

PART VII

RIGHTS

Fair Use, Photoduplication, Performing Rights, Compulsory License and Moral Right

Copyright has often been characterized as a bundle or complex of rights. One will, however, search in vain among the comprehensive studies comprising these volumes for an over-all survey of these rights and an analysis of their scope. This lacuna is of course hardly the result of oversight; it rather reflects the general agreement, except in several specific areas, as to the particular rights presently enjoyed and those which should be accorded by a new statute.

One basis for such agreement is the rule of reason known as "fair use" engrafted by the courts upon the rights of the proprietor to print, copy, make new versions, etc. The taking of a reasonable amount of material under certain circumstances is accordingly permissible. The study on fair use is thus, in an inverted fashion, the only general survey of what constitutes infringement found among the studies. This is perhaps not surprising since the statute does not define infringement, but merely specifies the exclusive rights of the proprietor. The doctrine of fair use is the most general limitation on the seemingly absolute specification of these rights. The most pressing aspect of this problem—photoduplication of copyrighted materials by libraries—has been singled out for specialized treatment.

As indicated above, there are several problem areas relating to rights. These appear to center about the field of music. One such problem, which has generated little litigation but much controversy, is the exemption of performances of music on coin-operated machines, *i.e.*, "juke boxes," from the sweep of the proprietor's exclusive right to perform his work publicly for profit. This problem, like that of designs, has been crystallized into specific legislative proposals on which Congressional hearings have recently been held. Since the Register of Copyrights has viewed these proposals as appropriate for consideration separate from and in advance of general copyright revision, there is no study devoted to the "juke-box" exemption.

It has been noted that rights in music do not extend to all public performances, but only those which are deemed "for profit." Although the "for profit" concept has been continually expanded by the courts, it remains a limitation on performance rights in music, as well as in non-dramatic literary works such as poems, lectures and the like. Dramatic works, on the other hand, are not subject to such a limitation. But

protected performances of such works must also be "public." The concepts "for profit" and "public performances" are examined in a separate study on limitations on performing rights. This study also reviews the question of performing rights in motion pictures for which the present statute makes no express provision.

Musical copyright is accorded specialized treatment by the statute in another respect. When "mechanical," *i.e.*, recording, rights were extended to music in 1909, they embodied a "compulsory license" provision whereby the recording of music under the authority of the proprietor made the work generally available for recording upon payment of two cents per record. Despite the attention directed to this innovation in the course of the 1909 revision, the provision did not produce much litigation until recently. At least a half dozen cases involving this provision have been decided since publication of the legal study on this subject. Most of these decisions have tended to enhance the proprietor's rights by expansive interpretations of the acts violative of such rights, see *Reeve Music Co. v. Crest Records, Inc.*, 285 F. 2d 546 (2d Cir. 1960); *Famous Music Corp. v. Seeco Records, Inc.*, 201 F. Supp. 560 (S.D.N.Y. 1961), and by the imposition of severe sanctions against infringers, see *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F. 2d 263 (2d Cir. 1959); *ABC Music Corp. v. Janov*, 186 F. Supp. 443 (S.D. Cal. 1960). *Cf. Norbay Music, Inc. v. King Records, Inc.*, 290 F. 2d 617 (2d Cir. 1961) (proprietor's delay in filing required "notice of use" excuses infringements prior to but not after such filing).

The paucity of earlier litigation involving the compulsory license provision is probably due in part to the gloss imparted to the statutory provisions by rather well-defined commercial folkways. These are examined in the context of economics by a separate factual survey.

The final study on rights deals with the moral right of an author, a right not presently found in the copyright statute. In analyzing the "droit moral" characteristic of a number of foreign systems, this study finds, as did the study on sound recordings, that coverage in the copyright statute is not the only effective means of recognizing literary property or rights akin to such property. Once again, state law is consulted with the finding that injuries to the integrity of a work or the reputation of its author are frequently redressed in the name of unfair competition, breach of contract, defamation or invasion of the right of privacy or of publicity.

STUDY NO. 14
FAIR USE OF COPYRIGHTED WORKS

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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.

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

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. 1956).

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); *Karl 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 *Karl 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. Oreen 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 is 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-

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 defendant'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 history⁴⁷ 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, 1937, 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 SYM-

POSIUM II (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 source⁶⁰ 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 very 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.

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* case⁷³ 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.

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 proposal⁸¹ 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 infringement. 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 infringement. 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

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."⁹⁵

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; (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

⁹⁵ 131 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

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 non-dramatic 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 bill¹¹⁶ 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. 4187, 59th Cong., 2d Sess. (1907).

¹¹⁵ *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 3539*, 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 bill¹¹⁸ limited significantly the public reading exemption of subsection (5). This use could be made only of non-dramatic works and was permitted only where the public reading or recitation was not for profit.

B. VESTAL BILLS, 1931

The Perkins bills¹¹⁹ 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 version¹²¹ and its companion bill in the Senate¹²² 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. 6900, 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 bills¹²³ 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 bill¹²⁴ introduced the addition of the words “or the work quoted” to the end of subsection, and this modification was retained in all the later versions¹²⁵ of the bill.

The Dill bill¹²⁶ 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. 3047¹²⁹ 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 bill¹³⁰ was silent as to fair use, but the Sirovich bill of 1936¹³¹ 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

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 provision¹³⁷ 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

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 34, 3 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 Thomas¹⁴¹ 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 scholarship¹⁴² 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 hearings¹⁵² 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.

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, p. 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 269-270 (1938-1939).

¹⁴⁹ Id. at 15, 1 Shotwell Papers 268 (1938-1939). See also Comparison of the Drafted Proposals of the Various Interested Groups prepared by Edward Sargoy, dated Nov. 16, 1938, at 17, 18, 1 Shotwell Papers 241 (1938-1939).

¹⁵⁰ Minutes, Mar. 2, 1939, p. 14, 2 Shotwell Papers 67 (1939).

¹⁵¹ Id. at 13, 2 Shotwell Papers 66 (1939).

¹⁵² 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 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

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. 5b, 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 COUNTRIES¹⁶⁷

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

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 work¹⁸¹ 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 photographs 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 law¹⁹³ 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 prohibition¹⁹⁵ 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 expand 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 purposes²⁰² 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 City²⁰⁴ and Buenos Aires²⁰⁵ 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, an 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 acknowledgment 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* case²²² 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.