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USE OF COPYRIGHTED IMAGES IN ACADEMIC SCHOLARSHIP AND CREATIVE WORK:

THE PROBLEMS OF NEW TECHNOLOGIES AND A PROPOSED "SCHOLARLY LICENSE"

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Introduction

The concept of copyright is a familiar and even an integral part of the work that film and audiovisual scholars produce. However, recent developments have served to impede that work, to a point where scholarship can be significantly adversely impacted. This article examines the concept of copyright; the traditional defenses to copyright actions, including fair use; and reflects on the copyright mitigation mechanisms in place for other disciplines and industries. The conclusion offers a proposal that seeks to both ease the use and incorporation of copyrighted material into scholarship, as well as see that scholars themselves receive swift and certain payment and credit for the use of their work by others.

Origins of Copyright Protections

Copyright has a sorted history, traceable to the Star Chamber and censorship laws in England in the 1500's. [n.1] The King granted to the Stationer's Company a monopoly over book publication in order to suppress the printing of teachings of the Protestant Reformists by prohibiting the printers from accepting anything not approved by the Star Chamber. There was no intent to protect authors, only to suppress speech that the government believed seditious or heretical. Later, the Stationary Companies recognized copyright as a means for securing exclusive rights in perpetuity in their works. [n.2] They asked the Crown for a reform of copyright laws to give them permanent rights. Instead, what emerged from the process was the Statute of Anne, the first real copyright act, [n.3] which secured to authors, instead of the publishers, exclusive rights in their works for periods of time from 14 to 21 years. The concept of copyright, that of protecting the author's work, was carried to the United States, and appears in the U.S. Constitution as Article 1, Section 8, Clause 8:

[Congress is authorized]: To promote the progress of science and useful arts, by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries. [n.4]

Intellectual property rights are therefore a basic concept of the structure of our democracy, with origins preceding the Bill of Rights. The reservation of these property rights to authors and inventors served important policy goals; chiefly the motivation of creative activity by providing a period of exclusive benefit:

[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. [n.5]

Further, although the provision confers a private benefit, it was enacted for the welfare of the society as a whole; "[t]he enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted...." [n.6]

The first Copyright Act, necessary to fulfill the Constitutional mandate to protect authors, was passed in 1790, and subsequent acts have frequently included major amendment or revision. The 1976 Act is the current law, and it has been amended several times, principally to accommodate new technologies and to bring it into conformance with international law. [n.7]

Scope of Copyright

Copyright protects "works of authorship fixed in any tangible means of expression." [n.8] The progress of technology has been one of the important motivators for re-interpretation and amendment of the Act. The Act, and its interpretation, has been changed to accommodate the new uses and technologies, including, at various times, such forms of expression as photography, [n.9] phonorecords, [n.10] movies, [n.11] videotape, [n.12] cable television, [n.13] satellite television, [n.14] videogames [n.15] and computer programs. [n.16] All of which are protected. [n.17]

Generally, during the period of exclusive use reserved to the copyright owner, [n.18] one has a wide variety of exclusive rights:

Subject to sections 107 through 119, the owner of copyright under this title has the exclusive rights to do and to authorize rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by the sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images

of a motion picture or other audiovisual work, to display the copyrighted work publicly. [n.19]

These are the five fundamental rights, summarized and known as the rights to reproduction, adaptation, publication, performance, and display. Images can be copyrighted under Section 102, whether they are motion picture, television, pictorial, graphic or sculptural. Infringement of such images can be through any of the methods in Section 106, including direct copying, preparation of derivative works, or performance of the work. [n.20]

Copyright as Applied to the Use of Images by Scholars

The questions and issues surrounding copyright are gaining increasing significance for scholars, and film/video scholars are at the forefront of these questions. This includes debating a series of fundamental issues regarding copyright and contemporary scholarly production for non-profit and educational institutions. These questions address the pragmatic strategy of use and the doctrine of fair use; and ask whether we should consider building a strategy that calls for a reasonable, low-cost compulsory license for the use of still and moving film/video images and other audiovisual information such as sound. What are the appropriate boundaries of fair use? Should students and teachers be given a fair use defense for the classroom but held to a compulsory license for scholarly and artistic work? How can an author/creator be sure that their work will be universally acceptable in the distribution channels? And finally, as an author/creator, how can one be reasonably assured of payment for the subsequent use of one's work by others?

Types of Scholarly Use of Images

Scholarship includes the traditional areas of criticism and analysis, the activities of creative artists in the academic community using visual images, as well as new and unforeseen uses of technology-based teaching both in and outside the classroom. The scholarly use of images falls into three basic categories. First, the use of the image for its intrinsic value in criticism, analysis and other forms of research; second, in the creation of a derivative work incorporating the original image either in its original or a modified form in a new artistic creation; and finally use of images in combination with new or existing knowledge, representations and media for teaching purposes.

Traditional scholarship now intersects with the use of copyrighted images. Examples of such uses include scanning in images for articles on film aesthetics, sequences of frames for analysis, and electronic publishing of articles that include illustrations and images that would have been traditionally disseminated by print. There are a number of scholarly refereed journals on cinema studies. [n.21] Scholarly presses regularly publish books on media and other fields that require inclusion of original images.

The Society for Cinema Studies, a scholarly organization dedicated to the study of the film and video media, [n.22] is concerned with the issue of publishing movie stills and has generated a report, Fair Usage Publication of Film Stills, [n.23] which documents usage of stills by film scholars and makes argument regarding the fair use of portions of movies. [n.24] One argument is that publishing one or a hundred frames of a film in an analysis is still a tiny percentage of the entire product (whether the film is looked at as a collection of thousands of individual frames or hundreds of shots) and should therefore be considered fair use. This argument is indeed clever, but fails to adequately rebut the most important factor of a fair use analysis, that of potential impact on the market. [n.25] Their report importantly brings the emerging issues to the fore, and while providing some guidance to film scholars, leaves this and other issues unresolved by the necessity of the indeterminate state of the Copyright Act in dealing with such uses. The Society's Report also anecdotally describes the various treatments a scholar is likely to receive from a potential publisher of their work. The report states that while one publisher may deem it unnecessary to get permission to print frame enlargements, other publishers may demand that the author have permission for the use of all photographs. [n.26]

The Register of Copyrights participated in the Society's examination of the issue by responding by letter to their questions. Importantly, the Copyright Office stated that the potential impact on the market [n.27] was the most important factor, that the determination of fair use must be made "in each instance" [n.28] and that scholars should rely on the four factors of fair use "as they decide these issues for themselves." [n.29] While those are the issues that face the film scholars, one can easily imagine similar considerations arising for scholars in various disciplines who want to reproduce copyrighted images in scholarly works; professors of political science who want to use images from political commercials in an article; business professors who want to demonstrate marketing techniques by reproducing stills of advertising commercials; or law professors doing First Amendment/speech analysis.

An examination of fair use decisions [n.30] suggests that even small takings, including takings for classroom use, have been held to not be fair use, and therefore scholars are at risk. The difficulty for scholars is the uncertainty of the issue, for even though the scholar makes the initial determination, all those who subsequently follow can stop the work from proceeding. At Northwestern University, the deposit of a recent dissertation of a film scholar was initially rejected by the archiving organization because the scholar had failed to clear the film stills used. [n.31] The scholarship met the standards for graduation, but the dissertation could not meet the deposit requirement until negotiation with the archive service over the use of the stills was finished. While the archive service eventually accepted the dissertation, it is still restricted to sales only to the author. [n.32] This ability of subsequent organizations to affect the production and dissemination of scholarly work is problematic, especially because the practice of including images for analysis will continue to grow as the cost of desktop computers and scanners continues to drop and the technology becomes more universally available. Scholars concerned with the text and representations contained in media will find their arguments more lucid and persuasive with the inclusion of such stills.

Scholarly production need not always remain tied to paper and ink. The phrase "scholarly production" also attempts to recognize the fact that electronic publishing [n.33] (including illustrations and photos using new video-based technologies) will continue to open new avenues for the dissemination of scholarly work, as well as the fact that traditional paper- based production (books and journals) will, for the foreseeable future, be the central technology of scholarly production. One major scholarly publisher "will make 42 of its materials-science journals available to colleges and universities" [n.34] over the computer network Internet (R). Fifteen major universities including Harvard, Cornell and Princeton are participating in this test. The peer-reviewed journals will include delivery of graphics, tables and charts. [n.35]

In another development, the Library of Congress has started the American Memory Project, to distribute by electronic means, portions of their special collections on American history. [n.36] It is distributing, on optical disks, "thousands of photographs, manuscripts, motion pictures, sound recordings, and other materials...." [n.37] The materials presently distributed are in the public-domain and not protected by copyright; however, eventually "the project will have to confront copyright issues." [n.38] An important area for current scholarly production might be in developing the equivalent of what in computer software parlance is termed "useful" programs. [n.39] The writing of "useful" programs for textual analysis of media, and/or the teaching of principles of media criticism, might stimulate a need for questions of copyright and compulsory license by creating a demand within the educational system for the computer-based digitization of films, television programs, and art that could then be subject to teaching and analysis through useful programs.

Scholars working in the film, video and art production areas also face extraordinary copyright issues as computer art becomes an integral part of our curriculums. [n.40] Video productions and computer art can include both traditional use of technology such as a device called a Paintbox (R) [n.41] to create graphics for incorporation into video productions, [n.42] as well as use of stand-alone computer art devices that create complete two and three- dimensional works. These works frequently include animation, that is either used as art itself or incorporated into film and video productions. [n.43] Such productions can start with a blank screen and include all original material, can use existing images, or can be a combination of existing and original images. [n.44] The use of others' images can be part of the growth process of art: "Visual artists use appropriation as an allegorical device to convey expression. A Copyright may, however, act to remove the required, appropriated image from the public realm, thus leaving the artist vulnerable to an infringement suit." [n.45]

Copyright issues arise when images, frequently copyrighted images, [n.46] or sounds, [n.47] of others gathered from books, movies and videos, are scanned into the computer [n.48] as raw material to form a part of the new work. These images may be used as they are, incorporated into collages or sequences, or changed, altered, manipulated and supplemented to form new art. [n.49]

In addition to the use of images in traditional publishing, including the new electronic modes, and the use of images in production, there is new computer software that allows for incorporation of moving images into standard personal computers. These images and text can also be joined in pedagogical experiences of students. For example, the Advanced Technologies Group and the Department of Radio/TV/Film at Northwestern University have developed a prototype of a student paper that might typically be written in a future "Intro to Media" class. This paper, designed to be read on a computer screen, begins with a page of text, then the reader reaches a still image from "The Simpsons" (the subject of this sample paper.) The reader uses a mouse to click on the image; the image goes in motion, delivering a 30 second clip. The text then goes on to analyze that clip. Northwestern was a beta test site for a program called QuickTime, (R) which is currently being marketed by Apple Computer. The incoming group of college and university freshman during the 1990s will have commercial software available to readily integrate the text and moving image; [n.50] the implications are profound for our field.

The classroom questions carry an importance beyond the college and university settings into public secondary and elementary education. Media studies has become an increasingly important and increasingly complex field of study at more and more school systems throughout the United States, and copyright issues surrounding moving images and electronic databases must be quickly and successfully resolved in such a manner that respects the rights of the copyright holder but at the same time does not add an additional significant financial burden to an already-strapped education economic system. More than budget-balancing is at stake; as Schwoch argues in Media Knowledge, the ability of elementary and secondary students to work with and reassemble audiovisual texts and artifacts as part of the analytic process is absolutely indispensable to moving beyond a passively viewing citizenry. The creation of a new public sphere with the values of empowerment regarding audiovisual representations [n.51] and readings is linked to the active, engaged citizenship of critical viewers that can only come about through the advocacy and instillation of a media literacy built upon multiple readings, reproduction, and reassemblage. [n.52] Therefore, integrative media experiences will become critical to the cognitive development of the students. Some scholars are using computers to create a "virtual reality" that will allow students to "enter computer-created universes to perform chemistry experiments, examine rare manuscripts, and study objects and cultures otherwise inaccessible." [n.53] Should these learning universes be restricted from containing those icons of reality that are important to establish authenticity or are directly important to the exercise, merely because they are recent enough to be covered by a valid copyright?

Techniques of authors/creators

There are a number of methods of using material covered by a valid copyright. The first is if the use of the work is of such a nature that it is insignificant or a de minimis use. The law does not deal with trifles. [n.54] If the use were truly insignificant, there would be no injury and the courts would not act. This, however, is problematical and of very little consequence in copyright since inherent in the use of a copyrighted work is to

borrow or quote something of significance from the original work to make the new work better or more complete. Additionally, courts have held that very small uses, for example, six notes of a song, [n.55] or the use of only 300 words out of an entire book can be an infringement. [n.56]

Secondly, material that a scholar desires to use may be in the "public domain." A work is generally in the public domain if its original copyright was improper and therefore ineffective, [n.57] or if its copyright has expired. [n.58] Thirdly, a work of the United States Government is not eligible for copyright protection and generally may be used without copyright liability. [n.59] Fourthly, one can pay a license fee for the use of the desired copyrighted material. Such is the proper way to secure access to currently copyrighted material. However, acquiring permission can take a long time; sometimes just ascertaining the current copyright owner after years of the copyright changing hands can be difficult. Although it is possible that a copyright owner will charge nothing and grant permission to use their material for free, there are no restrictions on what can be charged for permission to use their works. It is possible to be economically precluded from using the material because of too high of a license fee, as well as the possibility that the copyright owner can deny permission to use altogether. Also, in a licensing situation, the copyright owner may want to impose unacceptable burdens on the licensee; for example, United States-only rights for a work with international appeal. Denial of permission, or lack of any action could lead to the fifth possibility, that of committing intentional copyright infringement, misappropriation or theft. [n.60] This could have very adverse consequences to the infringer. [n.61] A sixth method, is to find accomodation in the Copyright Act, either through use of the material under the "fair use" provisions of Section 107 of the Copyright Act, or to find an exception or license within the Copyright Act that will assist the author/creator.

Fair Use

Notwithstanding the benefits conferred on the author/creators by copyright, the Copyright Act can also work hardship on subsequent authors. Common practice is to build upon the existing base of knowledge. This frequently requires quotation or other use of copyrighted material. The initial Copyright Act made no provision for such use, and strict interpretation of the basic rights would make it impossible to use a copyrighted work for any purpose without the consent of the copyright owner. This problem was quickly discerned:

> Copyright was never intended to give the copyright owner an arbitrary power to control an individual's use of the copyrighted work--and it would be most damaging to the basic copyright policies and principles if copyright ever becomes so corrupted. [n.62]

The courts made provision, in the form of fair use, to mitigate the harshness of copyright, a concept that Congress later codified. The concept of fair use, originally a judicial creation and now codified in Section 107 of the Copyright Act [n.63] is an equitable doctrine that permits others to use copyrighted works for certain purposes and under certain conditions. The most common manifestation of fair use in scholarship is

the quotation from prior copyrighted work. Fair use, a doctrine of reason, is a "privilege vested in others than the owner of a copyright to use copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner...." [n.64] The determination of what is fair use has been intentionally left undefined by Congress, and up to the interpretation of the courts. [n.65] The provision for fair use, and the factors that determine if a use is fair are:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered include--

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2) the nature of the copyrighted work;

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work. [n.66]

These factors must be applied by a court on a case-by-case basis. The factors are the only method of determining fair use. The scholar must therefore make an independent self-determination that the use is a "fair use." The final determination of whether a use is fair is left up to the courts. In between the initial determination by the scholar and a judicial determination, others feel free to substitute their judgement for that of the scholar. The publisher may decline a use; dissertation archives can reject dissertations; printers can reject work; and libraries can reject reserve articles. Thus, fair use is anything but a certain doctrine. [n.67] This uncertainty is a burden on academic users.

The first fair use factor is the purpose and character of the use. Character includes the rightfulness of the use, and rightfulness can be difficult to determine. A classic case of use of visual images where the user thought they had proper permission to use the images in another medium in a publication is Horgan v. Macmillian, Inc. [n.68] The plaintiff was the estate of George Balanchine, the co-founder of the New York City Ballet in 1948 and the creator of a version of "The Nutcracker" that became famous as the "Balanchine Nutcracker." Royalties for performances of this version of the ballet were paid by ballet companies to Balanchine. The defendants were Macmillian Publishing Co. and the photographers and author of the book The Nutcracker: A Story and a Ballet. The book tells the story of the ballet, and devotes most of its pages to the Balanchine version. [n.69] It contained sixty color pictures from the New York City Ballet's production of the ballet, which were taken by permission of the ballet company. The issue was whether consent was required from the owners of the copyright, the Balanchine estate.

The trial court found that choreography has to do with the "flow of the steps in a ballet," and that even the many photographs did not catch the attitudes of the dancers nor intend to "take or use the underlying choreography." [n.70] The appeals court, however,

reversed the trial court holding that the wrong standard had been applied. The standard should have been the "substantial similarity" test, and the fact that the two expressions of the ballet were in different media was not a defense to infringement. The court pointed to several cross-media examples including infringement of books by movies based on the book, a toy doll infringing cartoon characters, and short film clips of Charlie Chaplin movies infringing the full length movie. [n.71]

Horgan demonstrates not only the complexities of fair use, but also that even when you think you have the appropriate permission (here they had the permission of the ballet company to photograph their dancing), there may still be a trap awaiting. In Horgan, the book, which contained photographs of a live ballet, was a derivative work. Section 101 of the Act defines a derivative work as:

> a work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound-recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'. [n.72]

Similar to the "conversion" of the live ballet to photographic stills in a book, much of the work scholars do with images involves changing the form of the initial image, through scanning, and manipulation and therefore results in the creation of derivative works. The same situation exists in the audio realm, the digital input of audio sounds (the audio equivalent of image scanning), is called "sampling." The sampling of even short portions of a larger work has already been found to constitute copyright infringement. [n.73] Most record companies now require permissions for all uses of samples in new albums prior to their release.

The use of pictures of other media haunts academics. Josiah Thompson, an assistant professor at Haverford College in Pennsylvania, wrote a book, Six Seconds in Dallas, [n.74] about the assassination of President Kennedy and published by Bernard Geis and Associates. The book contained copies of part of the famous Zapruder film of the assassination; the rights to the film were owned by Time, Inc. and its publication, Life Magazine. Time sued, alleging that certain frames were " 'stolen surreptitiously' from Life by Thompson...." [n.75]

This may have been in fact the case. Thompson, while working as a consultant for Time/Life on alternative theories of the Kennedy Assassination, took pictures of the Zapruder frames after hours with his own camera and without the permission of Time. When he asked Time for permission to use the photos in his book, Time/Life refused, saying that "the film was considered 'an invaluable asset of the corporation' and that 'its use will be limited to our publications and enterprises.' " [n.76] Thompson and his publisher responded by making exact copies of the pictures as sketches, with attention to replicating the detail of the film. The court held that these sketches amounted to copies. The court also verified that Time/Life had a valid copyright in the film. However, when the court reached the issue of fair use, it held for the author. In applying the then-

proposed four factors of fair use; the court found that there was a public interest in the dissemination of information on the Kennedy assassination; that the book would not be bought because of the Zapruder frames, but rather because of the theories in the book; that there was little if any injury to the plaintiff since the court found no impact on the market for the film; and the use for commercial gain was not significant since the publisher had offered to surrender all of the profits from the book as a royalty payment for the use of the pictures. [n.77] Here, the character of use, the wrongfulness, was not in doubt. The taking was wrongful, but the nature of the work, the second factor, was more important. There was a high degree of public interest in the use of the photos. [n.78]

The same question has been raised about the use of copyrighted video images. The leading case is the home-taping case, Sony Corp. v. Universal City Studios, Inc., [n.79] where the plaintiffs, Universal Studios and Walt Disney, owned copyrights on movies and publicly-broadcast television programs and sued the manufacturer of the Betamax videotape recorder, distributors of the recorders, and a home user. The theory for suing Sony was that Sony was liable as a contributory infringer for selling the instrumentalities that enable the person at home to infringe plaintiffs' copyrights. [n.80] The record demonstrated that the principal use of the recorder was for time- shifting of copyrighted programs. [n.81] The Court found that there were also a substantial number of non-infringing uses and a substantial number of copyright owners (particularly sports, religious and educational) that have no objection to recording their programs for later playback. [n.82] The Court analyzed the use on the basis of the fair use doctrine, applying the four factors and found that the time-shifting function also constituted fair use. The Court particularly focused on the personal, home, non-profit use and stated that " i f the Betamax were used to make copies for a commercial or profit-making purpose, such use would be presumptively unfair." [n.83] In determining that this was fair use, the court found that in the case of personal, at-home copying, there was a different weighting of the factors:" t hus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter." [n.84] The Court found that harm from time-shifting a program is "speculative, and at best, minimal." [n.85] As a cautionary note, in this very important case on fair use, the Court also found that a non-profit characteristic of the work is not sufficient to end the inquiry, rather, the Court states: " t he purpose of copyright is to create incentives for creative effort. Even copying for non- commercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have" [n.86] (emphasis added.) Further, " a challenge to a noncommercial use of a copyrighted work requires proof that either the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." [n.87]

Use of videoclips even for "public interest" purposes can be impermissible. In Pacific & Southern Co. v. Duncan, [n.88] Pacific and Southern Co. (doing business as WXIA-TV) sued Carol Duncan (doing business as TV News Clips) for infringing on its copyrights by videotaping its news broadcasts and selling tapes to the subjects of the reports. TV News Clips claimed fair use of the material. TV News Clips did not seek permission of WXIA to sell the tapes and did not affix a notice of copyright to the tapes.

TV News Clips sold a tape to Floyd Junior College, which was the subject of a particular story. WXIA obtained the tape and sued. TV News clips claimed that its service was fair use because it served the important societal interest of full access to the news. [n.89] The appeals court held that the service was not a fair use because the use was for "unabashedly commercial reasons despite the fact that its customers buy the tapes for personal use." [n.90]

The third factor, the substantiality or quantity of the taking, is another difficult area for scholars to judge. In making the self- determination at the time of the "fair use," the scholar must determine the substantiality of the taking. In case of use of a small amount of a large work, fair use should be found. [n.91] However, that is not always the case. In Harper & Row Publishers, Inc. v. Nation Enterprises, [n.92] in an opinion by Justice O'Connor, the court held as not a fair use the excerpt of only 300 words from a book-length work, A Time to Heal: The Autobiography of Gerald R. Ford. The Nation magazine used part of the book, published by Harper and Row, in an article, "The Ford Memoirs-Behind the Nixon Pardon." The material that the article was based on was provided by an "undisclosed source," and the article was published shortly before the release of the book. Harper and Row had sold the rights to excerpt the work to Time, which canceled its contract once The Nation published excerpts first. The editor of The Nation knew that the manuscript was "borrowed" and that he had to work fast to get the story in print before it was released in the book. [n.93] The Court found that The Nation had used, for blatant commercial purposes, important original thoughts of the author, and this use had a tangible effect on the market for the original. Thus, the defendant's claim of fair use was not allowed. The Court cited precedent from 1841 concerning the letters of former President George Washington:

> [A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such use will be deemed in law a piracy. [n.94]

While Harper and Row is frequently cited as being important in defining the third factor of the test, that of substantiality of use, it is also important that when the Court applied the four statutory factors, it explicitly stated that the last factor (the effect of the use upon the potential market) "is undoubtedly the single most important element of fair use." [n.95] As a further finding, the Court stated that fair use is traditionally not available for unpublished works. [n.96] "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." [n.97]

The fourth factor is the effect on the market. Once again, the effect on the market is difficult to determine. Two cases illustrate this. In Williams & Wilkins Co. v. United States, [n.98] a publisher of medical books sued the United States government, Department of Health Education and Welfare and the National Institutes of Health for copyright infringement in some of plaintiff's medical journals. NIH subscribed to two copies of each of 3,000 journals for the use of its employees. One copy would remain in

the library and one copy would circulate among interested NIH employees. The demand for articles was not met by the subscriptions purchased, so NIH would provide photocopies of entire articles to its staff upon request. In 1970, the library fulfilled 85,744 requests for articles. Additionally, the National Library of Medicine would provide similar services on an interlibrary loan basis. NLM copied 93,746 articles. The court found that the copying was a fair use since the use was not-for-profit, under strict guidelines, and had only speculative impact on the market for the journals.

Williams & Wilkins illustrates the court's claim of a minimal impact by copying of complete articles that directly affected one of the chief outlets for scholarly journals, libraries. However, the potential infringer in Williams and Wilkins was the federal government, in the person of the NIH. In the case of a private infringer, the result can be different. In Iowa State University v. American Broadcasting Co., [n.99] a small portion of a film was given national exposure, as was the desire of the student producer then interning at ABC Television. ABC used eight percent of a student-made film, Champion, about a wrestler, Dan Gable, at Iowa University. ABC used the film clip in a highlight piece about the wrestler, who was participating in the 1972 Olympics, during ABC's telecast of the Olympics. ABC refused to pay the filmmaker or Iowa State University (one of the copyright owners) for the use of the film clip. Clips between 7 seconds and 2 1/2 minutes of a 28 minute film were used. The court applied the factors of fair use and found that ABC's commercial broadcast did infringe on the market for the film, even though it was an educational film. The court found that the most important factor was the commercial nature of the use of the film. It held that due to the profit motive involved in ABC's Olympic broadcast, ABC Television was not entitled to claim fair use for even the small portion of the film used. One could look to the altruistic purposes in Williams ("saving lives," although not necessarily directly) as opposed to the profit-motive in ABC (but ABC was giving something of value to the Iowa State plaintiffs--national exposure of an excerpt of their film, which was, incidentally, available for rent.) To both courts, the impact on the market was an important consideration and was resolved differently. Iowa State shows that even a short use and a good purpose will not necessarily be determinative if there is a significant impact on the market.

The profit motive is not the only, nor even in many cases the primary determiner of fair use. In Marcus v. Rowley, [n.100] a teacher used 11 pages of a 35 page cake decorating book for exclusively educational and teaching purposes, making fifteen copies for her students. The court held that it was not fair use. Similarly, in Whitol v. Crow, [n.101] arranging a Hymn for school use and making multiple copies was held not fair use. Publishers have even sued professors directly for preparing course anthologies. [n.102] Thus, the use by teachers even in a non-profit setting is not necessarily a fair use.

Nor are the First Amendment issues in newsgathering necessarily enough to outweigh someone's property interest in a copyright. The First Amendment claim was rejected in the circumstances in Harper & Row and in Time, Inc. Additionally, even if you pay for the rights to a piece of film/video, you only get those rights you have paid for and not the underlying copyright, unless you have a written agreement to that effect. A number of television stations were surprised by this in regards to what has become known as the

"Rodney King Video" of several Los Angeles police officers beating an African-American male. George Holliday sold the video to KTLA for $500; this "sale" included no written transfer of the copyright in the video. KTLA eventually made it available to the rest of the world [n.103] by CNN and satellite. Although the facts are vigorously disputed, Holliday claims that he only transferred the right to use the video on local newscasts. He then filed a $100 million copyright infringement lawsuit against other users of the video, alleging that they did not have permission to air the video. [n.104]

Many have criticized the doctrine of fair use. [n.105] Because fair use involves the application of the four factors, the potential results can be hard to predict. When the difficulty to identify fair use is combined with the necessity to have fair use determined judicially and the reticence of distributors and others to rely on the scholar's self-determination that the use made by the scholar was "fair use," the doctrine becomes an impediment for scholarship of anything other than traditional written quotation, instead of a facilitator in the public interest. Certainty is required for the progressive functioning of academe.

"The Scholarly License"

The concept of a "scholarly license" supplements the established mechanism of fair use. Fair use, the judicially interpreted doctrine, is frequently misunderstood, not easily applied to new technologies and an extremely uncertain mechanism for scholars. By the nature of scholarly work, it is typically non-profit (but not entirely without cash flow), has most often negligible impact on commercial markets for intellectual property and is a direct advancement of the useful arts. With fair use, a scholar is currently uncertain of whether the use that he/she has made of material is fair unless a court rules on it. This is a difficult and untenable situation for a scholar. Rather, a scholar should be able to rely on a certain and relatively simple procedure to respect the copyrights of others, to know that his or her work will be acceptable to and reproducible by those who are to distribute or use it, and finally, to be able to reap rewards from the use of their work by others. The intent of this proposal is not to supplant or interfere with the profitable commercial exploitation of intellectual property rights, but rather to institute a modestly priced, certain procedure for scholars engaged in activities that may or may not eventually produce a profit, but are not undertaken primarily with a profit motive. [n.106] The scope of such a license must be clearly stated, as many activities engaged in by scholars at various times cross over the line from non-profit to for-profit; the establishment of guidelines and parameters needs to be done in a cooperative manner, with consultation among scholarly organizations, publishers, performers, artists groups and legislators. Especially important will be defining the work that would qualify for such a simplified procedure and the mechanism to be followed if a work transitions to become blatantly commercial.

The Other Compulsory Licenses

Several provisions have been made in the Copyright Act to allow certain interest groups to function more efficiently. These provisions usually are predicated on the grounds that either the interest group needs a subsidy (public broadcasting) or that the actual computation of royalties would be too difficult to compute (jukeboxes) or that the interest groups need certainty in access (home satellite dishes). These provisions affect thefollowing uses of copyrighted material:

1) Compulsory license for public performance by a jukebox. This provision permits jukeboxes to play copyrighted music in public. The license is an annual fee, previously $63 per year [n.107] and now temporarily suspended by industry agreement.

2) Compulsory license for making and distributing phono records. This provision permits anyone who desires to use a song and make a new performance of that song (usually called a cover record) to do so upon payment of the statutory fee of 6.25 cents per copy of the song, or 1.2 cents per minute, whichever is greater. [n.108]

3) Compulsory license for cable television. [n.109] Cable television systems may freely use the transmissions of all local television stations, without compensating the television stations for the use of their copyrighted programs. A cable system may import distant signals for a fixed fee of 3.75% of their gross revenues, but with some involved provisions for grandfathering preexisting distant signals and multiple distant signals.

4) Compulsory license for home satellite dish owners. This section provides a similar license to that of cable television for home satellite dish owners. [n.110]

5) Public broadcasters have a compulsory license to play music, including theme music for their shows, and display works of art upon payment of very modest royalties. [n.111]

The rationale for the public broadcasting license is similar to that for a "scholarly license:"

The public broadcasters urged that a compulsory license was essential to assure public broadcasting broad access to copyrighted materials at reasonable royalties and without administratively cumbersome and costly clearance problems that would impair the viability of their operations. [n.112]

The international community is also dealing with similar questions. The European Community (EC) is writing provisions into its post-1992 accords that protect the rights of the developers of electronic databases, but at the same time provide compulsory licenses for the use of such data on fair and non- discriminatory terms. [n.113] Austria has established a "social fund" to support copyright fees paid for social and cultural purposes, suggesting that a government subsidy for copyright users who are primarily non-commercial in nature might be possible. [n.114]

Recent Developments

The reasons that this emergence of new technologies requires adaptation of the law to the actualities of academia are that 1) There is a paranoia sweeping those who deal with academics, particularly in the wake of the following case, Basic Books, Inc. v. Kinko's; 2) That the current mechanism of fair use leaves all work open to interpretation by others in the validity of copyright and reproducibility, an uncertainty that impedes scholarship

and creativity; and 3) There have been instances of direct interference in the stream of scholarship.

Notwithstanding sporadic, apparently favorable reactions of the courts to not-for-profit uses of copyrighted materials and the clear unfavorable treatment to for-profit uses of similar material, there are arising impediments to scholarship, generally based in a lack of understanding and a possible "paranoia" surrounding copyright law. A few adverse decisions send a chill through the pursuit of scholarly activities.

A major influence creating the current difficulties is the decision in Basic Books, Inc v. Kinko's. [n.115] The plaintiffs, all major publishing houses in New York City, brought a suit against Kinko's for copyright infringement in the sale of their course packets. Kinko's defended on four grounds, claiming first, that their use was "fair use" under section 107 of the Copyright Act; second, that plaintiffs misused their copyrights in attempting to overreach the law as enacted by Congress; third, that plaintiffs had forgone any legal remedies (were estopped) by waiting twenty years to bring action while having knowledge of Kinko's service; and finally, that some of the copyrights were not recorded. [n.116] The court found against Kinko's, awarding $510,000 in damages.

While admitting that courts and commentators disagree on the interpretation and application of the four factors, [n.117] the court pursued its own interpretation of fair use. Some of the key factors that cut against the defendant were that it involved multiple copying; that it was done by a commercial enterprise; that the copying did not "transform" the works in any way, as would a biographer's or critic's use of a copyrighted quotation or excerpt. [n.118] Since Kinko's claimed that the purpose was an educational use, the court took it upon itself to evaluate the use by Kinko's under the Agreement on Guidelines for Classroom Copying in Not-for-profit Institutions. [n.119]

The court found that Kinko's use did not "transform the work," although the court admitted that arguably "transformation" is not required. Therefore, the use by Kinko's was found to be mere repackaging and not protected. The court did find some effort by the professors in the use of judgment in the compilation of the readings. The court also found that the use of the readings in the hands of the students was "no doubt educational." [n.120] However, the use "in the hands of Kinko's employee's is commercial." [n.121] Kinko's intention of making a profit weighed against the claim of fair use. An additional factor the court relied heavily on was that the "defendant has effectively created a new nationwide business allied to the publishing industry by usurping plaintiff's copyrights and profits." [n.122] "Kinko's did not produce any professor to testify that he or she would be disabled from teaching effectively if Kinko's could not copy without paying permissions fees." [n.123] The court, however, expressly refused to consider copying by students, libraries, or on-campus copyshops, whether conducted for-profit or not. [n.124]

The court in Basic Books v. Kinko's considered whether the uses were "productive." [n.125] The court probably mis-applied the productivity standard, since that standard was specifically rejected by the United States Supreme Court in Sony Corp. v. Universal

City Pictures, [n.126] where the high court held that mere time-shifting, without more is a sufficient fair use of copyrighted material. Thus, the academic community is under attack for pursuing activities that it has performed for years.

Use of the "Scholarly License"

The "scholarly license" would be a new mechanism, an amendment to the copyright act, much in the image of the present compulsory licenses that would seek to speed scholarship, teaching and see that all authors and creators receive a fair payment for the use of their work. As conceived, the license would have the following elements:

1) A procedure certain for the use of visual images, aural expressions and all newforms of expression hereinafter created. This procedure would be compulsory, requiring no consent from the copyright holder, similar to the other compulsory licenses.

2) Procedures for swift payment of a small, fair fee to the copyright holder for the right to use the copyrighted images under the compulsory license. A review mechanism for periodically updating the license fees to maintain their fairness and an ability to self-audit the use of images under this section.

3) Statutory credit requirements for giving credit to the copyright owner and facilitating audit of and use under this section. An example of credit located on ornear the image used would be: "Copyright 1992 by J. Creator, image used by scholar's license."

While all of these proposals are conceptual and open to debate of the disciplines, some discussion and furtherance of the idea as presented, is warranted. [n.127] Fair use has, through years of interpretation, provided a satisfactory mechanism for scholars to work in the written medium. [n.128] We generally have little problem quoting freely, and crediting properly, other's writings. However, once the newer technologies enter the picture, from scanning for use of images, to manipulation of images and sounds; the concept of fair use fails the Academy. Similarly, copyright has failed other interest groups in gaining access to copyrighted materials that they required. When public television and radio stations have needed certain, low-cost relief, they have requested and received a special license provision, as have those who make "cover" records, those who own backyard satellite dishes, the cable television industry, [n.129] and those who own jukeboxes. The nation's scholars and universities, as well as secondary and elementary schools deserve no less treatment in overcoming the current chilling of their rightful activities. This concept would provide for mandatory access to those images that have been made public, and therefore already exposed to the eyes of the general population. Once so given to the public, a copyright would not be an impediment for use for any scholarly work.

The fees would be kept low, but payment would have to be made "certain," or with a high degree of compliance, as this is a substantial right to use copyrighted material. Once again, such a situation exists in the music industry where the fees for use of a song are modest, but payment is required. [n.130] In order to ease compliance, the collecting

agent, either the academic producing the work, the publisher, or others, would submit payment in a timely manner to a central authority who would distribute the proceeds to individual copyright owners. The scholars who produce original work will benefit by periodically receiving their royalties for any uses made of their work.

This central authority already exists, the government's Copyright Royalty Tribunal (the CRT) handles collection and distribution of such use fees, some of those collection and allocation procedures are far more complicated. Additionally, the CRT already sets the compulsory fees for jukeboxes, cable television, mechanical (music) licenses and could also set these fees. [n.131]

Some may be concerned that any payment at all is problematical to the academic community. So long as the fees are maintained at a reasonable level, the benefits outweigh the costs. The scholar/artist would benefit from the elimination of effort and delays in getting individual permissions, the possibility of perhaps years of research being destroyed by an obstinate copyright owner refusing to grant rights for publication, the universal acceptability of a work complying with the concept, and the potential of receiving fees for the use of their own work.

A compulsory license allows for a measure of compensation to the copyright holder through a system of ease and convenience to the holder and the user. A compulsory license also utilizes the regulatory system in a manner that does not overburden the system with continual court cases, but nevertheless has an established regulatory agency--the Copyright Royalty Tribunal--to oversee the process. Congress, acting in the interests of the American educational system, has the power to keep license rates low. Such a politically popular move, by extending the compulsory license to the entire educational system, could also create incentive for individuals to "consume" more from the educational market--to derive the benefit of license coverage. A beneficent contribution to the stabilization of enrollment rates within affected curriculums could be possible. Such action would also be in keeping with emergent trends and concepts in Europe and elsewhere.

Conclusion

The copyright law has traditionally had trouble keeping up with advances in technology. It has also proven to be inflexible. To overcome this, the courts created an equitable doctrine of reason (fair use), which Congress eventually codified. To overcome other deficiencies in the law, Congress has also enacted a series of licenses and exceptions.

The world of scholarship is changing as fast as the underlying technology. Inflexibility leads to the chilling of speech, scholarship and art. Those who create deserve certainty that their work is acceptable for free flow throughout the stream of commerce. Those who create also deserve prompt payment when others use their work. A "scholarly license" would facilitate both of these goals and breath warm air on the chill imposed on scholarship by the uncertainty of the Copyright Act.

[n.a]. A.B.1982 University of Illinois at Urbana-Champaign, J.D.1985 University of Kansas, LL.M.1991 New York University. Assistant Professor of Radio/TV/Film, Northwestern University. Portions of this work originated as a workshop paper (with J. Schwoch) for the Society for Cinema Studies 1992 annual conference. Funding for this work provided by the Ameritech Foundation. Thanks to my colleagues James Schwoch, James Webster and Mimi White for their input and general support.

[n.1]. See generally Robert Gorman, Copyright Law 1-9 (Federal Judicial Center, 1991). See also Harry Ranson, The First Copyright Statute 3-16 (1956), Lyman R. Patterson, Copyright In Historical Perspective 20-77 (1968).

[n.2]. Alan Latman, Robert Gorman And Janet C. Ginsberg, Copyright For The Nineties 1 (1989). L. Patterson, Copyright In Historical Perspective 5 (1968).

[n.3]. Latman, et. al., supra note 2, at 1. The text of the Statute of Anne: Whereas Printers, Booksellers, and other persons have of late frequently taken the liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their families: For Preventing therefore such Practices for the future, and for the encouragement of Learned Men to Compose and Write useful books; May it please your Majesty, that it may be enacted by the Queens Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Tenth Day of April, One thousand seven hundred and ten, the Author of any Book or Books already printed, who hath not transferred to any other the Copy or Copies of such Book or Books, Share of Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath Purchased or Acquired the Copy or Copies of any such Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty years, to commence from said Tenth Day of April and no longer; and that the Author of and Book or Books already Compiled and not Printed or Published, or that hereafter be Compiled, and his Assignee or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen. Statute of Anne, 8 Anne C. 19 (1710), as quoted in, A. Latman, R. Gorman And J. Ginsberg, Copyright For The Nineties (1989).

[n.4]. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1883).

[n.5]. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[n.6]. Id. at 429 n. 10.

[n.7]. E.g., Semiconductor Chip Protection Act of 1984, Pub.L. 98-620, 98 Stat. 3356 (1984), Satellite Home Viewer Act of 1988, Pub.L. 100-667, 102 Stat. 3935 (1988), Computer Software Rental Amendments Act of 1990, Pub.L. 101-650, 104 Stat. 5089 (1990), Berne Convention Implementation Act of 1988, Pub.L. 100- 568, 102 Stat. 2853 (1988).

[n.8]. 17 U.S.C. § 102 (1989).

[n.9]. Perhaps one of the most interesting and precedent-setting cases was decided at the inception of the technology of photography when the ability of Congress to "confer rights of authorship" on photographs was challenged. The copyright in photographs was upheld in a famous case involving a photograph of Oscar Wilde. Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). Similarly, chromolithographs were protected in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). For a discussion of the Oscar Wilde case, see also Janet Gaines, Contested Culture: The Image, The Voice And The Law 42-83 (1991).

[n.10]. Melville B. Nimmer And David Nimmer, Nimmer On Copyright, § 2.05[A].

[n.11]. Richard E. Low, The Ownership of Unforeseen Rights, The Pennsylvania State University Studies No. 16, (Dec. 1964).

[n.12]. Nimmer, Nimmer On Copyright, § 2.09[D][2].

[n.13]. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[n.14]. Satellite Home Viewer Act of 1988, Pub.L. 100-667, 102 Stat. 3935 (1988).

[n.15]. Nimmer, Nimmer On Copyright, § 2.09[D][1].

[n.16]. Id. at § 2.04[C]. See, e.g., Apple Computer v. Franklin Computer, 714 F.2d 1240 (3d Cir.1983).

[n.17]. Subject Matter of Copyright

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

17 U.S.C. § 102 (1989).

[n.18]. Currently, the duration of copyright is the life of the author plus fifty years; or in the alternative, 75 years for works made for hire or anonymous works. 17 U.S.C. § 302 (1989).

[n.19]. 17 U.S.C. § 106 (1989).

[n.20]. For a discussion of the methods and theories of image infringement by scanning, see Benjamin R. Seecof, Scanning Into the Future of Copyrightable Images: Computer-Based Image Processing Poses A Present Threat, 5 High Tech.L.J. 371 (1990).

[n.21]. Examples of Cinema Studies Journals: Cinema Journal, University of Illinois; Wide Angle, and Camera Obscura, Johns Hopkins University; and Velvet Light Trap, University of Texas Press.

[n.22]. The Society for Cinema Studies also sends a representative to the National Film Preservation Board as provided for by Congress in 2 U.S.C.S. § 178(g).

[n.23]. Fair Usage Publication of Film Stills, Fourth Draft, Society for Cinema Studies, 1992. Thanks to Kristen Thompson, chair of the ad-hoc committee on Fair/Derivative Use of Film Stills, for a copy of this report.

[n.24]. For the analysis of a film scholar, the actual frame(s) of the movie may be important, as publicity photos may be staged at a time or in a manner different from the actual scene in the movie. Fair Usage Publication of Film Stills, 1 Fourth Draft, Society for Cinema Studies, 1992.

[n.25]. See Sony Corp. v. Universal Studios, discussed infra at page 140.

[n.26]. Fair Usage at 19.

[n.27]. Id. at 11. Whether or not the author ever intends or ever has exploited the potential market. "The fact that a university press is 'non- profit' will not be dispositive if the work in question would threaten the potential market value for any work that the copyright owner wants to publish-- for example--, a book about the film by the copyright owner--even if the copyright owner has never released such a book in the past." Letter from Ralph Oman, Register of Copyrights as printed in Fair Usage at 29.

[n.28]. Id. at 30.

[n.29]. Id.

[n.30]. See Discussion of fair use, infra at page 136.

[n.31]. John Thornton Caldwell, Televisuality: The Emergence and Performance of Visual Style in American Television (unpublished Ph.D. dissertation, Northwestern University, December 1991).

[n.32]. Letter from John T. Caldwell to the Graduate School, Northwestern University (no date), containing conditions prescribed by archiving service.

[n.33]. "Project Gutenberg" intends to distribute "a trillion electronic copies from a collection of 10,000 books through computer networks by 2001...." The project, which distributes public domain work, is run by Michael S. Hart, an assistant professor of electronic text at Illinois Benedictine College. Some of the items distributed "rang[e] from Alice's Adventures in Wonderland to data from the 1990 Census." Electronic Versions of Public- Domain Texts Draw Praise and Fire, The Chronicle Of Higher Education, Aug. 12, 1992 at A15.

[n.34]. David L. Wilson, Major Scholarly Publisher to Test Electronic Transmission of Journals, The Chronicle Of Higher Education, June 3, 1992 at A17.

[n.35]. Id.

[n.36]. Beverly T. Watkins, 'American Memory' Coming Soon to America's Campuses, The Chronicle Of Higher Education, Nov. 27, 1991 at A18.

[n.37]. Id. at A19.

[n.38]. Id.

[n.39]. The following analogy if "useful" programs and film analysis is based on a discussion of "useful" programs found in Richard A. Jordan, On the Scope of Protection for Computer Programs Under Copyright, 17 Am.Intellectual Prop.L.Assn.Q.J. 199 (1989). Jordan concludes by arguing that copyright should be enforced, but only in such a manner so that it does not discourage new innovation in computer software; the overall goal, according to Jordan, is to enhance rather than restrict the dissemination of knowledge.

[n.40]. Production faculty can have their scholarly production include film and video works that face these copyright issues. Production faculty are frequently subject to tenure and promotion decisions based on such works.

[n.41]. Paintbox is a device created by the Quantel Corporation, Darien, Ct. There are numerous other devices that do similar and more advanced work. Digital effects, for example, can be done using the Harry, a device also created by the Quantel Corporation. At the low end of purchase price, is a new device called the Video Toaster created by New-Tek of Topeka, Kansas. The most advanced high-end effects include the process of "morphing" or the changing of one form into another, best seen in the movie Terminator 2: Judgment Day or in the Michael Jackson music video Black or White. Even so, special effects experts are looking for more advanced techniques and technology. See Christian Moerk, Can Morphing Stay on the Move?, Variety, July 20, 1992 at 18; Claire Doyle, Morphing and Feature Work Steal the Show at This Year's SIG-GRAPH Convention, Television Broadcast, September 1992 at 30.

[n.42]. Television stations face a similar dilemma on a routine basis. When an event happens that a TV station needs a visual graphic for, and such a graphic does not exist in their files; it is most tempting, especially in light of tight news deadlines, to merely scan in an image of the person/place/or thing involved in the news and apply a little paint brush art prior to using the image on air. Some networks now feed a series of graphics that have been originally prepared by their artists for national stories. The issue remains however for local stories and independent television stations. Some stations subscribe to independent graphics services. See Claire Doyle, Getting Instant Photographic Images the Legal Way, Television Broadcast, Dec. 1991 at 24.

[n.43]. An example of a three dimensional animation program is Wavefront Advanced Visualizer and Advanced Paintbox by Wavefront Technologies, Santa Barbara, California. Wavefront is currently in use at Northwestern University to develop computer animation. This program is capable of accepting input of actual existing images for incorporation in either their original or a modified form in a new production.

[n.44]. The use of image capture and manipulation, either for print or video purposes has reached the level of the desktop computer. See James A. Martin, All About Scanners, Macworld, Oct. 1992 at 150, Adobe Photoshop 2.0, Macworld, Sept. 1991 at 248, Infini-D 1.0, Macworld, Sept. 1991 at 222.

[n.45]. Note, Copyright, Free Speech, and the Visual Arts, 93 Yale L.J. 1565, 1568 (1984) (footnotes omitted).

[n.46]. Images are copyrighted as soon as they are fixed in a tangible form. 17 U.S.C. § 102 (1989). Even notice of copyright is no longer (post-Berne Convention Implementation Act) required. 17 U.S.C. § 401 (1989). Therefore, it is difficult to conceive of an image that is not copyrighted, so long as the copyright has not expired or is not valid for another reason.

[n.47]. Those who are creative artists using sounds of others have been facing this same question longer than those in the visual media; possibly due to the earlier arrival of inexpensive audio digitizers as compared to video scanners. Audio artists, especially Rap Artists have already faced extensive problems with digital sampling. See generally Note, Current and Suggested Business Practices for the Licensing of Digital Samples, 11 Loy.Ent.L.J. 479 (1991); Note, Your Sound or Mine?: The Digital Sampling Dilemma, 4 J. Of Legal Comm. 205 (1989); Molly McGraw, Sound Sampling Protection and Infringement in Today's Music Industry, 4 High Tech.L.J. 147 (1989).

[n.48]. James Karney, Inside a Color Scanner, PC Magazine, April 14, 1992 at 249.

[n.49]. Note, however, that original creators, principally Directors, of feature motion pictures may object to alteration of their work. Colorization of originally black-and-white films has led to such a debate and prompted enactment of the National Film Preservation Act of 1988, Pub.L. 100-446, 102 Stat. 1782 (1988). The uses in this article do not have the same attributes of mass commercial exploitation of film colorization for profit. See generally Report of the Register of Copyrights, Technological Alteration to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners and Consumers, 10 Loy.Ent.L.J. 1 (1990) covering primarily the techniques of colorization, letterboxing and lexiconning for commercial distribution purposes. See also Richard Nutak, Filmers Push for Bill to Label Altered Pix, Variety, July 20, 1992 at 5, discussing further attempts to require enhanced film labeling.

[n.50]. Quick-time is finding use in commercial video production. When coupled with another software program called Premiere by Adobe Software, it was used to do rough editing for the program "VH-1 World Alert." A Macintosh Quadra is used for design purposes by the scenic art director on "Star Trek: The Next Generation." Adobe Tool Blurs Video Boundries, Electronic Media, Aug. 31, 1992 at 12. See also Lon Poole, Quicktime in Motion, Macworld, Sept. 1991 at 154.

[n.51]. One project brings song and dance of world cultures to students and scholars on a multi-media computer system. Beverly T. Watkins, A Folklorist's Material on More than 400 Cultures to Be Available on a Multimedia 'Global Jukebox,' The Chronicle Of Higher Education, May 13, 1992 at A21.

[n.52]. James Schwoch, Mimi White, And Susan Reilly, Media Knowledge: Readings In Popular Culture, Pedagogy, And Critical Citizenship, especially pp. 60-61, 77-79 (1992).

[n.53]. David L. Wilson, Researchers Hope to Lead Students Into 'Virtual Reality', The Chronicle Of Higher Education, April 22, 1991 at A23.

[n.54]. De minimis non curat lex, Black's Law Dictionary 388 (5th ed. 1979).

[n.55]. Boosey v. Empire Music Co., 224 F. 646 (SDNY1915) (taking of six notes an infringement); Mark v. Leo Feist, Inc., 290 F. 929 (2d Cir.1923) (taking of six bars an infringement).

[n.56]. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

[n.57]. This was common under the 1909 Act which had rigorous requirements for registration and formalities. It is very difficult to lose a copyright under the 1976 Act. For works created after the effective date of the Berne Convention Implementation Act of 1988, notice is entirely optional. 17 U.S.C. § 401(a) (1989), notice "may" be placed on publically distributed copies. If the work was created before the effective date of the Berne Act, and notice is defective, an author had five years in which to cure the defective notice. 17 U.S.C. § 405(a)(2) (1989).

[n.58]. An expired copyright is common in works more than 75 years old or in works copyrighted under the 1909 Act whose owners have let their copyrights expire. Under the 1909 Act, copyrights ran for 28 years and were renewable for another 28. It was common for copyright owners to exploit their works for the original 28 year term and then fail to renew. This is not the case under the 1976 Act, which has a single unitary term, of lengths of life plus 50 years 17 U.S.C. § 302(a), 17 U.S.C. § 302(b), or of 75 years for a work- for-hire or anonymous work 17 U.S.C. § 302(c) (1989). The Copyright Amendments Act of 1992, Pub.L. 102-307, 102 Stat. ---- (1992) further protects copyrighted pre-1976 material from lapse of copyright by granting an automatic extension to materials in their first term.

[n.59]. 17 U.S.C. § 105 (1989).

[n.60]. A rap artist known as Biz Markie was found guilty of copyright infringement of the Gilbert O'Sullivan song Alone Again (Naturally). The court began its opinion with the admonition "Thou shalt not steal." The use was small, consisting of three words and a portion of the music. The defendant had requested permission to use the material, but while the requests were still pending, the record company released the record anyway. Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F.Supp. 182 (SDNY1991). The penalties for infringement of copyright can be severe. There are a wide range of civil penalties and remedies available in the Copyright Act, including temporary and permanent injunctions 17 U.S.C. § 502, impoundment and disposal of the infringing articles 17 U.S.C. § 503, monetary damage and profits 17 U.S.C. § 504, and costs including attorney's fees 17 U.S.C. § 505. The Copyright Act also provides for significant criminal penalties of up to a maximum of a $250,000 fine and five years in jail, or both. 17 U.S.C.A. § 506, 18 U.S.C.A. § 2319 (West 1992 Supp.).

[n.61]. The infringing material appeared in one of thirteen cuts on the album. Nonetheless, the court imposed a severe sanction, ordering the album pulled from the record stores. The Groove Robbers' Judgment; Order on 'Sampling' May Be Landmark, The Washington Post, Dec. 25, 1991 at D1.

[n.62]. L. Patterson And S. Lindberg, The Nature Of Copyright, 159 (1991).

[n.63]. H.R.Rep. No. 1476, 94th Cong., 2d Sess. 5679 (1976).

[n.64]. Ball, Copyright And Literary Property, 260 (1944), as quoted in, Rosemont Enterprises, Inc. v. Random House, Inc. 366 F.2d 303, 306 (2d Cir.1966), extending the concept of fair use from only scholarly works to articles with commercial value such as a Look magazine biography on Howard Hughes. The concept of application only to scholarly works has now been superseded by developments that abridge scholarly activities.

[n.65]. H.R.Rep. No. 1476, 94th Cong., 2d Sess. 5680 (1976).

[n.66]. 17 U.S.C. § 107 (1989).

[n.67]. For discussions of fair use, see A. Latman, R. Gorman And J. Ginsberg, Copyright For The Nineties, (1989); R. Gorman, Copyright, (Federal Judicial Center 1991); Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harv.L.Rev. 1137 (1990); Pierre N. Leval, Toward a Fair Use Standard, 103 Harv.L.Rev. 1105 (1990). For discussions of fair use as applied to Academe, See Mortimer D. Schwartz and John C. Hogan, Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students and Libraries, 17 U.C.Davis L.Rev. 1147 (1984); Brian S. O'Malley, Fair Use and Audiovisual Criticism, 4 Comment 419 (1982); Patricia A. Kreig, Note, Copyright, Free Speech, and the Visual Arts, 93 Yale L.J. 1565 (1984); Note, Fair Use in Copyright Law and the Nonprofit Organization: A Proposal for Reform, 35 Amer.Univ.L.Rev 1327 (1985).

[n.68]. 789 F.2d 157 (2d Cir.1986).

[n.69]. Id. at 159.

[n.70]. Id. at 160.

[n.71]. Id. at 162.

[n.72]. 17 U.S.C. § 101 (1989).

[n.73]. Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F.Supp. 182 (SDNY1991), discussed at note 56, infra.

[n.74]. Random House, 1967.

[n.75]. Time, Inc. v. Bernard Geis Assoc., 293 F.Supp. 130 (SDNY1968).

[n.76]. Id. at 138.

[n.77]. Id.

[n.78]. Courts do not always find use of "news" type photos are in the public interest. Cf. Pacific and Southern Co. v. Duncan, 744 F.2d 1490 (11th Cir.1984). Note however, that in Horgan the person who misappropriated offered to disgorge their profits.

[n.79]. 464 U.S. 417 (1984).

[n.80]. Id. at 420.

[n.81]. Id. at 423.

[n.82]. Id. at 424 n. 6. Fred Rogers, of Mister Roger's' Neighborhood, testified that he was in favor of recording and time-shifting his program: "Some public stations program the 'Neighborhood' at hours when some children cannot use it. I think that it is a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the 'Neighborhood' off-the-air, ... that they then become much more active in the programming of their family's television life. Very frankly, I am opposed to people being programmed by others. My whole approach has always been 'You are an important person just the way you are.' " Testimony of Fred Rogers, id. at 445 n. 27.

[n.83]. Id. at 449.

[n.84]. Id. at 451.

[n.85]. Id. at 454.

[n.86]. Id. at 450.

[n.87]. Id. at 451.

[n.88]. 744 F.2d 1490 (11th Cir.1984).

[n.89]. Id. at 1495. This is apparently a similar argument to the one that was successful in Time Inc., in a different court in 1968. It failed here. Another possible approach is found in Fortnightly Corp. v. United Artists Television, Inc. 392 U.S. 390 (1968) where cable television was held to be merely an extension of what the viewer could do themselves, ie. put up a higher antenna to enhance television reception. Sony Corp., supra at page 140, held that home taping is permissible. It could be argued that TV News Clips was doing merely what the home viewer could do themselves.

[n.90]. Id. at 1496.

[n.91]. See also Agreement on Guidelines for Classroom Copying in Not-For- Profit Educational Institutions, H.R.Rep. No. 1496, 94th Cong., 5681 (1976), Eileen N. Wagner, "Time to End the Confusion Over Copying," Academe 27 (Jan/Feb 1992).

[n.92]. 471 U.S. 539 (1985).

[n.93]. Id. at 543.

[n.94]. Folsom v. Marsh, 9 F.Cas. 342, 344-345 (No. 4,901) (CC Mass.) as quoted in, Harper & Row v. Nation Enterprises, 471 U.S. 539, 550 (1984).

[n.95]. Id. at 566.

[n.96]. Id. at 551.

[n.97]. Id. at 555.

[n.98]. 487 F.2d 1345 (Cl.Ct.1973).

[n.99]. 621 F.2d 57 (2d Cir.1980).

[n.100]. 695 F.2d 1171 (9th Cir.1983).

[n.101]. 309 F.2d 777 (8th Cir.1962).

[n.102]. Eric D. Brandfonbrener, Note, Fair Use and University Photocopying: Addison-Wesley Publishing Co. v. New York University, 19 U.Mich.J.L.Ref. 669 (1986), the case resulted in a settlement between the publisher and the University and its professors that enhanced restrictions on professor's copying activity.

[n.103]. KTLA fed the footage to CNN which in turn re-fed the material to its subscribing stations. George Holliday asked 900 stations across the country for $7,500 each if they had already aired the video. Los Angeles independent TV station KCAL also fed the footage to CONUS, another national news-sharing service. Stations Hit in Video Fight, Electronic Media, June 10, 1991 at 1.

[n.104]. Howard Kurtz, Video Vigilante Seeks Reward: Man Who Taped LA Beating Asks Stations for Payment, The Washington Post, (June 4, 1991) at B1.

[n.105]. P. Leval, Toward a Fair Use Standard, 103 Harv.L.Rev. 1105 (1990), Note, Fair Use in Copyright Law and the Non-Profit Organization: A Proposal for Reform, 34 Amer.U.L.Rev. 1327 (1985).

[n.106]. Clearances for mass-audience books written by scholars, under this proposal would still require copyright permission secured through normal channels, presumably by the publishers.

[n.107]. 17 U.S.C. § 116 (1989); see R. Gorman, Copyright Law, 92 (Federal Judicial Center 1991). The jukebox compulsory-royalty has been suspended until 1999 by a negotiated agreement between ASCAP, BMI, SESAC and the Amusement and Music Operators Association.

[n.108]. 17 U.S.C. § 115 as amended by 56 FR 56157.

[n.109]. 17 U.S.C. § 111 (1989).

[n.110]. 17 U.S.C. § 117 (1989); see R. Gorman, Copyright Law, 90 (Federal Judicial Center 1991).

[n.111]. 17 U.S.C. § 118 (1989); see R. Gorman, Copyright Law, 93 (Federal Judicial Center 1991).

[n.112]. H.R.Rep. No. 1476, 94th Cong., 2d Sess. 5732 (1976).

[n.113]. Information memo, Commission of the European Communities, 29 January 1992 at 8.

[n.114]. Austria-Country Marketing Plan 1990, 1991 National Trade Data Bank Market Reports, 11 June 1991.

[n.115]. 758 F.Supp 1522 (SDNY1991).

[n.116]. Id.

[n.117]. Id. at 1529. The court also indicates, in an off-handed way various court's confusion in interpreting fair use by mentioning that in the case of the fair use cases that have made it to the U.S. Supreme Court, that both were overturned at each level of review.

[n.118]. Id.

[n.119]. H.R.Rep. No. 1496, 94th Cong., 5681 (1976).

[n.120]. Id. at 1530.

[n.121]. Id.

[n.122]. Id. at 1534.

[n.123]. Id. at 1535.

[n.124]. Id. at 1536.

[n.125]. 758 F.Supp. 1522, 1529 (SDNY1991).

[n.126]. 464 U.S. 417 (1984).

[n.127]. As is obvious, this will require amendment to the Copyright Act, an act of Congress. However, much legislation originates with an interest groups seeking to solve problems that impede their functioning.

[n.128]. However, fair use has also been an insufficient doctrine to resolve the controversy of the use of unpublished letters in University archives.

[n.129]. There have been proposals before Congress to reduce the scope of this "subsidy" to the now viable, highly profitable and immensely competitive cable television industry.

[n.130]. 6.25 cents per song or 1.25 cents per minute, whichever is greater, 17 U.S.C. § 115 as amended by 56 FR 56157.

[n.131]. Some have suggested to the author the use of a private copyright clearance body, much as the Copyright Clearance Center (CCC) now exists. The implementation of a scholarly license would require the force of law, the use would not be voluntary, but rather compulsory and the royalty rate would have to be reviewed periodically. Since not all copyright owners must belong to the CCC and with the consideration of the

conceptual requirements for an administering body, the Copyright Royalty Tribunal seems a more appropriate existing organization to administer the provision.