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PATENTS, TRADEMARKS, AND COPYRIGHTS

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STUDIES 14–16

14. Fair Use of Copyrighted Works
15. Photoduplication of Copyrighted Material by Libraries
16. Limitations on Performing Rights

Printed for the use of the Committee on the Judiciary

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FOREWORD

This committee print is the fifth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statutes enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies relating to certain limitations on the scope of copyright: No. 14, "Fair Use of Copyrighted Works," by Alan Latman, formerly Special Adviser to the Copyright Office; No. 15, "Photoduplication of Copyrighted Material by Libraries," by Borge Varmer, Attorney-Adviser of the Copyright Office; and No. 16, "Limitations on Performing Rights," by Borge Varmer.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

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Librarian of Congress.

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STUDY NO. 14

FAIR USE OF COPYRIGHTED WORKS

By Alan Latman

March 1958

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FAIR USE OF COPYRIGHTED WORKS

I. Introduction

Section 1 of the copyright statute accords the proprietor of a copyright a number of exclusive rights. But unlike the patentee, the copyright owner does not enjoy the exclusive right to "use" his copyrighted work.[1] His exclusive rights include, among others, the right to print, publish, copy and vend the work; in other respects, the public may "use" the work. Such use includes not only intellectual and esthetic appreciation, but more concrete utilization as well. For example, there is no impediment to the use of a copyrighted form book in the development of the appropriate forms.[2]

In other areas, particularly where the copyrighted work is used in the production of a new work by the user, a potential conflict arises. The use may be of such a nature and extent as to impinge upon those exclusive rights which the copyright owner does enjoy. Thus, assimilation of the protected material into a new product may conflict with the owner's right to copy or publish. The courts have attempted to resolve this conflict through the introduction of a rule of reason. Where the circumstances render the appropriation a reasonable or "fair" use, the court will refuse to impose liability. Accordingly, one commentator has stated in a frequently-quoted definition that:

> Fair use may be defined as a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright.[3]

The courts have grappled with the problem of fair use without the aid of any specific statutory guide. The language of the statute has always been positive in granting exclusive rights, apparently admitting of no exceptions. In contrast, the statutes of most other countries have attempted to deal with at least some aspects of the problem.[4]

In view of the potential breadth of the problem of fair use, the scope of this study has been consciously limited. In particular, discussion of the peculiar problems facing libraries, chiefly with respect to requests from users for photocopies of copyrighted works,[5] has been minimized. This area is being reserved for specialized treatment. Also, limitations on the right of public performance are the subject of a separate study and will be mentioned only incidentally herein.

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[1] See Eichel v. Marcin, 241 Fed. 404, 410–411 (S.D.N.Y. 1913); Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165, 174 (S.D. Cal. 1955), *aff'd, sub nom.* Benny v. Loew's, Inc., 239 F. 2d 532 (9th Cir. 1956), *aff'd* by a 4–4 division of the Supreme Court, 356 U.S. 43 (1958). *Cf.* 35 U.S.C. § 154 which grants to patent owners "the right to exclude others from * * * using * * * the invention."

[2] American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D.N.Y. 1941). *Cf.* Brightley v. Littleton, 37 Fed. 103 (C.C.E.D. Pa. 1888).

[3] BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

[4] See IV, *infra.*

[5] This special problem of libraries is exemplified by the *Report of the Copyright Committee, United Kingdom Board of Trade*, Oct. 1952, pars. 43-53, and § 7 of the United Kingdom Copyright Act, 1956.

II. Present Law

The silence of the 1909 act on the question of fair use is consistent with prior history. There has apparently never been any specific statutory provision dealing with the question in the copyright law of the United States. At least one provision of the 1909 act has, however, had an indirect impact. Section 1(b) extends to the owner of a copyright in a literary work the exclusive right "to make any version thereof." This provision changes the prior case law under which a "bona fide abridgment" was permissible.[6] In general, however, the rationale underlying the fair use doctrine and the criteria for its application are discernible in a body of case law unaffected by legislative developments.

A. THEORETICAL BASES OF THE FAIR USE DOCTRINE

Fair use may be viewed from two standpoints. It may be considered a technical infringement which is nevertheless excused. On the other hand, it may be deemed a use falling outside the orbit of copyright protection and hence never an infringement at all. While this distinction has been said "to have no practical significance," [7] it may explain different usages of the expression "fair use." For example, the court in *Shipman* v. *R.K.O. Pictures, Inc.*,[8] stated that: "Fair use is defined as copying the theme or ideas rather than their expression." This definition is based on a concept of fair use as an appropriation of unprotected material.[9] Such concept is related to the view that fair use is the negation of infringement, rather than a privileged infringement. This usage is perhaps unorthodox in focusing upon a single inquiry, especially an inquiry which must be made in every infringement action. In other words, there may be no problem of determining the reasonable nature of a taking when nothing legally protectible has been taken.

This inquiry may, however, furnish a useful first step in the laborious weighing of factors characteristic of fair use analysis. Such was the procedure apparently used in a recent case involving the burlesque of a story, where the court stated:

> Burlesque may ordinarily take the locale, the theme, the setting, situation and even bare basic plots without infringement, since such matters are ordinarily not protectible.[10]

Appropriation of even protectible material must always be "substantial" to constitute infringement; thus a minimal amount of copying should perhaps always be considered "fair." It has been suggested that fair use simply represents an attempt by the courts "to bring some order out of the confusion surrounding the question of how much can be copied." [11]

Again, this approach may be directed to the question of infringement in general, rather than fair use in particular.[12] The question of the amount of material copied will be discussed below in conjunction

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[6] See Folsom v. Marsh, 9 Fed. Cas. 342, 343 No. 4,901. (C.C.D. Mass. 1841); AMDUR, COPYRIGHT LAW AND PRACTICE, 762 (1937).
[7] Cohen, "*Fair Use in the Law of Copyright*" ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 6, 43, 48 (1955).
[8] 100 F. 2d 533, 537 (2d Cir. 1938).
[9] *Cf.* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49 (2d Cir. 1936).
[10] Columbia Pictures Corp. v. NBC, 137 F. Supp. 348, 350 (S.D. Cal. 1955).
[11] Note, 14 NOTRE DAME LAW. 443, 449 (1939).
[12] See Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (2d Cir. 1938). *Cf.* Macmillan Co. v. King, 223 Fed. 862 (D. Mass. 1914).

with the other criteria of fair use.[13] It should be noted, however, that a broad underlying premise for the doctrine of fair use is supplied by the notions that: (1) the user has unlimited use of a great deal of unprotected material embodied in a copyrighted work; and (2) the user may, under any circumstances, copy an insignificant portion of protected material.

The doctrine of fair use goes beyond the boundaries set by these considerations. The amount of protected material freely available may be determined by many factors. One theory behind such permissible copying is the implied consent of the copyright owner. In many cases, duplication of portions of his works should be desired by the author for its beneficial effects.[14] These implications may be supported by express indications of the author's consent.[15] On the other hand, indications of a restrictive intent, such as a statement requiring consent for any quotations, undermine this theory.[16] In its place, there has been offered the theory of a consent enforced by the figurative bargain embodied in the securing of a statutory copyright.[17] In other words, as a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyrighted work to promote the ends of public welfare for which he was granted copyright. This concept has at least a surface harmony with the general assumption that the fair use doctrine does not apply to common law literary property.[18]

The theory of "enforced consent" suggests another rationale which relies more directly upon the constitutional purpose of copyright. It has often been stated that a certain degree of latitude for the users of copyrighted works is indispensable for the "Progress of Science and useful Arts." [19] Particularly in the case of scholarly works, step-by-step progress depends on a certain amount of borrowing, quotation and comment.[20]

Justification for a reasonable use of a copyrighted work is also said to be based on custom.[21] This would appear to be closely related to the theory of implied consent. It also reflects the relevance of custom to what is reasonable. In any event, it has been stated that fair use is such use as is "reasonable and customary." [22]

B. THE PROBLEM IN CONTEXT

The problem of fair use has so far been discussed in general terms. The defense of fair use has been raised most frequently in certain contexts. The more characteristic situations will be examined. It should be appreciated that the problem arises in other contexts and

[13] See II, C, *infra*.
[14] See *e.g.*, Karll v. Curtis Pub. Co., 39 F. Supp. 836 (E.D. Wis. 1941); G. Ricordi & Co. v. Mason, 201 Fed. 182, 183 (C.C.S.D.N.Y. 1911).
[15] See American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D.N.Y. 1941).
[16] See Yankwich, *What is Fair Use?* 22 U. of CHI. L. REV. 203, (1954) for the following illustrative legend: "All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews." Readers are often directed to the party from whom permission or information should be sought.
[17] Note, 15 SO. CALIF. L. REV. 249, 250 (1942).
[18] BALL, *op cit.* note 3 *supra*, at 260 n. 5; Golding v. Radio Pictures Inc., 193 P. 2d 153 (Cal., Dist. Ct. App. 1948). Perhaps the distinction is between published and unpublished works rather than works for which statutory protection has been obtained and those which are protected under the common law. See SHAW, LITERARY PROPERTY IN THE UNITED STATES 67 (1950). The test would be the applicability of the fair use doctrine to unpublished works registered under section 12 of the Federal copyright statute.
[19] See W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F. 2d 82, 89 (6th Cir. 1928); Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945).
[20] See Mathews Conveyor Co. v. Palmer-Bee Co. 135 F. 2d 73 (6th Cir. 1943).
[21] Note, 15 SO. CALIF. REV. 249, 250 (1942).
[22] Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934).

is, in a sense, inherent in much copyright infringement litigation. However, the wide range of situations would seem to be but variations of the basic conflict between the copyright owner anxious for exclusive rights and the user who, for one reason or another, denies that his use of the copyrighted material infringes upon such rights. Examination of the cases will reveal the various criteria of fair use and how they interact.

1. Incidental use

Section 1(b) of the copyright statute grants the exclusive right to make any new version of a literary work and to arrange and adapt a musical work. These rights are sufficiently broad to include a change in the medium of expression of copyrighted material. Thus, it has been held that a television comedy may not copy substantially from a serious motion picture.[23] But a different situation is presented where a reasonable amount of material is used incidentally and as background in an entirely different class of work. Such an appropriation may be considered a fair use. This is best illustrated by the use of excerpts from the lyrics of a copyrighted song in the course of a literary production. The courts have been reluctant to impose liability in such a case.[24] The incidental nature of such use, and its inability to compete with the copyrighted work have produced a finding of fair use.

The absence of music may preclude impairment of the value of the plaintiff's musical composition; it has been so held where portions of the lyrics were used as background for the action in a short story,[25] or in connection with a magazine article about the professional football team on which the song was based.[26] Similarly, a finding of fair use was made even where half of the magazine comment on the death of an actress consisted of extracts from the copyrighted song associated with her.[27] But a contrary result was reached where all the lyrics as well as the melody line of plaintiff's song were included in a narrative history of popular songs in the United States.[28]

Thus, the use of extracts from copyrighted material for illustrative purposes, or merely as a vehicle for an entirely different and noncompeting work, would seem permissible.[29] Reproduction of musical material for the "amateur performer" is not within such immunity.[30]

The fortuitous inclusion of copyrighted material in newsreels or news broadcasts represents an incidental use which has given rise to several legislative proposals. These will be discussed below.

2. Review and criticism

Discussions of fair use often begin with the question of quotation from a work for the purposes of criticism and review. It is universally agreed that "in reviewing a copyrighted work, or in criticising it,

[23] Benny v. Loew's Inc., 239 F. 2d 532 (9th Cir. 1956), *cert. granted*, 353 U.S. 946 (1957).
[24] Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., note 22, *supra*; Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817 (S.D.N.Y. 1940); Karll v. Curtis Pub. Co., 39 F. Supp. 836 (E.D. Wis. 1941).
[25] Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., note 22, *supra*.
[26] Karll v. Curtis Pub. Co., note 24, *supra*.
[27] Broadway Music Corp. v. F-R Pub. Corp., note 24, *supra*.
[28] Sayers v. Spaeth, Copyright Office Bulletin No. 20 at 625 (S.D.N.Y. 1932).
[29] *Cf.* Green v. Minzenheimer, 177 Fed. 286 (C.C.S.D.N.Y. 1909).
[30] Sayers v. Spaeth, note 28, *supra*.

quotations may be taken therefrom." [31] Thus it has been recently stated:

> Criticism is an important and proper exercise of fair use. Reviews by so-called critics may quote extensively for the purpose of illustration and comment.[32]

It is interesting to note that there is apparently no reported American decision involving alleged infringement in the course of serious criticism. This may be due to the self-restraint on the part of the critics and the desire on the part of authors and publishers to encourage reviews of their works—reasons suggested for the decline in libel litigation involving the cognate doctrine of fair comment.[33]

3. Parody and burlesque

There have been half a dozen American cases dealing with parody, mimicry, and burlesque. These may be considered a humorous type of criticism; but the element of criticism is often absent from burlesque, leaving humor as the only aim.[34] The current importance of the problem of parody as fair use in indicated by the fact that the Supreme Court recently granted certiorari in *Columbia Broadcasting System* v. *Loew's, Inc.*, in which the court, without discussing the issues in its opinion, divided four to four.[35]

The key issue would seem to be the extent, if any, to which the general tests of fair use are to be modified in this area. The early case of *Bloom & Hamlin* v. *Nixon*,[36] indicates that the parody feature is quite significant. The court there stated:

> Surely a parody would not infringe the copyright of the work parodied merely because a few lines of the original might be textually reproduced.

While it is not entirely clear that this was held to be so because of the nature of a parody, the court did find that "the good faith of such mimicry is an essential element." Liability was denied on the ground that the use of plaintiff's song was merely incidental to the mimicry of the singer, and not a subterfuge by which to reproduce copyrighted material.

In the well-known *Mutt and Jeff* case,[37] the court apparently assimilated the parody to serious criticism and use of copyrighted material in general. Perhaps because the comic strip was itself humorous, the court found that the defendant's parody constituted a "partial satisfaction of the demand" for the parodied work and accordingly amounted to an infringement.

Recent litigation in the California Federal courts indicates that the interaction between motion pictures and television has heightened the problems posed by parodies and burlesques. In *Loew's Inc.* v. *CBS, Inc.*[38] Jack Benny's television parody of the motion picture "Gaslight" was under attack. It was clear that the taking was substantial. In a comprehensive and analytical opinion, District Judge Carter noted that "parodized or burlesqued taking is treated no dif-

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[31] AMDUR, *op. cit.* note 5, *supra* at 757.
[32] Loew's, Inc. v. CBS, Inc., 131 F. Supp. at 175.
[33] Ford, *Fair Comment in Literary Criticism*, 14 NOTRE DAME LAW. 270 (1939). For an historical discussion of this area, see Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130 (1955).
[34] See Foley, "*Copyright-Burlesque of Literary Property as Infringement of Copyright*," 31 NOTRE DAME LAW. 46, 48 (1955).
[35] 356 U.S. 43 (1958). Justice Douglas took no part in the decision.
[36] 125 Fed. 977, 978 (C.C.E.D. Pa. 1903).
[37] Hill v. Whalen & Martell, Inc., 220 Fed. 359 (S.D.N.Y. 1914).
[38] 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom* Benny v. Loew's Inc., 239 F. 2d 532 (9th Cir. 1956), *aff'd* by a 4–4 division of the Supreme Court, 356 U.S. 43 (1958).

ferently from any other appropriation." [39] In finding for the plaintiff, the court held that the change in mode of expression from serious to comic did not preclude infringement. The court also found that the defendent's commercial use of plaintiff's material was directed to a competing entertainment field, although he concluded that reduction in demand for the original, stressed in the *Mutt and Jeff* case, was not essential. This result was affirmed by the Court of Appeals for the Ninth Circuit which emphasized that "wholesale copying" can never be fair use, not even where the treatment of the material is inverted by means of burlesque.[40]

Even more recently, Judge Carter has had before him what he labeled as "the reverse or counterpart" of the *Loew's* case. In *Columbia Pictures Corp.*, v. *NBC*,[41] he found that Sid Ceasar's television burlesque of "From Here to Eternity" did not infringe the copyright of that motion picture. This was so notwithstanding the similarities beyond theme, situation, setting and basic plot. In reaching this result, Judge Carter seems to have modified the *Loew's* approach He permitted use of an incident, some small part of the development of the story and even "possibly some small amount of dialogue," emphasizing that the burlesquer should be permitted "to bring about this recalling or conjuring up of the original." [42] The court adopted as a conclusion of law the statement that—

> the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque than in the creation of other fictional or dramatic works not intended as a burlesque.[43]

The subsequent 4 to 4 decision of the Supreme Court in the *Loew's* case indicates the uncertainty that exists regarding this problem.

4. Scholarly works and compilations

The conflict between the right to "use" and the right to publish or copy is sharply presented in the area of scholarly works; this area includes such fields as science,[44] law,[45] medicine,[46] history [47] and biography.[48] Research is the foundation of such works. And research has flippantly been defined as "plagiarism from two or more sources." [49] One court suggested that—

> with reference to works in regard to the arts and sciences, using those words in the broadest sense * * * authors are sometimes entitled, indeed *required* to make use of what precedes them in the precise form in which last exhibited. * * * [50] [Emphasis added.]

The decisions in the field of scholarly works, as well as those concerning compilations, do present special problems by reason of the identity of subject matter covered by groups of works.[51] It may be that the character of a work—as a scientific work, parody, etc.—is an extremely significant factor.[52] In any event, the decisions in

[39] 131 F. Supp. 177.
[40] 239 F. 2d 536, 537.
[41] 137 F. Supp. 348 (S.D. Cal. 1955).
[42] *Id.* at 350.
[43] *Id.* at 354.
[44] Simms v. Stanton, 75 Fed. 6 (C.C.N.D. Cal. 1896).
[45] Callaghan v. Myers, 128 U.S. 617 (1888).
[46] Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938).
[47] Eisenschiml v. Fawcett Publications, Inc., 240 F. 2d 598 (7th Cir. 1957).
[48] Toksvig v. Bruce Pub. Co., 181 F. 2d 664 (7th Cir. 1950).
[49] Pilpel, "But Can You Do That?," Publishers Weekly, Aug. 26, 1957, p. 33.
[50] Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539, 541 (1st Cir. 1905).
[51] Lipton, *The Extent of Copyright Protection for Law Books*, SECOND COPYRIGHT LAW SYMPOSIUM 11 (1940).
[52] See Thompson v. Gernsback, 94 F. Supp. 453 (S.D.N.Y. 1950).

the lawbook field, for example, have accurately been characterized by a recent court as "somewhat confusing." [53] Despite this confusion, it may be that the basic issue in each case is whether an earlier work has been collaterally used or substantially copied as well.

A law digester may "use" the citations of cases found in an earlier encyclopedia.[54] Since use of citations properly consists of reading and independently analyzing the cases, unauthorized copying cannot be said to take place even if the defendant's published list of cases is identical to the plaintiff's.[55] If the two works are mere compilations of cases, a different rule apparently obtains; even the verification of the original list will not shield the user from liability.[56]

The citations of an earlier work may be used as a check on the later work. But the copying of such material as headnotes cannot be justified as fair use, even in the case of treatises, encyclopedias, or texts.[57]

The latitude permitted scholars in quoting material from earlier works does not extend to the use of a scholarly work for nonscholarly purposes. Thus, in *Henry Holt & Co.*, v. *Liggett & Myers Tobacco Co.*,[58] three sentences from the plaintiff's scientific treatise were used in an advertising pamphlet to enhance the sale of the defendant's product. The court held that defendant's use was not for the scientific purposes for which plaintiff's consent might be implied. Similarly, the publishers of Sexology magazine met difficulties in attempting to convince the court of the scientific nature of the magazine so as to justify use of "the identical words of earlier books or writings dealing with the same subject matter." [59]

When material from a compilation of facts, names, or other information is used for the purpose of preparing a rival compilation, it is often difficult to avoid mere copying. The courts have permitted a very limited use of such material as a source [60] or means of verification.[61] But the use of earlier material as a check upon the completeness or accuracy of the user's work must be followed by a bona fide independent recanvass.[62] And in any event, independent effort, such as the exercise of judgment in the selection of material, must be expended.[63] Mere verification of the original material is insufficient.[64]

5. Personal or private use

Although the case law is apparently silent on the point, at least one writer has concluded that "anyone may copy copyrighted materials for the purposes of private study and review." [65] It has, moreover, been vigorously argued that "private use is completely outside

[53] Loew's, Inc. v. Columbia Broadcasting System, Inc., note 38, *supra*, 131 F. Supp. 175.
[54] Edward Thompson Co. v. American Law Book Co., 122 Fed. 922 (2d Cir. 1903).
[55] White v. Bender, 185 Fed. 921 (C.C.N.D.N.Y. 1911).
[56] W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F. 2d 82 (6th Cir. 1928).
[57] Callaghan v. Myers, 128 U.S. 617 (1888); West Pub. Co. v. Lawyers' Cooperative Pub. Co., 79 Fed. 756 (2d Cir. 1897).
[58] 23 F. Supp. 302 (E.D. Pa. 1938).
[59] Thompson v. Gernsback, 94 F. Supp. 453 (S.D.N.Y. 1950).
[60] See Social Register Ass'n v. Murphy, 128 Fed. 116 (C.C.D.R.I. 1904). In West Pub. Co. v. Edward Thompson Co., 169 Fed. 833, 853, (C.C.E.D.N.Y. 1909) *mod. and aff'd.*, 176 Fed. 833, (2d Cir. 1910) the court characterized cases involving maps and directories as depending "more upon the idea of unfair use, and the unlawful saving of labor in order to avoid the necessary original research than upon the appropriation of any literary ideas or arrangement, based upon literary ability and studied plan." *Cf.* Conde Nast Publications, Inc., v. Vogue School of Fashion Modeling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952).
[61] Dun v. Lumbermen's Credit Ass'n, 144 Fed. 83 (7th Cir. 1906).
[62] Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 Fed. 332 (C.C.D. Conn. 1906).
[63] List Pub. Co. v. Keller, 30 Fed. 772 (C.C.S.D.N.Y. 1887). *Cf.* Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83 (2d Cir. 1922).
[64] Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1st Cir. 1905).
[65] Cohen, *op cit.*, note 7, *supra* at 58.

the scope and intent of restriction by copyright." [66] It is difficult to assess the effect of the absence of litigation in this area. It may reflect acquiescence on the part of copyright owners to copying by scholars for their own use. That such acquiescence is not complete is indicated by attempts to regulate, by agreement, the role of libraries in supplying copies to scholars.[67] The increasing use of photoduplication processes will undoubtedly require continuing attention to this area. For the purposes of the present study, it may be observed that the categorical statements set forth above can neither be supported nor attacked on the basis of authority. It may well be, however, that the purpose and nature of a private use, and in some cases the small amount taken, might lead a court to apply the general principles of fair use in such a way as to deny liability.

6. News

The strong public policy in favor of the wide dissemination of news might conveniently be furthered by an expanded concept of fair use with respect to news items. As will be demonstrated below, this approach has been taken by many foreign countries and has been proposed in several attempts at legislative revision in this country. The present U.S. law, however, does not seem to have developed any special rules pertaining to the fair use of news articles. The incidents and facts embodied in news items cannot, of course, be subject to copyright protection.[68] News as such is not copyrightable.[69] But the literary aspect of a news article is entitled to protection and direct quotation or copying of the words or arrangement of the article entails the usual risks, notwithstanding the wider circulation of news achieved by the copying.

The appropriation of a copyrighted news article was directly involved in *Chicago Record-Herald Co.* v. *Tribune Association*. The court characterized the defendant's article as follows:

> It presents the essential facts of that [plaintiff's] article in the vary garb wherein the author clothed them, together with some of his deductions and comments thereon in his precise words, and all with the same evident purpose of attractively and effectively serving them to the reading public.[70]

Whether or not such a commercial purpose actuated the defendant in *New York Tribune, Inc.* v. *Otis & Co.*,[71] was one of the inquiries bearing on the defense of fair use which the court there reserved for full trial. The defendant in *New York Tribune* had photostated an entire editorial dealing with the presidential campaign. Questions insufficiently illuminated on motion included the number of copies distributed by the defendant, his intent, and the effect of his publication on the distribution of plaintiff's work.

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[66] Shaw, "*Publication and Distribution of Scientific Literature*," 17 College and Research Libraries 294, 301 (1956).

[67] See "Gentlemen's Agreement" between Joint Committee on the Reproduction of Materials for Research and the National Association of Book Publishers, set forth and discussed in 1 Journal of Documentary Reproduction 29 (1939); Smith, "The Copying of Literary Property in Library Collections," 46 Law Lib. Journal 197 (1953); 47 Law Lib. Journal 204 (1954).
The British have made similar arrangements. See The Royal Society Information Services Committee, "Fair Copying Declaration and List of Publishing Organizations Subscribing to It". (June 1950).

[68] *Cf.* Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (2d Cir. 1938).

[69] See Chicago Record-Herald Co. v. Tribune Ass'n, 275 Fed. 797, (7th Cir. 1921). Relief for unfair competition arising out of the appropriation of news was recognized in the famous case of International News Service v. Associated Press, 248 U.S. 215 (1918).

[70] 275 Fed. 799 (7th Cir. 1921).

[71] 39 F. Supp. 67 (S.D.N.Y. 1941).

7. Use in litigation

No cases have been found involving the permissibility of direct quotation or other use of copyrighted material in judicial or administrative opinions or by lawyers in briefs or otherwise in connection with pending litigation. It would seem that great latitude would be accorded such use. In the absence of reported decisions or records of controversy, the extent of this use cannot be delineated.

8. Use for nonprofit or governmental purposes

In *New York Tribune, Inc.* v. *Otis & Co.*,[72] it was indicated that a commercial motive on the part of the defendant would bear unfavorably upon the defense of fair use. Judge Carter in the *Jack Benny* case [73] analyzed "the impact of commercial gain or profit" even further and concluded that: (1) "in the field of science and the fine arts, we find a broad scope given to fair use"; (2) "As we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists we find the scope of *fair use* is narrowed but still exists"; and (3) the writer of a scholarly work "does not invite or consent to its use for commercial gain alone." [74]

It would seem to follow from Judge Carter's analysis that where the commercial element is completely absent, a finding of fair use is strongly indicated. In *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.*,[75] where the defendant was a nonprofit organization but engaged in commercial activities to raise funds for its expenses, the court rejected the defense of fair use. The infringing use of plaintiff's musical composition consisted of a broadcast of about one-third of the work during the course of a sustaining program of a radio station operated by a nonprofit corporation. The court held that the philanthropic and educational aims of the corporation did not prevent the broadcast from constituting a "public performance for profit" within the meaning of section 1(e) of the act; significant to this holding was the fact that the corporation sought immediate, if not ultimate, commercial gain by allocating one-third of the available time to commercial advertisers. In passing, however, the district court did take note of the fact that the defendants did not contend "that the corporation is a public or charitable institution."[76] The court found the fair use defense to "require little consideration."[77] In affirming, the Court of Appeals stated:

> There can be no doubt that the portion of the plaintiff's composition which was broadcast which amounted to about a quarter of his entire work and was reproduced to aid in building up a listening audience does not come within the definition of "fair use."[78]

The *Associated Music* case may demonstrate the difficulty in establishing the absence of any commercial motive. On the other hand, it may indicate that a finding of fair use will not be compelled by the fact that the defendant seeks no profit from its operation. Undoubtedly, this is but one illustration that generally no single factor will determine whether a use is fair or unfair.

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[72] 39 F. Supp. 67 (S.D.N.Y. 1941).
[73] Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's, Inc., 239 F. 2d 532 (9th Cir. 1956), *cert. granted*, 353 U.S. 946 (1957).
[74] 131 F. Supp. at 175.
[75] Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir. 1944).
[76] 46 F. Supp. 830.
[77] *Id.* at 831.
[78] 141 F. 2d at 855.

Where the Government is the user of copyrighted material, a different situation is presented. There is considerable doubt whether the Government is liable for copyright infringement.[79] Again, this is, strictly speaking, a situation governed by considerations other than fair use.[80] But immunity of the Government in this area has frequently been associated with the immunity of the members of the public who make a reasonable use of a copyrighted work. For example, a wartime legislative proposal [81] authorized the Librarian of Congress to make copies of copyrighted works for the purpose of furnishing such copies not only to high Government officials, but also:

> (3) To any person * * * upon his certification that he cannot otherwise obtain the material and that he desires it for the purpose of private study, research, criticism, review, demonstration, litigation, comment, newspaper summary, or fair use as recognized by the courts * * *.

It should be noted that this proposal (which did not become law) prescribed that the making of copies by the Librarian of Congress shall not constitute infringment. In the absence of such legislation, the Librarian might be personally liable, since the sovereign immunity of the Government in this area has been held not to shield individual Government employees committing the unauthorized copying.[82] It should further be noted that the proposal specifically recognized that subsequent use of the material furnished by the Librarian might constitute infringment. Although not entirely clear, it would seem that such subsequent use might constitute infringement even if within the governmental purposes or the purposes quoted above.

C. ANALYSIS OF THE CRITERIA OF FAIR USE

The cases examined above support the conclusion that fair use is not a predictable area of copyright law. One writer has characterized this situation as follows:

> There is one proposition about fair use about which there is widespread agreement: it is not easy to decide what is and what is not a fair use.[83]

The conflicting results possible in this area are graphically illustrated by two cases involving the same plaintiff, court, and year. In *Green* v. *Minzenheimer* [84] and *Green* v. *Luby*,[85] the court found factual differences upon which to distinguish two imitations or parodies of plaintiff's song. These differences do not present any clear guide to the disposition of future litigation. This situation is understandable in any inquiry dependent upon a concept of reasonableness.

The reluctance of courts to rule on the defense of fair use prior to trial has already been illustrated in *New York Tribune Inc.* v. *Otis & Co.*[86] Accordingly, "fair use is to be determined by examination of all the evidence." [87] Once determined, one appellate court treated it as a "question of fact" which the court was reluctant to reexamine.[88]

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[79] 101 Cong. Rec. 7894, 84th Cong., 1st Sess. (1955). *Cf.* H.R. 8419, 85th Cong. (1957) which would expressly impose liability on the Government.

[80] One writer points out that the normal rules of fair use should shield many Governmental uses, even without reliance on sovereign immunity. Stiefel, *Piracy in High Places—Government Publications*, ASCAP, *COPYRIGHT LAW SYMPOSIUM, No.* 8, 3 at 9 (1957).

[81] S. 2039, 78th Cong., 2d Sess. (1944).

[82] Towle v. Ross, 32 F. Supp. 125 (D. Ore. 1940) H.R. 8419, 85th Cong. (1957) would make the government liable rather than the individual employee.

[83] Cohen, *op. cit.*, note 7, *supra*, at 52.

[84] 177 Fed. 286 (C.C.S.D.N.Y. 1909).

[85] 177 Fed. 287 (C.C.S.D.N.Y. 1909).

[86] See p. 11, *supra*; *cf.* Winwar v. Time, Inc., 83 F. Supp. 629 (S.D.N.Y. 1949).

[87] See Mathews Conveyer Co. v. Palmer-Bee Co., 135 F. 2d 73 (6th Cir. 1943).

[88] Eisenschiml v. Fawcett Publications, Inc., 240 F. 2d 598 (7th Cir. 1957). A different view was expressed in 56 COLUM. L. REV. 585 (1956) at 593 n. 37, where it was concluded that: "The question of fair use should be decided by the court, as a *question of law*." [Emphasis added.]

It has been suggested that:

> The cases indicate that there are eight elements which the courts consider; any one of the eight may, in a particular case, be decisive. These factors are: (1) the type of use involved; (2) the intent with which it was made; (3) its effect on the original work; (4) the amount of the user's labor involved; (5) the benefit gained by him; (6) the nature of the works involved; (7) the amount of material used; and (8) its relative value.[89]

Perhaps more basic are the oft-quoted criteria set forth by Mr. Justice Story in *Folsom* v. *Marsh* as:

> the objects of the selections made, the quantity and value of the materials used and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[90]

Judge Yankwich found that Story's criteria have been the basis of American case law. He restates the decisive elements as follows:

> (1) the quantity and importance of the portion taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication.[91]

It has been noted above that the nature of the works involved has been suggested as one factor in determining fair use. This factor might explain what appears to be a stricter rule in the case of compilations than in more scholarly works. Whether special significance attaches to the nature of a work as a parody is involved in the *Loew's* and *Columbia* cases. But Judge Yankwich finds that with respect to the diverse publications which have been the subject of litigation, there has been "uniform application of the principles of 'fair use.' " [92]

Sufficient has been said to emphasize the factual niceties of fair use determinations. Accordingly, it is believed that for purposes of analysis, the criteria of fair use may conveniently be distilled even further, without danger of oversimplification. In fact, the tests may perhaps be summarized by: importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use? At times, custom or public policy defines what is reasonable.

It is well within the bounds of reasonableness for the copyright owner to consider important a use which competes with his own work. A use having such an effect undermines the very basis of his quasi-monopolistic protection. Thus, the court stated in the *Mutt and Jeff* case:

> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced will materially reduce the demand for the original.[93]

The courts have apparently been prepared to anticipate such a harmful effect; the copyright owner is protected not only against a use having an unfavorable competitive effect,[94] but also a use with a competitive purpose or potential. Thus, in *Shapiro, Bernstein & Co.*, v. *P. F. Collier & Son Co.*,[95] the following tests were set forth:

> * * * The extent and relative value of the extracts; *the purpose and whether the quoted portions might be used as a substitute for the original work*; the effect upon the distribution and objects of the original work. [Emphasis added.]

[89] Cohen, *op. cit.*, note 7, *supra*, at 53.
[90] 9 Fed. Cas. 348. See note 6, *supra*.
[91] *Op. cit.*, note 16, *supra*, at 213.
[92] *Id.* at 212.
[93] Hill v. Whalen & Martell, Inc., 220 Fed. 359, 360 (S.D.N.Y. 1914).
[94] Social Register Ass'n v. Murphy, 128 Fed. 116 (C.C.D.R.I. 1904). *Cf.* Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 Fed. 332 (C.C.D. Conn. 1906).
[95] 26 U.S.P.Q. 40, 43 (S.D.N.Y. 1934).

In the *Loew's* case, the competitive element was broadly construed. Judge Carter held that the plaintiff need not establish that the defendant's work reduced the demand for the plaintiff's; yet his emphasis on the commercial nature of the defendant's work has already been noted. In this connection Judge Carter had concluded that "the taking was for commercial gain for use in a competing entertainment field." [96]

A curious commentary on the importance of competition is reflected by *Henry Holt & Co.*, v. *Liggett & Myers Tobacco Co.*, where an extract from the plaintiff's scientific work was used in defendant's advertisement; such use was held to be an infringement. The dissimilarity between the nature of the plaintiff's work and defendant's use appears to have been a crucial consideration.[97] Presumably, had the defendant used plaintiff's work in a competing scientific work, fair use might have been established. It thus appears in the field of scholarly works, the effect of "competition" is mitigated. Scholarly works in any particular field may in a sense compete with one another; but this does not prevent such use of earlier materials as is sanctioned by traditions of research and dictated by the strong policy in favor of encouraging a steady flow of such works.

The importance to the copyright owner of a use made without his express consent also depends on the extent of the material taken and its value,[98] considered in connection with either the copyrighted work or the user's work. Thus, where the material taken constitutes a large part of the plaintiff's work, the use is unreasonable.[99] Of course, in determining the amount of material taken, there is presumably a distinction between the minimal amount which under no circumstances could constitute infringement and the slightly larger quantity which, in conjunction with other factors, amounts to fair use.[100] This distinction is not always clear in the case law.

The significance of material is determined by many factors. In the *Shapiro, Bernstein* case, the court upheld as fair use the reproduction of "some more or less disconnected 'snatches' or quotations from the words of the song." There were apparently three reasons why such material was not considered significant. (1) The amount was small; [101] (2) the quotations were disconnected; and (3) the material consisted of only words and not the music. More recently, qualitative analysis was made of the defendant's use in a 20-second commercial of a melodic obligato from plaintiff's song. The court held that copying of "that portion of plaintiff's song upon which its popular appeal, and hence, its commercial success depended * * *" was not shielded by the doctrine of fair use.[102]

Inquiry into the importance of the material to the defendant's work was made in the *Henry Holt* case discussed above. The material there copied constituted only three sentences from an extensive treatise by the plaintiff, but represented about one-twentieth of the

[96] 131 F. Supp. 182-83. See College Entrance Book Co. v. Amsco Book Co., 119 F. 2d 874, 876 (2d Cir. 1941) wherein the Court of Appeals, in reversing the district court, emphasized that both works "met exactly the same demand on the same market."

[97] *Cf.* Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1st Cir. 1905).

[98] In Folsom v. Marsh, 9 Fed. Cas. 342, 348, No. 4901, Justice Story emphasized the importance of the "value" of an extract rather than its "quantity."

[99] Leon v. Pac. Tel. & Tel. Co., 91 F. 2d 484 (9th Cir. 1938). *Cf.* Benny v. Loew's, 239 F. 2d 532 (9th Cir. 1956), *cert. granted*, 353 U.S. 946 (1957).

[100] See p. 30, *infra*.

[101] *Cf.* Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F. 2d 852 (2d Cir. 1944).

[102] Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795 (S.D. Cal. 1956).

defendant's advertising pamphlet. The court found that the matter copied was sufficiently substantial to overcome the threshold argument against a finding of infringement. Presumably, this consideration influenced the court in finding that fair use had not been established.

It might seem that the appropriation of a large amount of material would constitute an unreasonable use, notwithstanding the nature of the material or other circumstances. This view was strongly expressed in *Leon* v. *Pacific Telephone & Telegraph Co.*,[103] where defendant rearranged the order of listings in plaintiff's telephone directory from alphabetical arrangement of names of subscribers to consecutive listings of telephone numbers. The court stated:

> Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.

This dictum was relied upon heavily by the court of appeals in the *Loew's* case.[104]

Had the reported progress of *New York Tribune, Inc.* v. *Otis & Co.*, gone further, it might have furnished the "authority" not available at the time of the *Leon* case. The defendant there had photostated an entire editorial. The court, in denying the defendant's motions to dismiss and for summary judgment, apparently considered the issue of fair use an open one to be determined by "consideration of all the evidence in the case." Inasmuch as the court was not considering a motion on the plaintiff's behalf, its failure to rule out the possibility of a fair use defense may not contradict the *Leon* dictum. Yet, some question as to the sweep of the dictum may be raised by *Broadway Music Corp.* v. *F–R Pub. Corp.*,[105] wherein words from the plaintiff's copyrighted song constituted about half of the lines in the defendant's magazine article.

The state of mind of the user, ordinarily immaterial to the determination of infringement,[106] has been considered relevant to the question of fair use.[107] It was stated in the early case of *Lawrence* v. *Dana*,[108] that "evidence of innocent intention may have a bearing upon the question of 'fair use'." "Innocent intention" in this context has been roughly equated with "good faith."[109] The court in the *Broadway Music* case found the absence of an "intent to commit an infringement" to "go to fill out the whole picture."

In the *New York Tribune* case, the intent of the defendant to use the plaintiff's editorial in a noncommercial manner apparently would have been a significant factor. But this suggests that the purpose of a work or the intention to compete may be more crucial than the overall intention of a defendant to infringe or not to infringe. Similarly, the acknowledgment of source would merely reveal an intent to refrain from plagiarism—using another's material *as one's own*—rather than an intent to keep the use within reasonable bounds.

Acknowledgment itself presents an interesting situation. It is ordinarily assumed that credit to the source is a factor which reflects

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[103] 91 F. 2d 484, 486 (9th Cir. 1938).
[104] See note 40, *supra*. *Cf.* Sayers v. Spaeth, Copyright Office Bulletin, No. 20 at 625 (S.D.N.Y. 1932).
[105] 31 F. Supp. 817 (S.D.N.Y. 1940).
[106] See Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198 (1931).
[107] See Peck, *Copyright Infringement of Literary Works*, 38 MARQ. L. REV. 180, 187 (1955).
[108] 15 Fed. Cas. 26, 60 Case No. 8, 136, (C.C.D. Mass. 1869)
[109] Cohen, *op. cit.*, note 7 *supra*, at 60.

favorably upon the user as it helps "to fill out the whole picture." [110] Nevertheless, acknowledgment can have contrary implications. Thus, one court said of crediting the author:

> Far from there being any exculpatory virtue in this, it would tend rather to convey to the reading public the false impression that authority to appropriate the extracts from the copyrighted article had been duly secured by the offending publisher.[111]

In any event, it is clear that acknowledgment, in itself, is not sufficient to insure fair use and preclude infringement.[112]

III. Proposals for Legislative Revisions Since 1909

The omission of any mention of fair use in the 1909 act was not inadvertent. At the hearings leading to the act, the Librarian of Congress indicated that the question, "What is fair use?" was not answered by the bill which "leaves to the courts to determine the meaning and extent of terms already construed by the courts." [113] Similarly, the Senate Committee on Patents reported in 1907 that the bill—

> is not, however, an attempt to codify the common law. Questions such as that of what is a "fair use" of copyrighted matter, and what is an "infringement," it leaves still to the courts.[114]

This approach was recently suggested by the representative of the book publishers who felt that the judicial doctrine of fair use was preferable to a "for profit" limitation on the performing right of nondramatic literary works.[115] However, the statutory silence of the 1909 act was not followed in most of the major reform bills since 1909. Rather, there was proposed a wide variety of fair use provisions ranging from a single short sentence in the Sirovich bills to the extensive provisions of the Dallinger and Shotwell bills.

A. DALLINGER BILLS, 1924

The first Dallinger bill [116] proposed immunity for fair use and related situations, section 27 providing for six exemptions from infringement. Most of these were patterned after the British Copyright Act of 1911.[117] (1) The bill broadly exempted "any fair use of any work for the purpose of study, research, criticism, or review." (2) The author of an artistic work retained the right to use models, sketches, etc., even where he did not own the copyright in the work; but such limited right did not authorize him to "repeat or imitate the main design or scope of that work." (3) Permanently exhibited works of art could be freely copied, and sketches or drawings of works of architecture could be made as long as they were not in the nature of architectural plans or drawings. (4) Short passages from published literary works might be included in a collection mainly of noncopyrighted material intended for school use. The educational purpose was to be indicated

[110] See Warren v. White & Wyckoff Mfg. Co., 39 F. 2d 922, 923 (S.D.N.Y. 1930).
[111] Chicago Record-Herald Co. v. Tribune Ass'n., 275 Fed. 797, 799 (7th Cir. 1921).
[112] See Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938); Sayers v Spaeth, Copyright Office Bulletin, No. 20 at 625 (S.D.N.Y. 1932).
[113] *Hearings Before Committee on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess., at 15 (June 1906).
[114] S. REP. No. 6187, 59th Cong., 2d Sess (1907).
[115] *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 5589*, 82d Cong., 1st Sess., 36–37 (1951).
[116] H.R. 8177, 68th Cong., 1st Sess. (1924).
[117] 1 & 2 GEO. 5 c. 46 §2 (1911).

and the source acknowledged. This provision was inapplicable to passages from works which were themselves published for school use, and permitted the use of only two passages from the same author within a 5-year period. (5) Excluded from infringement was "The reading or recitation in public by one person of any reasonable extract of any published work." (6) A limited right to reproduce news articles, patterned upon Article 9 of the Berne Convention, was also proposed. Permitted was the—

> reproduction by another newspaper of any newspaper article other than serial or other stories and tales, unless the reproduction thereof is expressly forbidden, provided the source of said article is stated in connection with such reproduction.

In addition, section 28 authorized a newspaper report of a public address.

These provisions seem to embody three general themes. First, scholarly and peculiarly educational use of copyrighted material was accorded special concessions. Second, reporting and borrowing among newspapers of new items was facilitated. Third, performing rights and artistic reproduction rights of copyright owners were curtailed.

It will be noted, however, that the proposals failed to resolve many of the questions traditionally left to the courts in this area. Thus, subsection 1 of section 27 exempted "fair use" for scholarly or critical purposes, but no definition of "fair use" was supplied. And the educational exemption of subsection (4) was limited to "short passages." Similarly, the right to public recitation by someone other than the copyright owner was limited to a "reasonable extract" of the copyright work.

The second Dallinger bill [118] limited significantly the public reading exemption of subsection (5). This use could be made only of nondramatic works and was permitted only where the public reading or recitation was not for profit.

B. VESTAL BILLS, 1931

The Perkins bills[119] apparently contained no provisions concerning fair use. Neither did the first versions of the Vestal bills,[120] including H.R. 12549 which was passed by the House in the 71st Congress. But in the following session an amended version[121] and its companion bill in the Senate [122] took an interesting approach to the problem of fair use. They engrafted provisos directly upon the general grant of copyright in section 4, which insured that "nothing in this Act shall prevent the fair use of quotations from copyright matter." Both bills permitted such fair use only in the absence of an express prohibition by the copyright owner. And credit was required by the Senate bill where the use was by radio for profit, and by the House bill in every case.

C. SIROVICH AND DILL BILLS, 1932

The provisions of the Sirovich bills probably modified the effect of the silence in the Perkins bills only by an absolute requirement of

[118] H.R. 9137, 68th Cong., 1st Sess. (1924).
[119] H.R. 11258 and S. 4355, 68th Cong., 2d Sess. (1925), and H.R. 5841, 69th Cong., 1st Sess. (1925).
[120] H.R. 10434, 69th Cong., 1st Sess. (1926), H.R. 8912, 70th Cong., 1st Sess. (1928), H.R. 6990, 71st Cong., 2d Sess. (1929), and H.R. 12549, 71st Cong., 2d Sess. (1930).
[121] H.R. 139, 72d Cong., 1st Sess. (1931).
[122] Hebert bill, S 176, 72d Cong., 1st Sess. (1931).

acknowledgement. Thus, section 11 of the first and second Sirovich bills [123] contained the provision that:

> None of the remedies given to the copyright owner by this Act shall be deemed to apply to—(f) the fair use of quotations from copyright matter provided credit is given to the copyright owner.

The third Sirovich bill [124] introduced the addition of the words "or the work quoted" to the end of subsection, and this modification was retained in all the later versions [125] of the bill.

The Dill bill [126] hedged the privilege of fair use with a further condition and would seem to represent a dilution of the privilege as defined by the courts. Section 2 provided that:

> Nothing in this Act shall prevent the fair use of quotations from copyright matter, *unless the copyright owner by notice affixed, has expressly prohibited such quotations from the copyrighted work in whole or in part,* but whenever such quotations are printed or reproduced by radio for profit, credit shall be given to the source. [Emphasis added.]

D. THE DUFFY, DALY, AND SIROVICH BILLS, 1935–37

The original Duffy bill,[127] introduced in 1935, incorporated the substance of the provisions of the earlier Sirovich bills by granting immunity to "the fair use of quotations;" and a requirement of "due credit" was imposed. This provision was deleted in later versions.[128] But the Duffy bills also contained some innovations in U.S. fair-use proposals. For example, section 17g (4) of S. 3047 [129] exempted from liability the performances of a copyrighted musical work for charitable, religious, or educational purposes as well as:

> The merely incidental and not reasonably avoidable inclusion of a copyrighted work in a motion picture or broadcast depicting or relating current events.

The Daly bill [130] was silent as to fair use, but the Sirovich bill of 1936 [131] maintained the exemption for performances for charitable purposes, as well as the brief statement as to "fair use of quotations" found in the earlier Sirovich bills. Section 26 also exempted from infringement "the publication of a photograph as an item of public or general interest in the dissemination of news."

Hearings were held on the Duffy, Daly, and Sirovich bills in 1936.[132] The subsection of the Duffy bill quoted above came under attack by the American Society of Composers, Authors & Publishers. Its extensive brief included the following criticism of the provision:

> There is no reason why exhibitors and distributors of newsreels should be permitted to make a profit from the use of copyrighted material without payment.
>
> There is nothing to prevent an unscrupulous broadcaster from broadcasting an entire show as a current event. This could be done by merely coupling the performance with a broadcast of current news events.[133]

On the other hand, the National Association of Broadcasters favored the provision, arguing that the violation of the copyright

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[123] H.R. 10364 and H.R. 10740, 72d Cong., 1st Sess. (1932).
[124] H.R. 10976, 72d Cong., 1st Sess. (1932).
[125] H.R. 11948, H.R. 12094, and H.R. 12425, 72d Cong., 1st Sess. (1932).
[126] S. 3985, 72d Cong., 1st Sess. (1932).
[127] S. 2465, 74th Cong., 1st Sess. (1935).
[128] S. 3047, H.R. 8557, 74th Cong., 1st Sess. (1935) and S. 7, H.R. 2695 and H.R. 3004, 75th Cong., 1st Sess. (1937).
[129] 74th Cong., 1st Sess. (1935).
[130] H.R. 10632, 74th Cong., 2d Sess. (1936).
[131] H.R. 11420, 74th Cong., 2d Sess. (1936).
[132] *Hearings Before the House Committee on Patents*, 74th Cong., 2d Sess. (1936).
[133] *Id.* at 122.

was merely technical and the damage, minimal. The broadcasters argued further that "important considerations of public policy" dictated unrestricted continuation of—

> one of radio's greatest contributions to civilization * * * the instantaneous communication of public events to the public throughout the world.[134]

The representative of the motion picture producers characterized this provision as a very salutary contribution. It was suggested on behalf of the producers that the exemption should not be limited to the depiction of current events, but should extend to all subject matter where the infringement was "incidental and not reasonably avoidable." This extension was deemed necessary by reason of the filming of pictures out of doors and possible inclusion of a work of art in the scene.[135]

The debates on this controversial provision became more extended in the course of the Shotwell meetings.

E. SHOTWELL (THOMAS) BILL, 1940

The Shotwell Committee considered the wide range of problems broadly associated with the question of fair use. These problems occupied a good deal of the time of the Committee. They ranged from the special problems of the scholar to appropriate limitations on performing rights.

In addition to the provisions which ultimately appeared in the Thomas bill to be noted below, three proposals in the preliminary "Ware draft"[136] version of the bill deserve mention. This draft contained a provision[137] which, like subsection 26(6) of the Dallinger bill, was patterned after article 9(2) of the Berne Convention; it granted a qualified right of reproduction in the press with respect to articles of public interest. This provision was short lived as was subsection 18(c) which permitted the nonprofit exhibition of certain motion picture films.

Of longer endurance was a provision protecting "fair dealing" for "the purpose of private study, research, review or newspaper summary." [138] In the course of the discussions on this section, the radio broadcasters sought to delete the word "private" on the ground that "study and research as well as criticism and review are intended for the public and not merely for private edification." It was accordingly urged that "the research should not be limited to private research either as to sponsorship or its dissemination." [139]

The entire section was deleted after the Joint Committee on Materials for Research, apparently considering the position of the scholar more favorable under the case law, convinced all other interested groups except the book publishers that the attempt to codify the doctrine of fair use had been unsuccessful.[140]

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[134] *Id.* at 478.
[135] *Id.* at 1020.
[136] Ware Preliminary Draft dated April 7–12, 1939, 2 Shotwell Papers 226 (1939). The memoranda, minutes and proposals as collected and paginated in the U.S. Copyright Office are referred to herein as "Shotwell Papers".
[137] *Id.* at 24, 2 Shotwell Papers 248 (1939).
[138] *Id.* at 26, 2 Shotwell Papers 250 (1939).
[139] Memorandum, June 22, 1939, p. 12, 3 Shotwell Papers 289 (1939).
[140] Memorandum, October 16, 1939, p. 9, 4 Shotwell Papers, 11 (1939–1941). The committee reported, "The attempt in Subdivision (f) to codify the doctrine of fair use was not successful and should be abandoned."

Section 12 of the bill as actually introduced by Senator Thomas [141] took several different approaches to the question of fair use and covered a number of controversial situations. The provisions of subsections (f), (g), and (h) gave permission for translation incident to private study and research as well as for reproduction of single copies by libraries of unpublished or unavailable works needed for study or research.

These subsections were drafted by a subcommittee on scholarship [142] and embodied to some extent the proposals of the Joint Committee on Materials for Research.[143] The Joint Committee had emphasized the needs of the scholar at the outset of the proceedings.[144]

The general attitude of the Joint Committee is to be contrasted with that of the book publishers who charged that "professors and teachers are the chief pirates of literary matter." [145] Moreover, the authors had emphasized the question of limiting the scope of the protected class of "scholars," as well as the permissible number of copies; they also stressed the plight of authors whose writings were primarily intended for libraries and scholars.[146] And Dr. Shotwell acknowledged the possibility of overprotecting the scholar by noting that "the scholar is, in his use of * * * reproductive processes, taking the position of a quasi-publisher." [147]

Subsection (h), which permitted libraries to make single copies of works unavailable to scholars and researchers, was highly controversial. ASCAP compared it with compulsory licenses for recorded music and questioned its constitutionality.[148] The Authors League urged greater restrictions to preclude libraries from engaging in the publishing business "under the guise of scholarship." [149] The motion picture industry feared that the basic concept of this provision might spread to the field of motion pictures.[150] On the other hand, the Joint Committee apparently felt that the provision did not go far enough since it did not cover privately printed copyrighted books.[151] It should be noted that subsection (h) provided for the creation of a trust fund in the U.S. Treasury consisting of payments made by libraries for the reproduction of books which were out of print and unavailable.

The incidental infringement provisions consisted of an extension of the Duffy bill approach. Immunity was granted by subsection (b) to infringement in the course of simultaneous news reporting from the location in question; as in the Duffy bill, the excused infringement had to be "not reasonably avoidable." In addition, the view of the motion picture industry representative at the Duffy hearings [152] was apparently adopted in subsection (d) which permitted the inclusion of "a work of art visible from a public place" in a photograph, motion picture, or television broadcast.

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[141] S. 3043, 76th Cong., 3d Sess. (1940).
[142] Ware Preliminary Draft, Note, p. 27, 2 Shotwell Papers 251 (1939).
[143] Minutes of Meeting of Committee for the Study of Copyright (hereinafter, "Minutes") March 2, 1939, 12, 2 Shotwell Papers 65 (1939).
[144] Memorandum, July 15, 1938, 1 Shotwell Papers 18–20 (1938–1939).
[145] Minutes, Nov. 3, 1938, p. 42, 1 Shotwell Papers 169 (1938–1939).
[146] *Id.* at 39, 1 Shotwell Papers 166 (1938–1939).
[147] *Id.* at 37, 1 Shotwell Papers 164 (1938–1939).
[148] Minutes, Nov. 21, 1938, pp. 16, 17, 1 Shotwell Papers 269–70 (1938–1939).
Id. at 15, 1 Shotwell Papers 268 (1938–1939). See also Comparison of the Drafted Proposals of the ious Interested Groups prepared by Edward Sargoy, dated Nov. 16, 1938, at 17, 18, 1 Shotwell Papers 241 (1938–1939).
Minutes, Mar. 2, 1939, p. 14, 2 Shotwell Papers 67 (1939).
Id. at 13, 2 Shotwell Papers 66 (1939).
See note 135, *supra.*

Subsection (b) was the subject of considerable discussion, analysis, and controversy. ASCAP originally sought to limit application of the proposal to "events of a patriotic or political nature." [153] Concern was expressed over the use of the clause under consideration "for the purpose of infringing copyrighted works under the guise of depicting public events." [154] At a later stage, however, the Society took the position that the entire subsection should be eliminated because there was—

> no reason why broadcasters and motion picture producers should be permitted to profit from the use of the property of copyright owners unless the consent of such owners is secured in advance.[155]

ASCAP was prepared to "have the courts pass upon the question as to whether the use is a fair one." [156]

On the other hand, the broadcasters and motion picture producers were proponents of the measure, insisting that they were confronted with the insuperable problem of "clearing" the use of the copyrighted music which might be played at a football game or a parade.[157] In commenting on the final draft of the bill, the framers explained that the immunity was to be limited to cases in which "permission of the copyright owner could not have been obtained in advance with the use of reasonable diligence." [158] And the broadcasters agreed to limit the exemption to cases in which the broadcasters received "no direct compensation." [159]

The special immunity granted in subsection (d) with respect to works of art, though supported by music publishers and libraries,[160] was sharply criticized by the songwriters as—

> destroying copyright on works of art, since any public exhibition of a work of art would immediately remove copyright protection by permitting photographs to be taken and distributed.[161]

The motion picture industry was willing to qualify the immunity with the requirement that the use be "not for profit." [162] The book publishers also were of the opinion that the provision was too loosely drawn.[163]

Subsection (c), like subsection (d), was designed to "safeguard the taking of pictures of works of art and architecture when visible from a public place."[164] Subsection (c) permitted all representations of an architectural work as long as they "are not in the nature of architectural models, designs, or plans." The copyright owner was in any event precluded from enjoining the completion or use of an in-infringing building.

Subsection (a) complemented the limitation of musical performing rights to public performance for profit, found in section 1(e) of the Thomas bill. The remedies of the act were withheld in the case of a performance by a "bona fide charitable, religious, or educational

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[153] Minutes, June 13, 1939, p. 17, 3 Shotwell Papers 153 (1939).
[154] *Ibid.*
[155] Memorandum, June 20, 1939, p. 1, 3 Shotwell Papers 225 (1939).
[156] *Ibid.*
[157] *Id.* at 5–7, 3 Shotwell Papers 141–143 (1939).
[158] Notes and comments on the Draft of December, 1939, p. 11, 4 Shotwell Papers 240 (1939–1941).
[159] Outline of changes in the Copyright Law Proposed by Broadcasters and Prepared for the Committee on the Study of Copyright, November 1, 1939, 1 Shotwell Papers 123e–123f (1938–1939).
[160] Collected Comments Upon Sections of Copyright Bill Still on the Agenda, November 10, 1939, p. 6b, 4 Shotwell Papers 99 (1939–1941).
[161] Memorandum, June, 1939, p. 5, 3 Shotwell Papers 265 (1939).
[162] See note 160, *supra.*
[163] *Ibid.*
[164] Notes and Comments on the Draft of December, 1939, p. 12, 4 Shotwell Papers 241 (1939–1941).

organization." Two provisos were attached. The entire net proceeds had to be devoted exclusively to charitable, religious, or educational purposes and no part of the proceeds could inure to the private benefit of a promoter. The second proviso was criticized as undermining the entire effect of the immunity;[165] the book publishers, however, insisted on its inclusion.[166]

It might seem that this immunity is narrower than the general concept of a performance "not for profit." On the other hand, the proposal might conceivably excuse certain radio broadcasts which the courts had held were "for profit." In any event, the broadcasters strongly favored this provision, while the authors opposed it.

The Shotwell provisions concerning fair use were elaborate and varied. They may perhaps be grouped under four general headings. (1) The needs of scholarship were recognized in subsections (f), (g), and (h). (2) For somewhat different reasons, broadcasters and televisors were permitted by section (e) to record their programs for private file and reference purposes. (3) Certain incidental infringements were excused by subsections (b) and (d). (4) The rights of the owners of copyrights in musical compositions and architectural works were specifically limited by subsections (a) and (c) so as to sanction certain uses of such works.

IV. Laws of Foreign Countries[167]

Most of the nations having copyright laws have enacted specific provisions concerning fair use. Many of these provisions are extensive and intricate. They often make specific mention of the different classes of copyrighted material open to use. The conditions and qualifications relating to fair use are often specified in some detail. Brief examination will be made of such limiting factors as the purpose or type of the use, the length of quotations and the requirement of acknowledgement, with attention being given to variations among different classes of work. Following this, a more detailed examination of the United Kingdom Act of 1956 will be made in order to afford an integrated picture of a single statute containing relatively extensive fair use provisions. Finally, pertinent provisions of international conventions will be noted.

A. Purpose or Type of Use

The most characteristic fair use provision sanctions limited use of copyrighted material for educational, scientific, or similar purposes including criticism and discussion. The privilege of using extracts for the purposes of criticism and review is frequently permitted by express provision. Representative provisions are found in the statutes of Brazil (art. 666(V)); Denmark (§ 13); France (art. 41); India (§ 52); Italy (art. 70); Lebanon (art. 149); Netherlands (art. 16); Rumania (art. 14); the United Kingdom (§ 6); and other British Commonwealth nations.[168]

[165] Memorandum, October 16, 1939, p. 9, 4 Shotwell Papers 22 (1939-1941).
[166] See note 160, *supra*, at 6, 4 Shotwell Papers 97 (1939-1941).
[167] The statutes of foreign countries are translated in COPYRIGHT LAWS AND TREATIES OF THE WORLD (1956) which collection, including its 1957 supplement, is the basis for the discussion of all the foreign laws except the recent statutes of France (Law No. 57-298), India (Law No. 14 of 1957) and the United Kingdom (3 & 4 ELIZ. 2, C. 74).
[168] *E.g.*, Canada §17.

The particular purposes or types of work entitled to the privilege are not uniform. Article 41 of the French law of 1957 contains fairly broad specifications; permitted are:

> Analyses and brief quotations justified by the critical, polemical, pedagogical, scientific, or informational character of the work in which they are incorporated.

Even broader is the provision of the Portuguese law which includes publications for "religious or recreational" purposes as well as the more usual "teaching, scientific, literary, artistic" purposes.[169] The designation of "literary" purpose, repeated in various other statutes,[170] might seem sufficiently broad; the addition of "recreational" renders it difficult to imagine a purpose not covered.

Additional uses and purposes specified in statutes embellish the general theme. For example, the Chinese law includes "reference purposes," [171] while the law of Japan permits quotations "to provide for the aims of a book of ethics." [172] The law of Argentina permits the publication of a photographic portrait for "cultural purposes" generally as well as in connection with events of public interest.[173] And compilations and anthologies are frequently granted certain immunities.[174]

The charitable purpose or nonprofit character of a use are sometimes considered significant, but usually in connection with the privilege of performing a work publicly. Thus, the law of Denmark permits the performance of a musical composition not only in connection with teaching but during "popular meetings and * * * festivals" where there is no admission fee or element of private gain. Public performance is also permitted:

> when the proceeds are devoted exclusively to charity or to other purposes of public benefit, provided the performers do not receive any payment.[175]

Private or personal use is sanctioned explicitly by more than 20 countries. Many statutes use the terms "private use" or "personal use." [176] Others take a more indirect or limited approach. Thus the law of Brazil permits "the hand making of a copy of any work, provided that such copy is not intended for sale." [177] These provisions presumably sanction reproduction of the entire work.

B. THE AMOUNT OF MATERIAL

A number of statutes prescribe, to various degrees of specificity, the amount of material which may be used freely by persons other than the copyright owner. Such a restriction is ordinarily imposed in conjunction with other limitations. This is not universally true, however. Under the German law, for example, "single passages or minor portions" of a published literary work may be used in any "independent literary work." [178]

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[169] Art. 19.
[170] *E.g.*, Panamanian law. Article 1924 of the Administrative Code specifies "a definite literary purpose." The law of Chile permits reproduction of recitations and short extracts in "scientific, *literary* or critical works at public lectures or in educational texts." (Art. 11) [Emphasis added.] But such use must be "solely for the purpose of explaining the text of the work."
[171] Art. 24(1).
[172] Art. 30(3).
[173] Art. 31.
[174] *E.g.*, Guatemala, Art. 17.
[175] §14(h).
[176] *E.g.*, France (Art. 41, 2); Sweden (§10, subdivision 1); Austria (§42(1)); Turkey, Art. 38.
[177] Art. 666 (VI).
[178] §19, 1.

Several statutes set specific quantitative limits on the amount of material which may be taken. Thus, the law of Argentina specifies as a limitation "not more than one thousand words from literary or scientific works, or not more than eight bars from musical works." [179] Such material must, in any case, be "indispensable" for the achievement of the enumerated purpose for which such use may be made. One thousand words and four bars of music are prescribed in the statute of Colombia.[180] The law of Sweden limits certain uses to 1 printed page of a literary work [181] and 30 bars of music which cannot exceed one-twentieth of the new collection.[182] And in the Ukraine, elaborate limitations are imposed, with distinctions in the number of "printed characters" based on the length or nature of the literary work; one-quarter of a page is the limit with respect to a musical score and one reproduction with respect to a work of the fine arts.[183]

More frequent are more general statements of the permissible quantity. For example, the Czechoslovakian law mentions "fragments," and "inclusions * * * within reasonable limits." [184] The law of Denmark speaks of "single published brief poems or musical compositions or single passages extracted from published works." [185] Other limitations include "brief extracts" (Egypt, art. 17,1), "brief sections" (Finland, art. 17), "brief portions" (Norway, sec. 9,1), "isolated portions" (Switzerland, art. 26(c)(2)), and "a few sentences" (Turkey, art. 35,1).

C. OTHER CONDITIONS

In many situations where quotations and other use of copyrighted materials are authorized by statute, a requirement that the source be acknowledged is imposed. This condition is found in the statutes of several dozen countries, at least with respect to certain uses. Some statutes insist upon indication of both the author and the source. Thus, the French law requires mention of both and clearly indicates that this is a condition of quotation, reviews, parodies, or dissemination of public speeches.[186] Other statutes, such as that of Sweden, require only the name of the author.[187] Some statutes provide more generally for a "clear indication of source." [188] Section 6 of the United Kingdom Act of 1956 defines its requirement of "sufficient acknowledgement" to include the title or description of the work and, in most cases, the name of the author.

There are a number of statutes which condition the right to copy material upon the absence of an express reservation of rights by the copyright owner. These apply most frequently to the use of newspaper and periodical articles and are often accompanied by a requirement that the source be acknowledged. Characteristic are the statutes of Belgium (art. 14), Columbia (art. 21), Germany (sec. 18), Mexico (art. 7), and Switzerland (art. 25,4).

The absence of a notice by the copyright owner is also a condition in Finland with respect to architectural drawings; [189] in Iran with

[179] Art. 10.
[180] Art. 15.
[181] § 11(3).
[182] § 12(2).
[183] § 9(3).
[184] § 17(c), (d).
[185] § 14(a).
[186] Art. 41, 3.
[187] § 13.
[188] *E.g.*, Chile (Art. 11); Germany (§ 25).
[189] § 17, 8.

respect to the first compilation of the works of a deceased author;[190] in Hungary with respect to photogfaphs of press interest;[191] and in the U.S.S.R. with respect to architectural works, exhibition of any works, and the use of literary matter as a text for a musical work.[192]

Another condition imposed in some countries is noninterference with the moral right of the author. In other words, the reproduction must be faithful. Thus, in the Swedish law [193] and the new Mexican statute,[194] the reproduced texts may not be "altered." And the provision of the German law authorizing reproduction of news items in the absence of an express prohibition [195] predicates such authorization on the condition that the reprint "does not distort the sense of the article."

D. THE UNITED KINGDOM ACT OF 1956

Section 6 of the new British copyright statute, sets forth "general exceptions from protection of literary, dramatic, and musical works." This clause is the heart of "fair dealing," an area in which great interest had developed in the preparation of the new law. Section 7 enacts special exceptions respecting libraries and archives. As indicated earlier, this specialized area will not be covered extensively in this study.

Section 6 exempts from infringement "fair dealing" for the purposes of (1) research and private study, (2) criticism or review, and (3) conveying news of current events to the public. The uses described in (2) must be accompanied by "sufficient acknowledgement." Subsection (3) applies to broadcasts and news reels as well as newspapers and magazines; with respect to the latter group, acknowledgement is also required.

Subsection (4) of section 6 permits reproduction "for the purposes of a judicial proceeding or for the purposes of a report of a judicial proceeding." This immunity is apparently absolute and is not by its terms limited to "fair dealing" with the copyrighted material for the purposes enumerated.

Subsection (5) limits performing rights by permitting the public reading or recitation under certain conditions. The permitted reading must be (*a*) by only one person, (*b*) of a "reasonable extract," and (*c*) not for the purposes of broadcasting.

An elaborate provision permitting the inclusion of a short passage from a copyrighted work in a collection of mainly noncopyright material intended for school use is found in subsection (6). This provision does not apply to copyrighted works which themselves were published for school use and does not authorize any publisher to use more than two excerpts from the works of any one author during a 5-year period. In addition, the educational purpose of the work must be clearly indicated by the publisher who must make sufficient acknowledgment in connection with the passage. The similarity between this provision and the section of the Dallinger bills discussed above is not surprising; both were patterned after subsection 2(1)(iv) of the British Act of 1911.

[190] Art. 246, 3.
[191] § 71, 9.
[192] § 9.
[193] §§ 11, 12.
[194] Art. 15 (c).
[195] § 18.

Section 6 also grants broadcasters the right to make recordings for their internal use in connection with an authorized broadcast. Restriction upon this right insures that the permission applies only to "ephemeral" recordings.

Section 6 does not contain the only group of provisions covering fair use. Section 9 enacts fair dealing provisions with respect to artistic works. Thus, artistic works are treated in similar fashion to literary, dramatic, and musical works with respect to "fair dealing" for the purposes of private study, research, criticism, and review. In addition, permanent public exhibition of an artistic work entitles the public to paint, draw, photograph, film or televise the work, a right accorded also in connection with architectural works. Artistic works may also be reproduced for the purposes of a judicial proceeding or in its report, and may be included in a motion picture or telecast by way of background or incidental use. In addition, a limited use of studies, sketches, molds, and the like, is reserved to the originator of a work, even if he no longer enjoys its copyright.

Section 41 contains special provisions concerning certain uses in schools. It thus is a counterpart to section 6(6) which permits inclusion of passages from copyrighted works for publications designed for school use. Section 41 deals with uses other than by such publications. In rather complex provisions, the section permits the reproduction of the work "in the course of instruction" and performance for a school audience. The provisions are hedged with limitations and exceptions.

It will be noted that the use of the term "fair dealing" in several different contexts recognizes and perpetuates a good deal of judicial interpretation on the scope of the pertinent privileges. The imprecision of the term was recognized in the parliamentary debates on the bill. The Lord Chancellor observed that:

> So far as I know, the term [fair dealing] has never been defined in the courts. Obviously, it is difficult to determine.[196]

It is apparent, however, that the provisions of the new British Act were intended to expand the scope of fair dealing. The report of the Copyright Committee of the Board of Trade indicates several respects in which the wording of the 1911 act was being modified so as to expend the scope of fair dealing. For example, the privilege of the critic was expanded to cover use of a work other than that under review.[197] Similarly, the right of summary enjoyed by newspapers was extended to radio and television broadcasts and motion picture newsreels. And in the House of Lords Committee discussion, it was stated that:

> It is obviously desirable that the clause which protects fair dealing with literary and dramatic and musical works, should not be narrowly confined * * *.[198]

The view that authors' rights should not be eroded through expansive fair dealing provisions was voiced by Viscount Hailsham in the parliamentary debates. Against an attempt to add a broad authorization of fair dealing with material in certain publicly supported schools,

[196] Hansard, *Parliamentary Debates*, House of Lords, November 29, 1955 at 912.
[197] Paragraph 41.
[198] *Parliamentary Debates*, House of Commons, Standing Committee B, at 160 (June 28, 1956).

he argued that an author ought not be penalized for the adaptability of his work for educational purposes.[199] He urged that:

> As public authorities we should set an example in fair treatment of artists, composers and authors.[200]

Section 41 of the Act apparently represents a compromise on this issue.

Whether or not the British Act achieved fairness and effectiveness cannot yet be determined fully. Nevertheless, it represents an elaborate attempt to deal with the problem of fair use by statute, while permitting a substantial measure of judicial flexibility.

E. INTERNATIONAL CONVENTIONS

It has already been noted that article 9 of the Berne Convention recognizes the right, in the absence of express prohibition, to reproduce certain newspaper articles. Such articles must be on current economic, political, and religious topics. Article 10(1) also sanctions short quotations from newspaper articles and periodicals. Related provisions are found in the Pan-American multilateral conventions. Thus the privilege to reproduce or extract from newspapers, periodical literature or other material of current interest is covered by the Montevideo Convention (art. 7 and 8); the Mexico City Convention (art. 8 and 10); the Buenos Aires Convention (art. 11); and the Washington Convention (art. 62).

The Berne Convention expressly reserves for domestic legislation provision for the right to reproduce speeches, lectures, etc.[201] and make certain uses of extracts of other works for press purposes [202] and for the right to include excerpts of literary works in educational or scientific publications, or in chrestomathies, insofar as this inclusion is justified by its purpose.[203] The latter right is expressly recognized by the Mexico City [204] and Buenos Aires [205] Conventions. The latter provides:

> The reproduction of extracts from literary or artistic publications for the purpose of instruction or chrestomathy does not confer any right of property, and may, therefore, be freely made in all the signatory countries.

The Washington Convention is slightly broader in this connection; article 12 provides:

> The reproduction of brief extracts of literary, scientific, and artistic works in pedagogical or scientific works, in chrestomathies, or for the purposes of literary criticism or of research shall be permitted, provided such extracts are reproduced exactly and that their sources are indicated in unmistakable manner.

V. Analysis: The Issues Underlying Fair Use and Their Possible Legislative Resolution

The foregoing indicates that the concept of fair use is potentially coextensive with the question of infringement. Employing "fair use" in its broad connotation—such as signifying an appropriation of

[199] Hansard, *op. cit.*, note 196, *supra*, at 909.
[200] *Id.* at 911.
[201] Art. 2 *bis*.
[202] Art. 10 *bis*.
[203] Art. 10, 2
[204] Art. 11.
[205] Art. 12.

unprotected ideas—has been said to add "needless confusion to an already confused area of the law." [206] Whether or not the confusion is needless is not altogether clear. But the variations in usage demand careful scrutiny. Particularly troublesome is the question, in any particular case, whether an insignificant amount of copying constitutes fair use or noninfringement on other grounds.

Even within the narrower meaning of fair use, the cases, foreign statutes and domestic legislative proposals cover a wide variety of situations. The common thread in all these situations is the question whether limitations should be imposed on rights which the copyright owner would otherwise enjoy. The key inquiry for legislative solution of the problem of fair use would then seem to be: Why should such limitations be imposed? [207] Several possible answers suggest themselves.

(1) In certain situations, the copyright owner suffers no substantial harm from the use of his work. This may be due to the small amount of material used. Here, again, is the partial marriage between the doctrine of fair use and the legal maxim *de minimis non curat lex.*

Of course, the view has frequently been expressed to the effect that "if the taking is not sufficient to be substantial the question of fair use does not arise." [208] Yet Judge Carter has stated that although a fair use can never be "substantial," [209] it may be "extensive." [210] These apparent contradictions suggest that there is a borderland between (1) the insignificant amount of appropriation which could never, regardless of purpose, effect, acknowledgment or intent, amount to infringement and (2) the amount of appropriation which, in every case constitutes infringement. Within this borderland, the amount used may, in conjunction with other factors, be insufficient to exceed the bounds of fair use.

A use for a purpose different from that fulfilled by the original work might also be considered harmless.[211] This is graphically illustrated by the cases in which the lyrics of a song were printed in the course of a literary production.[212]

Closely related to difference in purpose is difference in medium. The *Loew's* case and the authorities cited therein indicate that mode of expression will not ordinarily preclude infringement; but such statutory provisions as section 12(c) of the Shotwell bill concerning architecture reach an opposite result, possibly on the ground that certain transpositions are not harmful to the copyright owner.

(2) Practical necessity is at times the rationale of fair use. Thus article 10 of the law of Argentina requires that an excerpt be "indispensable" to the purpose of the later work. The *modus operandi* of certain fields requires that the rights of each author yield to a step-by-

[206] Cohen, *op. cit.*, note 7, *supra*, at 46.

[207] See Recht, *Pseudo-quotation in the Field of the Plastic and Figurative Arts*, 17 REVUE INTERNATIONALE DU DROIT D'AUTEUR 85, 96 (1957). Fair use is viewed in II UNESCO COPYRIGHT BULLETIN 2-3 (1949) at 84 as one of several restrictions on copyright. It was there stated: "The second kind of restriction which one finds in almost all copyright laws or jurisprudence is, in the Anglo-Saxon countries, called 'fair use'. This permits reasonable use of the works of another in the form of quotations, excerpts, or résumés, or for private studies, criticism, reporting, etc."

[208] Note, 56 COLUM. L. REV. 589, 595 (1956).

[209] Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. at 350.

[210] Loew's Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165, 175, (S.D. Cal. 1955) *aff'd sub nom* Benny v. Loew's, Inc., 239 F. 2d 532 (9th Cir. 1956), *cert. granted*, 353 U.S. 946 (1957).

[211] Thus, fair use was summarized as "any reasonable use, noncompetitive," by Arthur Farmer, representative of book publishers, in hearings on the amendment of Section 1(c) of the copyright statute. See *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 3589*, 82d Cong., 1st Sess. (1951).

[212] See note 24, *supra.*

step progress. This consideration is often linked to the constitutional support for fair use as an indispensable tool in the promotion of "science." Practical necessity and constitutional desirability are strongest in the area of scholarly works.

Similarly, in reviews of a work, a certain amount of reconstruction is often necessary; and in burlesque, the user must be permitted to accomplish the "recalling or conjuring up of the original." Of more questionable necessity is the use of an earlier work in the preparation of a compilation. However, extensive use of earlier works as guides and checks appears to be common in this type of work which, although perhaps not achieving the intellectual aims inherent in the constitutional objective of copyright, does produce useful publications.

(3) The rights of the copyright owner may often be limited because of a public policy quite apart from any questions of copyright. Thus, the limitations on performing rights in favor of charitable, educational, or religious organizations seem to reflect a policy of indirect Government support for such organizations. In this sense, they are perhaps more akin to tax exemptions than to problems peculiarly related to copyright. Moreover, the right of the Government to use copyright material springs from the unrelated doctrine of sovereign immunity. An independent public policy would also seem to dictate free use of copyrighted material for the purposes of judicial proceedings or reports of judicial proceedings as insured by the new British statute.

(4) It may well be that the theory of implied consent, frequently is fictitious; it thus fails as an overall basis of fair use. But this theory does have vitality in certain areas. There are situations in which authors generally (not necessarily the plaintiff) permit a particular use. Such can be said for reviews and criticism.[213] Perhaps implied consent can be extended to any use which enhances, rather than impairs, the value of the copyrighted work, but such a rule might require fine-line drawing and difficulties of proof. The creation of a "utilitarian" work such as a form book clearly implies consent to put the work to its intended use. More equivocal is the "dedication" of a musical composition to a professional football team, held in *Karll* v. *Curtis Publishing Co.*, [214] to imply consent to any reasonable use associated with the team.

There are two general approaches to the implementation of the various policy considerations discussed above. One approach is the development of broad ground rules for the determination of fair use. These might include general statements of the permissible purposes for which copyrighted material may be used, conditioned with respect to the amount of such material and the effect of the use on the original work. The other approach is to seek to solve specific problems by specific answers.

By and large, statutory provisions, particularly proposals for legislative revision in the United States, have attempted only the latter course. Thus, the Shotwell bill sought to cover such things as recordings by broadcasters for private file use, and incidental infringement in the course of the depiction of current events. It is true that those provisions of foreign laws which specify maximum amounts of material that may be reproduced cover the area of fair use more generally.

[213] See Cane, "Why Ask for Permission?", Saturday Review of Literature, July 1, 1950, p. 20.
[214] 39 F. Supp. 836 (E.D. Wis. 1941).

But even the foreign laws are often limited to particular situations or classes of works.

American case law, on the other hand, rarely involves some of the special situations covered by past legislative proposals. Thus, we find no reported cases directly involving literary criticism or review, use of material for the purposes of litigation, personal or private use, or copying by libraries for scholarly use.[215] Rather, the cases have dealt primarily with fringe uses by competitors, particularly in the compilation and lawbook fields, and more recently with parody and burlesque. Accordingly, they reflect, albeit case by case, and attempt to draw more general guidelines.

The fact that cases and statutes frequently deal with different situations can be quite significant. It may indicate that the statutes attempt in some respects to codify established practices which are so well accepted that they do not produce litigation. Perhaps some of the provisions seek to clarify situations involving technical infringements which are ignored by copyright owners. The statute may attempt either to anticipate problems or to effect workable compromises prior to the development of a practical problem into the litigation stage.

In view of the foregoing, the possibilities for treatment of the problem of fair use in a new statute include the following:

(1) *Follow the approach of the Senate committee in 1907 and maintain the present statutory silence on the question.*—This approach would be based on the premise that the 1909 decision has proved neither ill-advised nor out of date. Arguably, the question of fair use, as merely one dimension of the problem of infringement, is as peculiarly susceptible to case-by-case solution as infringement itself. It could be urged that no statute can effectively cover questions of quantity, shadings of purposes and competitive effect and the like. To select narrow areas for solution might be inequitable unless there are special problems of practical significance to be resolved.

This line of argument was suggested by the approach of ASCAP with respect to the incidental infringement provision of the Shotwell bill. As already noted, ASCAP was quite prepared to leave the question to the courts. The society also argued that "there is no exemption under existing law, and no hardship has resulted."[216]

(2) *Recognize the doctrine and grant it statutory status in broad terms, without clarifying the meaning accorded fair use by the courts.*—This approach was followed in the Sirovich bills of 1932 which did not define or elaborate upon the expression "the fair use of copyrighted matter." The bills did, however, require acknowledgement, a condition which could be attached or ignored in a new proposal.[217] This proposal for statutory recognition in general terms may be subject to criticism on the ground that it is superfluous or may, no matter how well drafted, be read as an inadvertent modification of the case law.[218]

(3) *Specify general criteria.*—This would represent the boldest attempt to treat the problem. It could take the shape of codifying the common law, by merely specifying relevant factors such as the quan-

[215] See Smith, *op. cit.*, note 67, *supra*, 46 Law Lib. J. at 205.
[216] Memorandum, June 20, 1939, p. 3, 3 Shotwell Papers 227.
[217] A required acknowledgement does vitiate some of the harmful effects of unauthorized appropriation; it could serve as a safety valve against certain piracies which presently would rely on the fair use doctrine if called to account.
[218] See discussion of the effect of the patent law codification in 1952 in Note, 66 HARV. L. REV. 909 (1953).

tity of the material used, the purposes of the use, the noncompetitive and incidental character of the use, etc. Or it could provide for controlling effect for certain factors, for example, by making acknowledgement a condition precedent, or by specifying the permissible amounts of material that may be reproduced. A somewhat greater degree of predictability would be the objective of such an approach.

This approach is beset by the practical obstacles facing any attempt to codify common law or to legislate in an area of subtle factual interaction. It might be that the established judicial doctrines would survive to fill the gaps which might be left by the new statute.

Of course it is possible to specify general criteria in such a way as to curtail as well as enlarge or recognize the judicial doctrines of fair use. This was done in the Dill bill which permitted no quotation if permission was expressly denied.

(4) *Cover specific situations.*—Recognizing the difficulties of formulating general effective rules in this area, Congress might follow the general approach of past revision proposals and attempt to cover certain specific situations calling for clarification.

(*a*) There are certain situations which are presently effective and would require mere recognition by the statute. These stem either from general acceptance as to what the law is, without any reported cases on the subject, or technical violations of copyright which, for practical and other reasons, are never pressed. These would include the use for the purposes of criticism or review or litigation.

(*b*) Other situations have not been completely resolved in actual practice. One of the more notorious of these presently is burlesque or parody. Legislative solution of this question might take many forms; in the last analysis it would be directed at the question whether or not the burlesque form of entertainment requires special concessions because of the policy considerations discussed above. The considerations most directly involved appear to be (*i*) the practical necessity of extensive use of the work being burlesqued in order to create the burlesque, and (*ii*) the benefit, rather than harm, conferred upon the original work.

Judge Carter in the *Sid Caesar* case appeared to have been impressed by the argument of practical necessity. But this argument presupposes the desirability of supporting burlesques. One writer has suggested that increased protection of copyright owners at the expense of burlesquers is perhaps "to be welcomed as a spur to more original and ingenious entertainment." [219] The defendants in the *Loew's* case, on the other hand, warned that the death knell to the art of burlesque, predictable from an adverse decision, "would be a frontal attack on freedom in our democracy."

Judge Carter also emphasized in *Loew's* the importance of the commercial nature of the defendant's work, thereby distinguishing burlesque from a more scholarly endeavor. But it has been noted that:

> The trouble with this commercial-noncommercial distinction is that both commercial and artistic elements are involved in almost every work.[220]

Another area which has become disturbed by recent developments is the field of personal use. Photoduplication devices may make authors' and publishers' groups apprehensive. The Copyright Charter recently approved by C.I.S.A.C. emphasizes the concern of

[219] Note, 31 NOTRE DAME LAW. 46, 54 (1955).
[220] Note, 56 COLUM. L. REV. 589, 594 (1956).

authors over "private" uses which, because of technological developments, are said to be competing seriously with the author's economic interests. On the other hand, it has been argued that, at least with respect to books, "none of the photographic processes can compete with the book in print either in price per page or convenience of use."[221]

Perhaps another area for special treatment is that of incidental use in motion pictures and broadcasts of public spectacles, dealt with in the Shotwell bill. Whether this is presently an area of controversy is not known.

In covering specific situations, Congress might choose to affirm or reverse the judicial disposition of a particular issue. An indirect example of the latter approach is found in the reaction to the famous British *Colonel Bogey* case[222] wherein a brief excerpt from plaintiff's musical composition was included in a newsreel and deemed an infringement. This gave rise to the provisions in the Duffy and Shotwell bills excusing such incidental infringements.

VI. Summation of the Issues

1. Should a statutory provision concerning fair use be introduced into the U.S. law?
2. If so:
   (*a*) Should the statute merely recognize the doctrine in general terms and leave its definition to the courts?
   (*b*) Should the statute specify the general criteria of fair use? If so, what should be the basic criteria?
3. Should specific situations be covered? If so, what specific situations?

[221] Shaw, *op. cit.*, note 66, *supra*, at 302.
[222] Hawkes & Son, Ltd. v. Paramount Film Services, Ltd. [1934] 1 Ch. 593; 50 T.L.R. 363.

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON FAIR USE OF COPYRIGHTED WORKS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON FAIR USE OF COPYRIGHTED WORKS

By Harry G. Henn

APRIL 7, 1958.

* * * I am submitting my comments and views on the study on Fair Use prepared by Alan Latman.

* * * [Professor Henn here made several valuable suggestions regarding certain details of the study.]

With respect to the summation of the issues (study, p. 34), I do not favor introducing into the U.S. law a statutory provision concerning fair use.

Sincerely yours,

HARRY G. HENN.

By Walter J. Derenberg

APRIL 8, 1958.

I have now had an opportunity to read and consider the excellent study on Fair Use prepared by Mr. Latman. With regard to the issues on which our comments have been invited, page 34 of the Latman study, it would be my view that no general definition of "fair use" should be included in the statute and that the general applicability of the doctrine and its scope should be left to the courts.

I believe—and the Latman study seems to bear this out—that the term "fair use" defies definition and that in the long run more would be accomplished if our courts would be entrusted with setting the outer limits for the doctrine as they have been under the Act of 1909. We have always been faced with the same problem when we are considering a definition of "unfair competition" and here, too, experience would seem to have demonstrated that the most progressive and advanced unfair competition law may be found in those countries whose statutes contain a general prohibition against all forms of unfair business conduct without attempting to enumerate each individual proscribed practice. Similar general provisions against unfair practices without any attempt to define the terms "fair" and "unfair" appear, as you know, in several international conventions and in section 5 of the Federal Trade Commission Act. Even the new Trademark Act of 1946, in section 33(b)(4) refers to a "defense of fair use" of a descriptive term or a person's own name without attempting to provide any additional statutory guidance to the courts in determining the scope of this defense. It would seem to me to be impossible to draft a general definition of "fair use" which would embody even all the tests and standards so ably set forth in the old leading case of *Folsom* v. *March* (Latman study, footnote 6) in 1841. I doubt whether any effort to define "fair use" by statute would make the task of our judiciary any easier even though Judge Augustus Hand, in *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F. 2d 661, 662 (2d Cir. 1939), referred to the "fair use" problem as "the most troublesome in the whole law of copyright."

Nor am I confident that if we had a general definition of "fair use," the decision in the recent parody case—*Benny and Columbia Broadcasting Co.* v. *Loew's Inc.*, 116 USPQ 479 (1958)—would have been different and might not have resulted in a four to four split in the U.S. Supreme Court.

It would be my preference, therefore, to make no mention of the fair use defense in the proposed new statute, particularly if the latter should eliminate the distinction between common law and statutory copyright—as I hope it will—so that no question may arise as to whether the fair use doctrine would be available only under the statute and not at common law.

On the other hand, after considering the new British Act and the recent report on copyright to the Royal Commission in Canada, I would like—in answer to question 3 of the Latman study—to see the proposed statute make provision with

regard to certain specific troublesome situations, without, however, going into as much detail as the new British Act and particularly without having a set of separate provisions for literary works on the one hand and works of art and designs on the other. I would favor the inclusion of some provision dealing with the library problem covered in section 7, subsections 1 and 2, of the new British Act; I see no reason why a similar set of rules should not be incorporated in our proposed law but would also agree with the Canadian report that subsection 2(d) should be modified and 2(e) eliminated. There is also much useful specific language in the remaining part of section 7 of the British Act.

I would also be in favor of a specific provision authorizing broadcasters to make so-called "ephemeral" recordings.

In order to protect the motion picture industry against certain "strike" suits, it might be feasible to adopt a provision similar to section 6, subsection 9(5) of the British Act to the effect that the copyright in an artistic work is not infringed by inclusion in a motion picture or television broadcast if it is used only incidentally and as background material. Some other specific problems might well be regulated, such as the problem of reconstruction of architectural works (sec. 6, subsec. 9(10) of the British Act), or some of the other exceptions enumerated in section 6. But let me reinterate that my basic approach would be to leave the fair use problem as flexible as possible and not to formulate a general definition which, as past experience has shown here and in other countries, could never satisfactorily serve as a uniform standard for the infinite variety of problems which center around the concept of fair use under copyright.

Sincerely yours,

WALTER J. DERENBERG.

By John Schulman

APRIL 8, 1958.

I have read with great interest Mr. Latman's discussion of the subject of Fair Use.

My reaction to this phase of copyright law revision is very much the same as that which I have expressed concerning performing rights. The study discloses that the doctrine of fair use, although not defined in any single, precise sentence or paragraph, is well developed in our jurisprudence. It would be much better, in my opinion, to continue to rely upon these rules which have made a workable adjustment between the interests of the public and those of the copyright owners, than to upset that balance by a new statutory definition.

To most of us who are familiar with this branch of the law, the doctrine of fair use is reasonably definite. It is equally as definite as many legal criteria which we employ to advise clients from day to day. There is no mathematical formula, for example, by which to determine what constitutes negligence, or by which to determine what a reasonably prudent man would do in a given circumstance, but courts and lawyers apply the principle of these legal doctrines all the time. In exceptional situations the line of demarcation may be so hazy that the difference of opinion is extremely wide but for the most part there is little practical difficulty in applying the rules of law. Fair use depends upon so many factual circumstances that no adequate statutory language could be more definite and precise than the tests used by the courts, and no statute can cover every conceivable situation.

I think that our difficulties in this area do not stem from the absence of a statutory rule, but from ignorance of the jurisprudence. A greater knowledge about the doctrine of fair use and its application would allay many misconceptions and make a change of law unnecessary.

It is my view that no definition of fair use be attempted. Any report on the revised statute should state that the doctrine of fair use as developed in the courts of the United States is approved.

Sincerely,

JOHN SCHULMAN.

By Ralph S. Brown

MAY 5, 1958.

The dominant impression that emerges from Mr. Latman's helpful study is that a statutory definition of fair use is inordinately difficult. Since I, for one, regard a liberal concept of fair use as essential to our American concept of copyright, it seems in one sense an abdication of responsibility to ignore the subject in the

statute. Yet the history of statutory attempts in this country, and the examples from abroad, suggest great difficulties in specifying the scope of fair use for particular situations. On the other hand, a general statutory recognition of fair use seems to add nothing to the present law as a guide for the courts. There will always be new situations and new uses arising, so that a detailed statute, even if it gave some present guidance to the courts, would be certain to fall behind the times.

There are two general proposals on which I might comment briefly: It does not seem to be a helpful approach to make the fairness of use conditional on acknowledgment of the source. Though acknowledgment of credit may be an important element in determining whether a given use is fair, it should not immunize excessive takings. Conversely, the absence of acknowledgment should not stigmatize insubstantial ones.

Proposals that would give the copyright owner power to forbid any use are open to especially strong objection. Just as acceptance of the benefits of statutory copyright is conditioned on ultimate dedication to the public, so also permission for fair use should be implied in the statutory grant. If there is any doubt that our public policy requires the acquiescence of the copyright owner in copying that is insubstantial and noncompetitive, then perhaps these words should be included to make it quite clear that such copying is *not* an infringement. However, I doubt that this is necessary if the statutory statement with respect to infringement is consistent enough with present law so as to permit the survival of existing precedents. I realize that these precedents leave many areas of fair use uncertain in their boundaries, but that is a kind of disorder characteristic of the common law, and one that people seem to be able to live with.

RALPH S. BROWN.

By Edward A. Sargoy

JUNE 3, 1958.

Re: Copyright Office Revision Studies, Fair Use of Copyright Works by Alan Latman.

I have read with great interest Alan Latman's finely done analysis of the judicial development of the concept of "fair use" of copyrighted works. I particularly appreciate his perceptive breakdown of the subtle shadings in the criteria developed by the courts. These depend, as he indicates, upon such a diversity of factors, among others, as the character of the works involved, the type of use, the objective of the user, the relative amount and importance of use involved, the effects of the presence or absence of competition in the media concerned, the scope of benefits gained, the economic and other effects upon the original work, implied consent, forced consent, etc.

This judicial development tends to persuade me that, except as to certain specific situations, the statute should neither define nor specify general criteria for fair use. If a future law were to be modeled on the present system of statutory copyright for published and registered works, I would not find any necessity to depart from the present statute's omission to mention fair use (again, except for certain specific situations I would spell out). The concept has developed judicially, as Alan Latman so clearly brings out, under our statutory system which accords certain expressly defined and limited exclusive rights to the copyright proprietor and not an exclusive right of general use. As I understand it, the common law concept of personal property in an unpublished, unregistered intellectual or artistic work gives a far broader right of exclusive use to the owner. What may be fair use under the statute may not necessarily be noninfringement at common law.

It is possible that a general revision may bring into the statute aspects of common law protection now left to the States, either by way of broadening the definition of publication so as to include therein first public disseminations, or may even take over the entire field of writings, published as well as unpublished. If this be done, perhaps some distinctions as to fair use may have to be made in the statute, by way of exceptions to or limitations upon remedies, depending upon such factors as first publication, public rendition or dissemination, use of notice, deposit and registration in the Copyright Office, etc.

With the possible inclusion of certain new subject matters in the statute, such as works of architecture, and the necessity for clarification in certain fields for which there may be general public acceptance, I am sympathetic to covering special situations expressly in the statute. I think provisions such as those in

section 12 of the so-called Shotwell Committee legislation, the Thomas bill, S. 3043 (76th Cong., 3d sess., Jan. 8, 1940) providing that no remedies shall be available under that act in certain cases, could well be given consideration. These would cover such matters as the performance of copyrighted musical compositions for bona fide charitable, religious, or educational purposes; the incidental and not reasonably avoidable infringement of a copyrighted work in the depiction or representation of current news events made or taken at, or disseminated from, the scene or location, at the time of occurrence; the making, distribution, publication, exhibition, or dissemination of photographs, motion pictures, photographic or television images, printed illustrations or representations of a work of architecture which is not in the nature of architectural models, designs, or plans; the making, distribution, publication, exhibition, or dissemination incidental to and as part of the depiction of a public scene, of photographs, motion pictures, or photographic or televised images of a work of art visible from a public place; recording by a radio or television broadcaster for its private file and reference purposes of any matter broadcast; private translation for purpose of private study or research; making of single copies of an unpublished work lawfully acquired by a library if such copies are made and used for study and research only and not for sale, exchange or hire; an equitable system of remuneration whereby a library may make one copy of an out-of-print published work under certain circumstances for research purposes and not for sale, exchange, or hire. Provision might also be made for reproduction of the work in connection with judicial proceedings, along the lines of the British Act of 1956. I merely mention the above as areas in which there may be statutory provisions, which of course must necessarily be spelled out in further detail.

As Alan Latman's comparative study of the laws in other countries, and the history of our own proposed legislation, indicates, this problem of statutory limitations upon or exclusions from remedies in special situations is one which comes to the fore, when we consider general revision in this increasingly complex field. The British faced it, and their Act of 1956 is more extensive in this regard. The recent Report of the Royal Canadian Commission, as you know, also goes into these problems rather fully.

With kind regards,

Sincerely,

EDWARD A. SARGOY.

By Melville B. Nimmer

JUNE 16, 1958.

The following are my views with respect to the study, "Fair Use of Copyrighted Works," by Alan Latman.

The Copyright Act should give express legislative recognition of the judicially developed doctrine of fair use. However, it is my opinion that such recognition should be in general terms, and should not attempt any specific enumeration of particular instances of fair use. Such specific enumeration would be undesirable in that it would lead to a mechanical and rigid application of a concept which, by its very nature, is dependent upon a weighting of delicate factors in a given factual situation. Moreover, since the courts are not likely to abandon the doctrine of fair use, even in instances not specifically covered in any particular formula, the effect would be to unnecessarily broaden the doctrine of fair use by granting its immunity, even where not warranted if the particular formula can be made applicable, and by further granting its immunity where the court feels this is desirable, even if the formula cannot be made to expressly apply.

I would therefore suggest that any new Copyright Act expressly adopt and thereby codify the existing judicial doctrine of fair use. Furthermore, I would expressly exclude from the scope of fair use the unlicensed copying of the "basic dramatic core" taken from a copyrighted work. I have previously had occasion to discuss this issue in an article entitled "Inroads on Copyright Protection," (64 Harvard Law Review, 1125 (1951) at p. 1130). The California Supreme Court, in *Golding* v. *RKO Pictures, Inc.* (35 Cal. 2d 690, 221 P. 2d 95 (1950)), accorded protection to what the court there referred to as the plaintiff's "basic dramatic core." Subsequently, in *Weitzenkorn* v. *Lesser* (40 Cal. 2d 778, 256 P. 2d 947 (1953)), the California Supreme Court in effect overruled the *Golding* case, and held that a "basic dramatic core" was nothing more than an idea, and, as such, nonprotectible.

As I have indicated in the article cited above, it seems to me that the underlying policy of the copyright law warrants protection for a more or less intricately

developed plot line, and that such should not be regarded as merely an "idea," subject to the privilege of copying under the doctrine of either fair use or insubstantial appropriation. It is of course true that any workable distinction between a mere "idea" and a "basic dramatic core" is not susceptible of precise statutory definition, but must rather be worked out by the courts on a case-by-case basis. Nevertheless, a statutory exclusion of a "basic dramatic core" from the scope of fair use would create a judicial basis for extending the copyright owner's area of protection in this respect to a greater extent than has heretofore been recognized under the existing doctrine of fair use.

Finally, I should like to comment on what is currently the most controversial aspect of fair use: the issue of parody or burlesque.

On the one hand, it seems clear that there should not be an unlimited right to copy merely by virtue of the fact that the copier injects his material into a parody or burlesque. However, since a copyright owner is less likely to license the use of his work for purposes of parody or burlesque than he is for other purposes, and since there is a certain social utility to a parody or burlesque (at least when it constitutes a satire) I would conclude that although the traditional doctrine of fair use should apply in this area, the line of permissible appropriation should be drawn so as to give greater freedom to the copier in this area than would otherwise be true under the doctrine of fair use. Nevertheless, this nuance in the application of the fair use doctrine seems better adapted to case law (and is apparently the view adopted by Judge Carter in the *"Gaslight"* and *"From Here to Eternity"* cases), and probably should not be embodied in any statutory form, unless the courts hereafter depart from this approach.

In this connection, it is interesting to note that the 4-to-4 split by the U.S. Supreme Court in *Benny* v. *Loew's*, with Justice Douglas not participating, may foreshadow a future holding that parody or burlesque is per se privileged quite apart from the amount of material copied, in view of Justice Douglas' past tendency to limit the scope of the copyright monopoly (e.g., see *Mazer* v. *Stein* (347 U.S. 201 (1954))). I would regard such a rule of law as unfortunate, even though I believe the doctrine of fair use should be most liberally applied in the area of parody and burlesque.

Sincerely yours,

MELVILLE B. NIMMER.

By Elisha Hanson

OCTOBER 10, 1958.

Relative to the study on "Fair Use of Copyrighted Works," by Alan Latman, it would seem to be the wiser course to leave the further development of this phase of copyright law to the courts. Accordingly, in my opinion, no statutory provision regulating fair use should be advocated by the panel at this time. However, if someone comes up with a proposal for such a provision, I should like to see it.

ELISHA HANSON.

By Robert Gibbon (The Curtis Publishing Co.)

OCTOBER 24, 1958.

* * * * * * *

The following comments * * * I submit as a representative of a magazine publisher, not as an authority on copyright in all of its ramifications. There are some aspects of the law which are troublesome to us and to our writers. These, and the areas in which appropriate legislation can eliminate doubt and misunderstanding, are the source of major concern to us.

* * * * * * *

Fair Use of Copyrighted Works.—We recognize the concept of fair use as an abridgment of rights granted under a copyright. The courts have developed rather fixed limitations to the concept designed to give as much protection to the copyright holder as possible. This is as we think it should be. Any attempt in a statute to define fair use or to classify it would probably expand its scope. We can see no benefit to such expansion.

* * * * * * *

ROBERT GIBBON.

By William P. Fidler

OCTOBER 30, 1959.

As copies of the various studies on the general revision of the copyright law have been received, I have sought the advice of competent scholars concerning the relationship of the academic profession to the issues raised by these studies. At this time I am presenting some of the points of view expressed by professors who are competent to judge the technicalities of copyrights, and I hope to forward other views at a later date.

* * * * * * *

As to fair use, the academic scholars I consulted tend to agree with the comments of consultants, whose views were printed, particularly with respect to the point that statutory treatment of the problem is probably not feasible. Consideration might be given, however, to the enactment of a statutory rule applicable to prose text, which would permit free copying of a limited number of words without permission. The limit might be stated as 50 or 100. If there were such a provision, a great deal of bothersome correspondence might be avoided. I recognize, however, that it would be necessary also to require that the quotation be in isolation from other quotations from the same work, lest otherwise a substantial text be appropriated in the form of a series of relatively brief quotations. I am not sure whether a workable statutory provision along this line could be drafted, but the attempt might be worth making.

* * * * * * *

WILLIAM P. FIDLER.