LAW 160-62 (5th ed. 1979). "Because of the inherent difficulty in obtaining direct evidence of copying, it is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works." *Reyher*, 533 F.2d at 90; Walker v. Time Life Films, 784 F.2d 44, 48 (2d Cir. 1986). Once copying is established, it is necessary to prove that the taking of protected expression was material and substantial. Landsberg v. Scrabble Crossword Game Play-

of the ideas, facts and information disclosed in a protected work.[32] For example, a book explaining a bookkeeping system is copyrightable, but the creator's exclusive rights do not extend to the system that is the book's underlying idea.[33] Another author can write a book explaining that system without fear of infringement so long as he does not copy the first author's manner of expression.[34] Similarly, two works relating the life story of the same public figure will have many parallels, but similarities that derive only from treatment of the same historical material cannot provide the basis for an infringement claim because it is well established that facts cannot be copyrighted.[35] A copyright owner must prove copying of his work's protectible elements in order to recover, and it is always appropriate to examine and define a work's copyrightable subject matter in order to establish the metes and bounds of the author's property interest. This examination is necessary to determine whether an alleged infringer made any use of the author's protected expression.[36]

These principles of copyrightability accommodate copyright and the first amendment.[37] We are all free to speak our minds

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ers, Inc., 736 F.2d 485, 488 (9th Cir. 1984); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977). The test for substantial similarity is often stated as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966). The plaintiff generally must prove "similarities of treatment, details, scenes, events and characterization." *Reyher*, 533 F.2d at 91.

32. H. REP., *supra* note 26, at 56-57. *See, e.g.*, Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926); Freedman v. Grolier Enters., 179 U.S.P.Q. (BNA) 476, 478 (S.D.N.Y. 1973).

33. *See, e.g.*, Baker v. Selden, 101 U.S. 99, 101-03 (1879) (the system could only be protected by a patent).

34. *Id.*; *see also* Litchfield v. Spielberg, 736 F.2d 1352, 1356-57 (9th Cir. 1984); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Perlman & Rhinelander, *supra* note 4, at 382-83.

35. Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); Eisenschiml v. Fawcett Publications, 246 F.2d 598, 603-04 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); Marshall v. Yates, 223 U.S.P.Q. (BNA) 453, 453-54 (C.D. Cal. 1983); *see also* Miller v. Universal City Studios, 650 F.2d 1365, 1368 (5th Cir. 1981).

36. *See* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488-89 (9th Cir. 1984); Perlman & Rhinelander, *supra* note 4, at 383-84. Infringement is defined as substantial similarity of protectible expression which is something less than verbatim copying but more than similarity of unprotectible ideas or subject matter. *See supra* note 31. *See also Nation Enters.*, 471 U.S. at 580-84 (1985) (Brennan, J., dissenting).

37. Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1179 (5th Cir. 1980) (Brown, J., concurring in part and dissenting in part); Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980). *Cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 n.13 (1977) (the case involved an analogous property interest—the right of publicity—and the Court appeared to approve

and to state and debate another person's ideas, but the public's right to know facts does not include the right to state a person's ideas in the same words he used to express them.[38] The idea/expression dichotomy protects free speech interests by allowing the unfettered use of ideas, facts and information while simultaneously affording protection to the author's particular manner of expression.[39] The Supreme Court has acknowledged that the dichotomy embodies free speech protections,[40] and many lower

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the dichotomy in noting that the district courts had rejected first amendment challenges to copyright law on the ground that copyright does not restrain the use of ideas or concepts); Denicola, *supra* note 2, at 290-91; Nimmer, *supra* note 2, at 1192-93; TULANE Comment, *supra* note 2, at 136-37.

38. W. STRONG, THE COPYRIGHT BOOK: A PRACTICAL GUIDE 122 (2d ed. 1984). Copyright does not preclude others from using the protected work or from writing on the same subject. It precludes reproduction of a similar text. *Cf.* Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977). *See also* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 14 (1967). The democratic dialogue would hardly exist if the only ideas a speaker could discuss were those original to him. *See* 1 M. NIMMER, *supra* note 12, § 1.10[B] at 1-72.

39. [T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as a part of the democratic dialogue.

Nimmer, *supra* note 2, at 1192-93; *see also* Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1498-99 n.14 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). The late Professor Melville Nimmer's writings have set the stage for much of the debate and analysis on the copyright/first amendment conflict. Denicola, *supra* note 2, at 289. The dichotomy guarantees that facts, ideas, and information are liberated from the copyright monopoly and thus it operates as an extensive safeguard against possible infringement of free speech interests. Goldstein, *supra* note 2, at 1018. The balance provided by the idea/expression dichotomy allows courts to draw a line between forms of speech prohibited by copyright and those forms protected by the first amendment. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 2 W. NEW ENG. L. REV. 39, 60 (1980). It is, however, difficult to draw this line because the idea/expression distinction is evanescent. After all, expression is no more than the articulation of an idea and it can mean an arrangement of ideas. One author has said that the line between copyright and the first amendment has to be drawn ad hoc according to the following test: "Use of a copyrighted work is fair to the extent that the user could not otherwise convey or demonstrate his ideas in exercise of his freedom of speech." W. STRONG, *supra* note 38, at 116.

40. *Nation Enterprises*, 471 U.S. at 558; *see also id.* at 582-83 (Brennan, J., dissenting); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 n.13 (1977). *See also* Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM. J.L. & ARTS 333, 365 (1986).

courts have utilized it to avoid direct confrontations with the first amendment.[41]

B. The Fair Use Accommodation

Several decisions analyzing the idea/expression dichotomy in response to an alleged first amendment privilege have also discussed how conflicts between free speech interests and copyright may be resolved through the fair use defense.[42] Fair use is an established limitation on the copyright monopoly,[43] codified at 17 U.S.C. § 107,[44] which recognizes that a variety of unauthorized uses of copyrighted material do not infringe.[45] The doc-

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41. Roy Export Co. v. Columbia Broadcasting Sys., 672 F.2d 1095, 1099-1100 (2d Cir. 1982); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977); Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Quinto v. Legal Times of Washington, 506 F. Supp. 554, 560 (D.D.C. 1981); United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 115 (N.D. Cal. 1972), *aff'd in relevant part*, 581 F.2d 751 (9th Cir. 1978). *Cf. Zacchini*, 433 U.S. at 577 n.13 (noting that district courts had rejected first amendment challenges due to the dichotomy).

42. *See, e.g., Roy Export Co.*, 672 F.2d at 1099; *Wainwright Sec.*, 558 F.2d at 95; Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 960 (D.N.H. 1978). Fair use and the concept of copyrightability are the primary "adjustable" tools for maintaining copyright equilibrium. In some cases first amendment interests may demand more than just access to ideas and information, but the use of protected expression as well. The idea/expression dichotomy is inadequate to resolve such a dispute so the courts turn to fair use—a broader restraint against copyright's infringement of first amendment interests. Denicola, *supra* note 2, at 293; TULANE Comment, *supra* note 2, at 140.

43. The first American fair use case was Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). *See generally* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 447-51 (1984); Goldwag, *supra* note 2, at 9; Walker, *supra* note 2.

44. The text of section 107 is as follows:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such us is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982 & Supp. I 1983).

45. H. REP., *supra* note 26, at 65-66. A person making fair use of a work is not an

trine, developed in the mid-19th century,[46] enables courts to escape literal application of copyright restrictions. This avoids harsh consequences while reaching laudable results which promote the creativity that copyright is intended to encourage.[47] Fair use is a privilege to use copyrighted material in a reasonable manner without the copyright owner's consent.[48] Although various factors have been considered by the courts in determining fair use,[49] fixed criteria have never been established because the doctrine is an equitable rule of reason.[50] When Congress endorsed the doctrine in section 107 of the 1976 Act it merely intended to restate fair use, not to freeze or change it in any way.[51] Thus, there is no rigid, bright-line approach to fair use.[52] The defense presents a mixed question of law and fact[53] so that each case must be decided on its own merits.[54]

Section 107 lists several activities in its preamble which might be regarded as fair use,[55] and then it identifies four factors which the courts "shall" consider in determining whether a particular use is fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and, (4) the effect of the use upon the potential market for or value of the copyrighted work.[56] Although the final factor—effect of the use upon the

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infringer. *Sony*, 464 U.S. at 433. The listing of exclusive rights in section 106 is prefaced by the phrase "subject to sections 107 through 118." 17 U.S.C. § 106 (1982 & Supp. I 1983). Those sections describe uses which are not infringements and the most general is section 107, the codification of fair use. Thus, the defense allows certain uses notwithstanding the copyright owner's exclusive rights. *Sony*, 464 U.S. at 447.

46. Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136); *Folsom*, 9 F. Cas. at 347-49.

47. Copyright Office, Briefing Paper on Current Issues, *reprinted in* 1975 House Hearing 2051, 2055; H. REP., *supra* note 26, at 66; Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980); Walker, *supra* note 2, at 740; TULANE Comment, *supra* note 2, at 140-42.

48. H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

49. *See Sony*, 464 U.S. at 475-76 n.27 (1984) (Blackmun, J., dissenting).

50. *Id.* at 448; H. REP., *supra* note 26, at 65.

51. H. REP., *supra* note 26, at 66.

52. *See Sony*, 464 U.S. at 448 n.31.

53. Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

54. H. REP., *supra* note 26, at 65.

55. *See supra* note 44. For other activities that might be regarded as fair use, see H. REP., *supra* note 26, at 65 (quoting REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (1961)). *See also Pacific & S. Co.*, 744 F.2d at 1495.

56. 17 U.S.C. § 107(1)-(4) (1982 & Supp. I 1983).

market—is generally viewed as the most significant,[57] the statute, its legislative history,[58] and case law establish that no single factor is necessarily determinative.[59]

The section's listed activities and factors are not intended to be exhaustive.[60] Further, Congress did not assign weights to the factors,[61] nor did it prescribe a particular order in which they were to be evaluated.[62] There is no requirement that the use be productive because no factor is meant to be controlling.[63] Rather, the factors provide a "gauge for balancing the equities."[64] Finally, the statement of general intention in section 107's legislative history says that an exact rule cannot be formu-

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57. *See, e.g.*, Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 447-51 (1984) (Blackmun, J., dissenting); Consumers Union of United States v. General Signal Corp., 724 F.2d 1044, 1050-51 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1177 (5th Cir. 1980); 3 M. NIMMER, *supra* note 12, § 13.05[A]4 at 13-78, -79; Denicola, *supra* note 2, at 301; Hayes, *Classroom "Fair Use": A Reevaluation*, 26 BULL. COPYRIGHT SOC. U.S.A. 101, 108 (1978). *But see* Walker, *supra* note 2, at 742-43.

58. *See* H. REP., *supra* note 26, at 65-66. Section 107's legislative history is very important as indicated by the Supreme Court's frequent reference to it in *Sony* and *Nation Enterprises*. *See, e.g., Nation Enters.*, 471 U.S. at 549-51 & n.4; *Sony*, 464 U.S. at 448 n.31. Statements by committee chairmen and sponsors f bills are entitled to great weight, Simpson v. United States, 435 U.S. 6, 13 (1978), and it is improper to exclude reference to legislative history in construing a federal act. Train v. Colorado Pub. Interest Research Group, 436 U.S. 1, 9-10 (1976).

59. *See* Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1494-98 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Walker, *supra* note 2, at 743 and cases cited therein at notes 44 & 45.

60. *Sony*, 464 U.S. at 476 (1984) (Blackmun, J., dissenting); H. REP., *supra* note 26, at 65; *see also* Walker, *supra* note 2, at 743.

61. *Sony*, 464 U.S. at 455 n.40; *Pacific & S. Co.*, 744 F.2d at 1496.

62. Walker, *supra* note 2, at 743.

63. H. REP., *supra* note 26, at 65. There is no per se rule that the challenged use must be inherently productive or creative before it can be a fair use. The Supreme Court rejected "productive use" as an absolute prerequisite to the defense in *Sony*, 464 U.S. at 455 n.40.

64. H. REP., *supra* note 26, at 65. It remains an equitable rule of reason without a generally applicable definition. Prior jurisprudence is left unchanged by section 107. *Id.* at 65-66; *see also* Walker, *supra* note 2, at 739. Although the majority opinion in *Sony* repeated most of these principles and quotes heavily from the House Report, *see* 464 U.S. at 445 n.40, it states that unauthorized use for commercial or profit-making purposes are presumptively unfair, 464 U.S. 451. Similarly, the majority opinion in *Nation Enterprises* says that the unpublished nature of the infringed work tends to negate the defense of fair use. *Nation Enters.*, 471 U.S. at 554-55. These presumptions against certain kinds of conduct being fair use draw support from the common law of fair use and they are not inconsistent with the sensitive balancing of interests required by Congress because they are rebuttable instead of conclusive. *Contra* 471 U.S. at 595-96 (Brennan, J., dissenting).

lated. "[T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[65]

Although determining fair use remains one of the most troubling issues in all of copyright,[66] courts have not hesitated to utilize the doctrine to resolve infringement claims without invoking a first amendment privilege.[67] Fair use balances the need to induce authors to create with the public's interest in the dissemination of ideas. Thus, it is solicitous of free speech interests because it permits a defendant to reproduce some protected expression for a productive purpose, such as criticism or news reporting. A finding of fair use concludes the matter and the court does not need to deal with an argument that the alleged infringer's use was privileged under the first amendment.[68] On the other hand, copying for a commercial or profit-making purpose is presumptively unfair[69] and the defense is ordinarily negated when the defendant's use "supersede[s] the use of the original."[70] "The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance,"[71] but it has traditionally afforded scholarship, commentary, news reporting, and certain other activities consid-

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65. H. REP., *supra* note 26, at 66.

66. *Sony*, 464 U.S. at 475 (1984) (Blackmun, J., dissenting) (citing Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)); *see also* Goldwag, *supra* note 2, at 9. The troublesome nature of the fair use doctrine is aptly illustrated by the Supreme Court's 6-3 division in *Nation Enterprises*, its 5-4 split in *Sony*, and by its equal division in two earlier cases raising fair use issues, Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (mem. per curiam), and Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub. nom.* Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958) (mem. per curiam).

67. *See, e.g.*, Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65, 69-71 (S.D.N.Y. 1978); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 960 (D.N.H. 1978); TULANE Comment, *supra* note 2, at 140.

68. *See, e.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 746 F.2d 1148, 1151-52 (9th Cir. 1986); Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. (BNA) 124, 126 n.1 (N.D. Ga. 1981) (pornographic use of copyrighted work upheld under fair use doctrine); *Italian Book Corp.*, 458 F. Supp. at 67 (defendant's reproduction was excused as a fair use so it was unnecessary to deal with defendant's first amendment defense). *See generally* Note, *supra* note 2, at 92-96.

69. *Sony*, 464 U.S. at 449-50.

70. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 550 (1985) (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901); S. REP. No. 473, 94th Cong., 1st Sess. 65 (1975).

71. Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980).

erable latitude, thereby protecting the public's first amendment interest in the dissemination of ideas and information.[72]

C. *The Debated First Amendment Privilege*

The fair use doctrine and the established distinction between copyrightable expression and unprotectible ideas accommodate copyright and free speech interests so effectively that there appears to be no need to create an independent first amendment privilege.[73] The Act codifies these general limitations and thereby effectuates the purposes of the Constitution's patent and copyright clause while simultaneously serving free speech interests.[74] Copyright fosters creativity by encouraging the creation and dissemination of works of authorship containing ideas and information. The public benefits from the dissemination of these protected intellectual works and from the free use of the unprotectible information and ideas they disclose.[75]

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72. *See Nation Enterprises,* 471 U.S. at 560; *Sony,* 464 U.S. at 453-55 & n.40; TULANE Comment, *supra* note 2, at 140. *But see* Triangle Publications v. Knight-Ridder Newspapers, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd on other grounds,* 626 F.2d 1171 (5th Cir. 1980). This case involved the *Miami Herald's* use of copyrighted *TV Guide* covers for comparative advertising. The trial court held that the Herald's copying was not a fair use but concluded that the first amendment mandated that its actions should be excused as protected commercial speech. The Fifth Circuit affirmed but on fair use grounds. The *Triangle Publications* trial court decision was heavily criticized. *See* Denicola, *supra* note 2, at 284, 305-306; Note, *Copyright Infringement and the First Amendment,* 79 COLUM. L. REV. 320, 327-28 (1979); Note, *Constitutional Law—Commercial Speech—Copyright and the First Amendment,* 1979 WIS. L. REV. 242.

73. There are also other qualifications on the copyright holder's right which serve to eliminate free speech conflicts, e.g., the limited duration of protection and the requirement of authorship. Without these limitations on the scope of protection, copyright might be a threat to free speech interests. Goldstein, *supra* note 2, at 1007; Goldwag, *supra* note 2, at 3-4; Walker, *supra* note 2, at 740-41 (discussing how these general limitations operate). *See, e.g.,* Ladd v. Law & Technology Press, 762 F.2d 809, 815 (9th Cir. 1985), *cert. denied,* 106 S. Ct. 1260 (1986) (deposit requirement does not burden the first amendment concerns of expression and dissemination of ideas); United Christian Scientists v. Christian Science Board of Directors, 616 F. Supp. 476 (D.D.C. 1985) (private law extending the term of copyright protection for the central theological writings of the Christian Scientists violates the first amendment establishment clause).

74. The free speech defense has been inappropriately raised in many cases. *See, e.g.,* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187-88 (5th Cir. 1979); McGraw-Hill, Inc. v. Worth Publishers, 335 F. Supp. 415, 422 (S.D.N.Y. 1971). *See also* Leavens, *supra* note 2, at 25.

75. 17 U.S.C. §§ 102(b), 107 (1982 & Supp. I 1983). The Act balances the need to encourage and reward the creation of works of authorship against the need for the public to be able to freely use the ideas and information contained in those works. The public's interests in the creation and dissemination of intellectual works justified copyright's limited monopoly. The term "limited" is critical because the interests and rights of the public are paramount and are accorded primacy over the important, but secondary con-

Although the courts have not created a first amendment exception to copyright,[76] the Second Circuit has stated that "[s]ome day [courts may be required] . . . to distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment.' "[77] It has been argued that situations may arise where the conflict between free speech interests and copyright cannot be escaped through the copyright law's internal mechanisms,[78] and that in certain rare instances "the informational value of [a] film cannot be separated from the photographer's expression [and therefore] both should be in the public domain."[79] The argument is that if the otherwise infringing activity furthers free speech interests, then the first amendment should prevail.[80]

The courts and commentators invariably cite the late Professor Melville Nimmer's influential writings in connection with these arguments. He argued that the following scenario calls for a first amendment exception to copyright: The plaintiff's work of authorship is a graphic work such as a photograph and his copyrightable expression and the "idea" communicated therein

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cerns of authors. *Sony*, 464 U.S. at 429; Abrams, *supra* note 20, at 510. This philosophy is well established in copyright legislation and case law.

76. Pacific & S. Co. v. Duncan, 572 F. Supp. 1186, 1192-93 (N.D. Ga. 1983), *aff'd in part and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). The trial court decision in *Triangle Publications* is the only exception. *See supra* note 72.

77. Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977) (quoting Nimmer, *supra* note 2, at 1200), *cert. denied*, 434 U.S. 1014 (1978); *see also* Denicola, *supra* note 2, at 304, 306.

78. *See, e.g.*, Denicola, *supra* note 2, at 283 ("[A]n issue of constitutional dimensions is slowly crystallizing in a series of judicial decisions."); Goldwag, *supra* note 2, at 13; Nimmer, *supra* note 2, at 1185-86, 1200 (The courts will have to "delineate the respective claims of copyright and freedom of speech."). Similar statements have been made by courts: "Assuming, without deciding, that the First Amendment does mark out some boundary for the protection that may be afforded a creator under the copyright laws, that boundary has not been reached here." Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 116 (N.D. Cal. 1972) (dictum), *rev'd in part and aff'd in part*, 581 F.2d 751 (9th Cir. 1978). *See also* Triangle Publications v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1182 (5th Cir. 1980) (Brown, J. concurring); *Wainwright Sec.*, 558 F.2d at 95.

79. Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 61 n.6 (2d Cir. 1980). An example might be when a news organization has the exclusive footage of an event, the full impact of which is lost when communicated in another fashion. *See, e.g., Pacific & S. Co.*, 572 F. Supp. at 1193; 1 M. NIMMER, *supra* note 12, § 1.10[C][2] at 1-81 to -86.

80. *See* Denicola, *supra* note 2, at 286-88; *see also* Goetsch, *supra* note 39, at 60 (discussing cases where the courts have hinted that the first amendment may assert substantial muscle against copyright interests). *See generally* A. LATMAN, & R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES 468-69 (2d ed. 1985).

are so inseparable that the idea/expression dichotomy cannot be effectively utilized; the defendant must reproduce plaintiff's protected expression in order to convey the underlying idea; and, the defendant's unauthorized copying of expression cannot be sanctioned as a fair use because it damages the potential market for or value of the copyrighted work. These circumstances seem to present a conflict between copyright and the first amendment that cannot be resolved through the Act's internal mechanisms. According to Nimmer, resolution of the first amendment issue here is unavoidable.[81] In most situations, he argues, the plaintiff's copyright claim should succeed,[82] but in certain rare cases the protected work may be so infused with public interest that the defendant's first amendment defense should prevail over the copyright interest. The work's protected expression, as well as the inseparable idea, should be in the public domain and exempt from copyright protection because of its significant contribution to our democratic dialogue.[83] Accordingly, Nimmer argues that the infringer's first amendment defense must succeed in these circumstances.[84]

The Supreme Court's refusal in *Nation Enterprises* to create a "public figure exception" to the copyright scheme raises serious doubts about the need for a first amendment defense, let

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81. 1 M. NIMMER, *supra* note 12, § 1.10[C][2] at 1-81 to -82. *See also* Nimmer, *supra* note 2, at 1196-99. Since in this situation the distinction between idea and expression is poorly defined, the copyright owner, by controlling use of his expression, can preclude use of the idea as well.

82. Triangle Publications v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1182 (5th Cir. 1980) (Brown, J., dissenting in part) (citing 1 M. NIMMER, *supra* note 12, § 1.10[C][2] at 1-82); Goldwag, *supra* note 2, at 13.

83. Roy Export Co. v. Columbia Broadcasting Sys., 672 F.2d 1095, 1099-1100 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 61 n.6 (2d Cir. 1980); Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Pacific & S. Co. v. Duncan, 572 F. Supp. 1186, 1193 (N.D. Ga. 1983) (citing 1 M. NIMMER, *supra* note 12, § 1.10[C][2] at 1-82 to -84), *aff'd in part and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *see also Triangle Publications*, 626 F.2d at 1182 & n.4 (Brown, J., dissenting); Nimmer, *supra* note 2, at 1196-201; Note, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*, 65 NEB. L. REV. 631, 646 (1986).

84. *See also* Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1171 (9th Cir. 1977) ("There may be certain rare instances when first amendment considerations will operate to limit copyright protection for graphic expressions of newsworthy events."); Crowley, *supra* note 2, at 458-59 (arguing for a first amendment exception in exigent circumstances); Denicola, *supra* note 2, at 302-05, 307-09 (conflicts of this nature not limited to copyrighted graphic works). *See generally* A. LATMAN, R. GORMAN & J. GINSBURG, *supra* note 80, at 468-69.

alone the propriety of establishing any explicit public interest or first amendment limitation on copyright. Justice O'Connor's majority opinion and Justice Brennan's dissent support the proposition that the doctrines codified at sections 102(b) and 107 of the Act—the idea/expression distinction and the fair use defense—are adequate for resolving all disputes and ensuring that copyright does not infringe the constitutional guarantees of free speech and free press. Thus, as will be shown, there is no need to recognize an independent free speech or public interest privilege because the fundamental, internal limitations on the copyright monopoly already embody adequate first amendment protections.[85]

II. PRESIDENT FORD'S MEMOIRS AND *Nation Enterprises*

A. *The Proceedings of the District Court and Court of Appeals*

Soon after leaving the White House in 1977, President Gerald Ford granted Harper & Row and *Reader's Digest* exclusive rights to publish his then unwritten memoirs. The book was to include the circumstances and reasoning surrounding the Nixon pardon, Ford's observations about the Watergate crisis and his reflections about that period and many of its actors. Since "[t]he memoirs were to contain 'significant hitherto unpublished material' ",[86] the President agreed not to disseminate that information in any media prior to publication. In addition, the publishers were granted the exclusive right to license prepublication excerpts.[87] A senior editor from Reader's Digest was retained to assist President Ford and after almost two years of interviews, research, writing and editing, a draft was completed. Harper & Row and *Reader's Digest* then negotiated a prepublication licensing agreement with *Time* magazine whereby *Time* agreed to pay $12,500 in advance and another $12,500 upon publication for the right to excerpt 7,500 words from the President's account

85. *See* Kernochan, *supra* note 40, at 365; Perlman & Rhinelander, *supra* note 4, at 387-98; *see also* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429-30 (1984) (discussions of copyright's purposes).

86. *Nation Enters.*, 471 U.S. at 542.

87. *Id.* at 542-45. President Ford acknowledged the need to protect the value of the publishers' rights. He avoided participation in any public discussion of unique information not previously disclosed and the publication contract influenced his decision not to appear on an NBC television special in which the pardon was to be the central topic of discussion.

of the pardon. The parties maintained efforts to keep the manuscript confidential, and *Time*'s excerpts were scheduled to be published in its April 23, 1979 edition, about one week before the memoirs were shipped to bookstores.[88]

In March, shortly before the scheduled publication of the *Time* excerpts, an unidentified person secretly gave a copy of Ford's manuscript to Victor Navasky, editor of *The Nation.* Navasky knew that his temporary possession of the manuscript was unauthorized although he had neither solicited nor paid for it. He also knew that the memoirs were about to be published, although he did not at first know of the upcoming *Time* serialization. Therefore, in order to make news by publishing in advance of the Ford book, he worked frantically over a weekend reading the manuscript and selecting directly from it material about the pardon and several other matters. He did not check the materials, he did no research, and he did not attempt any independent commentary or criticism in writing a 2,250-word article.[89] Navasky eventually learned of *Time's* publication plans and his article, which appeared on April 3, 1979, announced the expected publication dates of the complete memoirs and the excerpts in its opening paragraphs. Thus, *The Nation* "scooped" the *Time* article and the book. *Time* sought permission to publish their excerpts a week earlier than planned but Harper & Row refused. *Time* subsequently canceled its agreement and refused to pay the remaining $12,500.[90]

The Nation was sued by Harper & Row in February 1980 for copyright infringement and common law claims of conversion and tortious interference with contractual relations.[91] The common law claims were preempted by the Copyright Act and dismissed,[92] but the copyright claims were fully litigated in a six-day bench trial.[93] *The Nation* argued that it did no more than

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88. *Id.* at 543.

89. *Id.*

90. *Id.*; *see also* Crowley, *supra* note 2, at 448; Francione, *Facing* The Nation*: The Standards for Copyright, Infringement, and Fair Use of Factual Works,* 134 U. PA L. REV. 519, 523-25 (1986); Mandelbaum, The Nation: *Overprotection of the First Amendment in Fair Use Analysis,* 32 J. COPYRIGHT SOC'Y 138, 139-40 (1984); Note, *supra* note 83, at 635; Note, Harper & Row, Publishers v. Nation Enterprises: *Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests,* 79 NW. U.L. REV. 587, 591-95 (1984).

91. 501 F. Supp. 848 (S.D.N.Y. 1980).

92. *Id.* at 852-53.

93. *Nation Enters.*, 471 U.S. at 543.

relate unprotectible facts and that its minimal use of copyrightable expression was a fair use, but the district court held for the plaintiffs and awarded damages of $12,500.[94] The court found that the unpublished manuscript was protected by copyright and that *The Nation*'s use of protected expression infringed plaintiffs' reproduction right, their right to authorize the preparation of derivative works, and their right to control the first distribution of the work to the public.[95] In a footnote the court speculated that there might be situations where the first amendment afforded more protection than fair use, but said that this was not such a situation, even though the article was billed by defendants as "hot news." The fair use defense was rejected because the article contained no new facts and it was not news. Further, it was published for profit, it took the "heart" out of "a soon to be published work," and it caused *Time* to cancel its agreement.[96] The defendants' actions could not be excused notwithstanding the court's acknowledgment that some of the copied material was per se uncopyrightable[97] because it was "the totality of these [noncopyrightable] facts and memoranda collected together with Ford's reflections that made them of value to The Nation."[98]

The Second Circuit Court of Appeals reversed the district court in a two-to-one opinion which emphasized that much of the copied material was not copyrightable. Judge Kaufman's majority opinion left no doubt that matters discussed in the Ford manuscript were of significant public importance—Watergate, Nixon's resignation, and the pardon—and that free speech concerns were paramount over creators' interests in control of their work. Indeed, the opinion's preamble said that "[b]ecause we do not believe it is the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a

94. 557 F. Supp. 1067, 1073 (S.D.N.Y. 1983). The damage award was based upon *Time*'s nonperformance of the prepublication agreement. The court also awarded "such further amounts as may be found to be profits in an accounting before a Magistrate." *Id.*

95. 471 U.S. at 543-44 (summary of district court's findings).

96. 557 F. Supp. at 1070 n.4, 1071-72. The court concluded that Ford's revelations were not news, "hot" or otherwise, and that the fair use defense had to fail because *The Nation*'s article superseded use of the original—*Time*'s agreement was aborted and this diminished the value of the copyright.

97. *Id.* at 1072-73. For instance, facts and government documents are not copyrightable.

98. *Id.* at 1072.

democratic state, we reverse."[99] Judge Kaufman later said that the majority's analysis was "guided by [the] conviction that the [copyright] statute was not meant to obstruct the citizens' access to vital facts and historical observations about our nation's life."[100] "We do not believe the Act was intended to chill the activities of the press by forbidding a circumscribed use of copyrighted words . . . ."[101]

The threshold issue was whether the material taken from the Ford manuscript was copyrightable.[102] This issue had to be resolved before turning to fair use because it was necessary to determine whether there had been any appropriation of copyrightable expression.[103] Accordingly Judge Kaufman utilized the idea/expression dichotomy to excise the unprotectible elements *The Nation* had taken from the Ford manuscript.[104] This analysis emphasized the need to construe the concept of copyrightability in accord with first amendment interests,[105] and it attacked the novel "totality" theory espoused by the trial court.[106] Judge Kaufman argued that this theory was severely flawed because it erroneously construed section 102 of the Act to protect matters deemed to be uncopyrightable and this was "tanta-

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99. 723 F.2d 195, 197 (2d Cir. 1983).

100. *Id.* at 208.

101. *Id.* at 209.

102. *Id.* at 202.

103. *Id.*

104. *Id.* at 202-206. The court acknowledged that it is often difficult to distinguish between facts and expression, but said that an author's overall arrangement of facts, as well as his chosen language, are generally copyrightable. It found, however, that *The Nation* had not usurped such protectible expression. Rather, Navasky copied scattered pieces of information and described that material in his own words. He did not copy the structure of the book as a whole. *Id.* at 203.

105. *See, e.g., id.* at 202. The court said that the Act's distinction between ideas and expression enables authors to be protected "without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression." *Id.* It also said that the dissent's approach to copyrightability failed to recognize the need to strike a definitional balance between the first amendment and the Copyright Act by permitting free use of ideas and facts while protecting expression. *Id.* at 203. "Were information copyrightable [then protection] would clash with the First Amendment on every occasion is which an author chose to put in his own words facts which had already been described by another writer." *Id.* at 204 (citing Goldstein, *supra* note 2). The need to construe copyrightability in accord with free speech concerns was said to be especially important in this case in view of the subjects discussed in the article and the memoirs. If the scope of protection was too broad then a person could own a "political event merely by being the first to depict that event in words." *Id.* The "totality" theory assumed that when Ford's copyrightable reflections and revelations about his states of mind were coupled with facts, the information was thus transformed into a protectible totality. *Id.*

106. *Id.* at 204-05.

mount to permitting a public official to take private possession [of historical and political facts] by adding language here and there on the perceptions or sentiments he experienced while in office . . . ."[107] The Copyright Act was not intended to permit that to happen. The majority concluded that once all of the uncopyrightable material was stripped away, the article printed by *The Nation* contained no more than 300 protected words.[108]

Those protected words—several paragraphs and scattered phrases copied verbatim from the manuscript—became the focus of a fair use analysis that also made reference to free speech concerns. The court said that fair use was "[t]he second means of ensuring a proper balance of the citizenry's need to be informed and the author's monopoly . . . ."[109] The article was characterized as the reporting of either news or recent history;[110] the absence of original commentary or research by Navasky was regarded as immaterial,[111] defendants' profit motive was "legally irrelevant" since the article served the public interest,[112] plaintiffs' work was essentially factual, and the amount of the taking of protected expression was insubstantial.[113] In regard to the critical fourth factor, the district court had found an adverse economic impact because "the effect of [*The Nation*'s] extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright."[114] The majority disagreed because almost all the material reproduced was uncopyrightable, the evidence did not support a finding that *The Nation*'s limited use of expression per se led to

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107. *Id.* at 205.

108. *Id.* at 208. The uncopyrightable material the court excised included facts, the President's reflections (tantamount to facts), information presented before the Hungate Committee and subsequently published in a government document, and conversations attributed to other persons. *Id.* at 205-06, 202 n.8, 203 n.9.

109. *Id.* at 206.

110. *Id.* at 206-07. The majority determined that the trial court's conclusion that the article was not news, "hot" or otherwise, was clearly erroneous.

111. *Id.* at 207. To require either original commentary or independent research makes fair use turn on the amount of the user's labor. The idea/expression distinction and fair use are designed to prevent such "wasted efforts." *Id.* at 206 (quoting Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967)).

112. *Id.* at 208.

113. *Id.* The majority felt that the district court had ignored the factual character of plaintiffs' book in assessing factor three—the nature of the copyrighted work—and factor four—the substantiality of the taking. Its faulty "totality" theory had colored its analysis.

114. 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983).

Time's decision to cancel,[115] and to allow the copyright holder to prevail on these facts would "ignore those values of free expression which have traditionally been accommodated by the statute's 'fair use' provisions."[116] *The Nation*'s copying was a fair use because it took an infinitesimal amount of Ford's original language and "the Act was [not] intended to chill the activities of the press by forbidding a circumscribed use of copyrighted words . . . ."[117]

The majority did not expressly base its decision on a free speech exception to copyright, but first amendment considerations permeated the opinion. In contrast, Judge Meskill's dissent characterized the defendants' use as "chiseling for personal profit" that "knowingly invaded the market for the *Time* serialization [by] fulfilling the demand for the *Time* excerpts."[118] He found Ford's descriptions of his state of mind to be protected, he stated that paraphrasing of factual passages may infringe, and he rejected the majority's methodology of applying the fair use factors after determining what aspects of a work are protected by copyright.[119] Because Judge Meskill disagreed with the majority's copyrightability analysis and accepted the totality approach,[120] he subjected the entire article—including *The Nation*'s paraphrasings and quotations—to fair use analysis.[121] He concluded that the fair use defense should not apply because the infringing work was merely an unoriginal abstract that adversely affected the market for the memoirs and the *Time* article.[122] Furthermore, he argued that finding infringement would not threaten freedom of the press or the public's right to know because "the book itself and the other authorized uses of the copyrighted material would satisfy that need."[123]

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115. 723 F.2d at 208. *The Nation*'s use of protected expression did not "supersede the use of the original work . . . ." *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901)).

116. *Id.* at 208.

117. *Id.* at 209.

118. *Id.* at 216.

119. *Id.* at 212-14.

120. *Id.* at 214.

121. *Id.*

122. *Id.* at 216.

123. *Id.* at 216-17.

B. The Supreme Court's Decision

1. The majority

The Supreme Court reversed the Second Circuit in a six-to-three decision, finding *The Nation*'s verbatim copying of roughly 300 words from the unpublished manuscript not a fair use. Justice O'Connor, writing for the majority, and emphasizing copyright's rationale and its objectives, initially stated that copyright is intended to increase and not impede the harvest of knowledge, but then said that the Second Circuit did not give enough deference to the Act's scheme "for fostering the original works that provide the seed and substance of this harvest."[124] The Court reiterated that copyright is designed to assure authors a fair return for their labors and "to motivate" their creative activities "by the provision of a special reward" in order to benefit the public.[125] These memoirs provided a good example of this precept—President Ford was motivated to work for two years to create "new material of potential historical value."[126]

The Court then explained how the copyright monopoly is limited; no rights can be claimed in facts or ideas,[127] and the exclusive rights are subject to several exceptions including the fair use privilege.[128] Thus, although the unpublished manuscript was copyrightable and protected against unauthorized copying,[129] this did not prevent others from copying "those constituent elements that are not original . . . as long as such use does not unfairly appropriate the author's original contributions."[130] The Court recognized the disagreement between the lower courts over whether *The Nation*'s taking of unprotectible elements "encroached on the originality embodied in the work as a whole,"[131] but said it was unnecessary to resolve those unsettled issues of copyrightability because *The Nation* admitted to the

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124. 471 U.S. 539, 545-46 (1985). Justice O'Connor was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens. *See generally* Francione, *supra* note 90, at 530-36.

125. *Id.* (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

126. *Id.* at 546. The monopoly actively served its intended purpose. *Id.*

127. *Id.* at 547.

128. *Id.*

129. *Id.* "Creation of a nonfiction work, even a compilation of pure fact, entails originality." *Id.*

130. *Id.* at 548.

131. *Id.*

verbatim lifting of some original expression.[132] Further, defendants did not dispute that the taking was an infringement unless excused as fair use.[133]

The Court proceeded to discuss the evolution of the fair use privilege. It emphasized that when Congress codified fair use its intent was to restate the common law doctrine[134] that traditionally permits reasonable uses to be made of an author's copyrighted work without consent. It is a necessary incident of the constitutional rationale for copyright protection.[135] While acknowledging that fair use has never been a precise doctrine,[136] the Court said that uses which supersede the use of the original have always been precluded[137] and that fair use traditionally was not recognized as a defense to the copying of an unpublished work.[138] Although this latter "rule" was not absolute, the fact that the infringed work was unpublished tended to negate the fair use defense because of the importance of the right to control first publication.[139]

The respondents asserted that notwithstanding this common law tradition, the terms of the 1976 Act evidenced congressional intent for fair use to apply *in pari materia* to published and unpublished works.[140] The Court disagreed. It acknowledged that the right of first publication is subject to the defense,[141] but noted that fair use analysis must always be tailored to the facts of each case and that "[t]he nature of the interest at stake is highly relevant to whether a given use is fair."[142] In contrast to

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132. *Id.* The Court noted that the law is unsettled regarding the ways in which uncopyrightable elements in factual narratives combine with the author's original contribution to form protected expression. *Id.*

133. *Id.* at 548-59. *See also* Francione, *supra* note 90, at 521-22, 531-32.

134. 471 U.S. at 549.

135. *Id.*

136. *Id.* at 550 n.3.

137. *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901)).

138. *Id.* at 550-51 & n.4.

139. *Id.* at 551. "Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be published, a factor not present in fair use of published works. *Id.*

140. *Id.* at 552. The respondents' argument was based on the language of section 106. The right of first publication (distribution) is found at 17 U.S.C. § 106(3) (1982 & Supp. I 1983). All of the exclusive rights in section 106 are explicitly made subject to the fair use defense in section 107.

141. *Id.* The Court noted that the 1976 Act eliminated "publication" as the dividing line between common law and statutory protection and recognized for the first time an author's statutory right to control the first public distribution of his work.

142. *Id.* at 552-53.

the other rights in the copyright bundle, only one person can be first publisher.[143]

> [T]he commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.[144]

Respondents also argued that first amendment interests required a different rule, and that "the substantial public import of the subject matter [should excuse] a use that would ordinarily not pass muster as a fair use . . . ."[145] They further suggested that President Ford's manner of expression was as newsworthy as what he said and the public's interest in learning this news outweighed the author's right to control first publication. In rejecting this contention the Court acknowledged that the idea/expression dichotomy balances copyright and the first amendment.[146] The news cannot be protected because it is not the creation of the writer. However, copyright must simultaneously assure that authors of factual narratives "enjoy the right to market" their original contributions in such works "as just compensation for their investment."[147] The respondents' public interest justification for copying original expression as well as unprotectible facts would upset this balance and diminish the incentives for public figures to write their memoirs.[148] The Court

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143. *Id.* at 553. This right is inherently different from the other rights.

144. *Id.* This conclusion drew additional support from the Act's legislative history and from Congress's characterization of section 107 as a "restatement" intended to preserve the existing judicial doctrine. H. REP., *supra* note 26, at 66. Furthermore, it did not matter that the Ford manuscript was about to be published. The Court said that the right to choose when to publish needs to be protected because authors and the public alike benefit when authors can develop their ideas free from fear of expropriation. The right of first publication furthers this creative interest as well as valuable economic interest. These interests outweighed any short term news value gained from an unauthorized and premature publication. Harper & Row, Publishers v. Nation Enters., 471 U.S. 529, 554-55 (1985).

145. 471 U.S. at 556.

146. *Id.*

147. *Id.* at 556-57.

148. *Id.* at 557. The respondents' argument "would expand fair use to effectively destroy any expectations of copyright protection" for such works. *Id.* Thus, the fact the author is a public figure is irrelevant to fair use analysis. The Court also said that respondents had not asserted any need to circumvent the copyright scheme. The memoirs and the *Time* excerpts were about to be released and no legitimate aim is served by preempting the first publication right. In addition, the newsworthiness of President Ford's chosen expression is not an independent justification for unauthorized copying

elaborated on the importance of preserving this incentive by stating that "the Framers intended copyright itself to be the engine of free expression,"[149] and that "[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike."[150] The Court concluded that an expansion of fair use to create a public figure exception to copyright was not warranted because of "the First Amendment protections already embodied in the . . . distinction between copyrightable expression and uncopyrightable facts and ideas . . . traditionally afforded by fair use . . . ."[151]

The remainder of the majority opinion applied the four factors found in section 107 to explain why *The Nation*'s use could not be excused under the traditional equities of fair use. First, the majority accepted news reporting as *The Nation*'s general purpose, but said that this productive use was simply one factor in the analysis. It was offset by *The Nation* having gone beyond its right to report unprotectible information to make a news event out of its unauthorized first publication of another person's protected expressions.[152] Moreover, the commercial nature of the publication also weighed against fair use. Respondents' argument that their purpose was not purely commercial ignored the crux of the fair use doctrine's profit/nonprofit distinction: "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[153] Respondents' stated purpose of scooping the petitioners' publications also undermined their defense because *The Nation* knowingly exploited the purloined manuscript for "the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."[154]

The Court's analysis of the "nature of the copyrighted work" factor also tipped against *The Nation,* even though the Court recognized the greater need to disseminate factual works

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prior to first publication. *Id.*

149. *Id.* at 558.

150. *Id.* at 559.

151. *Id.* at 560.

152. *Id.* at 561.

153. *Id.* at 562.

154. *Id.* (emphasis in original). The Court added that the propriety of a defendant's conduct was relevant because fair use presupposes good faith and fair dealing. *Id.*

like petitioners' historical narrative.[155] *The Nation*'s use did not stop at the taking of isolated phrases and facts. Rather, the copied excerpts focused on the most expressive elements of the memoirs, so that the reproduction exceeded what was necessary to report unprotectible facts.[156] Moreover, the fact that the copied work was unpublished was treated as a critical element of its nature. The scope of fair use is considerably narrower when a work is unpublished because of the importance of the author's right to control first publication.[157]

With respect to the third statutory factor—the amount and substantiality of the portion used—the Court noted that quantitatively *The Nation* copied an insubstantial portion of the memoirs, but that qualitatively *The Nation* had taken the heart of the book.[158] The majority could not agree with the Second Circuit's finding that this was "a meager, indeed an infinitesimal amount of Ford's original language."[159]

And fourth, the Court characterized the "effect on the market" factor as the single most important element in fair use[160] and disagreed strongly with the Second Circuit's conclusion that the record did not establish a causal relation between *Time*'s cancellation and the unauthorized publication of Ford's expression.[161] The Court said that "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage."[162] Furthermore, to permit the respondents' copying would pose "substantial potential for damage to the marketability of first serialization rights in general."[163]

In sum, the majority concluded that the Second Circuit had placed too much emphasis on the public interest in the subject matter of the work while overlooking its unpublished nature and

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155. *Id.* at 563.

156. *Id.* at 563-64.

157. *Id.* at 564. The Court's prior discussion established that the scope of fair use is narrower with respect to unpublished works. *Id.* at 551-55. It added that a use which clearly infringes the author's "interests in confidentiality and creative control is difficult to characterize as fair.' " *Id.* at 564.

158. *Id.* at 564-65 (quoting *Nation Enterprises*, 557 F. Supp. at 1072). The Supreme Court believed that the Second Circuit had erred in overruling the trial court's evaluation of the qualitative nature of the taking. The quality of the material copied must be considered along with the quantity that is reproduced.

159. *Id.* at 566 (quoting *Nation Enterprises*, 723 F.2d at 209).

160. *Id.*

161. *Id.* at 567.

162. *Id.* The respondents failed to rebut this prima facie case.

163. *Id.* at 569.

the damage to petitioners' first publication rights. In addition, that court did not give sufficient weight to the qualitative importance of the quoted expression.

2. *The dissent*

Justice Brennan's dissenting opinion, joined by Justices White and Marshall, argued that the majority's exceedingly narrow approach to fair use would "stifle the broad dissemination of ideas and information copyright is intended to nurture."[164] Justice Brennan acknowledged that copyright's economic incentives warranted protection but said that the vigorous debate essential to an informed public was not served by the majority's constricted reading of fair use.[165]

The dissent said the case presented two issues: whether *The Nation*'s use of material in forms other than direct quotation infringed, and whether the quotation of roughly 300 words constituted a fair use. Justice Brennan said that it was necessary to decide the threshold copyrightability issue because he disagreed with the majority's fair use holding; they had failed to distinguish between protected expression and uncopyrightable information.[166] His analysis of copyrightability compared the language and the structure of presentation in the two works and determined that when *The Nation* was not quoting from the President, its attempt to convey the uncopyrightable information in the manuscript did not track Ford's protectible expression so closely as to constitute an infringing appropriation of literary form.[167] He concluded, as did the majority, that the case turned on whether *The Nation*'s quotation of roughly 300 words was a fair use.[168]

The dissent stressed, as did the majority, basic principles of copyright: Copyright protects original expression, not ideas, information and facts, in order to promote the creation of authorship for the benefit of the public while simultaneously assuring the public's right to freely use ideas and information. In spite of this agreement, Justice Brennan emphasized that the public's

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164. *Id.* at 579 (Brennan, J., dissenting).

165. *Id.*

166. *Id.* at 579-80 & n.1. He noted that the majority was not intimating, in bypassing the copyrightability issue, that the respondents' use of ideas and information contributed infringement. *Id.* at 580 n.1.

167. *Id.* at 584-87.

168. *Id.* at 587.

interest in free access to and use of uncopyrightable information was paramount to the need to protect the owner's exclusive rights.[169] For instance, after briefly explaining the economic rationale for copyright, he said that the rights in copyright are defined "so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product."[170] The first author to report an event does not have copyright protection for the facts he descibes. The Constitution's copyright clause "requires this limit on the scope of an author's control."[171] This limitation is also necessary to promote first amendment interests.[172] Public debate would be stifled if a politician could copyright his speeches and obtain a monopoly on the ideas they contain. "[E]very citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices."[173]

This emphasis on the public's use of ideas and information, coupled with an attempt to distinguish clearly between what was and was not copyrightable in the memoirs, were also central to Justice Brennan's fair use analysis. He stressed that since copyright does not protect information or ideas, "[t]he question must always be: Was the subsequent author's use of *literary form* a fair use . . . ."[174] He recognized that with respect to a historical work it is difficult to limit the fair use inquiry to this question because the literary form such a work contains often reflects only a part of the author's labor. Also, the value produced by a nonfiction author often lies in the information and ideas he reveals and not in his particular form of expression.[175] Thus, there is an understandable urge to compensate authors of historical narratives for uses of the information disclosed in their works,[176] but Justice Brennan warned that such takings are not necessarily piratical because copyright does not protect that which is often of greatest value in a work: ideas and informa-

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169. *See generally id.* at 580-81.

170. *Id.* at 580.

171. *Id.* at 582.

172. *Id.*

173. *Id.*

174. *Id.* at 588 (emphasis in original).

175. *Id.* at 588-89. Justice Brennan emphasized in his discussion of copyrightability that some latitude must be given subsequent authors seeking to convey facts because the ideas and information contained in a fact work often can be expressed in only a limited number of ways. *Id.* at 585-86.

176. *Id.* at 589-90.

tion.[177] The distinction between protectible expression and unprotectible ideas is at the essence of copyright, so it is necessary for courts to "resist the tendency to reject the fair use defense" because they feel that an author "has been deprived of the full value of his or her labor."[178] Justice Brennan felt that the majority fell prey to this temptation. "The failure to distinguish between information and literary form permeate[d]" their fair use analysis and led to the wrong result.[179]

With this distinction in mind, Justice Brennan's factor-by-factor analysis led to a finding of fair use. He emphasized that the purpose of *The Nation*'s use—news reporting—is listed in section 107 as a prime example of fair use. In view of this explicit congressional endorsement, the majority's reliance on the commercial nature of the use was not appropriate because it "render[ed] meaningless the congressional imprimatur placed on such uses."[180] Further, the majority's failure to focus on literary form colored their analysis. They failed to recognize that "The Nation had every right to seek to be the first to disclose . . . facts and ideas [contained in Ford's manuscript] to the public. The record suggests only that The Nation sought to be the first to reveal the [uncopyrightable] information in the Ford manuscript."[181]

With respect to the nature of the copyrighted work, Justice Brennan said that section 107(2) suggests "that the scope of fair use is generally broader when the source of borrowed expression is a factual or historical work."[182] He concluded that this factor favored a finding of fair use and he strongly disagreed with the majority's categorical presumption against prepublication fair use because " 'Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests' " and the is-

177. *Id.* at 589.

178. *Id.*

179. *Id.* He said that copyright will serve as the engine of free expression only if the monopoly does not choke off the dissemination of ideas and information. *Id.*

180. *Id.* at 592.

181. *Id.* at 593. Justice Brennan also said that the Court's reliance on *The Nation*'s alleged bad faith was unwarranted. The majority's failure to distinguish between information and expression colored their analysis and led them to characterize the respondents' conduct as thievery. Imputing bad faith prejudiced the Court's analysis of the purpose of the use factors. *Id.*

182. *Id.* at 594.

sue may never be resolved "on the basis of such a 'two dimensional' categorical approach."[183]

Analysis of the other fair use factors led the dissent to conclude that although *The Nation* copied some protected expression of substantial quality, the taking was neither clearly excessive nor inappropriate.[184] Further, the dissenters agreed with the Second Circuit that any injury petitioners suffered was not due to *The Nation*'s publication of protected expression, but because of its publication of unprotectible information.[185]

In sum, the Brennan dissent argued that the majority's approach to fair use allowed the petitioners to monopolize information, and, as a consequence, it jeopardized robust debate of important issues. The copyright law is intended to promote the dissemination of ideas and information, yet liability was imposed "for no other reason than that The Nation succeeded in being the first to provide certain information to the public."[186] Despite his disagreements with the majority, it is essential to note that Justice Brennan would have held for *The Nation* but not on first amendment grounds. Rather, he would have justified his decision by established copyright principles of fair use and the idea/expression dichotomy.

III. Consensus and Divergence

A. Agreement on Basic Principles

There was complete agreement among the members of the Court with respect to several fundamental principles of copyright law. Both the majority and the dissenters acknowledged that our scheme of copyright protection does not conflict with the first amendment, but serves free speech interests. Justice O'Connor's statements about copyright's objectives are explicit: "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[187] Copyright is intended to increase the harvest of knowledge[188] by stimulating the creation of works of au-

183. *Id.* at 597 (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455 n.40 (1984)).

184. *Id.* at 601-05.

185. *Id.* at 603 n.25.

186. *Id.* at 605.

187. 491 U.S. at 558.

188. *Id.* at 545.

thorship for the general public good.[189] Similarly, Justice Brennan writes that copyright is intended to nurture the creation and dissemination of ideas and information. Progress in the arts and sciences and the robust public debate essential to our society are served when the Act's exclusive rights are properly balanced against the recognized limitations on those rights.[190] Thus, he agrees that copyright, when so limited, serves as the engine of free expression.[191]

Both opinions also discuss how the incentive to create afforded by copyright is balanced against several limitations on the scope of protection and this serves society's competing interest in the free flow of ideas and information.[192] Justices O'Connor and Brennan each note that these limitations include the fair use defense found in section 107 of the Act,[193] and the principle, reflected in section 102, that copyright protects an author's original expression, not the ideas, facts or information contained in a work of authorship.[194] Copyright does not preclude subsequent writers from copying the unoriginal elements from a prior author's work, such as ideas, information and other matters in the public domain.[195] Each Justice acknowledged that this distinction between ideas and expression balances the first amendment and the Copyright Act by permitting free use of facts and ideas while protecting original expression.[196]

Even though there was disagreement over the need to analyze the issue of copyrightability,[197] the entire Court agreed that

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189. *Id.* at 558.

190. *Id.* at 589 (Brennan, J., dissenting).

191. *Id.* It functions as this engine when the monopoly does not choke off the spread of ideas and information. *Id.*

192. *Id.* at 546 (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429, 477 (1984)); *id.* at 580 (Brennan, J., dissenting) (quoting *Sony*, 464 U.S. at 429).

193. *Id.* at 547; *id.* at 580 (Brennan, j., dissenting). Justice O'Connor also cited the other statutory exceptions at 17 U.S.C. §§ 108-118 (1982). *Id.* at 547. Justice Brennan referred in addition to the principle of substantial similarity as a doctrine that accommodates the competing interests. *Id.* at 580 n.2.

194. *Id.* at 547, 556 ("The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."); *id.* at 580 (Brennan, J., dissenting) (originality requirement crucial to maintaining the appropriate balance between the competing interests).

195. *Id.* at 548; *id.* at 581 (Brennan, J., dissenting).

196. *Id.* at 556 ("No author may copyright his ideas or the facts he narrates.") (citing 17 U.S.C. § 102(b) (1982); *id.* at 581 (Brennan, J., dissenting)).

197. *Compare id.* at 548 (no need to reach these issues because *The Nation* admits to lifting 300 to 400 words of expression) *with id.* at 579-81, 589-90 (Brennan, J., dissenting). Although the entire Court agrees that copyright does not prevent the copying of those parts of a work which are unprotectible, the majority opinion provides little guid-

The Nation's liability turned on whether its quotation of roughly 300 words of protected expression[198] was a fair use under section 107.[199] Justices O'Connor and Brennan both analyzed *The Nation*'s copying in light of the four factors identified by Congress in section 107,[200] and they both repeated several of the basic guidelines applied to this troublesome inquiry: that the factors are not exclusive; that fair use is an equitable rule of reason so no general definition is possible; and, that each case raising the issue must be decided on its own facts.[201]

There also was some agreement about how the four factors were to be evaluated. Justice O'Connor and Justice Brennan recognized that *The Nation*'s purpose in quoting from the manuscript was news reporting.[202] They both acknowledged that the scope of fair use was generally broader with respect to copying from factual and historical works.[203] They agreed that in analyzing the third factor—the amount and substantiality of the portion used—it was necessary to consider the taking in terms of quality as well as quantity.[204] Finally, they both regarded the "effect on the market" factor as the single most important element of fair use.[205]

B. Disagreement on Application

Notwithstanding this agreement on fundamental principles, Justices Brennan and O'Connor disagreed about whether or not

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ance to help determine how uncopyrightable elements combine with an author's original contributions to form protected expression. *See id.* at 547-48. In contrast, Justice Brennan said, while admitting that the test for infringement (a substantial appropriation of literary form) is not precise, that in a fact work such as the Ford memoir, infringement has to be based on too close and substantial a tracking of Ford's expression of information—information that is not itself protectible. *Id.* at 582-84 & n.7.

198. Justice Brennan said that *The Nation* copied only approximately 300 words, *id.* at 579-80, while Justice O'Connor said that *The Nation* admitted to lifting between 300 and 400 words constituting some 13% of its article. *Id.* at 548.

199. *Id.* at 549; *id.* at 587-88 (Brennan, J., dissenting).

200. *Id.* at 560-69; *id.* at 587-605 (Brennan, J., dissenting).

201. *Id.* at 560 (quoting H. REP., *supra* note 26, at 65); *id.* at 588 (Brennan, J., dissenting) (citing Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 448, 449 n.31 (1984) and H. REP., *supra* note 26, at 65.)

202. *Id.* at 561-63; *id.* at 590-94 (Brennan, J., dissenting).

203. *Id.* at 563 (citing Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560, 561, 563 (1982)); *id.* at 594 (Brennan, J., dissenting) (citing 3 M. NIMMER, *supra* note 12, § 13.05 [A][2], at 13-73 to -74).

204. *Id.* at 564-66; *id.* at 598-602 (Brennan J., dissenting).

205. *Id.* at 566; *id.* at 602 (Brennan, J., dissenting). Both the majority and the dissent cited to 3 M. NIMMER, *supra* note 12, § 13.05[A][2], at 13-76.

The Nation had infringed. This is not surprising. In *Sony Corp. of America v. Universal City Studios,* the Supreme Court noted the difficulty of striking a balance between the interests of authors in the control and exploitation of their writings and society's competing interest in the free flow of ideas and information.[206] Further, even though the Constitution, case law, and the legislative history of the 1909 and 1976 Acts confirm that the rights and interests of the public are accorded primacy over the concerns of authors,[207] the Supreme Court has divided almost evenly in cases raising the fair use defense.[208] Fair use is perhaps the most troublesome issue in all of copyright,[209] and someone is bound to feel that a particular decision is arbitrary regardless of how the balance is struck. In *Nation Enterprises,* the majority struck the balance in favor of protecting the economic incentives which stimulate the creation of works of authorship. The dissenters, on the other hand, concluded that the public's interest in free and ready access to facts, ideas and information justified the reproduction of some protected expression notwithstanding the copyright owner's exclusive rights.[210]

1. Protecting copyright's economic incentives

The majority reversed the Second Circuit because it had given "insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of [the] harvest [of knowledge]."[211] The Court held that copyright's limited monopoly rewards authors of nonfiction as well as fiction works so as to stimulate creative activity,[212] and it noted that the scheme served its intended purpose in this case: Ford worked for two years in "the creation of new material of potential historical value."[213]

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206. 464 U.S. 417, 429 (1984).

207. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); Abrams, *supra* note 20, at 510 & n.7.

208. *See* cases cited *supra* note 66.

209. *Sony,* 464 U.S. at 475 (Blackmun, J., dissenting) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)).

210. The Supreme Court has vacillated in its attitude toward copyright precedents and principles. *Compare* United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) *with* Mazer v. Stein, 347 U.S. 201, 219 (1954). *See also* Francione, *supra* note 90, at 522; Kernochan, *supra* note 40, at 365.

211. *Nation Enterprises,* 471 U.S. at 545-46.

212. *Id.* at 546.

213. *Id.*

a. Rejection of a public figure limitation. However, the Court refused to accept the defendant's argument that the public's interest in the subject matter justified limitations on the scope of petitioners' copyright beyond those already imposed by existing doctrine. Incentives to write such works must be maintained. "[C]opyright assures those who write and publish factual narratives such as 'A Time to Heal' that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment."[214] The majority thus refused to create a public figure limitation on copyright. In their view, full copyright protection must be granted to public figure authors because "[a]bsent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information."[215] The majority disagreed with the Second Circuit's view that the scope of fair use is wider when the work relates to matters of high public concern: "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public."[216] Further, the Court added that the public's first amendment interests in such works of authorship are adequately protected through the idea/expression dichotomy and fair use.[217]

b. The right of first publication. The general tenor of the Court's opinion, emphasizing the importance of protecting copyright's incentives, was profoundly influenced by the fact that *The Nation* appropriated the material for its article from an unpublished manuscript, and that the article's publication scooped the book itself as well as the *Time* serialization. *The Nation* thus arrogated to itself the right of first publication. These facts were emphasized throughout the opinion and were central to the Court's determination that *The Nation*'s appropriation of protected expression was not a fair use.[218]

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214. *Id.* at 556-57.

215. *Id.* at 557.

216. *Id.* at 559.

217. *Id.* at 559-60. *But see* Maxtone-Graham v. Buntchaell, 631 F. Supp. 1432, 1435 (S.D.N.Y.), *aff'd*, 803 F.2d 1253 (2d Cir. 1986) (the district court says that the Supreme Court's rejection of the public interest expansion of fair use is dictum limited by the fact that defendant quoted from an unpublished work).

218. 471 U.S. at 548-49. For instance, the opinion's first sentence states that the case required consideration of the extent to which fair use "sanctions the unauthorized use of quotations from a public figure's *unpublished* manuscript." *Id.* at 541-42. Its summary of the facts repeats that Navasky worked directly from the purloined manuscript

Even though *The Nation* copied only 300 to 400 words of protected expression, the article's unauthorized publication prior to the scheduled public dissemination of the authorized excerpts usurped petitioners' right under section 106(3) to control first distribution. Thus, *The Nation* infringed an important marketable subsidiary right that provides economic incentive for the creation of works like the Ford memoirs.[219]

Much of Section III of the majority opinion concentrates on these two critical elements[220] as a prelude to the Court's factor-by-factor determination of fair use in Section IV.[221] The Court noted that fair use traditionally had not been recognized as a defense to charges of copying an author's unpublished work.[222] Even though the doctrine's equities have softened this absolute rule, it has never been seriously doubted that this factor (the unpublished nature of the work) tended to negate the fair use defense.[223] Justice O'Connor explained that this was not altered by the Copyright Revision Act of 1976 since the Act codified existing common law prepublication rights.[224] The Court concluded that the "unpublished nature of a work is '[a] key, though not necessarily determinative, factor' " that cuts against a fair use defense.[225] The author's right to control first publication will ordinarily outweigh a claim of fair use.[226] The Court

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that contained "hitherto unpublished information" to write an article that was timed to scoop the *Time* serialization. *Id.* at 543.

219. *Id.* at 541-42, 549.

220. *Id.* at 549-60. Part A of this section deals with the impact on fair use analysis of a violation of the right to control first publication. Part B concerns the first amendment's impact on fair use analysis.

221. *Id.* at 560-69.

222. *Id.* at 550-51.

223. *Id.* (citing 3 M. NIMMER, supra note 12, § 13.05, at 13-62 n.2).

224. *Id.* at 552-53.

225. *Id.* at 554. The Court said that the nature of the interest at stake is highly relevant to whether a particular use is fair, and the distribution right implies a threshold decision by the author as to whether and in what form to release his work. Thus, the right is inherently different from the other rights in the copyright bundle; only one person can be first publisher and the right's commercial value lies in exclusivity. *Id.* at 552-53.

226. *Id.* at 555. *See also* Salinger v. Random House, Inc., 1 U.S.P.Q.2d (BNA) 1673 (2d Cir. 1987). In this case the Second Circuit held that a biographer's quotation and paraphrasing from 44 of J.D. Salinger's unpublished letters was not a fair use. The court states:

> [W]e think that the tenor of the [Supreme] Court's entire discussion of unpublished works [in *Nation Enterprises*] conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower "scope" seems to refer to the diminished *likelihood* that copying will

stressed that this right deserved protection because it implicates not only the author's interest in creative control, but also his economic interests.

The Court also concluded that the public's interest in obtaining the news—the facts in the book and the manner in which Ford expressed himself about those facts—did not outweigh the author's right to control first publication in these circumstances.[227] It stressed that public figure authors are entitled to as much of an expectation of copyright protection as any other author because there have to be incentives for them to create works which provide significant information.[228] Moreover, the Court said that the first amendment includes the right to refrain from speaking; the right of first publication is recognized as serving this free speech value.[229]

The majority's factor-by-factor analysis of fair use continued to call attention to the unpublished nature of the manuscript and *The Nation*'s usurpation of the right to control first publication. *The Nation*'s news reporting purpose was undermined by the fact that the use was intended to be a "scoop," and that it had the "*intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."[230] Most important, there was no doubt that *The Nation*'s use caused the *Time* cancellation and seriously damaged the plaintiffs' right to control first publication.[231] Unauthorized quotation from an unpublished work "poses substantial potential for damage to the marketability of first serialization rights in general."[232] Although reward to the author is said to be a secondary consideration,[233] the majority could not sanction *The Nation*'s conduct as fair use because of its impact on copyright's incentives.

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be fair use when the copyrighted material is unpublished.

Id. at 1677.

227. *Id.* at 557.

228. *Id.* at 555-60. Copyright is the engine of free expression because it establishes a marketable right to the use of one's expression that supplies the economic incentive to create and disseminate ideas, *id.* at 558, and the first publication right is an important part of this incentive. *Id.* at 560.

229. *Id.* at 559-60.

230. *Id.* at 562 (emphasis in original). In addition, the fact that a work is unpublished is a critical element of its nature which narrows the scope of fair use. *Id.* at 554.

231. *Id.* at 567.

232. *Id.* at 569.

233. *See* United States v. Paramount Pictures, 334 U.S. 131, 158 (1948).

2. The dissent: Avoiding the risk of extending protection to facts

Justice Brennan's dissenting opinion acknowledged the importance of copyright's incentives, but it emphasized instead the idea/expression dichotomy and the need to foster the dissemination of ideas and information to the public.[234] He stated that this established limitation on copyright protection promotes the creation of new works[235] and assures copyright's consonance with first amendment values. Thus, infringement cannot be based on the copying of the ideas, facts, and unprotectible information contained in a work. Rather, it must be based on a substantial appropriation of literary form.[236]

Justice Brennan paid close attention to these principles in analyzing *The Nation*'s use of the memoirs—a historical biography containing facts, information and Ford's reflections about events and personalities.[237] As a result, the work's factual nature is a central factor in his analysis. He did not, however, argue for a public figure exception nor did he skew his analysis because of the public's particular interest in this subject matter. He relied on neutral principles. For Justice Brennan, infringement has to be based on too close and substantial a tracking of the author's expression of the information. Furthermore, an author's chronological presentation of facts cannot preclude another writer from presenting those facts in the same order.[238] Some leeway must be given to subsequent authors of fact works because "those 'wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression.' "[239]

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234. 471 U.S. at 580-81 (Brennan, J., dissenting) (citing S. REP. No. 983, 93d Cong., 2d Sess. at 107-08 (1974) and H. REP., *supra* note 26, at 56-57).

235. *Id.* at 582 (citing Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)).

236. *Id.* at 582-83. Justice Brennan noted that it is difficult to determine whether an infringing appropriation of literary form has occurred because the idea/expression distinction is often elusive as is the determination of whether there has been a substantial appropriation of expression. *Id.* at 583 & nn.5-6. He warns that these principles, which accommodate the competing interests of authors and the public, cannot be neglected because of the risk of extending the copyright monopoly to unprotectible information. *Id.* at 589-90, 605.

237. *Id.* at 583-84.

238. *Id.* at 586-87.

239. *Id.* at 585-86 (quoting Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1047 (1984)). The relevant determinations are how closely the first author's language and structure of presentation has been tracked, and how much of his language and structure has been appropriated. *Id.* at 583.

Justice Brennan's fair use analysis repeats these principles and concentrates on the fact that the Ford manuscript is a historical work.[240] "With respect to a work of history, particularly the memoirs of a public official, the statutorily prescribed analysis cannot properly be conducted without constant attention to copyright's crucial distinction between protected literary form and unprotected information or ideas."[241] He then observed that due to these basic principles copyright does not protect that which is often of most value in a work of history: the facts and information collected by the historian which are contained in his work.[242] While understanding the tendency by the courts to find infringement in order to compensate an author when these unprotectible fruits of an author's labors are appropriated,[243] Justice Brennan warned that the goals of the copyright scheme, as well as first amendment values, will be undermined if courts find infringement based on a minimal use of expression and thus extend copyright to unprotectible ideas and information.[244]

Justice Brennan's step-by-step analysis of the four factors also underscores the paramount interest of the public in the dissemination and use of unprotectible information. *The Nation*'s use was news reporting and section 107 lists this activity as a prime example of fair use because it informs the public. "Congress saw the spread of knowledge and information as the strongest justification for a properly limited appropriation of expression."[245] The nature of the plaintiffs' copyrighted work favored a finding of fair use. The doctrine's scope "is generally broader when the source of borrowed expression is a factual or historical work" because such informational works are afforded less protection than works of fiction; the law recognizes a greater need to disseminate fictional works.[246] *The Nation* copied some protected literary form of substantial quality, but this use of expression did not cause injury to the petitioners because it was *The Nation*'s permissible publication of *unprotectible* ideas and

240. *Id.* at 587-89.

241. *Id.* at 588. "The question must always be: Was the subsequent author's use of *literary form* a fair use . . . ." *Id.* (emphasis in original).

242. *Id.* at 589.

243. *Id.*

244. *Id.* at 589-90. According to Justice Brennan, the majority succumbed to this temptation in their fair use analysis. *Id.* at 590.

245. *Id.* at 591.

246. *Id.* at 594-95.

information that caused *Time* to cancel its serialization agreement.[247]

In sum, Justice Brennan concluded that the fair use balance tipped for *The Nation* because Navasky's article took only a small amount of protected expression from a historical work, and infringement cannot be based on the copying of information and facts. This conclusion was not based on a first amendment or public figure exception to copyright. Rather, the dissent relied on the idea/expression dichotomy and the principle that copyright protects literary form and not ideas and information.

IV. THE IMPACT OF *Nation Enterprises*

A. *Historians and Biographers Versus Reporters*

Notwithstanding Justice Brennan's contention that the majority's approach to fair use permitted Harper & Row to monopolize unprotectible information, the Court's ruling does not significantly expand the scope of copyright protection for historians, biographers and public figure authors. Neither does it significantly restrict the ability of reporters, journalists and news organizations to gather and disseminate information to the public.

The Court did not attempt to define where unprotectible information ends and copyrightable expression begins.[248] It did, however, emphasize the importance of the idea/expression dichotomy and that ideas, information and facts revealed in unpublished as well as in published works may be freely used by subsequent authors. Those elements cannot be protected under the guise of copyright.[249] Similarly, even though *The Nation*'s verbatim quotation of roughly 300 words from the unpublished manuscript was not a fair use, the Court's approach to this established defense still allows subsequent authors considerable latitude in quoting from copyrighted works. *The Nation* was liable because it reproduced protected expression of substantial quality from an unpublished work and this usurped the copy-

247. *Id.* at 602-03. *Time*'s cancellation "was the product of wholly legitimate activity." *Id.* at 602.

248. *Id.* at 548-49 ("We need not reach these issues . . . ."). Justice Brennan dealt with the copyrightability issue but his general guides for distinguishing between literary form and ideas and information do not provide much of a definition. *Id.* at 582-83.

249. *Id.* at 547-48. *See also* Salinger v. Random House, Inc., 1 U.S.P.Q.2d (BNA) 1673, 1679 (2d Cir. 1987) (Facts may be reported but Salinger has a right "to protect the expressive content of his unpublished letters.").

right owner's valuable right of first publication. The Court's warning is clear: The reproduction of protected expression from an unpublished work will not ordinarily pass muster as a fair use.[250] The Court did not, however, establish an absolute rule against "pre-publication" fair use.[251] Further, the decision implies that even verbatim quotation as extensive as *The Nation*'s from an already published work might qualify as fair use.[252]

Thus, the decision does not expand the scope of copyright protection for published fact works such as biographies, histories and memoirs by public figures.[253] Authors can feel secure prior to the authorized publication of their works since unauthorized prepublication copying will not ordinarily be a fair use. They cannot, however, prevent the use of the facts, ideas and information revealed in either their unpublished or published works. Subsequent authors seeking to convey facts are given some leeway in copying protected expression when the information contained in a fact work can be communicated in only a limited number of ways.[254] Further, the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy, and the Court acknowledges that the scope of fair use is generally broader with respect to factual works.[255]

Conversely, *Nation Enterprises* limits the ability of reporters, journalists and news organizations to extensively reproduce protected expression from unpublished works. As a result, it might chill their activities because they will have to make judgments about the scope of permissible copying and carefully distinguish between copyrightable expression and unprotectible

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250. *Id.* at 554, 563-64. Other uses of unpublished works also may infringe.

251. *Id.* at 554. The fact that the infringed work is unpublished is a key, though not necessarily determinative factor, that tends to negate the defense. *Id.* at 554. *But see* Salinger v. Random House, Inc., 1 U.S.P.Q.2d (BNA) 1673, 1677 (2d Cir. 1987) (unpublished works normally enjoy complete protection against copying any protected expression).

252. 471 U.S. at 564-65.

253. *Cf.* 2 COPYRIGHT L.J., Sept. 1985, at 4 ("[T]he effect of the Supreme Court ruling may be to give greater copyright protection to factual and historical works when copying the facts includes copying original expression—particularly if the work is unpublished."); Francione, *supra* note 90, at 522-23 (The decision provides excessive protection to factual works and restricts fair use. This "threatens to impede the dissemination of such works to a degree prohibited by the Constitution and copyright statutes.").

254. 471 U.S. at 585-86 (Brennan, J., dissenting) (quoting Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1047 (1984)).

255. 471 U.S. at 563; *id.* at 594 (Brennan, J., dissenting).

facts, ideas and information.[256] These are not, however, significant limitations on free speech interests. Any subsequent user of copyrighted material, published or unpublished, has to make these same determinations in order to understand and avoid the risk of infringement.[257]

The copying of protected expression from an unpublished work will not ordinarily be a fair use, but the unprotectible materials contained in such a work may be used without fear of infringement. Fair use may even justify the reproduction of some protected expression from an unpublished work, at least when the copier is not attempting to create a news event out of reporting that protected expression.[258] Further, fair use allows reporters and journalists considerable leeway to quote copyrighted material from a published work.[259] In short, the following propositions are still intact: first, the idea/expression dichotomy confines the protected expression in a fact work to the bare elements of the author's ordering and choice of words;[260] and second, the scope of fair use is generally broader with respect to fact works.[261]

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256. Any work has copyrightable and uncopyrightable elements and subsequent users must take care that they do not appropriate original expression. *Compare* Hoehling v. Universal City Studios, 618 F.2d 972 (2d Cir.), *cert. denied,* 449 U.S. 841 (1980) *with* Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978).

257. *See generally* Shipley & Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption,* 63 N.C.L. REV. 125, 129-151 (1984).

258. *See* 471 U.S. at 561-64 (majority's discussion of the "purpose of the use" factor and the emphasis placed on *The Nation*'s stated purpose of scooping the book and the *Time* extracts). *Cf. id.* at 590-93 (Justice Brennan's discussion of the "purpose of the use" factor emphasizing that news reporting is listed in section 107 as a prime example of fair use). *But see* Salinger v. Random House, Inc., 1 U.S.P.Q.2d (BNA) 1673, 1677 (2d Cir. 1987).

259. "[The] ruling does not represent a stifling of public expression, but 'rather [constitutes] a positive opinion of what is proper and what is fair.' " 30 PAT. TRADEMARK & COPYRIGHT J. (BNA) 449 (Aug. 29, 1985) (remarks of David Goldberg). *Contra* Note, *When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in* Harper & Row, Publishers, Inc., v. Nation Enterprises, 72 CORNELL L. REV. 218 (1986).

260. *See* Hoehling v. Universal City Studios, 618 F.2d 972, 974 (2d Cir. 1980). The Second Circuit relied on this proposition in ruling that the coupling of Ford's original reflections with facts did not transform the information into a copyrighted totality. The Supreme Court did not overrule this, but disagreed with the Court of Appeals on whether *The Nation*'s use of 300 protected words was a fair use.

261. 471 U.S. at 563; *see also id.* at 595 (Brennan, J., dissenting). *But see* Francione, *supra* note 90, at 522, 544-51 (the Court has truncated fair use analysis and diminished its utility).

B. Copyright Interests Versus Free Speech Interests

The Supreme Court has always declined to afford special, free speech based protections to libel and defamation defendants in addition to those already embodied in the substantive law in those areas.[262] In *Nation Enterprises* the Court declined to grant special, free speech based protection to defendants in copyright infringement actions.[263] Justice O'Connor's and Justice Brennan's general statements about the rationale for copyright and their shared views on the function of the idea/expression dichotomy and the fair use doctrine show that the Court does not perceive an irreconcilable conflict between copyright and the first amendment. Rather, the majority states that copyright is the engine of free expression, and Justice Brennan repeats this statement but adds that the monopoly must not be permitted to choke off the use and dissemination of ideas, facts and information.[264] The Court recognizes that the potential chill on protected speech stemming from the enforcement of a copyright is already accounted for by the established limitations embodied in the substantive law of copyright.[265] There is therefore no need to introduce the first amendment into the difficult determination of what constitutes copyright infringement.[266]

Neither opinion calls for a first amendment privilege in copyright. As noted above, Justice O'Connor's opinion states that "[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public,"[267] and asserts that there are no risks in

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262. Calder v. Jones, 465 U.S. 783, 790-91 (1984); Herbert v. Lando, 441 U.S. 153, 158, 160-61, 168 (1979) (no first amendment privilege bars inquiry into editorial process); Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979).

263. 471 U.S. at 561 (no public figure exception to fair use due to the first amendment protections embodied in the idea/expression dichotomy and the latitude afforded by fair use).

264. *Id.* at 558. *See also id.* at 589 (Brennan, J., dissenting).

265. *Id.* at 559-60. Copyright is not an absolute monopoly but a grant that is inhibited in a variety of ways so as to encourage the creative activity of authors while simultaneously protecting society's competing interest in the free flow of ideas, facts, and information. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429-31 (1984). Similarly, the potential restraint on protected speech stemming from libel and defamation actions is accounted for in the constitutional limitations on the substantive law governing such suits. *See Calder*, 465 U.S. at 790-91; Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

266. 471 U.S. at 559-60. *See also id.* at 582 (Brennan, J., dissenting). The apparent conflict between the first amendment and copyright is more imagined than real. 3 COPYRIGHT L.J. 21 n.1 (N. Boorstyn ed., Oct. 1986).

267. *Id.* at 559. The Court noted in *Zacchini* that the federal district courts had

treating works by and about public figures like other works of authorship because of the first amendment protections already embodied in the idea/expression distinction and the latitude afforded by the equities of fair use.[268] The majority thus refused to create a public figure exception and it rejected the proposition that the scope of fair use expands when the information conveyed relates to matters of great public concern.[269] Similarly, Justice Brennan's dissent, emphasizing the importance of the elusive distinction between protected literary form and unprotectible information and ideas,[270] does not call for the creation of a first amendment privilege. His copyrightability analysis concentrates on the established principles that protection cannot extend to information and chronological presentations of facts, and that some latitude must be given to subsequent authors seeking to convey the same facts.[271] He also notes that there would be serious first amendment problems if these principles were ignored so as to give an author a monopoly over historical events.[272] Thus, he recognizes that denying protection to facts, ideas and information ensures copyright's consonance with first amendment values.[273] His fair use analysis repeats these concerns "[t]o ensure the progress of arts and sciences and the integrity of the First Amendment values, ideas and information must not be freighted with claims of proprietary right"[274] but Justice Brennan does not argue for any special treatment of President Ford's memoirs because of the free speech interests. He would have ruled for *The Nation* on the fair use defense without adopting a public figure or first amendment limitation.[275]

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rejected first amendment challenges to copyright because the law does not restrain the use of ideas. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 n.13 (1977).

268. 471 U.S. at 559-60; *see also* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429-33 (1984) (discussions of the competing interests which must be balanced in copyright law and of the role of fair use in the balancing process).

269. 471 U.S. at 555, 559-60. *But see* Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432, 1435 (S.D.N.Y.), *aff'd*, 803 F.2d 1253 (2d Cir. 1986).

270. 471 U.S. at 582. (Brennan, J., dissenting).

271. *Id.* at 583-87.

272. *Id.* at 584 n.7.

273. *Id.* at 582.

274. *Id.* at 589-90.

275. He concluded that the majority adopted a narrow view of fair use and thus imposed liability for what was essentially a taking of information. *Id.* at 605. Although he felt that this holding curtailed the free use of ideas and thus monopolized information, he would have reached the opposite result without adopting a public figure or first amendment exception.

The Supreme Court had earlier recognized in *Sony Corporation of America v. Universal City Studios* that copyright constantly struggles to achieve a delicate balance between protecting the incentives for authors to create and insuring that the public has unfettered access to ideas and information.[276] *Nation Enterprises* builds on this recognition by suggesting that the balancing should not be weighted and perhaps upset with unnecessary first amendment concerns.[277] Of course, it is difficult to determine what expression is protected, and deciding what is fair use still remains one of the most troublesome issues in copyright.[278] Taken together these two difficult decisions mean that determining copyright infringement is an imprecise inquiry. This inquiry would be needlessly complicated by the infusion of first amendment considerations.[279]

V. The Exceptional Case Scenario After *Nation Enterprises*

In view of the first amendment protections which are embodied in the Copyright Act, there is no need to recognize an independent free speech limitation even when a work's idea and the author's expression have arguably merged.[280] The soundness of this proposition can be tested by analyzing *Time Inc. v. Bernard Geis Associates*,[281] a decision that has been repeatedly used to illustrate and support the need for a first amendment exception.[282]

Time, the plaintiff, owned the copyright to the Zapruder film of the Kennedy assassination. Defendants were the author and publisher of *Six Seconds in Dallas*, a book that challenged

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276. 464 U.S. 417, 429 (1984).

277. *Cf.* Perlman & Rhinelander, *supra* note 4, at 387-89; Note, *supra* note 83, at 643-44.

278. 471 U.S. at 583 & n.5 (Brennan, J., dissenting); *see also* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting).

279. *Cf.* Calder v. Jones, 465 U.S. 783, 790-91 (1984). "[T]he refusal to permit infringement under the guise of First Amendment freedoms 'would only chill chiseling for personal profit.' " 3 Copyright L.J. 21 n.1 (N. Boorstyn ed., Oct. 1986).

280. *See supra* notes 73-85, 262-75 and accompanying text.

281. 293 F. Supp. 130 (S.D.N.Y. 1968).

282. *See, e.g.*, Crowley, *supra* note 2, at 443-43; Denicola, *supra* note 2, at 300-03; Goldwag, *supra* note 2, at 15-18; Note, *supra* note 2, at 100-06. Professor Nimmer uses this case, and an example based on news photographs of the My Lai massacre, to illustrate the scenario set forth in the text at notes 81-84 and to explain his argument for a first amendment defense. 1 M. Nimmer, *supra* note 12, § 1.10[C][2], at 1-84; Nimmer, *supra* note 2, at 1196-1204.

the Warren Commission's lone assassin conclusion with a "second gun" theory.[283] Defendants repeatedly sought permission from *Time* to reprint specific frames from the published film in order to present and support their theory, but all requests were refused. Nevertheless, they hired an artist to make detailed sketches of twenty-two of the forty most important frames.[284] *Time* sued for infringement and the primary issue was whether the defendant's reproduction was a fair use.[285] The court stated that the sketches were "in fact copies, . . . with no creativity or originality whatever."[286] It acknowledged that *Time* had plans to use the film in a book or a movie, but it also recognized that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."[287] In view of this consideration and determination that it was "speculative" whether defendants' use would affect *Time*'s plans for the film, and that there was "little, if any, injury" because the market for the film was not jeopardized,[288] the court concluded that the copying was a fair use.[289]

Professor Nimmer was critical of the court's fair use analysis. He argued that the court ignored potential competition and was wrong in saying that there was no damage to the value of *Time*'s copyright.[290] He asserted that fair use should be based primarily on whether the infringing work tended to diminish or prejudice potential sales of the copyrighted work and that here potential users could turn to *Six Seconds in Dallas* instead of *Time*. Thus, the defendants' copying may have satisfied some of the demand for a future work based on the copyrighted film. Accordingly, the fair use defense should have been precluded.[291]

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283. 293 F. Supp. at 133-34. *See generally* Crowley, *supra* note 2, at 444.

284. 293 F. Supp. at 133, 138-39. Many of the frames from the film had been published in *Life* magazine and included in the Warren Commission's Report. The film had 480 frames, 140 of these showed the immediate events of the shooting and forty pertained to the actual shots. *Time* had paid $150,000 for all rights to the film. Defendant's sketches were almost exact copies.

285. *Id.* at 132, 137, 141-44. The court first concluded that the Zapruder film was copyrightable and that *Time* had taken the proper steps to secure protection.

286. *Id.* at 139. See also Note, *supra* note 2, at 100-01.

287. 293 F. Supp. at 146.

288. *Id.* The court said that defendants' use may have enhanced the value of the film. *Contra* Nimmer, *supra* note 2, at 1201.

289. 293 F. Supp. at 146.

290. 1 M. NIMMER, supra note 12, § 1.10[D], at 1-87 to 2-88; Nimmer, *supra* note 2, at 1200-01; *see also* Denicola, *supra* note 2, at 302.

291. 1 M. NIMMER, *supra* note 12, § 1.10[D]; Goldwag, *supra* note 2, at 16-17. *Time* had plans for the film, 293 F. Supp. at 146, and the defendants' book may have satisfied

Professor Nimmer did not, however, disagree with the court's result because free speech interests made the copying defensible.[292] His basic argument was that *Time*'s copyright extended to the film's form of expression, and it was necessary for the defendants to reproduce this protected expression from the essential frames in order to explain and support their second gun thesis. They could have relied solely on a written description, but their reproduction of the pertinent frames enabled them to communicate their theory more accurately.[293] Even though this copying should not have been regarded as a fair use since it arguably had an adverse impact on the market for or value of the film, the full and accurate dissemination of the defendants' theory should not be inhibited. Therefore, Nimmer argued this would have been an appropriate case for recognition of a first amendment privilege.[294]

A. The Idea/Expression Dichotomy and the Zapruder Film

The Supreme Court has acknowledged that the copyright owner's power to restrain the flow of information is diluted by the idea/expression dichotomy. It effectively eradicates the monopoly's potential for impinging on free speech interests because it embodies first amendment protections.[295] Therefore, it is appropriate to determine what is copyrightable in a particular work in order to insure that the copyright owner's rights are properly limited to literary form as opposed to unprotectible ideas, facts and information.[296] This should always be the initial

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some of the demand for a future work based on the film.

292. Nimmer, *supra* note 2, at 1198-1200.

293. 1 M. NIMMER, *supra* note 12, § 1.10[C], at 1-83 to -84; *see also* Denicola, *supra* note 2, at 300-01; Timberg, *supra* note 18, at 218-19 (use of a visual work like a photo necessitates a substantial taking); TULANE Comment, *supra* note 2, at 157.

294. 1 M. NIMMER, *supra* note 12, § 1.10[C], at 1-83 to -87; Denicola, *supra* note 2, at 301-07; Note, *supra* note 2, at 103-05; *see also* Pacific & S. Co. v. Duncan, 572 F. Supp. 1186, 1193 n.5 (N.D. Ga. 1983) (agreeing with Professor Nimmer's conclusion), *modified*, 744 F.2d 1490, 1498 (11th Cir.) (first amendment does not conflict with plaintiff's effort to enforce its copyright), *cert. denied*, 471 U.S. 1004 (1985). *Cf.* Crowley, *supra* note 2, at 445, 459; TULANE Comment, *supra* note 2, at 157-60 (arguing that there should be a necessity factor for the courts to utilize in making fair use determinations instead of turning to the first amendment).

295. *Nation Enters.*, 471 U.S. at 557; *see also id.* at 589-90 (Brennan, J., dissenting). *Contra* Timberg, *supra* note 18, at 229-30 (idea/expression dichotomy not adequate with regard to visual, auditory and audio-visual works).

296. *See* 471 U.S. at 588-89 (Brennan, J., dissenting); Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488-89 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

inquiry because its resolution may eliminate the need to face the difficult issues of substantial similarity and fair use.[297]

This threshold determination of copyrightability should have received greater attention in *Time Inc. v. Bernard Geis Associates*.[298] The Zapruder film was a copyrightable work that recorded an event of significant importance.[299] Although the Supreme Court has indicated that the scope of protection does not depend on a work's public importance,[300] it has also stated the accepted neutral principle that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[301]

Although a great deal of subjectivity is involved in determining whether a particular work is of public importance, there is little subjectivity involved in resolving whether a work is factual. A film of an event records facts. This means that the Zapruder film, as a fact work, does not have as much copyrightable expression as a painting or a staged, artistically lighted, studio photograph.[302] *Time*'s copyright on the film could not extend to the events at Dallas on November 22, 1963. It encompassed only the "particular form of expression of the Zapruder film"[303] and not the many facts it disclosed, e.g., the make, speed and color of the automobiles carrying the President, the time of day, the

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297. There can be no copyright infringement absent a substantial reproduction (substantial similarity) of protected expression. 471 U.S. at 582-84 & nn.5-7 (Brennan, J., dissenting). The majority's determination in *Nation Enterprises* that the threshold issue of copyrightability did not have to be resolved, 471 U.S. at 548-49, does not imply rejection of Justice Brennan's approach. *See* 2 COPYRIGHT L.J. 4 n.2 (N. Boorstyn ed., Sept. 1985) (the Second Circuit's copyrightability analysis is left intact by the Supreme Court's opinion). *But see* Francione, *supra* note 90, at 597-98.

298. 293 F. Supp. 130 (S.D.N.Y. 1968).

299. *Id.* at 131, 141-44. The 1976 Copyright Act establishes that films and photographs are copyrightable subject matter. 17 U.S.C. § 102(a)(5)-(6) (1982 & Supp. I 1983).

300. 471 U.S. at 559-60.

301. *Id.* at 563; *see also id.* at 595 (Brennan, J., dissenting).

302. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1594-1600 (1963). *See generally* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488-89 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984). The issue of whether a common snapshot is copyrightable has long been settled in favor of protection, Gorman, *supra*, at 1595-96, but in 1918, Justice Brandeis espoused the contrary position: "The mere record of isolated artistic skill, are denied such [copyright] protection." International News Serv. v. Associated Press, 248 U.S. 215, 254 (1918) (Brandeis, J., dissenting). This view has not been followed, but it supports the proposition that the scope of protection for an ordinary photograph is narrow. *See also* Gross v. Seligman, 212 F. 930 (2d Cir. 1914); Alt v. Morello, 227 U.S.P.Q. (BNA) 49 (S.D.N.Y. 1985).

303. *Time Inc.*, 293 F. Supp. at 143.

weather conditions, the location of the building from which the shots were fired in relation to the motorcade, distances, angles, the timing and sequence of the events, and the President's posture and demeanor. *Time*'s copyrightable expression did not encompass these facts even if some of them could only be learned from the film.

Infringement cannot be based on the taking of the unprotectible information contained in the Zapruder film.[304] Those facts can be expressed by others in books, pictures and in any other media. The defendants expressed them in several accurate sketches in order to support and explain their second gun theory.[305] *Time*'s copyright protected the expression contained in the film against reproduction in the original medium or in any other medium, such as a photocopy or a drawing,[306] but in order to constitute infringement the similarity of expression between defendants' drawings and the film had to amount to almost verbatim reproduction.[307] This conclusion was required by copyright's strong policy favoring the free use of ideas and information that is embodied in the idea/expression dichotomy. The degree of substantial similarity required to establish infringement varies with the nature of the protected work and the ideas and information it expresses.[308] The Geis sketches were close reproductions of the most important frames in the copyrighted film,[309] but in view of the idea/expression dichotomy's limitations on copyrightable subject matter, defined by the Supreme Court over a century ago in *Baker v. Selden*[310] and reiterated in *Nation Enterprises*, the court could have concluded that de-

304. *Cf. Nation Enters.*, 471 U.S. at 582-832 (Brennan, J., dissenting).

305. Arguably, the defendants did not have to draw their sketches so closely to the copyrighted frames in order to effectively explain their theory. The familiar saw that "a picture is worth a thousand words" no doubt is correct, but this should not necessarily excuse exact reproduction of a protected graphic work. *But see* Timberg, *supra* note 18, at 203-10 (discussing the differing impacts of literary and visual materials—a photograph presents what really happened (reality) in a way that is lacking even in the most painstaking literary, biographical or historical research); Denicola, *supra* note 2, at 292, 301 (discussing the potential inadequacy of the dichotomy).

306. 1 M. NIMMER, *supra* note 12, § 2.08[E].

307. *Cf.* 471 U.S. at 583 (Brennan, J., dissenting) ("Infringement would thus have to be based on too close and substantial a tracking of Mr. Ford's expression of this information.").

308. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *see also* 471 U.S. at 585-87 (Brennan, J., dissenting).

309. *Time Inc.*, 293 F. Supp. at 139.

310. 101 U.S. 99 (1879); *see also* Perlman & Rhinelander, *supra* note 4, at 383.

fendants reproduced only a very small amount of protected expression.[311]

Further, it would have been reasonable to conclude that defendants' taking of a small amount of protected expression did not constitute infringement because of the policies supporting the dichotomy. That conclusion would resolve the matter without having to turn to fair use or to the first amendment.[312] Even if protected expression is copied, it is necessary for the taking to be substantial in order to constitute infringement,[313] and if an event can be described only by adoption of part of an earlier description's protected expression, then that copying should be excused.[314] The dichotomy embodies the principle that copyright protection must not extend to the expression of subject matter that is so limited in the form in which it can be presented that protection for the expression would effectively prevent public access to the work's substance.[315] As an idea takes on greater expressive dimensions, the scope of copyright protection increases. Those increasing dimensions suggest that there are ordinarily a variety of ways for any author to communicate ideas or facts. In contrast, if an author's statement of an idea does not lend itself to restatement, then its almost verbatim reproduction should not be actionable. Otherwise the copyright monopoly would improperly extend to an idea.[316] Justice Brennan acknowledged this limitation on copyrightability when he said that "some leeway must be given to subsequent authors seeking to convey facts because those 'wishing to express the ideas contained in a factual work often can choose from only a narrow

311. *Cf.* 471 U.S. at 590 (Brennan, J., dissenting).

312. *Cf.* Perlman & Rhinelander, *supra* note 4, at 389.

313. *See* 471 U.S. at 582-83 & nn.5-6 (Brennan, J., dissenting).

314. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); Perlman & Rhinelander, *supra* note 4, at 387-89. These authors analyze the decisions in *Time Inc.* and Rosemont Enters., v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), to show how the *Baker v. Selden* analysis of the boundaries of copyrightable expression could be utilized to resolve infringement issues without unnecessary discussion of first amendment interests.

315. *Cf.* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Freedman v. Grolier Enters., 179 U.S.P.Q. (BNA) 476, 478 (S.D.N.Y. 1973); Denicola, *supra* note 2, at 292-93.

316. Goldstein, *supra* note 2, at 1018; *see, e.g., Apple Computer*, 714 F.2d at 1253; *Morrissey*, 379 F.2d at 678-79; Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926); *see also* Goldstein, *Federal System Ordering the Copyright Interest*, 69 COLUM. L. REV. 49, 86 (1969).

range of expression.' "[317] In short, the idea/expression dichotomy sanctions the appropriation of protected expression in some instances so that ideas and information will not be fretted with claims of a proprietary right that would hinder the progress of arts and sciences and the dissemination of information.[318]

Copyright's fundamental purpose is to increase the harvest of knowledge by fostering creativity.[319] The public's interest in the dissemination of ideas and information is superior to the copyright owner's interest in controlling the use of his work.[320] Since the Geis reproductions of the Zapruder film were not used simply for aesthetic satisfaction, but for recording an event *and* explaining what happened, it would have been very reasonable to conclude that these permissible objectives would be undermined if the knowledge and information the film contained could not be used without fear of infringement. The information in the film could not be effectively communicated without utilizing particular frames; those frames were thus necessary incidents to the information they contained.[321] Accordingly, the defendants' close reproduction of this factual work need not have been regarded as an infringement of *Time*'s copyright because the reproduction did not come within the metes and bounds of the property interest granted by copyright.[322] Those metes and bounds are limitations flowing from the idea/expression dichotomy. They help strike the definitional balance between copyright and the first amendment, and they enable copyright to be the engine of free expression. They do not, however, emanate from the first amendment.[323] Rather, they flow from the copy-

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317. *Nation Enters.*, 471 U.S. at 585-86 (Brennan, J., dissenting) (quoting Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. at 1037 (1984)).

318. *See id.* at 589-90 (Brennan, J., dissenting); Denicola, *supra* note 2, at 292-93; Goldstein, *supra* note 2, at 1018 & n.136; Perlman & Rhinelander, *supra* note 4, at 383.

319. 471 U.S. at 545-46.

320. *Cf.* Abrams, *supra* note 20, at 510. *But see* 471 U.S. at 545-46 (necessary to give proper deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of the harvest of knowledge); Eichel v. Marcin, 241 F. 404, 410 (S.D.N.Y. 1913); 3 M. NIMMER, *supra* note 12, § 13.03[A].

321. *Cf.* Baker v. Selden, 101 U.S. 99, 103 (1879); TULANE Comment, *supra* note 2, at 156-60 (arguing for a rule of necessity in fair use analysis).

322. The case could have been resolved without facing an issue of constitutional dimension. Perlman & Rhinelander, *supra* note 4, at 389. *But see* Francione, *supra* note 90, at 547-48, 597-98.

323. *But see* Rosemont Enters., v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Judge Lumbard stressed in a concurring opinion that the copyright laws should not be allowed to interfere with the public's first amendment

right statute and the Constitution's patent and copyright clause.[324]

B. Accommodation Through Fair Use

Proponents of a first amendment exception to copyright have a restrictive view of the fair use doctrine which is inconsistent with the Supreme Court's approach as expressed in *Nation Enterprises* and *Sony Corporation of America v. Universal City Studios.* The Court recognized that fair use is a long established defense that facilitates balancing the author's rights against the needs of the public.[325] No single factor among the doctrine's criteria is controlling,[326] and the defense is not necessarily lost when the challenged copying might have some adverse impact on the potential market for or value of the copyrighted work.[327] Fair use is a flexible doctrine—an equitable rule of reason[328]—involving a delicate balancing process that enables the

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interest in being fully informed about matters of general concern. He stated, in dictum:

> 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 regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

Id. at 311. In view of the facts of this case—Howard Hughes purchased the copyrights to previously published articles about him, and then attempted to use the copyrights to prevent publication of an unauthorized biography—the statement is reasonable. It was not, however, necessary to invoke the first amendment and to suggest that fair use emanated therefrom because it is well established that copyright cannot be used to prevent the use of facts.

324. Perlman & Rhinelander, *supra* note 4, at 383-84; Abrams, *supra* note 20, at 510 & n.7 (The rights and interests of the public are paramount and more important than the propriety concerns of authors—"[t]his philosophy is thoroughly ingrained in . . . copyright legislation and decisions.").

325. *Nations Enters.*, 471 U.S. at 549-52; Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984); *see also* Hustler Magazine, Inc. v. Moral Majority Inc., 796 F.2d 1148, 1151 (9th Cir. 1986); Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). *Cf.* Raskind, *A Functional Interpretation of Fair Use*, 31 J. COPYRIGHT SOC'Y U.S.A. 601, 603, 616 (1984) (fair use should be viewed as a statement of public policy to ensure access to information).

326. *Sony*, 464 U.S. at 448-49; H. REP., *supra* note 26, at 65.

327. *Sony*, 464 U.S. at 449-56. In *Sony*, which involved non-commercial home use, the majority placed the burden on the copyright owner to show how the challenged conduct was or would be harmful. This approach to the fourth fair use factor makes it easier to establish the defense with respect to non-commercial uses of protected materials. *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152-53 (9th Cir. 1986).

328. H. REP., *supra* note 26, at 65.

courts to harmonize copyright and first amendment interests on a case-by-case basis.[329]

Professor Nimmer argued that the finding of fair use in *Time Inc. v. Bernard Geis Associates* was incorrect because the court ignored the copying's possible adverse impact on the market for the protected film; the defendants' reproduction and publication of selected frames might have prejudiced the copyrighted work's future sales, so it was not appropriate to find fair use.[330] The Supreme Court's recent treatment of fair use does not warrant that conclusion. Even if *Time* could show that the copying had an adverse impact on the value of its copyright (or even if the defendants could not rebut a presumption that its use had such an impact), in view of the fluidity of fair use analysis the court correctly concluded that the fair use equities favored the defendants.[331] Although the district court's statement that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy"[332] seems to be inconsistent with the Supreme Court's statement in *Nation Enterprises* that "[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public,"[333] the result in *Time Inc.* can be adequately defended under the fair use doctrine as interpreted by the Supreme Court. The doctrine is not distorted when it is applied to such facts and in the other situations which

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329. The Second Circuit's decision in Rosemont Enters., v. Random House, Inc., 366 F.2d 303 (1966), *cert. denied*, 385 U.S. 1009 (1967), is one of the earliest discussions of how the fair use doctrine reconciles copyright and free speech interests. An unauthorized biography quoted about 250 words from the 13,500 words contained in the plaintiff's articles, paraphrased another 80 words, and there were other instances of copying. The Second Circuit held that this was a fair use because, inter alia, "in balancing the equities . . . the public interest should prevail over the possible damage to the copyright owner." *Id.* at 309; *see also id.* at 311 (Lumbard, J., concurring). Some commentators have questioned this result because of the absence of a showing of need by defendants to copy so extensively. *See* 1 M. NIMMER, *supra* note 12, § 1.10[D], at 1-87 to -88; Denicola, *supra* note 2, at 294-95; Nimmer, *supra* note 2, at 1201-03. This was not, however, a bodily appropriation, and most of the materials defendants took were unprotectible facts about Howard Hughes. Fact or informational works are less protected than works of fiction so the scope of fair use is generally broader. *Nation Enters.*, 471 U.S. 582-83 (Brennan, J., dissenting).

330. 1 M. NIMMER, *supra* note 12, § 1.10[D], at 1-86 to -87; Denicola, *supra* note 2, at 307; Nimmer, *supra* note 2, at 1201.

331. *See* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 448 & nn.30-34 (1984); *id.* at 475-78 (Blackmun, J., dissenting); Walker, *supra* note 2, at 744-45.

332. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

333. 471 U.S. at 559.

are seen as appropriate cases for establishing a first amendment privilege because fair use is an expression of public policy favoring the dissemination of information.[334]

The defendants' use of the Zapruder film might arguably be characterized as commercial, although not unabashedly so,[335] and this tends to weigh against a finding of fair use.[336] Commercial motivation leads to a presumption of unfairness but it is not conclusive.[337] Most uses are for gain and the book was a serious explanation of a theory entitled to public consideration. The frames from the film—a factual work—were reproduced for the purpose of assisting readers to understand the author's explanation of the event.[338] The book educated its readers and it is doubtful that many people bought it because of the reproductions. Defendants were not selling the film to their readers. Rather, readers purchased the book because of the author's theory and explanation as supported in part through the copied frames.[339] This was copying for productive scholarly and histori-

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334. *Cf.* Raskind, *supra* note 325, at 603, 616; Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1495 and 1499 n.14 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). *Contra* Denicola, *supra* note 2, at 302-05, 307.

335. It may be too harsh to say that defendants' use was commercial. The sole motive of their use was not profit but they might have stood to gain from using the frames for free. It is, however, important to note that Geis Associates offered to pay *Life* a royalty equal to the profits from publication of the book in return for permission to use the frames. The offer was refused. 293 F. Supp. at 138. *See also* Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526, 1534-35 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148, 1153 (9th Cir. 1986).

336. 471 U.S. at 562; Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 449 & n.32, 455 n.40 (1984); Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (5th Cir. 1980).

337. 3 M. NIMMER, *supra* note 12, § 13.05[A][1], at 13-69 to -71; Walker, *supra* note 2, at 745-47; *see also* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 451 (1984); *Triangle Publications*, 626 F.2d at 1175; Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). The commercial or nonprofit character of the use factor in 17 U.S.C. § 107(1) (1982 & Supp. I 1983), while not conclusive, should be weighed along with the other factors. H. REP., *supra* note 26, at 66. Even though the *Sony* case treats commercial or profit-making uses as presumptively unfair, the Court recognizes that the presumption can be overcome by the other fair use factors. *See* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986).

338. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

339. Several of the relevant frames had been reproduced in full color in a special edition of *Life* magazine published on December 7, 1963. 293 F. Supp. at 134. It is likely that readers who wanted to learn more about the assassination would have been willing to see a movie using the film even after reading the defendant's book or looking at the photos in *Life*. *Cf.* Hustler Magazine, Inc. v. Moral Majority Inc., 796 F.2d 1148 (9th Cir. 1986) (Jerry Falwell's use of *Hustler*'s copyrighted parody ad was not solely to raise money, plus his organization was not selling that ad to his followers). *Contra* Denicola,

cal purposes rather than copying for the protected work's intrinsic purpose.[340] These several factors offset the defendants' commercial motive to some extent. Thus, a presumption of unfairness can be rebutted by the characteristics of the use.[341]

The second fair use factor—the nature of the copyrighted work—definitely favored the defendants.[342] The Zapruder film was copyrightable subject matter, but it was also a published fact work; a historical document containing the most important photographic evidence of many of the facts surrounding the Kennedy assassination.[343] This newsworthy, informational work that readily lent itself to productive uses was less protected than a purely creative work because the law generally recognizes a greater need to disseminate fact works.[344] Accordingly, the scope of permissible fair use is greater with such a work than in respect to a creative work like a painting or a studio photograph.[345]

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supra note 2, at 302.

340. *See* Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978); Wainwright Sec. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (fair use distinguishes between the true scholar and a chiseler who infringes for personal profit), *cert. denied,* 434 U.S. 1014 (1978); *see also Sony,* 464 U.S. at 478-79 (Blackmun, J., dissenting). The defendant's use resulted in some added benefit to the public beyond that produced by the first author's work. The Supreme Court's decision in *Sony* does not preclude consideration of the productive versus ordinary or intrinsic use factor. The fact the challenged use is arguably productive is simply one factor in fair use analysis. *Nation Enters.,* 471 U.S. at 561.

341. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986).

342. 17 U.S.C. § 107(2) (1982 & Supp. I 1983); *see also* Timberg, *supra* note 18, at 203-210 (courts have failed to probe adequately into the nature of the copyrighted material). *See generally* Walker, *supra* note 2, at 747-49.

343. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 131, 140-44 (S.D.N.Y. 1968); Gorman, *supra* note 302, at 1594.

344. *Nation Enters.,* 471 U.S. at 563; *id.* at 595 (1985) (Brennan, J., dissenting); Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting); Peckarsky v. American Broadcasting Co., 603 F. Supp. 699, 694 (D.D.C. 1984) (copyright provides only limited protection to news reports); Gorman, *supra* note 302, at 1599. The *Sony* majority mentioned that use of a news program may give rise to the fair use defense more readily than use of a motion picture. 464 U.S. at 455 n.40. A major limitation on this proposition is that expression cannot be expropriated in major amounts in order to recount facts when there are several ways to express that information.

345. Maxtone-Graham v. Burtchaell, 803 F.2d 1295, 1263 (2d Cir. 1986); Hoehling v. Universal City Studios, 618 F.2d 972, 974 (2d Cir.), *cert. denied,* 449 U.S. 841 (1980); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986) (discussed fair use with respect to surrealistic fine art photographs); Financial Information v. Moody's, Copyright L. Rep. (CCH) ¶ 25,617, at 18,765 (S.D.N.Y. 1984) (discussing fair use with respect to a compilation of factual matter); *see also* Consumers Union v. General Signal

The "amount and substantiality of the portion used" factor cut against the defendants to some extent. They did not reproduce the entire film and much of what they copied is not protectible,[346] but they did closely copy several of its most important frames. In absolute and qualitative terms the defendants copied a substantial portion of the plaintiff's copyrighted film.[347] This factor should not, however, weigh heavily against the defendants because, as already discussed,[348] careful reproduction of portions of this graphic, factual work was arguably necessary and appropriate for the explanation of defendant's theory.[349]

The fourth fair use factor—the effect of the use on the market—does not significantly undermine the fair use defense even though commercial uses of protected works are presumptively unfair and presumptively the cause of future economic harm.[350] Defendants were not selling the pictures as such nor were they publishing a magazine or producing a film derived from the Zapruder home movie.[351] Their use arguably was an insignificant threat to copyright incentives because it seems unlikely that *Time* would have attempted to take advantage of that activity. Still, the court might have been incorrect in stating that there was no competition between the parties and in discounting *Time*'s potential injury. At most, however, there was an insignif-

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Corp., 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). *Cf. Sony*, 464 U.S. at 455 n.40; 3 M. NIMMER, *supra* note 12, § 13.05[A][2], at 13-65; Gorman, *supra* note 302, at 1599-1600; TULANE Comment, *supra* note 2, at 146.

346. 293 F. Supp. at 139. Fair use usually does not apply when an entire work is reproduced and used for its original purpose with no added benefits to the public. *Sony*, 464 U.S. at 480 (Blackmun, J. dissenting).

347. Defendants reproduced parts of 22 frames out of the 480-frame film. Of the 480 frames, 140 deal with the immediate events of the shooting and 40 are relevant to the shots themselves. 293 F. Supp. at 133. The third fair use factor, 17 U.S.C. § 107(3) (1982 & Supp. I 1983), requires a qualitative as well as a quantitative evaluation of the portion used. 471 U.S. at 564-65; *see also id.* at 598 (Brennan, J., dissenting). The *Nation Enterprises* majority notes that a taking may not be excused merely because it is insubstantial with respect to the infringing work while Justice Brennan, in dissent, says that the statute directs inquiry to the portion used in relation to the plaintiff's work. *See also* Roy Export Co. v. Columbia Broadcasting Sys., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982); Walker, *supra* note 2, at 749-51; TULANE Comment, *supra* note 2, at 142-43.

348. *See supra* text accompanying notes 312-24.

349. *Haberman*, 626 F. Supp. at 202; Hustler Magazine, 796 F.2d at 1154-55; *Cf.* Peckarsky v. American Broadcasting Co., 603 F. Supp. 688, 694-95 (D.D.C. 1984) (use of plaintiff's work incidental to publication of ideas and news).

350. *Sony*, 464 U.S. at 461.

351. *See supra* text accompanying notes 335-41.

icant decrease in the value of the copyrighted work,[352] and this uncertain likelihood of future harm does not preclude a finding of fair use.[353] The copyright statute and its legislative history, as well as case law, show that the fair use defense can be used notwithstanding potential harm to the market value of the copyrighted work.[354]

Moreover, it is difficult to determine the cause of this uncertain harm to *Time*. Is it due to defendants' reproduction of copyrightable expression, or does it stem from their use of the unprotectible information disclosed in the copied frames? Copyright is concerned with the dissemination of ideas and information and this concern must be weighed in the fair use equation.[355] The law recognizes a need to disseminate fact works and the fair use doctrine allows the courts to avoid rigid application of the copyright law when it would stifle the very creativity it was designed to foster.[356] Although the extent to which protected expression may be copied so as to assure the dissemination of ideas and information varies from case to case, the fair use doctrine recognizes that there are situations when the copyright owner's interests should yield to copyright's paramount concern for the growth of learning and the creation of new

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352. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968). The court was not applying section 107 but the common law of fair use. It concluded that the effect of the use of *Time*'s future plans was speculative and that the defendants' activities would, if anything, enhance the value of the work. Arguably, it is safer to say that the effect on the market was de minimis. *See supra* notes 291-94 and accompanying text. *See also* Hustler Magazine, Inc. v. Moral Majority Inc., 606 F. Supp. 1526, 1539-40 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148, 1156 (9th Cir. 1986). *Cf.* Crowley, *supra* note 2, at 445. *Contra* Nimmer, *supra* note 2, at 1200-01; Denicola, *supra* note 2, at 302-03.

353. *Cf. Sony*, 464 U.S. at 451 (It is necessary to show by a preponderance of the evidence that some meaningful likelihood of future harm exists. However, if the intended use is primarily for commercial gain, that likelihood may be presumed.). *See also Hustler Magazine*, 796 F.2d at 1152-53. *Cf.* 464 U.S. at 481-82 (Blackmun, J., dissenting); *Haberman*, 626 F. Supp. at 202 (defendant established that its reproduction of plaintiff photos did not impair their marketability—his sales increased after the publication).

354. *See, e.g., Sony*, 464 U.S. at 447-56; Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). Note, however, that these decisions, along with *Time Inc.*, have been sharply criticized because the courts did not give sufficient weight to the potential injuries to the copyright owners and the resulting dilution of the law's economic incentive. *See, e.g., Sony*, 464 U.S. at 475-86 (Blackmun, J., dissenting). The critics seem to overlook the fact that the defense is intended to be elastic.

355. *See, e.g., Sony*, 464 U.S. at 454-56; *see also* Walker, *supra* note 2, at 754; WIS. Comment, *supra* note 2, at 1168-73.

356. *Nation Enterprises*, 471 U.S. at 563; *id.* at 595 (Brennan, J., dissenting); Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980). *Cf.* Bruzzone v. Miller Brewing Co., 202 U.S.P.Q. (BNA) 809, 812 (N.D. Cal. 1979).

works. Otherwise, the dissemination of ideas and information would be impaired and the very purpose of copyright frustrated.[357] Therefore, in view of the uncertain impact of the copying on the market for or value of the film, the fact that the frames had already been published, the factual nature of the work, and copyright's policy favoring the dissemination of ideas and information, it was reasonable for the court in *Time Inc.* to conclude that the fair use equities favored the defendants.[358]

C. *Accounting for the Public Interest*

The *Time Inc.* court stated that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."[359] This sort of statement need not be regarded as an implicit recognition of a public interest exception or first amendment privilege.[360] Rather, it is appropriate to regard this valid concern for the dissemination of facts, ideas and information as an important, noncodified factor in fair use analysis. This factor reflects copyright's ultimate aim, to promote creativity and the availability of literature, music and other arts for the general public good.[361]

"The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection . . .: 'To Promote the Progress of Science and the Useful Arts.' "[362] In order to serve this purpose while determining par-

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357. *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting) ("There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very Progress of Science and Useful Arts' that copyright is intended to promote."); H. REP., *supra* note 26, at 65. *Cf. Bruzzone*, 202 U.S.P.Q. (BNA) at 811 (market researcher's copying of five or six out of 720 frames from a television commercial held to be a fair use).

358. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

359. *Id.* Similar statements have been made in other decisions. *See, e.g.*, Consumers Union v. General Signal Corp., 724 F.2d 1044, 1055 (2d Cir. 1983); Hustler Magazine, Inc. v. Moral Majority Inc., 606 F. Supp. 1526 (C.D. Cal. 1985); Belushi v. Woodward, 223 U.S.P.Q. (BNA) 511, 512 (D.D.C. 1984); Keep Thomson Governor Comm. v. Citizens for Galen Comm., 457 F. Supp. 957, 959-60 (D.N.H. 1978).

360. *Contra* Nimmer, *supra* note 2, at 1196-1200; WISCONSIN Comment, *supra* note 2, at 1159; 1168-76 (arguing that when a court finds fair use due in part to the public interest in the dissemination of ideas and information it has implicitly based its decision on first amendment considerations).

361. *Sony*, 464 U.S. at 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979).

362. Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citing U.S. CONST. art. I., § 8); *Cf.* Pacific & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984), *cert. denied*, ___ U.S. ___

ticular claims of infringement, the courts must occasionally subordinate the author's interest in maximizing his financial return to copyright's paramount concern for fostering creativity and the development of the arts and sciences.[363] Courts should be wary about enforcing a copyright in a manner that curtails the dissemination and use of ideas, facts and information. Simultaneously, courts must endeavor to protect the copyright owner's property interest so that the law's incentive to create is maintained. The public has an interest in the creation and dissemination of new works of authorship as well as unfettered access to ideas, facts and information. The courts can effectuate copyright's objectives and, at the same time, protect first amendment interests by assessing all of these interests in determining whether a particular use is fair.[364]

This delicate balancing of competing interests leads to decisions which are consistent with free speech principles, but are not based on the first amendment. Since fair use is a substantive rule of copyright law, not a constitutional principle,[365] the balancing stems from copyright's internal structure and reflects copyright's accommodation of the tensions between creators of works of authorship and the public.[366] The Supreme Court stated in *Nation Enterprises* that it is at odds with the copyright scheme "to accord lesser rights in those works that are of

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(1985); *see also* Perlman & Rhinelander, *supra* note 4, at 403-10 (discussing the difficulty in accepting a first amendment justification for fair use).

363. Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Abrams, *supra* note 20, at 510.

364. Denicola, *supra* note 2, at 296 (court analyzed fair use factors); Walker, *supra* note 2, at 735-36 (fair use is a tool used to balance individual interests). For instance, in Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986), the trial court's discussion of first amendment considerations was unnecessary. *See id.* at 727. The court correctly recognized that there is no free speech defense to infringement, but it should have placed greater emphasis on the fact that Jerry Falwell's reproduction and use of *Hustler*'s parody ad constituted part of his criticism and commentary (recognized in section 107 as examples of fair uses) in connection with the parties' continuing debate about pornography. That focus would have facilitated the dissemination of ideas, fostered debate on social issues and thus served copyright and free speech interests simultaneously.

365. *Cf.* Denicola, *supra* note 2, at 299 (conclusion that fair use is a constitutional doctrine was unnecessary). *Contra* Rosenfield, *supra* note 2, at 791, 807 (concluding that fair use has a constitutional status).

366. *See generally* Denicola, *supra* note 2, at 296; Goldstein, *The Competitive Mandate: From* Sears *to* Lear, 59 CALIF. L. REV. 873 (1971). *Cf.* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429-29 (1984) (difficult to balance between author's and public's interest). These tensions are inherent in the law of intellectual property generally.

greatest importance to the public."[367] Weighing copyright's concern for the dissemination of ideas and information as part of fair use analysis is not inconsistent with that statement. The Court has recognized that it is difficult to determine whether particular subject matter is of public concern,[368] and it has acknowledged that copyright's incentives would be seriously damaged if any book worth reading could be freely copied in the name of the public interest.[369] Weighing copyright concerns for the dissemination of facts, ideas, and information does not require courts to evaluate the public interest in the subject matter of a particular work, nor does it raise the public interest to independent significance in fair use analysis.[370] Rather, this concern is a neutral consideration that is implicitly part of two of the codified factors: the nature of the copyrighted work and the amount and substantiality of the taking of protected expression in relation to the protected work as a whole.[371] It reflects the basic principle of the idea/expression dichotomy that copyright protects original expression, not facts, ideas and information.[372] That principle is at the heart of the copyright scheme, and it enables copyright to function as the engine of free expression.

Weighing the law's concern for the dissemination of ideas, facts and information into the fair use equation guarantees that findings of infringement are based on substantial takings of literary form and not on appropriations of unprotectible facts and ideas. Further, this approach will not result in unfettered access to all works deemed to be of public importance because courts will not make that subjective determination. All works, regardless of the importance of the topics they discuss, should be treated alike. Moreover, a court's fair use analysis will thus involve some continuing evaluation of determinations it already had to make prior to facing the defense: what is copyrightable in the plaintiff's work and what elements were copied by the defendant. This objective, content-neutral approach to fair use in-

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367. *Nation Enters.*, 471 U.S. at 559. *But see* Sobel, *supra* note 2, at 78-79; TULANE Comment, *supra* note 2, at 155-56.

368. *Cf.* TULANE Comment, *supra* note 2, at 154; Francione, *supra* note 90, at 548-49.

369. *Nation Enters.*, 471 U.S. at 559. *See also* Sobel, *supra* note 2, at 79; TULANE comment, *supra* note 2, at 155.

370. *See* TULANE Comment, *supra* note 2, at 154-56.

371. 17 U.S.C. § 107(2) & (3) (1982 & Supp. 1983).

372. *See supra* text accompanying notes 25-41; 17 U.S.C. § 102(b); *Nation Enters.*, 471 U.S. at 580-81 (Brennan, J., dissenting); Raskind, *supra* note 325, at 603, 616.

sures the dissemination of facts, ideas and information without having to weigh the public importance of, or the public interest in, the work expressing those unprotectible matters.

VI. Conclusion

Copyright and the first amendment are mutually supportive. The copyright scheme provides incentives for the creation of works of authorship and thereby encourages the development, dissemination and exchange of ideas. The judgment of the Constitution is that "free expression is enriched by protecting the creations of authors from exploitation by others . . . ."[373] Thus, copyright functions as the engine of free expression. It does not restrain the dissemination of ideas and information when it is applied in accordance with its established limitations.

Although copyright's goals of promoting the free use of ideas and encouraging authorship frequently collide, there is no sound justification for turning to the first amendment to resolve apparent conflicts between these competing interests because copyright law has the inherent capacity for their accommodation. That is the challenge of copyright: to strike the difficult balance between the interests of authors in exploiting their works and society's interest in the free flow of ideas and information. The Supreme Court's refusal to create a "public figure exception" in *Nation Enterprises* implicitly recognizes that the first amendment is not a license to trammel on an author's copyright regardless of the importance of the subject matter dealt with in the protected work. Reliance on the first amendment is not necessary because free speech protections are already embodied in copyright's distinction between protectible expression and uncopyrightable facts and ideas, as well as in the latitude for reporting, scholarship, comment and criticism traditionally afforded by fair use. These two established, internal limitations on copyright, codified at sections 102 and 107 of the Act, serve the goals of the Constitution's copyright clause, and limit the monopoly's application to a constitutionally permissible sphere.

373. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979).