

COMMENTS AND NOTES

COPYRIGHT FAIR USE—CASE LAW AND LEGISLATION

Fair use is a judicially formulated concept which allows persons other than the copyright owner to use copyrighted material without permission. The present comment sets forth the rather unsettled case law definition of fair use, and recommends an analyzer for delineating the relationship between fair use and an equally amorphous copyright concept, substantial similarity. This delineation is then assessed in light of the codification of fair use proposed in the copyright legislation now pending before Congress.

Technological advances in the fields of photocopying and information storage and retrieval, combined with the proliferation of educational and cable television, have stimulated a thorough congressional review of copyright legislation.¹ In addition to specific provisions covering information storage² and developments in television,³ resulting legislation proposals contain a general provision codifying the previously nonstatutory concept of "fair use."⁴ Under that concept, persons other than the owner may use copyrighted material, despite the fact that a literal reading of the copyright statute would permit use of the material only by the copyright holder.⁵ Since the judicial formulation of fair use is at

¹ 113 CONG. REC. 3629 (daily ed. April 6, 1967) (remarks of Representative Rhodes); H.R. REP. NO. 83, 90th Cong., 1st Sess. (1967) [hereinafter H.R. REP. NO. 83].

² Copyright Bill 108, H.R. 2512, 90th Cong., 1st Sess. (1967) [hereinafter referred to as Copyright Bill]. Also printed at 113 CONG. REC. 3631 (daily ed. April 6, 1967); H.R. REP. NO. 83. In the 90th Congress the House passed an amended version of H.R. 2512 on March 11, 1967. CCH 1967-68 CONGRESSIONAL INDEX at 5563. The Senate, however, never acted on the companion bill, S. 597, *see id.* at 3546, but did hold hearings. *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

³ Copyright Bill §§ 110-11.

⁴ Copyright Bill § 107. For the text of the bill, see text accompanying note 192 *infra*. Sections 108-116 contain qualifications on the exclusive rights granted in § 106. Specific provisions not mentioned in the text deal with ephemeral recordings; pictorial, graphic and sculptural works; and problems of the phonograph record industry.

⁵ *See* 17 U.S.C. § 101 (1964).

best a nebulous concept, the recommended codification could significantly affect developing case law, with any construction or expansion of the doctrine having broad ramifications for the publishing industry. The purpose of this comment is to delineate more clearly the scope of fair use by analyzing its essential factors and their present interrelationship under the impact of the current bill.

DEVELOPMENT OF COPYRIGHT PROTECTION

The proposed copyright legislation is the most recent development in the expansion of protection for the interest of authors in their works, the statutory inception of which was the copyright act of 8 Anne in 1709.⁶ That act granted authors of books certain exclusive rights in their works for a limited time period. However, early attempts were made to claim even broader protection than that afforded by the statute. Thus, in the decade prior to the American Revolution, publishers attempted to avoid the time limitations of 8 Anne by asserting a perpetual copyright at common law.⁷ Indeed, in *Millar v. Taylor*,⁸ it was held, with the concurrence of Lord Mansfield, that a perpetual copyright did exist at common law. Later, however, in *Donaldson v. Beckett*,⁹ the House of Lords ruled that although an owner possessed perpetual literary property in *unpublished* works, any similar common law right as to *published* works had been displaced by 8 Anne. Moreover, in practice this statutory protection was further limited by permitting some copying as long as there was a judicial finding of "fair dealing."¹⁰ The fair dealing concept, codified by Parliament in 1911,¹¹ apparently represented an attempt to reconcile what the

⁶ Copyright Act of 1709, 8 Anne c. 19. Prior to 8 Anne, the laws granting exclusive rights in literary property had taken the form of exclusive licenses granted to the stationer's company by the crown as a method of controlling the dissemination of printed matter. See generally H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* §§ 2-3 (1944); W. COPINGER & S. JAMES, *COPYRIGHT* §§ 21-30 (10th ed. 1965); A. WEIL, *AMERICAN COPYRIGHT LAW* §§ 8-9 (1917).

⁷ See H. BALL, note 6 *supra* at § 3.

⁸ 98 Eng. Rep. 201 (1869).

⁹ 1 Eng. Rep. 837 (1774).

¹⁰ See *Saunders v. Smith*, 40 Eng. Rep. 1100 (1838); *Bramwell v. Halcomb*, 40 Eng. Rep. 1110 (1836); *Wilkins v. Aikin*, 34 Eng. Rep. 163 (1810); W. COPINGER, *supra* note 6, at § 460.

¹¹ Copyright Act of 1911, § 2(1)(i), 1 & 2 Geo. 5 c. 46.

courts recognized as the dual purposes of 8 Anne: to reward the author, and to stimulate other authors to produce for the benefit of society.¹²

The historical development of American copyright law closely parallels the English experience. While the first English copyright act could have become part of state common law under various reception statutes and constitutional provisions,¹³ resort to such statutes was never necessitated since, pursuant to a recommendation of the Continental Congress,¹⁴ many states adopted express statutory provisions patterned on 8 Anne.¹⁵ Drawing on the English and state experience, the framers of the Constitution subsequently established the basis for uniform national copyright legislation by expressly providing for power in the national government to secure to authors exclusive rights in their writings. Thus, Article I, Section 8 of the Constitution provides: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁶ The first Congress implemented this grant with legislation similar in form to its English and state law antecedents.¹⁷ State laws were not entirely preempted, however, for the Supreme Court, analogizing to *Donaldson v. Beckett*, construed the federal legislation as the exclusive source of copyright in published works, thereby leaving protection of the property in

¹² See *Cary v. Kearsley*, 170 Eng. Rep. 679 (1802); Yankwich, *What is Fair Use?* 22 U. CHI. L. REV. 203, 204 (1954).

¹³ See, e.g., CONST. OF MD., DECLARATION OF RIGHTS ACT, art. 5 (1957) (received as of July 4, 1776); CONST. OF N.Y., art. I, § 14 (1954) (1775); PA. STAT. ANN. tit. 46, § 152 (1952) (Feb. 10, 1777).

¹⁴ The Continental Congress by resolution recommended such legislation. 8 JOURNALS OF CONGRESS: CONTAINING THEIR PROCEEDINGS FROM NOV. 2, 1782 TO NOV. 1, 1783 at 256-57 (1800).

¹⁵ For a collection of these early state statutes, see COPYRIGHT ENACTMENTS, COPYRIGHT OFFICE BULLETIN NO. 3, at 1-21 (1963). Only Delaware failed to enact such a statute. *Id.* at 21.

¹⁶ U.S. CONST. art. I, § 8. For a thorough review of the interpretations of the constitutional language, see M. NIMMER, COPYRIGHT §§ 1-9 (1966).

¹⁷ Compare Copyright Act, 1790, ch. 15, 1 Stat. 124 with authorities cited in note 15 *supra*. The first federal statute broadened the scope of the "writings" protected by 8 Anne. Thus, the U.S. enactment included maps, charts and prints, a listing that has been used as the basis of a liberal construction of the constitutional term "writings." See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

unpublished works to the states.¹⁸ Reliance on other English precedents also led lower federal courts to develop the concept of "fair use,"¹⁹ the American counterpart of England's "fair dealing."

INFRINGEMENT—JUDICIAL IMPLEMENTATION OF THE STATUTORY PATTERN

The basic pattern of the United States' copyright law has remained unchanged since the original act in 1790.²⁰ Thus, the federal statutes have continuously authorized the granting of copyrights which confer certain exclusive rights. For instance, section 1(a) presently protects the exclusive right of the copyright holder to print, reprint, publish, copy, vend, and make a translation or other version.²¹ If the enumerated rights are infringed, section 101 provides for injunctive relief plus recovery of actual damages and profits, or in lieu thereof, damages according to a statutory schedule.²² However, aside from special provisions dealing with musical²³ and dramatic²⁴ productions, which were enacted to solve unique problems,²⁵ no statute has yet given a general definition of infringement.²⁶

Within the context of the literary arts,²⁷ the failure to define infringement raised several problems.²⁸ First, in comparing two

¹⁸ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 59 (1834).

¹⁹ *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5,728) (C.C.D. Mass. 1839).

²⁰ *Compare* Copyright Act, 17 U.S.C. §§ 1-216 (1964) with Copyright Act, 1790, 1 Stat. 124.

²¹ *See* Copyright Act, 17 U.S.C. § 1 (1964).

²² *See id.* § 101.

²³ *Id.* § 1(e).

²⁴ *Id.* § 1(d).

²⁵ These sections were necessitated by decisions such as *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), which held that a music roll for a player piano and, therefore, by inference a phonograph record, was not a "copy" of a song.

²⁶ "[I]nfringement is a word not defined in the statute, but is assumed to be something already known to the law . . ." *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84 (6th Cir. 1943); see Copyright Act, 17 U.S.C. §§ 1, 3 (1964).

²⁷ While copyright protection has been broadly construed to apply to nonliterary works, see, e.g., *Mayer v. Stein*, 347 U.S. 201 (1954) (figurine lamp base); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photographs), and no reason appears why the concept of fair use could not apply to such nonliterary works, see *Firstot v. First Am. Natural Ferns Co.*, 251 F. Supp. 886 (S.D.N.Y. 1966) (artificial flowers), the concept has been developed in cases concerning literary works and will be discussed here in that context.

²⁸ Of course, a plaintiff cannot claim infringement unless he is the *owner* of a *valid*

works, the identity of their contents alone could have been deemed an infringement. However, the courts experienced little difficulty in holding that in such situations, no infringement occurred so long as the later work was independently produced. As a corollary, the *absence* of independent production became an element in the definition of infringement.²⁹

A further problem arising from failure to define infringement was that the language of the statute could have been read as requiring exact reproduction of the entire copyrighted work in order to constitute infringement. Such an interpretation, of course, would permit easy invasion of exclusive rights by paraphrasing or by exact reproduction of less than the entire text.³⁰ Not surprisingly, the courts blocked any such abuses. However, they recognized that overzealous restrictions on paraphrasing could hinder the free use and dissemination of ideas. Resolution of the tension between these competing interests was attempted through the verbal formula that only the mode of expression and not the idea of a work were protected by copyright: in short, the ideas could be used, but employment of the same mode of expression would be deemed an infringement.³¹ So formulated, it becomes apparent that this second problem is basically one of determining the level of abstraction at which use must be made of a copyrighted work to avoid infringing upon it.³² This, in turn, became another factor pertinent in the determination of infringement.

copyright. See generally M. NIMMER, *supra* note 16, § 141.1. In the discussion here it will be assumed that the plaintiff owns such a copyright.

²⁹ Baker v. Selden, 101 U.S. 99, 102-03 (1879) (dictum); Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 541 (1st Cir. 1905); Greenbie v. Noble, 151 F. Supp. 45, 65 (S.D.N.Y. 1957); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 592 &n.33 (1956).

³⁰ Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478, 485 (9th Cir. 1961), *cert. denied*, 368 U.S. 801 (1962); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930); see Nikanov v. Simon & Schuster, 246 F.2d 501 (2d Cir. 1957); West Publishing Co. v. Lawyers Coop. Publishing Co., 79 F. 756 (2d Cir. 1897); M. NIMMER, *supra* note 16, § 143.11; Note, 56 COLUM. L. REV. 585, 589-90 (1956).

³¹ See Mayer v. Stein, 347 U.S. 201, 217-18 (1954); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908); Holmes v. Hurst, 174 U.S. 82, 86 (1899); Baker v. Selden, 101 U.S. 99, 102-03 (1879); Manes Fabrics Co. v. Miss Celebrity, Inc., 246 F. Supp. 975 (S.D.N.Y. 1965); Eichel v. Marcin, 241 F. 404 (S.D.N.Y. 1913). The mode-of-expression formulation has been reenforced by the statutory provision granting the author exclusive rights in any *version* of his work. Copyright Act, 17 U.S.C. § 1(b) (1964).

³² "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may

Since some degree of nonverbatim use may be an infringement, it seems obvious that merely leaving out a small portion of a work and mechanically producing the remainder verbatim would not preclude the finding of infringement.³³ On the other hand, quoting of some passages of a prior work would sometimes seem necessary for effective writing, as for instance in literary criticism, scientific works, and histories.³⁴ While no simplistic formula has been offered to resolve the policy conflict surrounding this verbatim reproduction problem, the task is simply to determine how much, if any, verbatim reproduction is permissible. Such a determination must be made as a step in ascertaining infringement.

A finding of infringement, then, requires (1) absence of independent production, and either (2) nonverbatim use at an impermissibly low level of abstraction³⁵ from the text, or (3)

perhaps be no more than the most general statement of what the play is about, and at times consists of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property never extended." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); see *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841).

³³ See Copyright Act, 17 U.S.C. § 3 (1964): "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted . . ." *Cf. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir.), *aff'd sub nom.*, *Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1956); *National Comics Publications v. Fawcett Publications*, 191 F.2d 594 (2d Cir. 1951); *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5,728) (C.C.D. Mass. 1839). All of these cases involved court prohibition of verbatim quoting of extensive portions of the copyrighted work.

³⁴ See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (history); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905) (dictum); *Lawrence v. Dana*, 15 F. Cas. 26, 60 (No. 8136) (1869) (criticism); Jensen, *Fair Use: As Viewed by the User*, 39 *DICTA* 25, 28-32 (1962); Latman, *Fair Use of Copyrighted Works*, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDIES ON COPYRIGHT LAW REVISION NO. 14, 8-11 (Comm. Print 1960); Yankwich, *supra* note 12 at 207-09. *But cf. Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950) (history).

³⁵ The case of *Bradbury v. Columbia Broadcasting System*, 287 F.2d 478 (9th Cir. 1961), *cert. denied*, 368 U.S. 801 (1962), illustrates what is meant by an impermissibly low level of abstraction. In *Bradbury* the plaintiff had written an article and book in which "firemen" were charged with the duty of burning books. The book *Fahrenheit 451* traced the evolution of a fireman's ideals toward his task under the influence of an "unorthodox" girl. An infringing teleplay, "A Sound of Different Drummers," followed the same basic story line and in addition had 22 key incidents that were almost identical to *Fahrenheit 451*. Thus, though the use of the same basic story line would probably not have been an infringement, *i.e.*, the level of abstraction at which the idea was appropriated would have been sufficiently high, the development of the story around virtually identical incidents was appropriation at too low a level of abstraction.

excessive verbatim quoting of the copyrighted work.³⁶ Such simplicity of statement, however, fails to reflect the difficulties encountered by the courts in recognizing and resolving these issues. Indeed, the courts have compounded the problem by analyzing each issue under rubrics tending to obscure the real issues.³⁷ Confusion has also been engendered by subsuming different issues or combinations thereof under the same terms.³⁸ Thus, some courts apparently use the single term "copying" as a shorthand for both the first and second issues.³⁹ Others use the term "copying" to stand only for the first issue and employ the appellation "substantial similarity" when investigating the second⁴⁰ and third issues.⁴¹ The confusion is further heightened by uncertainty as to the demarcation between substantial similarity and "fair use," fair use having been employed not only as the concept for resolution of the third issue, but also as the label for the doctrine that the nature

³⁶ See generally M. NIMMER, *supra* note 16, §§ 141.2-143.

³⁷ For instance, the element of substantial similarity apparently had its genesis in the *de minimus* doctrine of equity practice, see Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 593 (1956); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?* 12 VAND. L. REV. 459, 464, 467 (1959), but has retained a label with quantitative connotations long after the merger of law and equity. This quantitative connotation is at variance with the frequently recited statement that quality rather than quantity is determinative. H. BALL, *supra* note 6, at 335.

³⁸ See Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 590-93 (1956); notes 175-89 *infra* and accompanying text.

³⁹ "It is agreed that to recover for . . . copyright infringement . . . the plaintiff must prove (1) access; (2) substantial similarities between the two works; and [therefore] (3) copying of the plaintiff's work by the defendant." *Costello v. Loew's Inc.*, 159 F. Supp. 782, 783 (D.D.C. 1958); *cf.* *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908). See also *Lapsley v. American Institute of Certified Public Accountants*, 246 F. Supp. 389 (D.D.C. 1965); *Richards v. Columbia Broadcasting System, Inc.*, 161 F. Supp. 516 (D.D.C. 1958); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 590 (1956).

⁴⁰ "There are two principal elements. To prove infringement plaintiff must establish (1) that plaintiff's work was copied in the allegedly infringing work, and (2) that if so, a material and substantial portion of plaintiff's work was copied . . ." *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 457 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966). It is indicative of the dual function served by the term "copying" that the Second Circuit has used the term in both senses here discussed in the same opinion. "[I]t is important to avoid confusing two separate [essential] elements . . .: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying . . . went so far as to constitute improper appropriation. . . . If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying." *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

⁴¹ See M. NIMMER, *supra* note 16, § 143.12; notes 175-90 *infra* and accompanying text.

of the use can be of overriding importance in the solution of both problems two and three.⁴² To avoid these semantic difficulties and to facilitate the present analysis, unless otherwise indicated, "appropriation" will be used only to refer to the absence of independent production; "substantial similarity" will include only nonverbatim use at a low level of abstraction; and "copying" will be considered to require both "appropriation" and "substantial similarity."⁴³

Appropriation

Although there can be no infringement unless some actual appropriation of the copyrighted work has been made, access⁴⁴ to the allegedly infringed work, coupled with its similarity to the supposedly infringing work,⁴⁵ may be sufficient evidence of the requisite appropriation.⁴⁶ Even an identical work does not infringe if independently produced, but depending on the potentiality for imaginative treatment,⁴⁷ similarity alone may be so striking as to preclude any inference other than appropriation from the copyrighted work.⁴⁸ Certainly no finder of fact would hesitate to

⁴² See notes 175-90 *infra*.

⁴³ Since the right to "copy" is one of the exclusive rights granted by the Copyright Act, 17 U.S.C. § 1, the violation of which *is* infringement, it is arguable that "copying" should be synonymous with "infringement" and subsume all three issues. However, when the appropriation is verbatim, the courts seldom use the term, but instead move directly to consideration of fair use. See, e.g., *Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y. 1909); *Bloom v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903); *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. 1841); *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941). It is thus difficult to discern whether "copying" is coterminous with "infringement" or whether infringement subsumes an additional element of "fair use." See notes 84-86 and 175-89 *infra*.

⁴⁴ Although there is a split of authority as to whether actual access or mere opportunity for access need be shown in light of the difficulty of obtaining direct proof of appropriation, the latter view seems preferable. *Smith v. Little, Brown & Co.*, 245 F. Supp. 451 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966).

⁴⁵ The Second Circuit has expressly endorsed the use of expert analysis and testimony as an aid to determining similarity in an appropriation contest. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); note 75 *infra* and accompanying text.

⁴⁶ See authorities cited in notes 39-40 *supra*.

⁴⁷ Thus, if a particular work is subject to great imaginative treatment, yet the allegedly infringing work is markedly similar, it is probable that appropriation has occurred. However, if the particular work simply cannot be imaginatively treated, the fact of similarity alone would not be so probative of the appropriation issue.

⁴⁸ See *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478, 481 (9th Cir. 1961), *cert. denied*, 368 U.S. 801 (1962); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

find appropriation if presented a verbatim similarity between two novels or plays,⁴⁹ but identical listings in directories or indices where the listings should correspond if both have been accurately prepared would have no such probative value.⁵⁰

The degree of similarity needed in order to enable the trier of fact to find some appropriation is not necessarily the same as required to establish "substantial similarity."⁵¹ Yet while the similarity required to establish substantiality has been frequently examined, no court has attempted to delimit the amount of similarity which would show appropriation as a matter of law.⁵²

Substantial Similarity

To reconcile the public interest in free dissemination of ideas with the protection of the copyright holder's exclusive rights, substantial similarity, as well as appropriation, has been made a prerequisite to an establishment of copying.⁵³ The substantiality requirement may be a product of equity practice, under which the appropriation had to be substantial enough to justify enjoining the entire work.⁵⁴ However, it also seems likely that the element arose to accommodate the judicial difficulty experienced in discerning impermissible nonverbatim appropriation, and the reluctance to restrict free use of ideas if there was any uncertainty about the degree of appropriation.⁵⁵ Presently, the requirement is a

⁴⁹ Thus, although in theory no infringement would result if one independently produced a literary work identical to Keats' "Ode on a Grecian Urn," practically, a court could not be convinced that there had been no appropriation. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

⁵⁰ Compare *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936) with *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903).

⁵¹ See *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946). "In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying [i.e., appropriation] and to prove improper appropriation [i.e., substantial similarity]. But such double-purpose evidence is not required; that is, if actual copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying." *Id.*

⁵² But cf. note 49 *supra*.

⁵³ See notes 39-40 *supra*. Nimmer has pointed out that substantial similarity has been used in cases of nonverbatim copying, while similar considerations have been subsumed under the fair use heading when the copying was verbatim. See M. NIMMER, note 16 *supra*, §§ 143.11-12.

⁵⁴ Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 593 (1956); see *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943).

⁵⁵ "The case, therefore, comes back at last to the naked consideration, whether the book of

prerequisite both for equitable and legal relief, a circumstance explained in part by the usual practice of seeking injunctive relief along with a claim for damages.⁵⁶

Of more practical concern than the historical origin of substantial similarity is the uncertainty as to an appropriate test for application of the concept. A variety of tests of substantiality have been utilized, including the pattern test, the audience test, and the demand test. The pattern test would find substantial similarity if the "pattern" of a work was appropriated.⁵⁷ Since the term "pattern" has no precise definition, this test does not answer the question, but merely poses another.⁵⁸ However, by adverting to the pattern, the test does direct attention to a relatively high level of abstraction⁵⁹ and attempts to protect against genuinely damaging appropriations at this high level.⁶⁰ The danger of appropriation at a highly abstract level is particularly acute in the context of the dramatic arts, where the rendition of the same work in different

Davies, in the parts complained of, has been copied substantially from that of Emerson, or not. It is not sufficient to show, that it may have been suggested by Emerson's, or that some parts and pages of it have resemblances, in method and details and illustrations, to Emerson's. It must be further shown, that the resemblances in those parts and pages are so close, so full, so uniform, so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. In short, that there is substantial identity between them. A copy is one thing, an imitation or resemblance another. There are many imitations of Homer in the Aeneid; but no one would say that the one was a copy from the other. . . . The question is, therefore, in many cases, a very nice one, what degree of imitation constitutes an infringement of the copy-right in a particular work. . . . So that, I think, it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject" *Emerson v. Davies*, 8 F. Cas. 615, 622, 624 (No. 4,436) (C.C.D. Mass. 1845); G. CURTIS, COPYRIGHT 258 (1847).

⁵⁶ See Copyright Act, 17 U.S.C. § 101 (1964).

⁵⁷ See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931); *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845); *Grove Press Inc. v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 525 (E.D.N.Y. 1965); *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 459 (S.D.N.Y. 1965), aff'd, 360 F.2d 928 (1966); *Richard v. Columbia Broadcasting System, Inc.*, 161 F. Supp. 516 (D.D.C. 1958); Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513-14 (1945); Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1127-33 (1951); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 592-93 (1956).

⁵⁸ See Chafee, note 57 *supra*, at 513-14.

⁵⁹ See notes 32 and 35 *supra*.

⁶⁰ *Id.*; M. NIMMER, note 16 *supra*, § 143.52, at 638.

media may of necessity result in a surface dissimilarity.⁶¹ Advocates of the pattern test argue that such surface dissimilarity might delude the unaided lay juror into finding no appropriation. Therefore, they suggest that the court should avail itself of experts to assist in determining the level at which appropriation did occur.⁶²

In contrast to the pattern test, the audience test discourages expert analysis to determine the level of abstraction at which any nonverbatim appropriation has been made.⁶³ Under the audience test, similarity is deemed substantial if the average reasonable man would spontaneously and immediately detect the literary piracy without any aid or suggestion or critical analysis by others.⁶⁴ Although the audience test has broad support in the case law,⁶⁵ it is susceptible to telling criticism.⁶⁶ Its rejection of expert analysis reduces its utility as a universal test of substantiality.⁶⁷

⁶¹ "The statute giving authors of copyrighted works the exclusive right to dramatize them must receive a reasonably liberal application or it will be wholly ineffective. . . ." *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478, 484 (9th Cir. 1961), *cert. denied*, 368 U.S. 801 (1962). That is true because "[i]t is impossible to make a play out of a story—to represent a narrative by dialogue and action—without making changes" *Dam v. Kirke La Shelle Co.*, 175 F. 902, 907 (2d Cir. 1910).

⁶² See M. NIMMER, note 16 *supra*, §§ 143.52-53; *cf.* *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (court expressly employed expert analysis to determine if there was appropriation but left the question of substantiality to the audience test).

⁶³ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir.), *cert. denied*, 296 U.S. 669 (1933); *Costello v. Loew's, Inc.*, 159 F. Supp. 782, 784 (D.D.C. 1958).

⁶⁴ *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir.), *cert. denied*, 296 U.S. 669 (1933).

⁶⁵ See, e.g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1907); *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966); *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478 (9th Cir. 1961), *cert. denied*, 368 U.S. 801 (1962); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir.), *cert. denied*, 296 U.S. 669 (1933); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Manes Fabrics Co., v. Miss Celebrity, Inc.*, 246 F. Supp. 975 (S.D.N.Y. 1965); *Lapsley v. American Institute of Pub. Accountants*, 246 F. Supp. 389 (D.D.C. 1965); *Hedeman Prods. Corp. v. Tap-Rite Prods. Corp.*, 228 F. Supp. 630 (D.N.J. 1964); *Costello v. Loews, Inc.*, 159 F. Supp. 782 (D.D.C. 1958).

⁶⁶ See generally M. NIMMER, note 16 *supra*, § 143.52.

⁶⁷ See *id.*; *cf.* *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir.) *cert. denied*, 296 U.S. 669 (1933). While the average reasonable man may well be able to detect many forms of literary piracy, he could not be expected to recognize some of the more subtle and complex forms. Application of the audience test to all infringement cases will therefore produce a certain amount of inaccuracy and injustice, which could be avoided by employment of a more sensitive test.

Furthermore, the average reasonable man standard employed by the test ignores the fact that the work's actual audience might not consist of average reasonable men.⁶⁸ Indeed, no attempt has been made to refine the average reasonable man test so as to incorporate special attributes and knowledge of particular audiences, as has occurred in the analogous concept of the reasonably prudent man in tort law. However, one decision expressly recognized that the average reasonable man standard was being applied because the audience to whom the work was directed was composed of such persons.⁶⁹ It could therefore be argued that a potential audience of average reasonable men is a *condition* for the application of the audience test,⁷⁰ or alternatively, that special attributes of the audience should be considered.

Even if the audience test was refined to account for variations in the intended audience, it would still retain the deficiency of oversimplifying the substantiality issue for jury consideration. The jury, however, is seldom the trier of fact in a copyright case.⁷¹ Thus, in a typical year, only four-tenths of one percent of the copyright cases terminated went to a jury trial,⁷² there being only two jury trials in the entire country. The vast majority of copyright cases are bench trials, and certainly judges are capable of handling the complexities of analysis and the broadened issues encompassed by a more realistic test. Furthermore, in actual practice, judges as the triers of fact do engage in detailed dissention and analysis.⁷³

⁶⁸ The inadequacy of the reasonable man test probably explains why the cases employing it have uniformly concerned works directed to the public generally and why the courts have turned to fair use rather than substantiality as the tool of analysis when the works involved were of a scientific or technical nature. See notes 177-78 *infra*.

⁶⁹ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). The standard was "[l]ay listeners, who comprise the audience for whom such popular music is composed" *Id.* at 473.

⁷⁰ Assuming that audience reaction is merely a relevant factor to consider in applying the demand test and not an exclusive test, see notes 79-80 *infra* and accompanying text, this interpretation would be preferable to consideration of special attributes of the audience. If such attributes are to be considered, certainly expert testimony from persons possessing such attributes would be required, and if experts are to be used, it would seem more pertinent to seek expert opinion on the effect on demand for the allegedly infringed work.

⁷¹ This is true despite an apparent attempt by the Second Circuit to encourage jury trials by discouraging dismissals of failure to state a claim and summary judgment. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *MacDonald v. Du Maurier*, 144 F.2d 696 (2d Cir. 1944); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939). *But see* *Tralins v. Kaiser Aluminum & Chem. Corp.*, 160 F. Supp. 511 (D. Mo. 1958).

⁷² 1964 ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFF. OF THE UNITED STATES COURTS 226.

⁷³ A perusal of the infringement cases indicates that in most cases the judge engages in

Even if the level of abstraction or the amount of verbatim reproduction can be ascertained under either the pattern or audience test, neither of these tests develop adequate criteria for measuring *substantial* similarity. Thus, under both tests, the typical opinion merely analyzes the works involved to determine what similarities exist and then states the conclusion that the similarity is substantial without identifying the determinative factors.⁷⁴ *Arnstein v. Porter*⁷⁵ seemed to sanction just such a procedure for, although approving the use of expert analysis in determining the issue of appropriation, it eschewed all analysis in determining whether the appropriation was so substantial as to be prohibited.⁷⁶ However, while continuing to rely on the audience test, the *Arnstein* court suggests a major factor of substantiality. According to the *Arnstein* court, substantial similarity turned on

whether defendant took from plaintiff's works *so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.*⁷⁷

Thus defined, the audience test becomes a measure of appropriation of the copyright owner's exclusive interest in audience appeal. Since an appropriation of audience appeal would adversely affect demand, the audience test appears highly related to a demand test in its measurement of the economic detriment at different points in the chain of causation.⁷⁸ Since demand can be reduced by using a

such analysis. *E.g.*, *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478 (9th Cir. 1961) (dissenting opinion), *cert. denied*, 368 U.S. 801 (1962); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49 (2d Cir. 1936); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir.), *cert. denied*, 296 U.S. 669 (1933); *Fristot v. First Am. Natural Ferns Co.*, 251 F. Supp. 886 (S.D.N.Y. 1965); *Richards v. Columbia Broadcasting System, Inc.*, 161 F. Supp. 516 (D.D.C. 1958); *American Visual Corp. v. Holland*, 162 F. Supp. 14 (S.D.N.Y. 1957); *Simonton v. Gordon*, 12 F.2d 116 (S.D.N.Y. 1925).

⁷⁴ See authorities cited in note 73 *supra*.

⁷⁵ 154 F.2d 464 (2d Cir. 1946). *Arnstein*, appearing pro re, was apparently a professional copyright plaintiff with a history of five previous suits who alleged that Cole Porter works such as "Begin the Beguine," "My Heart Belongs to Daddy," and "Night and Day" were plagiarized from certain of his own copyrighted and uncopyrighted work such as "The Lord is My Shepard," and "A Mother's Prayer." The state discussion of expert testimony was volunteered in an enumeration of the elements of infringement preparatory to rulings on the trial court's granting of summary judgment to the defendant. *Id.* at 467.

⁷⁶ *Id.* at 468, 472-73.

⁷⁷ *Id.* at 473 (emphasis added).

⁷⁸ The audience test attempts to measure the decreased value of the copyright holder's

work without direct reliance on those features which create its unique audience appeal,⁷⁹ the demand test makes possible consideration of a greater number of relevant factors than does the audience test. This greater breadth of the demand test, combined with its closer approximation to the economic philosophy of the constitutional grant,⁸⁰ would seem to make it better suited for accomplishing the intended function of substantial similarity in the widely varying contexts in which copyright is asserted. The demand test also seems to serve the interest of the pattern test in preventing concealment of an economically damaging use behind changes necessitated by a transfer of medium. Therefore, under a demand test, both the similarity of pattern and the reduction in audience appeal remain factors, but not the exclusive criteria, in determining substantial similarity.⁸¹

FAIR USE

Like the concepts of appropriation and substantial similarity, the doctrine of fair use is frequently judicially employed in the resolution of copyright infringement. However, the uncertainty as to the doctrine's function, rationale, and elements has contributed to the prevailing confusion in copyright cases. In applying this difficult concept, the courts have avoided legal analysis by emphasizing that fair use is a question of fact, turning on the

rights by determining the degree to which his work's audience appeal is lessened. The demand test, however, seeks to ascertain diminution of value by measuring the lessened market demand for the copyrighted work. By using a market gauge, the demand test measures the economic detriment caused by infringement in more direct monetary terms.

⁷⁹ See notes 102-04 *infra* and accompanying text.

⁸⁰ See notes 95-97 *infra* and accompanying text.

⁸¹ It has been said that utilization of the demand test in determining substantial similarity is merely the result of mistaken reliance on fair use cases. Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 592 (1956). Nevertheless, three circuits and a noted commentator have endorsed the test at various times. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947); *Mathews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *National Institute, Inc., for the Improvement of Memory v. Nutt*, 28 F.2d 132, 135 (D. Conn. 1928), *aff'd*, 31 F.2d 236 (2d Cir. 1929); H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 334 (1944). Still this is a rather limited recognition, and, therefore, the anatomy of the demand test in the context of substantiality has not been explored. *Mathews Conveyor Co. v. Palmer Bee Co.*, *supra* at 85, however, indicates that the demand test of substantiality is "like" the demand test of fair use, so that the analysis in the context of fair use seems applicable here. For analysis of the demand test, see notes 95-104 *infra* and accompanying text.

particular circumstances of each case.⁸² Of course, every case turns on its own facts, but the difficulty of generalization alone should not inhibit courts from stating more specific guidelines for future decision.⁸³

Although most attempts at defining fair use have been singularly unhelpful,⁸⁴ one which has gained relatively wide acceptance explains fair use as a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without . . . consent . . ." ⁸⁵ While debate persists as to whether fair use is a privilege and therefore a defense to be assessed after a finding of infringement, or whether it is an element the absence of which must be established to prove infringement,⁸⁶ the definition does delineate the doctrine's broad function of permitting some amount of nonconsensual use of copyrighted material. However, this definition provides no helpful guide for a court in determining the fair use question in a particular case. No more helpful are the numerous catalogues of factors⁸⁷ which contain only very general, undefined terms with no indication of their relative weights or interrelationships.⁸⁸ Certainly, a specific

⁸² See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960); *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir. 1957); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943). Since most copyright cases are tried without a jury, the primary practical results of classification of fair use as a question of fact are that the appellate courts will be reluctant to review lower court findings, see *Eisenschiml v. Fawcett Publications, Inc.*, *supra*, and the lower courts may be more reluctant to grant judgment on the pleadings. See notes 71 *supra* and 188 *infra*.

⁸³ See *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963).

⁸⁴ See M. NIMMER, *COPYRIGHT*, § 145 (1966); A. WEIL, *AMERICAN COPYRIGHT LAW* 429-32 (1917); Cohen, *Fair Use in the Law of Copyright*, in *COPYRIGHT AND RELATED TOPICS* 105, 108 (Los Angeles Copyright Soc'y & U.C.L.A. Law School ed. 1964).

⁸⁵ H. BALL, *supra* note 81, at 260. See also Schulman, *Fair Use and The Revision of the Copyright Act*, 53 *IOWA L. REV.* 832 (1968).

⁸⁶ Cohen, *supra* note 84, at 109-10; Latman, *supra* note 34, at 6-7. Modern commentators, see H. BALL, *supra* note 81, at 260; M. NIMMER, *supra* note 84, at § 145, including the British, see W. COPINGER & S. JAMES, *COPYRIGHT* § 460 (10th ed. 1965), tend to classify fair use as a defense. See note 188 *infra* and accompanying text.

⁸⁷ See, e.g., *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. 1841); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5,728) (C.C.D. Mass. 1839); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); Cohen, *supra* note 84; Latman, *Fair Use of Copyrighted Works*, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *STUDIES ON COPYRIGHT LAW REVISION* No. 145 (Comm. print 1960); Yankwich, *What is Fair Use?* 22 *U. CHI. L. REV.* 203, 204 (1954).

rationale with which to isolate the most helpful factors and determine their interrelationships is needed.

The Rationale of Fair Use and Its Primary Factors

The initial explanation of fair use, offered by early English and American decisions, was that either custom of the literary community⁸⁹ or the implied consent of the author⁹⁰ sanctioned some non-consensual use of a copyrighted work. The more recent cases, however, have traced the doctrine to policies underlying the constitutional grant of power.⁹¹ Since the present Copyright Act states, "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted . . . ,"⁹² and many of the cases invoking fair use have involved verbatim reproduction of copyrighted language seemingly in violation of the Act, the courts have understandably looked to the Constitution to justify a concept that arguably circumvents an express statutory command.⁹³ Indeed, the Second Circuit has expressly declared that "the fundamental justification for . . . fair use . . . lies in the constitutional purpose in granting copyright protection in the first

⁸⁸ The earliest and most frequently cited of such listings is found in *Folsom v. Marsh*, 9 F. Cas. 342, 344 (No. 4,901) (C.C.D. 1841): "[T]he identity of the two works in substance, and the question of piracy, often depends upon a nice balance of the comparative use made in one of the materials of the other: the nature, extent and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources"

⁸⁹ See *Dodsley v. Kinnersley*, 27 Eng. Rep. 270 (1761); H. BALL, *supra* note 81, at 260; A. WEIL, *supra* note 84, at 429-30; Latman, *supra* note 87, at 15; Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 595 (1956); 15 SO. CAL. L. REV. 249, 250 (1942).

⁹⁰ E.g., *Sampson & Murdock v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); see M. NIMMER, *supra* note 84, at § 145; authorities cited note 89 *supra*. Not only is the implied consent rationale a fiction, but it is also inconsistent with the principle that restrictive statements in the copyright notice apparently add nothing to the protection. M. NIMMER, *supra* note 84, at § 145; Cohen, *supra* note 84, at 106; Note, *Parody and Copyright Infringements*, 56 COLUM. L. REV. 585, 595 (1956).

⁹¹ See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?* 12 VAND. L. REV. 459, 472 (1959). See also Chafee, *supra* note 57, at 511; Latman, *supra* note 87, at 7.

⁹² Copyright Act, 17 U.S.C. § 3 (1964).

⁹³ See M. NIMMER, *supra* note 84, at § 143.12; notes 164-72 *infra* and accompanying text.

instance.”⁹⁴ Under Article I, Section 8, Congress is granted power “to promote the Progress of Science and useful Arts . . .” (the constitutional *purpose*), “by securing . . . to Authors . . . the exclusive Right to their . . . Writings . . .” (the constitutional method). Reasoning from the method clause, the Supreme Court has asserted that the basic philosophy of the Constitution’s copyright clause is an economic one, which persuades that since “encouragement of individual effort by personal gain is the best way to advance public welfare . . . ,”⁹⁵ the public welfare will not be defeated if the use of the copyrighted work by another does not in fact reduce the economic benefit to the individual copyright holder.⁹⁶

Apparently relying on this economic rationale, lower federal courts have held that an important factor in the determination of fair use is whether the unauthorized use causes a diminution in demand for the copied work.⁹⁷ “Diminution in demand” would clearly be found upon a showing of an actual invasion of the market for the allegedly infringed work by a competitive work.⁹⁸

⁹⁴ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). This ground of the *Rosemont* decision could be distinguished, since the court also found that there had been no showing that the Random House book lessened economic benefit of the article, the copyright of which was held by Rosemont, since there was no current income being derived from the article, no definite plans for its expansion to a biography, and the two works were not directly competitive. *Id.* at 305. However, to conclude that the value of the copyrighted article was not diminished seems very doubtful. Certainly such publication diminished the market for any biography that Rosemont might eventually publish.

⁹⁵ *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *accord*, *Addison-Wesley Publishing Co., Inc. v. Brown*, 223 F. Supp. 319 (E.D.N.Y. 1963). While the personal gain philosophy may not be universally valid, especially where writers and artists are involved, it still retains a great deal of merit. Therefore, for purposes of this comment, its validity will be accepted.

⁹⁶ Chafee, note 57 *supra*, at 507. Since creative production is likely to be discouraged to some degree whenever copying *might* reduce the economic benefit, the position that actual economic injury is required to offend the public welfare seems questionable.

⁹⁷ *E.g.*, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5,728) (C.C.D. Mass. 1839); *Addison-Wesley Publishing Co., Inc. v. Brown*, 23 F. Supp. 219 (E.D.N.Y. 1963); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); *G. Ricordi & Co. v. Mason*, 201 F. 182 (S.D.N.Y. 1911); *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332 (D. Conn. 1906).

⁹⁸ *See* Latman, *supra* note 87, at 14-16.

Thus, a foreign language word list which copied extensively from a previously copyrighted list was not justified as a fair use and infringed that copyright because it filled the same demand.⁹⁹ In contrast, a synopsis of an opera's plot appearing in a book explaining the opera was held a fair use because, if anything, such use increased demand for the opera.¹⁰⁰ Moreover, actual damage is not always required to preclude a finding of fair use, for obviously only potential "diminution of demand" need be shown to obtain an injunction. Even in a suit for damages, the present copyright statute apparently provides for minimum damages, if actual damages cannot be proved with sufficient specificity.¹⁰¹ Thus, the demand test may be satisfied where the economic impact on the copyrighted work has only a very remote causal connection with the nonconsensual use. For example, a diminution of demand was found where the potentiality of diminished demand for a scientific book arose as a result of the unfavorable impact which its unauthorized commercial use had upon the writer's reputation;¹⁰² where prejudice to sales of a textbook accrued because of production of an answer sheet for the book's questions;¹⁰³ and where the advertising value of a free sales pamphlet was reduced by its use in another advertisement.¹⁰⁴

The diminution-of-demand factor alone, however, does not always explain judicial reliance on the doctrine of fair use, as a comparison of the facts of two well-known cases demonstrates. On the one hand, the demand test justifies the decision in *Henry Holt & Co. v. Liggett and Myers Tobacco Co.*,¹⁰⁵ where a district court found that the use in a cigarette advertisement of three sentences

⁹⁹ *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874 (2d Cir. 1941).

¹⁰⁰ *G. Ricordi & Co. v. Mason*, 201 F. 182 (S.D.N.Y. 1911).

¹⁰¹ "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . ." Copyright Act, 17 U.S.C. § 101(b) (1964); see M. NIMMER, *supra* note 84, at § 154.11.

¹⁰² *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

¹⁰³ *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963).

¹⁰⁴ *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965) (district court had assumed that there was no economic injury if the pamphlet was free).

¹⁰⁵ 23 F. Supp. 302 (E.D. Pa. 1938).

from a book on the care of the voice was not a fair use. The works were not competitive, but the use in advertising of the author's conclusion apparently damaged his reputation and therefore reduced the demand for his book.¹⁰⁶ On the other hand, in *Bloom & Hamlin v. Nixon*,¹⁰⁷ the use by an entertainer of a chorus of a copyrighted song to parody the style of another entertainer was held a fair use.¹⁰⁸ The court concluded that "surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced."¹⁰⁹ The *Henry Holt* case and *Bloom* might be distinguished on the basis that there was no damage to the writer's reputation in *Bloom* and therefore no economic detriment. Such a distinction, however, may be criticized as ignoring the fact that the chorus's public performance, even a parody, was filling a part of the demand for the song for which the author was receiving no compensation.¹¹⁰

If the demand test cannot adequately reconcile *Henry Holt* and *Bloom*, some factor other than the demand test may be determinative. However, since the demand test has been related to the constitutional policy,¹¹¹ it would seem that any impingement on that test would require similar justification. Indeed, some further rationale of fair use may be found in the constitutional purpose clause, which, by expressly authorizing the granting of exclusive rights to authors, was intended to promote the arts and sciences. If it can be established that certain uses of copyrighted material are by their nature more conducive to the promotion of the arts and

¹⁰⁶ The court apparently accepted the plaintiff's allegation that use of the "work in advertising matter of this nature has cast reflections upon his professional ethics and has brought down upon him the term 'commercialist,' all of which has contributed to negative and deter the sale of the book. . . ." *Id.* at 303. Thus, the demand test was found to be satisfied. However, the court then went on to consider the nature of the appropriating work, and held that although the use of exact words of the appropriated work might have been justified by some types of use, it was not justified by an advertising use. *Id.* at 304. See notes 127-30 *infra* and accompanying text.

¹⁰⁷ 125 F. 977 (E.D. Pa. 1903).

¹⁰⁸ *Accord*, *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (rhyme scheme and identical lines from songs in *Mad Magazine*); *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941) (chorus of Green Bay Packers fight song in magazine article).

¹⁰⁹ 125 F. at 978.

¹¹⁰ *See* *Benny v. Loew's, Inc.*, 239 F.2d 532, 535-36 (9th Cir. 1956), *aff'd sub nom.* *Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958).

¹¹¹ See notes 91-96 *supra* and accompanying text.

sciences than others, then arguably a greater amount of diminution in demand must be shown to justify a finding of infringement.¹¹² Such analysis is supported by the language of the recent case of *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹¹³ which indicated that the nature of the use is the initial consideration in resolving the ultimate question of infringement. Implicitly relying on the purpose clause, the Second Circuit in *Rosemont* stated its understanding of the doctrine of fair use:

Whether the privilege [of fair use] may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently the privilege has been applied to works in the fields of science, law, medicine, history and biography.¹¹⁴

Since the majority of all copyright cases are decided in the Second Circuit¹¹⁵ and since the Supreme Court has made no ruling on the matter, the Second Circuit recognition of the nature of the use as a factor in fair use must be considered the currently prevailing view. However, the Ninth Circuit, which also hears a significant number of copyright cases,¹¹⁶ has indicated some reluctance to accept this view. In *Benny v. Loew's Inc.*,¹¹⁷ the Ninth

¹¹² See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Folsom v. Marsh*, 9 F. Cas. 342, 343 (No. 4,901) (C.C.D. Mass. 1841); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950); cf. *Baker v. Selden*, 101 U.S. 99 (1879).

¹¹³ 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967). For a detailed description of the facts of *Rosemont*, see text accompanying notes 137-39 *infra*.

¹¹⁴ 366 F.2d at 307.

¹¹⁵ 1965 ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFF. OF THE UNITED STATES COURTS 182-97. The statistics for copyright, patent, and trademark are combined so that an exact comparison of copyright statistics cannot be made. However, in this combined category, 484 cases were commenced in the district courts of the Second Circuit in 1965, as compared to the next largest number, 239, in the Ninth Circuit. Thus over one-fourth of all cases in the combined category were in the Second Circuit. *Id.* at 180, 183. This figure probably understates the percentage of copyright cases, since the types of cases tend to be grouped geographically. For instance, the Sixth and Seventh Circuits, with their high industrial concentration, would tend to have a higher proportion of patent cases, and the Ninth and Second Circuits as entertainment centers would tend to have a higher proportion of copyright cases.

¹¹⁶ *Id.* at 187.

¹¹⁷ 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* *Columbia Broadcasting System, Inc. v.*

Circuit held that fair use did not apply to a televised parody in which the entire copyrighted script of a movie was used almost verbatim. In so ruling, the court implied that there could be no fair use if there was substantial similarity.¹¹⁸ Such a rule, equating fair use with the absence of substantial similarity, would eliminate any separate function for fair use. Furthermore, if substantial similarity is determined by the audience test, the Ninth Circuit ruling effectively eliminates specific consideration of either the diminution in demand or the nature of the use factors. However, a subsequent opinion by the district court that had initially decided *Benny* apparently recognized nature of the use as an element to be considered, though not as a defense *per se*.¹¹⁹ Nevertheless, no retraction of the *Benny* rule that nature of the use is not a consideration has occurred. While the *Benny* doctrine has been resoundingly condemned by the commentators,¹²⁰ constitutional history lends some support to its validity. Both the language of the granting clause¹²¹ and its prior history¹²² indicate that the framers

Loew's, Inc., 356 U.S. 43 (1958) (evenly divided court). The affirmance by the evenly divided Supreme Court is of no precedential value. *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910). For a more complete discussion of the *Benny* precedent, see notes 175-82 *infra* and accompanying text.

¹¹⁸ *Id.* See notes 175-82 *infra* and accompanying text.

¹¹⁹ *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955). "When the alleged infringing work is of the same character as the copyrighted work, viz., a serious work with a taking from another serious copyrighted work, then the line is drawn more strictly than when a farce or comedy or burlesque takes from a serious copyrighted work or vice versa The defense, 'I only burlesqued' the copyrighted material is not *per se* a defense" *Id.* at 350. However, the court still phrased its opinion in terms of substantiality and not fair use. See notes 164-70 *infra*. Still, the district court's approach varies considerably from the *Benny* opinion where fair use seemed to be limited to cases where "a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text." *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir.), *aff'd sub nom.*, *Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

¹²⁰ See, e.g., Jensen, *Fair Use: As Viewed by the "User,"* 39 *DICTA* 25 (1962); Comment, *Parody and the Law of Copyright*, 29 *FORDHAM L. REV.* 570 (1961); Note, *Parody and Copyright Infringement*, 56 *COLUM. L. REV.* 585 (1956); Note, *Parody and Burlesque—Fair Use or Copyright Infringement?* 12 *VAND. L. REV.* 459 (1959).

¹²¹ See note 17 *supra*.

¹²² See generally Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 *BULL. COPYRIGHT SOC'Y* 53 (1958). Both the deliberations surrounding the resolution of the Continental Congress recommending state copyright legislation, see note 15 *supra*; 24 *JOURNALS OF THE CONTINENTAL CONGRESS* 326 (1922), and the passage of the related state legislation, see *Copyright Enactments*, *COPYRIGHT OFF. BULL. NO. 3*, at 1-21 (1963), seem

assumed that the constitutional method of granting exclusive rights would *invariably* advance the constitutional purpose of promoting the arts and sciences. Arguably, therefore, the Constitution left no leeway for discrimination between types of uses.¹²³

Assuming the validity of the nature of use factor, an examination of the cases reveals a double aspect to this theory. Although the label "nature of the use" would seem to concentrate on the characterization of the appropriating work, the nature of the appropriated work has been considered.¹²⁴ Thus, in *Rosemont* the court seemingly was persuaded to find fair use by the fact that the appropriated work was an exclusive source of part of the biographical data on a public figure.¹²⁵ In like manner, courts undoubtedly consider that certain copyrighted reference and scientific books derive their marketability from the prospect of subsequent reproduction of at least some of the information that they contain.¹²⁶ However, separate analysis of the appropriated and appropriating works occurs infrequently, since works involved usually fit within the same broad classification and the courts simply conclude that the particular use is justified because the appropriating work is within some broad classification such as critique, history, or reference.

to assume the identity of the method and purpose of these copyright enactments in much the same way as the language of the constitutional grants. See also 5 ELIOT, DEBATES ON THE FEDERAL CONSTITUTION 439-40 (1937).

¹²³ See Selvin, note 122 *supra*, at 58.

¹²⁴ The present copyright bill refers to the "purpose" of the copyrighted work; however, the section apparently was not intended to make a technical distinction between "nature" and "purpose." See note 140 *infra*. Moreover, the bill distinguishes between the nature of the appropriated and the appropriating work, so that both works apparently are to be characterized as to the type of use. See note 192 *infra*.

¹²⁵ See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). See also *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955).

¹²⁶ "The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

Interrelationship of the Primary Factors

Assuming that the Second Circuit's *Rosemont* rule¹²⁷ will prevail, two factors have been isolated—diminution of demand and nature of the use—which, because of their close relationship to the underlying constitutional policies, must be considered to be the primary components of fair use. However, isolation of factors is of little assistance unless their interrelationship can be ascertained so as to furnish a guide for decision making. Since both primary factors are grounded in a clause of the constitutional grant, the relationship between the policies enunciated in those clauses is peculiarly significant to the interaction of the factors. The clearest articulation of this relationship is found in *Berlin v. E.C. Publications, Inc.*,¹²⁸ where the Second Circuit stated:

While indeed broad, the area in which a copyright proprietor is permitted the exclusive commercial benefit of his copyrighted work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must *occasionally* subordinate the copyright holder's interest in a *maximum* financial return to the greater public interest in the development of art, science and industry.¹²⁹

The interrelationship suggested in the *Berlin* decision may be applied to the primary factors of fair use as substituted for their

¹²⁷Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that their form is their essence, and their object the production of pleasure in their contemplation. This is their final end. They are as much the produce of genius and the result of composition, as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them." *Baker v. Selden*, 101 U.S. 99, 103-04 (1879).

¹²⁸ See note 114 *supra*.

¹²⁹ 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964). *Berlin* concerned reproduction of the rhyme scheme and some lines verbatim in a *Mad Magazine* spoof of current events. Like *Rosemont*, *Berlin's* discussion of the constitutional bases of fair use and its disapproval of *Benny* can be classed as dicta, since the court found that the most rigorous application of the substantial similarity test would find no infringement here, *id.* at 545; the rigor of the court's analysis indicates that this is highly reliable dicta.

¹²⁹ *Id.* at 543-44 (emphasis added).

respective constitutional bases. Under this analysis if the initial inquiry shows that non-consensual use has caused no diminution in demand, the use will be fair, thus eliminating the need to consider the nature of the use. However, if diminution in demand occurs, the nature of the use must be considered to determine whether the economic interest of the copyright holder is to be subordinated.¹³⁰ Since *Berlin* says that it is the "maximum" financial interest of the copyright holder that may be "occasionally" subordinated, it would seem that the nature of the use *may* justify some diminution in financial return, but that this would be the exceptional case.

Since the framers of the Constitution seemed to assume that granting exclusive rights to an author would promote the arts and sciences,¹³¹ the restraint shown by the *Berlin* court in indicating that the courts should find the nature of the use determinative only occasionally seems wise. However, the later *Rosemont* decision suggests that greater weight will be given to nature of the use.¹³² Nevertheless, constitutional history, plus the danger inherent in a judicial license to favor one work over another,¹³³ would seem to dictate caution in deciding whether or not the nature of the use justifies a diminution in demand. It would therefore seem that, in designating a particular use as preferred, a court should not resort to its unaided discretion but instead should look for assistance in constitutional clauses other than the copyright clause, in copyright statutes, and in case law precedents.

The first amendment is the most likely source of constitutional policies justifying preferential treatment of certain kinds of uses.

¹³⁰ See Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585, 603 (1956); Note, *Parody and Burlesque—Fair Use or Copyright Infringement*, 12 VAND. L. REV. 459, 478 (1959); note 106 *supra*.

¹³¹ See notes 121-22 *supra*.

¹³² See note 114 *supra*.

¹³³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.). Addressing himself to the copyright ability of circus advertising posters, the eminent justice cautioned: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public . . . the taste of any public is not to be treated with contempt." *Id.* at 251-52.

For instance, *New York Times v. Sullivan*¹³⁴ and *Time, Inc. v. Hill*¹³⁵ indicate that the policy favoring dissemination of information about and criticism of public figures is sufficiently strong to proscribe a libel or invasion of privacy action by such persons in the absence of actual malice. That same policy would seem to support rather extensive non-consensual use of the utterances of public figures. In fact, in the case of governmental officials performing official duties, the policy favoring free dissemination of information is so strong that their statements would probably not be copyrightable in the first instance.¹³⁶ In the case of public figures other than acting governmental officials, a copyright would be granted to protect their writings, but would be implemented by a rather broad application of fair use. Thus, the *New York Times* policy seems to have had decisive influence in the determination of fair use in *Rosemont*.¹³⁷ Rosemont, a corporation controlled by associates of Howard Hughes, purchased the copyright in a magazine article that was apparently the only authoritative source of biographical information about a substantial portion of Hughes' life. Claiming a violation of the copyright, Rosemont sought an injunction against Random House to prevent distribution of a book which evinced significant reliance on the magazine article.¹³⁸ The Second Circuit, in reversing the grant of an injunction, was obviously concerned that issuance of the injunction would result in suppression of information about a public figure, for it asserted that the right to privacy "must be tempered by a countervailing privilege that the public have some information."¹³⁹

¹³⁴ 376 U.S. 254 (1964).

¹³⁵ 385 U.S. 374 (1967) ("knowledge of falsity or reckless disregard of the truth").

¹³⁶ See *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962). The *Rickover* case turned on whether the speeches of a governmental official were publications of the United States government and, hence, not copyrightable under 17 U.S.C. § 8 (1964). The question was not resolved by the court because of an inadequate record below; however, the Copyright Bill § 105 defines a work of the United States government as ". . . a work prepared by an officer of the United States government as part of his official duties." Of course, the question is only changed, not answered, by this section, and an investigation of the official duties of the complaining official is called for, an inquiry of considerable complexity when the official is in a high position in the government.

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

¹³⁸ See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y. 1966).

¹³⁹ 366 F.2d at 309.

In addition to the constitutional policy favoring free dissemination, the codification of fair use in the pending copyright legislation will probably be a primary source of preferred uses, since it summarizes some of the "purposes"¹⁴⁰ which have been held to be a fair use. The statutory listing of preferred uses¹⁴¹ includes, for example, criticism,¹⁴² comment,¹⁴³ news reporting,¹⁴⁴ scholarship,¹⁴⁵

¹⁴⁰ The Copyright Bill § 106 requires consideration of the "purpose and character" of the use and the "nature" of the copyright work. The terms "nature," "purpose" and "character" apparently are not intended to have any technical meaning since the committee report uses the terms "nature" and "character" interchangeably. See H.R. REP. NO. 83.

Compare the detailed provisions of the British counterpart:

"6.—(1) No fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work.

"(2) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgement.

"(3) No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of reporting current events—(a) in a newspaper, magazine or similar periodical, or (b) by means of broadcasting, or in a cinematograph film, and, in a case falling within paragraph (a) of this subsection, is accompanied by a sufficient acknowledgement.

"(4) The copyright in a literary, dramatic or musical work is not infringed by reproducing it for the purposes of a judicial proceeding, or for the purposes of a report of a judicial proceeding.

"(5) The reading or recitation in public by one person of any reasonable extract from a published literary or dramatic work, if accompanied by a sufficient acknowledgement, shall not constitute an infringement of the copyright in the work:

"Provided that this subsection shall not apply to anything done for the purposes of broadcasting.

"(6) The copyright in a published literary or dramatic work is not infringed by the inclusion of a short passage therefrom in a collection intended for the use of schools, if (a) the collection is described in its title, and in any advertisements thereof issued by or on behalf of the publisher, as being so intended, and (b) the work in question was not published for the use of schools, and (c) the collection consists mainly of material in which no copyright subsists, and (d) the inclusion of the passage is accompanied by a sufficient acknowledgment:

"Provided that this subsection shall not apply in relation to the copyright in a work if, in addition to the passage in question, two or more other excerpts from works by the author thereof (being works in which copyright subsists at the time when the collection is published) are contained in that collection, or are contained in that collection taken together with every similar collection (if any) published by the same publisher within the period of five years immediately preceding the publication of that collection."

¹⁴¹ H.R. REP. NO. 83.

¹⁴² No American case has held a use to be fair because it was a critique, but many decisions in dicta have indicated that use may be made of portions of a criticized work in a critique. See, e.g., *Lawrence v. Dana*, 15 F. Cas. 26, 61 (No. 8,136) (C.C.D. Mass. 1869); *Folsom v. Marsh*, 9 F. Cas. 342, 344 [No. 4,901] (C.C.D. Mass. 1841); *Consumer's Union v. Hobart Mfg. Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960); *Hill v. Whalen & Martell, Inc.*, 220

and research.¹⁴⁶ One use listed in the current bill, teaching, had previously been held not to justify reproduction of substantially all of a work for classroom use;¹⁴⁷ however, it finds expression in the statute as a result of extensive teacher lobbying, and a concern that the full exploitation of modern audio-visual teaching aids would not be possible without some copying.¹⁴⁸ Finally, a third source of preferred uses will continue to be the body of case law which has built up around the fair use concept. Such precedents serve to amplify the meaning of the preferred purposes listed in the proposed legislation.¹⁴⁹

F. 359 (S.D.N.Y. 1914). The absence of direct authority is apparently just an indication of the wide acceptance of such uses. See Jensen, note 120 *supra*.

¹⁴³ It is difficult to discern the necessity of a distinction between criticism and comment for the purpose of fair use. It would seem that these two terms are basically repetitious.

¹⁴⁴ News reporting would certainly be fair under the *Rosemont* free-dissemination rationale, see notes 137-38 *supra*, but no American case seems to have decided the question. See Latman, *Fair Use of Copyrighted Works*, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., STUDIES ON COPYRIGHT LAW REVISION No. 15, p. 12 (Comm. print, 1960).

In England, the purposes listed in the 1911 Copyright Act were exclusive not illustrative, so that a newsreel which included a copyrighted song which was being played as part of the event being reported was held not to be a "news summary" within the meaning of that statute and therefore infringed the copyright of the song. *Hawkes & Son (London), Ltd. v. Paramount Film Service, Ltd.* (1934) Ch. 593. This case was reversed by statute. Copyright Act of 1956, § 6(3)(b), 4 & 5 Eliz. II, c. 74.

¹⁴⁵ Works of history, biography, and science would apparently be included here. See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *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), *aff'd by equally divided court*, 356 U.S. 43 (1958); cf. *Baker v. Selden*, 101 U.S. 99 (1879).

¹⁴⁶ Although there is certain to be an overlap between scholarship and research, one group of works included indices, directories and digests and apparently would fit more readily under the research classification. See, e.g., *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906) *aff'd*, 209 U.S. 20 (1908); *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903); *Produce Reporter Co. v. Fruit Produce Rating Agency*, 1 F.2d 58 (N.D. Ill. 1924); *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332 (D. Conn. 1906). See also notes 153-63 *infra*.

The term "research" might also be stretched to include the notes taken or other reproductions made by a researcher in the course of his research. See *Hearings Before Subcomm. No. 3 of the House Committee on the Judiciary*, 89th Cong., 1st Sess., § 8, pt. 1, at 448-72 (1966) [hereinafter cited as *House Hearings, 89th Cong.*]; A. WEIL, AMERICAN COPYRIGHT LAW 406 (1917).

¹⁴⁷ *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

¹⁴⁸ See *House Hearings, 89th Cong.*, at 1770-87.

¹⁴⁹ See notes 142-46 *supra*.

Additional Factors

In addition to the demand and nature of use tests, which can be traced to the policies of the constitutional grant, other factors have been considered relevant to a determination of fair use.¹⁵⁰ One of these indicators, called the labor-saving factor, has rather wide support in the cases,¹⁵¹ but would appear to be only an application of the two primary factors in a particular factual context. The other component, the amount and substantiality of the use, is included in the list of factors in the proposed codification of fair use,¹⁵² but has less frequently been independently considered by the courts.

The labor-saving factor is most frequently resorted to in cases involving directories,¹⁵³ indices,¹⁵⁴ digests,¹⁵⁵ and certain other works,¹⁵⁶ the production of which require primarily the expending of labor to collect publicly available factual information. In spite of some doubts as to whether such writings had enough content—aside from facts in the public domain—to justify issuance of a copyright, all the decisions have recognized the copyright in such works.¹⁵⁷ These cases, typically against rival compilers, predictably provoke a defense that the prior work was merely used as a check on accuracy. Although the public's interest in accuracy would seem to justify such use of copyrighted information,¹⁵⁸ a holding on that ground would create the danger that a subsequent compiler could price the first compiler out of the market by saving labor through use of the prior compilations. Thus, the presence of the labor-saving factor would militate against the finding of fair

¹⁵⁰ See authorities cited note 87 *supra*.

¹⁵¹ See, e.g., authorities cited in notes 153-56 *infra*.

¹⁵² See note 192 *infra*.

¹⁵³ *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332 (C.C.D. Conn. 1906).

¹⁵⁴ *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908); *Produce Reporter Co. v. Fruit Produce Rating Agency*, 1 F.2d 58 (N.D. Ill. 1924).

¹⁵⁵ *W.H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82 (6th Cir. 1928); *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (2d Cir. 1903).

¹⁵⁶ See *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950). See notes 162-63 *infra* and accompanying text.

¹⁵⁷ E.g., *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332, 333 (C.C.D. Conn. 1906).

¹⁵⁸ See *W.H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82, 89 (6th Cir. 1928); *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922, 923 (2d Cir. 1903).

use.¹⁵⁹ In reconciling the policy favoring saving labor—which is an underlying objective of the fair use doctrine—with the protection of the copyright owner from being priced out of the market, the courts have permitted a subsequent compiler to check his work against the prior copyrighted work, but have forced him to confirm any discrepancies by a check of original sources.¹⁶⁰ While this solution seems reasonable in the context of copying indices, digests and directories, where it arose, it appears to be merely a logical application of the demand test to a rather unique circumstance.¹⁶¹ It, therefore, should not constitute an independent variable in the determination of fair use.

*Toksvig v. Bruce Publishing Co.*¹⁶² illustrates the consequences that result from treating the “labor saving” rule as an independent factor of general application outside of the limited context for which it was developed. In *Toksvig* the defendant-author of a biography of Hans Christian Anderson relied heavily on a prior, copyrighted biography, the material for which had been in large part translated from the original Danish. Noting that such use had enabled the defendant to produce her work in one year while the previous work had required three, the court held that the use was unfair because of the labor saved by the defendant. While the use in *Toksvig* might have been unfair under a nature of use-diminution of demand analysis, a mere saving in labor alone should not have resulted in a finding of infringement, since a primary function of the fair use doctrine is to prevent duplication of effort and to allow subsequent authors to build on prior scholarship.¹⁶³

¹⁵⁹ *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332, 334 (C.C.D. Conn. 1906).

¹⁶⁰ *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83, 84 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332, 334 (C.C.D. Conn. 1906). Since accurate compilation would produce substantially identical works and identical mistakes are unlikely, common errors have been given substantial weight in the determination of noncompliance with this rule.

¹⁶¹ Thus, a use is being made of the copyrighted work that would reduce its demand by enabling the subsequent user to sell at a lower price. See notes 98-104 *supra* and accompanying text.

¹⁶² 181 F.2d 664 (7th Cir. 1950).

¹⁶³ In disapproving of *Toksvig*, see note 156 *supra* and accompanying text, the Second Circuit has stated: “We . . . cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the proscription against the copyright of

Another additional factor of fair use is the "amount" of the portion copied in relationship to the work as a whole. Although courts have never attempted to measure fair use quantitatively, they have ruled that copying an entire work can never be fair use.¹⁶⁴ Generally, it is true that a reproduction of a separately copyrighted item such as an entire song¹⁶⁵ or magazine cover¹⁶⁶ would so adversely affect demand so as not to be justified by the nature of any use. However, the unqualified formulation of the "entire work" rule is misleading. For instance, copying an entire work for the performance of a different function may have no adverse effect on demand,¹⁶⁷ as was true where the use of a copyrighted hand puppet on a children's television show was held not to be an infringement.¹⁶⁸ Furthermore, the "entire work" rule produces even greater difficulty when it is applied in conjunction with section 3 of the present Copyright Act, which provides that the copyright "shall protect all of the copyrightable component parts of the work copyrighted"¹⁶⁹ By such coordinated application, reproductions of an illustration from a commercial catalogue and a newspaper have been held to fall within the "entire work" rule,¹⁷⁰ with the resultant negation of fair use. The undesirable rigidity produced by forbidding the reproduction of the "entire work" of a copyrightable component part demands that the "entire work" rule be limited in order to prevent elimination of the concept of fair use in the context of verbatim appropriation. Otherwise, the inquiry becomes

ideas and facts, and to a less extent the privilege of fair use, are designed to prevent." *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). *See also* *W.H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82, 89 (6th Cir. 1928); *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905); Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945).

¹⁶⁴ *See, e.g.*, *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc.*, 105 F. Supp. 325 (S.D.N.Y. 1952).

¹⁶⁵ *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

¹⁶⁶ *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc.*, 105 F. Supp. 325 (S.D.N.Y. 1952).

¹⁶⁷ For a discussion of the difference in "function" and media see M. NIMMER, COPYRIGHT § 145, at 646-68 (1963).

¹⁶⁸ *Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587 (S.D.N.Y. 1965).

¹⁶⁹ 17 U.S.C. § 3 (1964).

¹⁷⁰ *Markham v. A.E. Borden Co.*, 206 F.2d 199 (1st Cir. 1953) (catalogue); *Hedeman Products Corp. v. Tap-Rite Prods. Corp.*, 228 F. Supp. 630 (D.N.J. 1964) (catalogue); *Inter-city Press, Inc. v. Siegfried*, 172 F. Supp. 37 (W.D. Mo. 1958) (newspaper).

merely whether the particular segment copied would be independently copyrightable. Such a development would unfortunately focus entirely on the nature of the appropriated work, ignoring the constitutionally-based nature-of-use factor, and its concern with the nature of the appropriating work.¹⁷¹ Limitation of the entire-work rule remains unresolved, the confusion being so great that the committee considering revision of the copyright laws was unable to reach any resolution in its report.¹⁷²

In addition to "amount," "substantiality" is also listed as an element in the proposed bill's fair use section.¹⁷³ These two elements are listed conjunctively as "amount and substantiality of the portion used in relation to the copyrighted work as a whole." Although "substantiality" might be interpreted to mean "amount" considered in relation to the whole, its inclusion seems redundant unless used as a term of art embodying the definitional nuances of "substantial similarity." If substantiality is so used, it primarily serves to indicate that there is a confused interrelationship between substantial similarity and fair use. Although some commentators have included among the indicators of fair use, elements that might be summarized as substantiality,¹⁷⁴ the concept seems not to have been separately considered as a factor in a finding of fair use. It thus appears that the separate listing of substantiality is of relatively little significance.

¹⁷¹ Chafee has convincingly demonstrated that a use does not have to be of a copyrightable part in order to be an infringement. For instance, a "transitory expression" such as television image would have been uncopyrightable according to Chafee because of its lack of permanence but unauthorized use of such an expression would be an infringement. Chafee, note 163 *supra*, at 504-05. It would also seem that the reverse is true, so that the reproduction of an integral part of a larger work which might have been separately copyrighted does not necessarily have to be an infringement. Thus, a beautifully formed descriptive paragraph from a novel most certainly might have been separately copyrighted by an author if he had produced it apart from any larger work and wished to publish it, but it does not follow that a critic quoting a similar paragraph from the larger work would infringe upon such a work. See *Folsom v. Marsh*, 9 F. Cas. 342, 344 (No. 4,901) (C.C.D. Mass. 1841).

¹⁷² H.R. REP. No. 83 at 34. The third factor which must be considered under the fair-use section of the Copyright Bill indicates that the entire-work rule will continue to have some vitality as a component part but not as an exclusive test for fair use. The third factor is ". . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Presumably, under this language, the third element would weigh against a finding of fair use unless the amount copied was less than the whole.

¹⁷³ See note 192 *infra*.

¹⁷⁴ A frequent listing of factors to be considered is: "(1) the quantity and importance of the material appropriated; (2) the value of this material to each of the works in controversy; (3)

The Relationship Between Substantial Similarity and Fair Use

One of the most perplexing dilemmas in the resolution of infringement suits has long been whether or not substantial similarity and fair use were synonymous concepts; whether both doctrines would ever be utilized in the same kind of suit; and if both concepts could be offered, what their relationship would be. The controversy was clearly presented in *Benny v. Loew's, Inc.*,¹⁷⁵ where Jack Benny used almost the verbatim script of the movie *Gaslight* in a television parody, *Autolight*. In that case, the Ninth Circuit stirred great controversy with the following statement:

The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like In certain of these cases, it is held that a writer may be guided by earlier copyrighted works, may consult original authorities, and may use those which he considers applicable in support of his own original text In these instances, as has been said, there are certain to be considerable resemblances But up to the time of the present controversy, no federal court, in any adjudication has supposed that there was a doctrine of fair use applicable to copyrighting the substance of a dramatic work, and presenting it, with few variations, as a burlesque.¹⁷⁶

This statement from *Benny* dramatically highlights the separate chains of authority which have developed. On one hand, substantial similarity had been applied to works of the imagination such as plays, novels, and songs, where the issue is generally the level of abstraction at which copying is permissible.¹⁷⁷ On the other hand, fair use had been most frequently employed in suits involving works that were certain to have a great deal of similarity, such as works of science, directories, and indices, where the issue was generally

the extent to which the copied matter will tend to supercede the original, or interfere with its sale." Comment, *A Copyright Quandary: Parody, Burlesque and the Fair Use Doctrine*, 29 ALBANY L. REV. 312, 315 (1965); see *Markham v. A.E. Borden Co.*, 206 F.2d 199 (1st Cir. 1953); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Yankwich, What is Fair Use?* 22 U. CHI. L. REV. 203, 213 (1954).

¹⁷⁵ 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.*, *Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

¹⁷⁶ *Id.* at 536.

¹⁷⁷ See M. NIMMER, note 167 *supra*, § 143.11. See also note 35 *supra* and accompanying text, where the level of abstraction question was classed as the second issue of an infringement suit.

one of excessive verbatim copying.¹⁷⁸ The use of material by parody focused attention on this difference in treatment because it arguably could fall into either category. While not requiring verbatim quoting, parody is of necessity similar to the parodied work, but is susceptible to more imaginative treatment than the typical work to which the fair use doctrine had been applied.¹⁷⁹ By impliedly repudiating the fair use doctrine and its chief component, the nature-of-the-use test, in parody cases,¹⁸⁰ the *Benny* decision seemed to preclude consideration of the nature of the use wherever nonverbatim appropriation occurs. Furthermore, because the courts have seldom consciously adverted to any distinction between verbatim and nonverbatim appropriation, some commentators understandably assumed that decisions like *Benny* were rejecting the nature of use test as to both types of appropriation.¹⁸¹ Nevertheless subsequent cases—especially in the Second Circuit—seem to have employed the nature of use test in the context of both nonverbatim and verbatim appropriation.¹⁸²

The application of the nature-of-use test to nonverbatim appropriation reveals an additional problem, however. Since substantial similarity is tested against a demand standard or alternatives crudely reflecting the demand factor,¹⁸³ application of the doctrine of fair use after a determination of substantial similarity will result in a duplication of the demand element, a circumstance which probably explains much of the confusion as to the appropriation. On the other hand, no concept corresponding to

¹⁷⁸ M. NIMMER, note 167 *supra*, § 143.12. See also note 36 *supra*, where the excessive verbatim question was classed as the third infringement issue.

¹⁷⁹ Selvin, *Parody and Burlesque of Copyrighted Works as Infringement*, 6 BULL. COPYRIGHT SOC'Y 53, 59-60 (1958).

¹⁸⁰ The idea that substantial similarity and fair use are coterminous has actually been stated in several decisions. *Compare* Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579 (9th Cir. 1944), and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), with *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

¹⁸¹ See Jensen, *Fair Use: As Viewed by the User*, 39 DICTA 25, 37 (1962); Selvin, *supra* note 179, at 60; Note, *Parody and Burlesque—Fair Use or Copyright Infringement*, 12 VAND. L. REV. 459, 478-79 (1959).

¹⁸² See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (popular biography); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (parody); notes 111-23 *supra* and accompanying text.

¹⁸³ See notes 53-77 *supra* and accompanying text.

substantial similarity has been employed where the appropriation was verbatim. Rather, fair use has in such a context encompassed both the demand and nature of use tests.¹⁸⁴ Thus, both the concept of substantial similarity and that of fair use have subsumed demand and demand-related tests, the concept employed varying with the type of appropriation in question.

To prevent the overlap of the demand factor in fair use and substantial similarity on the plaintiff and the burden to establish fair use doctrine to a determination of the nature of use and define the concept of substantial similarity to include only the demand factor.¹⁸⁵ So delineated, both fair use and substantial similarity should be applied in cases involving either verbatim or nonverbatim appropriation. Such a redefinition would also eliminate much of the confusion that has surrounded the proper allocation of the burden of proving fair use. Under the recommended definition, this confusion is easily obviated by placing the burden of proving substantial similarity on the plaintiff and the burden of establish fair use on the defendant. Such a division of burden between the plaintiff and defendant would be efficient because the evidence needed to meet the demand test—which requires proof of present or potential economic detriment¹⁸⁶—would seem closely related to that needed by any plaintiff to prove damages, and because the defendant will be in a better position to demonstrate the necessity of some appropriation for the production of his work. Moreover, allocating to the defendant the burden of proving fair use as an excuse for the alleged economic diminution¹⁸⁷ seems in keeping with the policy of making any defendant prove why he should not pay for damage caused.¹⁸⁸ However, the greatest advantage of

¹⁸⁴ See M. NIMMER, note 167 *supra*, §§ 143.12 and 145.

¹⁸⁵ *Id.*

¹⁸⁶ See notes 97-104 *supra* and accompanying text.

¹⁸⁷ See notes 127-30 *supra* and accompanying text.

¹⁸⁸ In the current state of confusion about fair use, it has been stated that this burden is of no practical importance. See Cohen, *Fair Use in the Law of Copyright* in COPYRIGHT AND RELATED TOPICS 105 (Los Angeles Copyright Soc'y & U.C.L.A. Law School ed. 1964). This position is not unfounded. It would seem that the primary function of classification as a defense is to allocate the burden of pleading, proof and persuasion. The burden of pleading is of little significance, however, since courts under the federal rules of civil procedure are reluctant to dismiss for failure to state a claim, see *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), and decisions on the pleadings in copyright cases have been expressly discouraged, *MacDonald v. Du Maurier*, 144 F.2d 696, 700-01 (2d Cir. 1944); *Dellar v. Samuel Goldwyn*,

subsuming the demand test under substantial similarity and the nature of use test under fair use is that the primary factors constituting infringement would be clearly delineated along lines approximating those of the two policies expressed in the copyright clause of the Constitution. The respective tests retain the same basic relationship as the policies from which they are derived¹⁸⁹ but are disentangled so that this relationship is more readily apparent and more easily applied.

The Effect of Codification

After extensive hearings and floor debate during the Eighty-Ninth Congress,¹⁹⁰ the House passed a bill representing a thorough revision of the copyright law.¹⁹¹ Section 107 of that bill provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of phonorecords or by any other means specified by that section for purposes such as criticisms, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantially [sic] of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁹²

Although the committee report insisted that Section 107 is intended

Inc., 104 F.2d 661, 662 (2d Cir. 1939). The burden of going forward is not of its usual importance since fair use is frequently decided on the basis of a comparison of the two works, *see* *Tralins v. Kaiser Aluminum & Chem. Corp.*, 160 F. Supp. 511 (D. Md. 1958); *Frankel v. Irwin*, 34 F.2d 142 (S.D.N.Y. 1918), and not surprisingly the plaintiff must append a copy of each to his petition. Rule 2, Rules Adopted by the Supreme Court of the United States for Practice and Procedure under Copyright Act. Furthermore, since most copyright decisions are heard by the judge, *see* notes 71-72 *supra* and accompanying text, the burden of persuasion would seem to be much less important than when the trier of fact is a jury. It is unlikely that a judge will find all other factors so equally balanced that he will be swayed by this burden alone.

¹⁸⁹ See notes 127-30 *supra* and accompanying text.

¹⁹⁰ See *House Hearings, 89th Cong.*; 113 CONG. REC. 3626 (daily ed. April 6, 1967); 113 CONG. REC. 3857 (daily ed. April 11, 1967).

¹⁹¹ See H.R. REP. NO. 83, 90th Cong., 1st Sess. (1967).

¹⁹² Copyright Bill § 107.

to codify and not to change the current scope of fair use,¹⁹³ one conclusion is evident: What Congress thinks the law is in this ill-defined area is certain to influence the future judicial development of the fair use doctrine.

The most salient feature of this statutory definition is its express recognition of the validity of the nature of the use test.¹⁹⁴ Thus enactment would resolve any lingering doubt that was raised by the *Benny* holding.¹⁹⁵ Furthermore, the bill's enumeration of purposes for which fair use may be made is a potential source of preferred uses which could simplify the courts' inquiry in this regard.¹⁹⁶ The present proposal is not free of deficiencies, however. For example, the bill states that both demand and nature of the use "shall" be considered in determining fair use. This combination if enacted could deter the simplification and delineation of substantial similarity and fair use.¹⁹⁷ To prevent such a restriction on the evolution of the fair use concept, it might be preferable to delete the entire final sentence of the section.¹⁹⁸ This would leave the congressional recognition of fair use intact and still give preferential recognition to teaching uses and uses by other interests with strong lobbies, which was the primary motivation for expansion¹⁹⁹ of the original proposed section which made no attempt at definition.²⁰⁰ Such a deletion could be justified on the

¹⁹³ H.R. REP. NO. 83, 90th Cong., 1st Sess. 32 (1967). *But see Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 221 (1967).

¹⁹⁴ Section 107 speaks in terms of "purpose" and "nature," but apparently these terms are synonymous with "nature." See note 140 *supra*.

¹⁹⁵ See notes 115-23 *supra* and accompanying text.

¹⁹⁶ See notes 140-49 *supra* and accompanying text. *But see Schulman, Fair Use and the Revision of the Copyright Law*, 52 IOWA L. REV. 832 (1968).

¹⁹⁷ See notes 175-89 *supra* and accompanying text.

¹⁹⁸ The section would then read: "[N]otwithstanding the provisions of section 106, the fair use of a copyright work, including such use by reproduction in copies of phonorecords or by any other means specified by that section for purposes such as criticisms, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright." This abbreviated version would meet the general requirements of the original recommendations of the Copyright Office which stated: "The statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner's rights." HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 25 (Comm. Print 1961).

¹⁹⁹ See H.R. REP. NO. 83, 90th Cong., 1st Sess. (1967).

²⁰⁰ The Copyright Bill § 107 as it stood at the beginning of the House Hearings read:

broad ground that even a listing of inclusions structures the concept beyond its present judicial formulation and may inhibit further development. However, the drawback to this suggestion is that the bill's express recognition of the nature of the use test would be eliminated.

A more modest proposal consistent with the recommendations here offered would be to delete only clauses three and four of the bill, which incorporate the demand factor into fair use considerations. Perhaps these demand-factor criteria could be delineated in a separate section defining substantial similarity. Such a modification would enable the courts to avert the substantial similarity-fair use overlap, and to allocate the burden of proof equitably and in a manner which would promote the fullest agreement on all relevant points.

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright." *House hearings, 89th Cong.* at 5.

