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FAIR USE: AS VIEWED BY THE "USER"

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The scholar is writing a treatise on Elizabethan drama and would like to quote passages from an earlier work in the field. The scientist is preparing a paper on a series of organic syntheses he has performed and would like to set out earlier results obtained in this area. The literary critic is writing a review of a new novel and would like to quote its passages for the purpose of criticism. The humorist is producing a comedy skit in which he would like to parody a current dramatic Broadway play. If any of these persons asked, "Do I have a right to make this particular use of another's material?" the answer under copyright laws of today would almost surely include a discussion of the complex and crucial doctrine of "fair use."

The purpose of this paper is to discuss the kind of answer that the copyright law doctrine of "fair use" gives to those who ask "Do I have a right to make this particular use of another's material;" to investigate whether the answer given in light of our copyright policy is a just and proper one; and, finally, to determine whether a more correct and more certain answer can be insured through legislation.

Investigation of these problems must start with the nature and source of our copyright laws.

I. SOURCE OF COPYRIGHT PROTECTION

> The Constitution does not establish copyrights, but provides the Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.[1]

In 1909, the Congress of the United States with the above words firmly in tow, presented our present Copyright Act[2] to the world. The significance of these words should not be overlooked, for they represent the Congressional interpretation of the ultimate source of all copyright legislation in the United States—the constitutional provision which authorizes Congress ". . . 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. . . ."[3] The constitutional provision and its subsequent interpretation clearly indicate that the primary purpose of our copyright laws is to advance the progress of science and the useful

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1 H. R. Rep. No. 2222, 60th Cong., 2d Sess (1909), reprinted in Howell, The Copyright Law 194, 200 (2ed. 1942).

2 The Copyright Act of March 4, 1909, ch. 320, 35 Stat. 1075, consolidated and extensively reformed the existing Federal copyright acts that dated back to the Act of May 31, 1790, c. 15, 1 Stat. 124. The present Copyright Act, Title 17 U.S.C. (1952), is a codification, with a few minor revisions, of the Act of 1909.

3 U.S. Const. art. 1, §8, cl. 8.

arts; the securing of benefits to authors being its secondary purpose.[4] The seeds of justification for the doctrine of "fair use" lie in this particular philosophical attitude towards our copyright laws. This point will be discussed later.

The right to prevent a person from using the literary products and works of another is based on Section 1(a) of the Copyright Act which states that "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy and vend the copyrighted work."[5] Section 3 of the Act extends this exclusive right to "all the copyrightable component parts of the work protected."[6] It is obvious that the question put by our authors will receive a "yes" answer when the prior work is not copyrighted, or when there has been no copying[7] of the copyrighted work, or when the material used was not a copyrightable component[8] part of the whole work. If any of these three factors are present, there will be no invasion of the literary rights and hence no basis for an infringement proceeding.[9] When there is a copying of a protected component of a copyrighted work without the owner's consent, the answer would appear to be "no." However, a judicial restriction placed on these statutory rights may allow the author to go ahead—a judicial restriction known as "fair use." The response, therefore, must now be in terms of "fair use"—it may be said that the use of copyrighted material will be permitted if it is a fair use of such material.[10]

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4 See Mazer v. Stein, 347 U.S. 201 (1954); Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957).

5 17 U.S.C. § 1(a) (1952). The rights of an author in his work, after publication, are entirely statutory in that such rights can only be insured by compliance with the requirements of the Act. This problem was first settled in the famous case of Donaldson v. Becket, 4 Burrous 2303 (1774), which was decided 64 years after the passage of the Statute of Anne, 1710, 8 Anne, c. 19, the forerunner of all modern copyright legislation. The English court in Donaldson v. Becket held that an author's common law perpetual right in his work remained only as long as the work was unpublished and that the terms of the Statute of Anne provided his only protection after publication. In Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834), the Supreme Court followed the English view that copyright legislation superseded common law rights in published works. The present copyright act, 17 U.S.C. § 2 (1952), does preserve common law rights in unpublished works; England, however, has abolished the distinction between common law and statutory rights and has brought protection of all literary property under its copyright act. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, sec. 31. This paper will discuss only the use of materials from prior published works.

6 17 U.S.C. § 3 (1952).

7 A determination of whether a work has been "copied" is a most troublesome one in copyright law. In 1909, Congress turned down the opportunity to define the word "copy." The House of Representatives Report accompanying the Copyright Act of 1909 pointed out that the word "copy" had been a part of the Copyright Act of 1790 and in view of its being construed so often by the courts, it seemed undesirable to change or delete the word in the act. H.R. Rep. No. 2222, 60th Cong. 2nd Sess. (1909), reprinted in Howell, The Copyright Law 194, 200 (2ed. 1942). It has been said that "infringement of a copyright is judicially held to consist in the copying of some substantial and material part of that as to which the statute affords protection," and to constitute infringement, such copying must be "something which ordinary observations would cause to be recognized as having been taken from the work of another." Dymow v. Bolton, 11 F.2d 690, 691, 692 (2d Cir. 1926). While the quantity of the work taken has always been important in determining whether there has been a "copying" or substantial appropriation, there seem to be other elements worthy of consideration. See Rossett, *Burlesque as Copyright Infringement*, in ASCAP, Copyright Law Symposium Number Nine 1, 9-13 (1958).

8 It is clear that a copyright does not protect every literary element in a work. There can be no copyright of facts, Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938), nor of historical events. Echevarria v. Warner Bros. Pictures, 12 F. Supp. 632 (S.D.Cal. 1935). Moreover, it has been said that "theme," "plot" and "ideas" are not copyrightable elements; and it is only the "expression" of a copyrighted work that is protected. Dellar v. Samuel Goldwyn, Inc., 150 F.2d 613 (2d Cir. 1943); See Holmes v. Horst, 174 U.S. 82 (1899); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936). However, in attempting to separate a work into its "plot," "theme" or "idea," it is well to keep the words of Judge Hough in mind: " 'Theme' is not a word of art, and an examination of the cases will show that, where it has been used in decision writing, it means a great deal more than the jealousy motif on which the fabric of Othello is hung, or, to go to the other extreme of composition, the theorem of a proposition of Euclid." Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926).

9 17 U.S.C. § 101 (1952) reads: "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . "

10 See Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 174, n. 14 (S.D. Cal. 1955).

II. RATIONALE OF DOCTRINE OF FAIR USE

Before attempting to determine whether a use of materials in a particular literary field will be a "fair use," it is necessary to examine the rationale and primary considerations behind the doctrine of "fair use." More importantly, it can be estimated whether these considerations have been duly weighed in particular determinations of fair use.

Any judicial limitation placed on a statutory right, such as the doctrine of "fair use," must have a basis in some important underlying policy. Lord Mansfield stated such a policy for "fair use" in 1785:

> In deciding it [the case] we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copy-right to authors guards against the piracy of words and sentiments; but it does not prohibit writing on the same subject.[11]

The use of copyrighted material, then, is permitted when in so doing the public will benefit from the author's work, without that use seriously abusing the author's rights. It is a balancing of interests.

Lord Mansfield's justification for the "fair use" doctrine is in accord with the constitutional policy of our copyright laws.[12] The policy involves the reconciliation of what might seem to be two conflicting interests: the right of the author to retain complete control over his works, and the right of the general public to gain the benefit of the work. In a theoretical sense, these two desires can be said to be consistent, in that the reward granted the author will induce him to make public the products of his intellectual labors.[13] Nevertheless, to the degree that the two interests are inconsistent in practice,[14] priority must be given to the public, for "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."[15] From such a policy arises the principal rationale for the doctrine of "fair use:" encouragement of literary and other intellectual works for the public benefit will be furthered by allowing subsequent authors and publishers to make a "fair use" of a copyrighted work without the consent of the copyrighted owner.[16] Every determination of a fair use must ultimately rest on this rationale.

Other rationale have been advanced for the doctrine of "fair use." It has been suggested that the doctrine is derived from the

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11 Sayre v. Moore, 1 East 361, 102 Eng. Rep. 139, 140 (K.B. 1785).

12 *Supra*, notes 1 and 3.

13 See U.S. v. Paramount Pictures, 334 U.S. 131, 158 (1947).

14 See Continental Cas. Co. v. Beardsley, 131 F. Supp. 2832 (S.D. N.Y. 1955).

15 U.S. v. Paramount Pictures, 334 U.S. 131, 158 (1947).

16 Greenbie v. Noble, 151 F. Supp. 45, 67 (S.D. N.Y. 1957). "The right of subsequent authors, publishers and the general public to use the works of others to a limited extent has always been universally recognized as consistent with the object of publication and the policy of encouraging the dissemination of knowledge, learning and culture . . . " Ball, Law of Copyright and Literary Property 259; as cited in Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955).

author's "implied consent" to a reasonable use[17] or from those uses that are "reasonable and customary."[18] The "implied consent" theory, however, seems to be realistic only to the extent that the facts of a particular case indicate such a consent.[19] It will not serve as a rationale for all cases. The "reasonable and customary" theory seems to be nothing more than a statement that what is "fair" is "reasonable and customary," and hence does not go beyond the facts in any particular case. In any event, the two theories are subordinated to, and are a part of the constitutional rationale;[20] their ability lies in helping judges, in appropriate fact situations, to implement the constitutional policy.

III. WHAT IS FAIR USE: ANSWERING THE QUESTION

How then, will the author's question: "may I make this particular use of another's material?" be answered? Whether his use will be fair is a most difficult problem.[21] While this question may be a difficult one, the importance of the doctrine in copyright law cannot be denied. It is said that the tests—

> strike a scrupulous balance between the right of the author to the product of his creative intellect and his imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the constitutional mandate in which the American law of copyright originated.[22]

Upon inquiring, the author and potential user would probably discover that what is fair use "depends on the circumstances of the particular case."[23] Upon further inquiry, he would learn that the factors considered relevant in a "fair use" case may include: the

17 *E.g.* Sampson v. Murdock Co. v. Seaver-Radford, 140 Fed. 539 (1st Cir. 1905); American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D. N.Y. 1941); Karll v. Curtis Pub. Co., 39 F. Supp. 836 (E.D. Wis. 1941).

18 See Wolf, An Outline Of Copyright Laws 143 as cited in Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 49, *Copyright Decisions, Copyright Off. Bull.* No. 20656 (S.D. N.Y. 1934).

19 See American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D. N.Y. 1941), where the court found that the author of architectural book forms had consented to their being put to private use by people working in the construction business.

20 See Shaw, Literary Property In The United States 67 (1950). Shaw finds that the inherent nature of the copyright laws require that an author "dedicate" a certain part of his work to the public in return for his statutory protection. On page 67, he says " . . . fair use is all use dedicated to the public by the nature of statutory copyright."

21 Lawrence v. Dana, 15 Fed. Cas. 26, 59 (No. 8, 136) (C.C.D. Mass. 1869).

22 Yankwich, *What Is Fair Use?*, 22 Chi.L.Rev. 203, 213-14 (1954).

23 18 C.J.S. *Copyright and Literary Property* § 104 (1939): "Fair use may be made of books or literary works, but what is fair use depends on the circumstances of the particular case."

nature of the material used; the amount of the material used and its value; the degree to which the new work will lessen the profits or sales of the prior work; the possibility that the new work will supersede the objects of the original work;[24] the proportion of the new work that contains only materials taken from prior works;[25] the kind of the intellectual area in which the user is working, the labor and expense of the user saved by taking and using the materials of another;[26] the extent to which the user's work and the work from which he is borrowing are in direct competition;[27] whether a person has presumably consented to the use of his works;[28] the presence of good faith or innocent intention on the part of the user;[29] and the manner in which the borrowed materials are used in the new work.[30]

Obviously the many considerations and variables involved in the doctrine make easy explanation impossible.

From the standpoint of a person contemplating a use of another's material, a discussion of the "fair use" elements will be beneficial only if it can be directed towards his field. Furthermore, the particular type of use involved is a significant factor in a fair use determination,[31] and therefore suggests an approach from the standpoint of the planned use. Finally, and perhaps most important, this approach places emphasis on the constitutional rationale underlying a determination of what is a "fair use." The basis of our copyright laws and the constitutional policy behind them is one of promoting "the progress of the sciences and the useful arts;" but it is apparent that some areas of endeavor promote the progress of the sciences and useful arts more than others. It is therefore clear that a question of what is a 'fair use" requires that a certain intellectual area or type of use be considered in light of its social value or merit. This discussion will begin with a consideration of the law of "fair use" as it has been applied in certain types of intellectual areas and the particular uses therein and then briefly reexamine these areas in light of constitutional and policy considerations—attempting to discover whether the answers to the author's questions have been correct.

IV. THE AREA OF LITERARY AND DRAMATIC CRITICISM—THE RIGHT TO USE THE MATERIAL OF ANOTHER FOR COMMENT AND CRITICISM

The use of materials from copyrighted work for the purposes of comment and criticism has traditionally been recognized as a fair use. Justice Story, in 1841, said "Thus, for example, no one can

24 Folsom v. Marsh, 9 Fed. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841).
25 Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938).
26 Samuson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1st Cir. 1910).
27 W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928).
28 American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S.D. N.Y. 1941).
29 Lawrence v. Dana, 15 Fed. Cas. 26 (No. 8, 136) (C.C.D. Mass. 1869).
30 Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40, *Copyright Decisions, Copyright Off. Bull.* No. 20656 (S.D. N.Y. 1934).
31 See Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960). This case involved a request for a declaratory judgment [action brought] by a publisher [for a declaration] that Admiral Rickover could not restrict the use of quotations from [his] public speeches and other publications that had been distributed prior to his applying for a registration of a claim for a copyright. The court held for the publisher; a question arose as to the right to use for the purpose of quotation or criticism, materials from those works that were covered by a copyright. In discussing this question, Mr. Justice Reed at p. 272 stated: "This is a suit for declaratory judgment, and appellant has not presented a copy of the book or pamphlet it intends to publish. Nor has it otherwise unambiguously indicated just what use it plans to make of these later speeches. Without the planned use before the court, it is, of course, impossible to determine whether it is fair."

doubt a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism."[32] Quoting of the exact text for the purpose of criticism was early recognized in England to be a fair use.[33] Use of copyrighted work for the purposes of criticism does not seem to be confined to literary criticism only. It has been said that this type of fair use also extends to dramatic criticism, editorial comment, and to mimicry and parodies.[34] However, it is doubtful whether mimicry and parody are given automatic acceptance by the courts as an instance of fair use.

The fact that there are few reported cases on the question of quotation for criticism being a "fair use" indicates that the particular type of practice is well accepted. While of no legal significance, publishers often place a notice in newly published books to the effect that a particular amount of the material may be quoted for purposes of comment and criticism.

The recent case of *Alexander v. Irving Trust Co.*[35] presents an element not usually found in a determination of "fair use" as it relates to editorial comment and criticism. In this case the plaintiff alleged that a two-page article she had caused to be published in a medical journal, entitled "Oliver Wendell Holmes, Psychiatrist," was infringed by defendant's 270 page book entitled "The Psychiatric Novels of Oliver Wendell Holmes." The court found no appropriation; at the most there was only a borrowing of ideas. One of plaintiff's contentions was that the quotations on the dust jacket of the defendant's book invaded her legal rights because they stated that the book was a "novel contribution" and presented "hitherto unsuspected knowledge" on the work of Holmes. The court found that the statements were "a fair use of comments made by third parties concerning the defendant's work."[36] The usual determination of fair use concerns the originator of certain work and the one who borrows from him. The court here seems to indicate that the quotations used were "fair" in that they did not injure a third party's (i.e., plaintiff's) rights. This determination of "fair use" seems more akin to tort law than to copyright law.[37]

However, it is clear that the right of comment and criticism is limited to what is reasonable. In *Folsom v. March*,[38] the defendant had published a book on the life of George Washington, copying 353 of its 866 pages from a previous work by the plaintiff on Washington. In answer to the defendant's assertion that this taking was for the purpose of criticism, the court pointed out that if important parts of the book were cited, not for purpose of criticism, but for the purpose of superseding the use of the original work, it would be a piracy.[39] A finding of unfair use is often made in

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32 Folsom v. Marsh, *supra* note 24, at 343.

33 Bell v. Whitehead, 3 Jurist 68 (1839).

34 Shapiro, Bernstein & Co. Inc. v. P. F. Collier & Son Co. 26 U.S.P.Q. 40, *Copyright Decisions, Copyright Off. Bull.* No. 20656, 658 (S.D. N.Y. 1934). (dictum). "Dramatic criticism is one of the most common forms of 'fair use.' Mimicry, editorial comment, and parodies are other varieties or instances of 'fair use'."

35 132 F. Supp. 364 (S.D. N.Y. 1955), *aff'd per curiam* 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956).

36 *Id.* 132 F. Supp. at 369.

37 The privilege of fair comment or criticism in copyright law is analogous to the libel and slander law privilege of fair comment on matters of public concern. For a discussion of the libel and slander privilege, see Prosser, Torts § 95 (1955).

38 9 Fed. Cas. 343 (No. 4,901) (C.C.D. Mass. 1841).

39 *Ibid.*

cases where the new work will tend to become a substitute for the original—with a resulting unjust deprivation of the original author's rights.[40]

V. THE AREA OF LEGAL, SCIENTIFIC AND OTHER SCHOLARLY WORK

The person desiring to use materials from prior works in this field is given extensive leeway. The extent of the "fair use" doctrine in this field is indicated by the following statement: "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writing dealing with the same subject matter."[41] This latitude afforded workers in the scientific, legal and medical fields is a well established one.[42] Futhermore, it seems that courts will go a long way in finding that a particular field is scientific or professional. In *Sims v. Stanton*,[43] it was stated that "physiagnomy, the art of reading faces, deserved recognition as a science" (in finding that there was a fair use made of the plaintiff's work on this subject).

While it is true that facts, theories and ideas that have been set down in prior works can be used since they are not copyrightable,[44] and that certain uses of the exact words of the prior work are proper,[45] elements appear which will limit such use.

The first element is competition. In one case 15% of the word lists in a French Language book were used by the defendant in his book—a book that was in competition with the prior work. This was held to exceed the bounds of fair use.[46] In a similar case a certain type of alphabet groupings for Russian letters, unique to the plaintiff's book, were used by the defendant in his Russian language work. The appropriated lists made up only a small part of the defendant's book, but the court found that such appropriation was not a fair use, especially in view of the fact that the books were in competition. The court also mentioned that there had been no independent effort made on the part of the defendant in his word groupings.[47] But this element, in the absence of a competitive factor, is probably more properly confined to cases involving dictionaries, form books, and the like.[48]

One of the most troublesome problems in this area has been the determination of fair use in those instances where citations, case abstracts, and case lists from legal books have been used in similar legal books.[49] The problem arises, in part, from the necessity to classify the various legal publications by their essential

40 See Macmillan v. King, 223 Fed. 862 (D.C. Mass. 1914); Ginn & Co. v. Apollo Pub. Co., 215 Fed. 772 (E.D. Mass. 1914).

41 Thompson v. Gernsback, 94 F. Supp. 453, 454 (S.D. N.Y. 1950).

42 See W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928); West Publishing Co. v. Edward Thompson Co., 176 Fed. 833 (2d Cir. 1910); Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539 (1st Cir. 1905).

43 75 Fed. 6 (N.D. Cal. 1896). See also Eisenchiml v. Fawcett Publications Inc., 246 F.2d 598, 604 (2d Cir. 1957) where the court treated a True Magazine article on the death of Lincoln as a "historical writing."

44 Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938).

45 *Supra* note 41.

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

47 Nikanov v. Simon & Schuster, Inc., 246 F.2d 501 (2d.Cir. 1957).

48 See Weathersby and Sons v. International Horse Agency and Exchange, Ltd., 2 Ch. 297 (1910); Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83 (2d Cir. 1922).

49 The cases are difficult to reconcile. See W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928); West Pub. Co. v. Lawyers Co-op Pub. Co., 79 Fed. 756 (2d Cir. 1897); Edward Thompson Co. v. Am. Law Book Co., 122 F.2d 922 (2d Cir. 1903); West Pub. Co. v. Edward Thompson Co., 176 Fed. 833 (2d Cir. 1910).

nature—whether they are textbooks in the professional sense or whether they are mere lists and compilations. From a policy standpoint, greater appropriation should be permitted from textbooks and treatises than from mere compilations or digests.[50] The fact that the digests, containing case lists and annotations, are in direct competition with each other is another reason for limiting the copying of case lists and annotations from prior works.

50 In W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82, 89 (6th Cir. 1928), it was said: " . . . greater latitude is to be expected in the case of authors consulting other text books or using directories and lists than in the case of one compiler attempting to make use of another similar compilation."

Novels and biographies fit into the literary and scientific fields. In *Toksuiq v. Bruce Pub. Co.*,[51] an action for infringement involved two biographies of Hans Christian Anderson. It was alleged that the second work was an infringement of the prior biography in that the defendant had taken certain ideas, themes, and a few quotations from the first work. It was found that such a use allowed the defendant to write the book without going to all the Danish sources. This was held to be an unfair use, the court stating that the test for determining a fair use is "whether the one charged with infringement has made an independent production, or made a substantial and unfair use of the complainant's work."[52] Another case involving biographies found no infringement, the emphasis appearing to be on the policy of promoting the arts rather than on "labor saving consideration."[53]

The emphasis on labor-saving devices, as mentioned before, does not seem justified in cases in this area. This element is important when the works consist of mere lists or forms, for there it would appear that the principle value of an author's property is the labor that he expended in producing the works. In scholarly areas, where the promotion of the arts is the paramount concern, this factor should not be stressed.

VI. BUSINESS AREA—USES FOR COMMERCIAL PURPOSES

In moving from the scholarly to the commercial area, it can be seen that the use of another's material will generally be more restricted. This is because the profit and competitive factors are more prevalent here. Substitution often appears. In a case where a book giving the history of popular songs in the United States contained the words and melody line of a copyrighted song, it was held that the book provided a substitute for the song, even though the song was no longer popular, and therefore the use was not fair.[54] The copying of a chorus of a copyrighted song belonging to a rival and competing publishing company was held to be unfair;[55] the use of a news item of a rival newspaper (involving a substantial copying of the literary style of the item) was held to be an infringement.[56]

In *Associated Music Publishers v. Debs Memorial Radio Fund*,[57] the defendants claimed that the broadcasting of the plaintiff's copyrighted composition was for the ultimate purpose of raising funds for a charitable organization set up in honor of the late Eugene Debs. However, it was found that the money for the fund was to come in part from the radio station's profits and that the broadcast was for the purpose of building up a listening audience so that profits might be realized. The defendant's claim of fair use was rejected.

In other commercial cases, the doctrine of *de minimis non curat*

51 181 F.2d 664 (7th Cir. 1950).
52 *Id.* at 667.
53 Greenbie v. Noble, 151 F. Supp. 45 (S.D. N.Y. 1957). This case involved a biography and a magazine article on a famous woman in the Civil War.
54 Sayers v. Spaeth, *Copyright Decisions, Copyright Off. Bull.* No. 20,625 (S.D. N.Y. 1932).
55 Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282 (8th Cir. 1939).
56 Chicago Record-Herald Co. v. Tribune Ass'n, 275 Fed. 797 (7th Cir. 1921).
57 141 F.2d 852 (2d Cir. 1944).

lex has apparently been applied in excusing small appropriations of another's copyrighted work.[58]

Cases involving uses for the purposes of advertising have not looked with favor on the defense of fair use. Perhaps the leading case in the field is *Henry Holt & Co. v. Liggett & Myers Tobbaco Co.*,[59] where three sentences from a doctor's work on the human voice were quoted, with credit, in a cigarette advertising pamphlet. The quoted parts made up one-twentieth of the pamphlet. The amount of material appropriated was small and there was no competition between the pamphlet and the book. The court held that the use was unfair, pointing out that the doctor was damaged in that it would appear he had commercialized his work, thereby retarding the sale of his book in academic and medical areas.[60] Similarly, other cases have found an unfair use where the advertising use constituted an appropriation of a valuable and essential part of the plaintiff's work.[61]

Cases involving the use of business forms are examples of situations where the rationale of "implied consent" in fair use is relevant and realistic. The courts can readily find that the use of the form is to be expected, is impliedly consented to, and is in fact the sole reason for the preparing of the form. In a case involving forms attached to ledger books, the United States Supreme Court said, ". . . the teachings of science and the rules and methods of useful art have their final end in application and use; and their application and use are what the public derives from the publication of a book that teaches them."[62] Cases involving architectural forms[63] and insurance forms[64] have followed this reasoning; the cases in this general area hold that the public is entitled to copy and use the very outline and words of the form.[65]

Before leaving this area, it is important to note those situations involving the use of copyrighted material for an "incidental" or "background" purpose. There are at least three reported cases involving the use of copyrighted song lyrics in a magazine article. In *Karll v. Curtis Pub. Co.*,[66] a magazine article on the Green Bay Packers contained the lyrics of a song written by a Packer fan who had dedicated it to the football team. This was held to be a fair use, the court finding a mere incidental use and one to which the songwriter had implicitly consented.[67] Two other cases involved the use of song lyrics as a background or setting in a magazine article; in

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58 See Kane v. Penna. Broadcasting Co., 73 F. Supp. 307 (D.C.D. Pa. 1947) (radio broadcast used small portions of plaintiff's pamphlet on historical facts). Consumers Union of U.S., Inc. v. Hobart Mfg. Co., 189 F. Supp. 275 (S.D. N.Y. 1960). Defendant's sales bulletin for salesmen's use quoted portions of plaintiff's consumers research magazine which had criticized some of the features of dishwasher manufactured by the defendant. The portions were quoted for the purpose of attacking the conclusions reached by the consumer magazine.

59 23 F. Supp. 302 (E.D. Pa. 1938).

60 *Id.* at 304.

61 Conde Nast Pub., Inc. v. Vogue School of Fashion Modelling Inc., 105 F. Supp. 325 (S.D. N.Y. 1952) (advertising brochure for modelling school contained substantial reproduction of Vogue magazine cover). Robertson v. Batten, Barton, Durstine & Osborne, Inc., 146 F. Supp. 795 (S.D. Cal. 1946) (A singing beer commercial used the parts of plaintiff's copyrighted song upon which rested the success and popular appeal of the song).

62 Baker v. Selden, 101 U.S. 99, 104 (1879).

63 Continental Casualty Co. v. Beardsley, 151 F. Supp. 28 (S.D. N.Y. 1957).

64 American Institute of Architects v. Fenichel, 41 F. Supp. 146 (S. D. N.Y. 1941).

65 Crume v. Pac. Mut. Life Ins. Co., 140 F.2d 182 (7th Cir. 1944). In speaking of a business form, this court, at 184, stated, "Its use, to which the public is entitled, can be effected solely by the employment of words descriptive thereof."

66 39 F. Supp. 836 (E.D. Wis. 1941).

67 *Id.* at 837.

each, there was a finding of fair use.[68] The reasoning of the courts in these decisions seems justified in that the use of the materials did not economically harm the plaintiff nor did the article serve as a substitute for his song. The point here is that the use was made for the purpose of setting a background and in no way affected any economic rights that the author had or may still have had in the songs themselves.

VII. THE AREA OF PARODY — USE OF MATERIALS FOR PURPOSE OF BURLESQUE OR PARODY

Rules governing the application of the doctrine of "fair use" in in the area of parody and burlesque have not been clearly established by the courts. There have only been a few cases on the problem. Furthermore, the existing cases have, in a strict literary sense, only dealt with what is known as "burlesque," and have not decided questions concerning true "parody."[69] However, the two terms will be used interchangeably here, in that both signify a type of intellectual or artistic creation apart from the borrowed work.

To begin with, at least three of the cases in this area involved a mimicry or "take off" which, strictly speaking, was not a use of a copyrightable component part of a work. In *Bloom & Hamlin v. Nixon*,[70] the defendant mimicked the gestures and mannerisms of a popular singer of the day, using the copyrighted chorus of a song identified with the popular artist. The court held that gestures and mannerisms in a performance were not copyrightable. The use of the chorus of the copyrighted song was held to be "incidental" and a mere vehicle for the mimicry performance.[71] The court also said, by way of dictum, that the good faith of the mimicry was essential if there was to be a finding of non-infringement.[72]

Two other cases concerned the mimicking of popular singers and actresses. Infringement was found in one where the mimic had used an entire copyrighted song as her "taking off point;"[73] in the other there was no evidence showing a substantial using of a copyrighted song.[74] Neither of the cases involved a burlesque of an actual copyrighted work—the use of the songs was incidental to the burlesque.

In *Hill v. Whalen & Martell, Inc.*,[75] the defendant put on a stage performance involving two characters named "Nutt and Giff,"

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68 Shapiro, Bernstein & Co. v. P. F. Collier & Co., 26 U.S.P.Q. 40, *Copyright Decisions, Copyright Off. Bull.* No. 20,656 (S.D. N.Y. 1934); Broadway Music Corp. v. F-R. Pub. Corp., 31 F. Supp. 817 (S.D. N.Y. 1940). (In this case the chorus of the song constituted 50% of the total article).

69 See Macdonald, Parodies, An Anthology From Chaucer To Beerbohm—And After 557-68 (1960). In the appendix to the Anthology, Macdonald sets out some definitions for the various forms of "humor" generally referred to as "parody." He defines *travesty* as a form that " . . . raises laughs, from the belly rather than the head, by putting high, classic characters into prosaic situations, with a corresponding stepping-down of the language." He says that burlesque ". . . imitates the style of the original" and "it differs from parody in that the writer is concerned with the original not in itself but merely on a device for topical humor." *Parody* is said to " . . . concentrate on the style and thought of the original" and "at its best, it is a form of literary criticism."

In many instances, classification following the definition above would be difficult. If however, we take parody to mean a type of literary criticism, we have a traditional situation for the application of the "fair use" doctrine. The absence of any reported cases concerning "parody" (as defined by Macdonald) suggests that this type of use has always been considered "reasonable and customary" —a "fair use." The cases that have been reported in this area seem, for the most part, to fall under Macdonald's definition of "burlesque."

70 125 Fed. 977 (E.D. Pa. 1903).

71 *Id.* at 978.

72 *Ibid.*

73 Green v. Minzensheimer, 177 Fed. 286 (S.D. N.Y. 1909).

74 Green v. Luby, 177 Fed. 287 (S.D. N.Y. 1909).

75 220 Fed. 359 (S.D.N.Y. 1914).

who were presented in the garb and spoke in the manner of Mutt and Jeff, the cartoon characters. The court held that this went beyond a parody and in fact became a substitute for Mutt and Jeff, thereby reducing the demand for the Mutt and Jeff works.[76] As shown above, the element of substitution or harm to the plaintiff through a reduction in demand for his works is a compelling reason for a refusal to find a fair use.[77]

Two recent decisions involving television burlesque or skits of movies constitute the only real case law on the question of burlesque being a fair use. In *Loew's Inc. v. Columbia Broadcasting System*,[78] an injunction was granted enjoining Jack Benny from parodying the movie *Gaslight* on his television program. The parody closely followed the plot, dramatic incidents, and the expression of the original movie. The court found that there was a substantial copying and appropriation of the movie—beyond the realm of fair use. The court emphasized the commercial factor involved in the television skit, finding that fair use is more restricted in a commercial area than in areas of science and art. The judge did not treat parody as a particular instance of a valuable art and literary form which could call for a more liberal application of the "fair use" doctrine.

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76 *Id.* at 360. The court said: "A copyrighted work is subject to fair criticism, serious or humorous," but that such a use would not be permitted when the result will be to "materially reduce the demand for the original." The court also said that the reduction in demand must result from the fact that the use constituted a substitute; that mere adverse criticism, even if it reduced the demand, would not be an unfair use.

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

78 131 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 without opinion by equally divided court*, 356 U.S. 43 (1958).

The *Columbia Pictures Corp. v. Nat'l Broadcasting Co.*[79] case involved a Sid Caesar skit entitled "From Here to Obscurity"—a burlesque of the movie *From Here to Eternity*. In this case the plot was altered considerably in the skit, characters were deleted, and the dramatic incidents combined. The parody seemingly served as a mere vehicle for Sid Caesar pratfalls. Judge Carter, who had decided the Jack Benny case, also decided this one. He found for the defendant. In this case, he stated that the doctrine of "fair use" would permit some taking in order to "conjure up, at least the general image, of the original"[80] in the minds of the audience.

The two decisions are not entirely consistent. The doctrine of "fair use" was never seriously considered in the Benny case—its application in the Caesar decision does not indicate whether it could ever be applicable in a situation like the Benny case. More important, parody is not given express recognition as an art form in either case; the uses were treated as uses in a commercial area. These two decisions have not succeeded in determining the true application of fair use in parody and burlesque situations. To the extent that they hinder the doctrine's use, the cases seem undesirable.

VIII. A REEXAMINATION OF THE FAIR USE DOCTRINE IN LIGHT OF OUR COPYRIGHT LAW POLICY

Having examined the principle areas of copyright law in which the doctrine of "fair use" is applied, it must now be determined whether the answers that our authors have received have been correct in view of the fair use rationale.

Our constitutional policy requires that the judicial process in copyright law give primary attention to the advancement of "science and the useful arts." This necessitates some type of value judgment in the area of endeavor being considered. Traditionally, this has been done. The fields of science and learning are considered to be of greater value and worth to our culture than the field of advertising, and therefore, more deserving of encouragement. Consequently, one is allowed greater freedom to use the materials in the scientific than in the commercial areas.

Generally speaking, the fields that have been historically considered beneficial to the advancement of learning are recognized and given due weight in copyright law. However, the two recent parody cases are examples of a failure to give proper recognition and consideration to a field that has been long deemed a desirable form of artistic creation.[81] In denying its place in our culture, and in refusing to expressly apply the doctrine of "fair use" to its activities, the cases have restricted its growth.

It is submitted that the same results in the cases could have been reached through application of the "fair use" doctrine. The right to recognition as a distinct literary area could have been granted without opening the door to infringement. First of all, neither parody presented competition or caused economic harm to

79 137 F. Supp. 348 (S.D. Cal. 1955).
80 *Id.* at 350.
81 See Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 Can. Bar Rev. 1130-37 (1955) for a discussion of parody's well established place in world literature. Also see Macdonald, *supra* note 69.

the movies from which they borrowed. In fact, each parody probably helped popularize the particular borrowed work.

Secondly, the Benny case presented elements that usually mitigate against the application of the "fair use" doctrine. It can be said that the parody here did not constitute a new work; little in the way of original material was added. This is a substantial appropriation of the plaintiff's labor, even though he has suffered no economic harm, and so is probably not a fair use.[82]

Conversely, Caesar's use of the material from the *From Here to Eternity* movie can be classified as an "incidental" use. The material taken was used for a different purpose ("taking-off point" for jokes and slapstick) in the skit than in the movie. The incidents borrowed evoked different emotional responses in the skit than they did within the movie's framework. The humor of the skit did not compete with the dramatic moods of the movie. As such, the use is similar to the incidental and background uses of song lyrics in magazine articles.[83]

The fact that a just result was reached without relying on the fair use doctrine is not a justification for not applying it. The precedents of the decisions, especially the Benny one, may seriously restrict proper use in parody fields in the future.

In summary, it would appear that, with the exception of the areas of parody and burlesque, the doctrine of "fair use" is being applied with the constitutional rationale behind the doctrines well in mind. It is hoped that the future brings the application of the rationale to all fields of copyright endeavor.

CONCLUSION

The examination of the doctrine of "fair use" is now completed. The source and rationale of the doctrine has been discussed and its application to various areas investigated. The law's answer to the question: "May I make this particular use of another's material?" has been, with the exception of the parody area, a proper one. Legislation must now be considered.

A case for laboratory study in the consideration of codification of the "fair use" doctrine is *Hawkes & Son, Ltd. v. Paramount Film Service, Ltd.*[84] This case was decided under the British "fair dealing" statute, which provided that the following shall not constitute an infringement of a copyright: "Any fair dealing with any work for purposes of private study, research, criticism, review, or newspaper summary."[85] The action arose at a hospital opening in England where a newsreel company was filming the events of the opening. In taking pictures of a boys' military band, there came on to the soundtrack of the film twenty-eight bars of the "Colonel Bogey" March, which the boys were playing. The owner of the copyright on the march sued for infringement. A lower court judge found no

82 See Weatherby & Sons v. Internat'l Horse Agency and Exchange, Ltd., 2 Ch. 297 (1910).

83 Cases cited, *supra* note 68. Sid Caesar's selection of only a few dramatic incidents from the *Eternity* movie for use in his skit would correspond with the definition of burlesque as given by Dr. Frank Baxter, who testified, as an expert on parody and burlesque in the Benny case. Dr. Baxter described burlesque as a technique by which reference is made to one or two or more of the incidents in the original for purposes of identification, and then the burlesque "takes off into the blue" with its own story or plot. Loew's, Inc. v. Columbia Broadcasting System, 131 F. Supp. 165, 183 n. 48 (1955). 84 1 Ch. 593 (1943).

84 1 Ch. 593 (1934).

85 Copyright Act, 1911, 1 & 2 Geo. 5 c. 46 (s. 261) proviso (i).

substantial appropriation or, in the alternative, a "fair dealing." The appellate court found that there was a taking which was not excused under the fair dealing statute. One judge, to his "regret,"[86] found that there was an infringement, even though he felt there was no injury—he could not bring the taking under the "fair dealing" statute. The "regretable" decision here was not necessarily the result of an inherent evil in codification. A phrase covering incidental newsreel shots in the statute would have saved the day for the defendant. However, the view of the judges appeared to indicate a basic flaw in such a statute. Under this provision it is still necessary to decide whether the quantity or quality of that taken was fair or unfair. The interpretation of the word "fair" is still left to the court. Consequently it would seem that legislation is not the answer.

The answer to the question, and the correction of mistakes in the application of the doctrine of "fair use," must ultimately be sought in the judicial process. What has been pointed out here, and contended for, in the judicial process, is a more conscious alignment with the constitutional rationale behind fair use. This means a consideration for the advancement of the arts and an accompanying expansion of the "fair use" doctrine where the needs of society and the interest of progress call for them. Judge Palmieri has observed:

> The general purposes of copyright protection are to afford authors the right to reap the fruits of their expression and to promote the store of information and objects of culture available for public enjoyment and application. Usually these two purposes are not inconsistent. When, however, an author's monopoly threatens to infringe unduly on public use of the ideas or objects of that expression, the courts have demonstrated flexibility in adjusting the conflicting theories. Thus copyrightability may be altogether denied, or, if copyright is upheld, restrictively protected by requiring almost verbatim copying to constitute infringement. In other situations, the subject and purpose of copyright may be explicitly defined so as not to authorize an overgeneralized monopoly which would restrict fair use of the disclosed information or objects.[87]

86 Hawkes and Son, Ltd. v. Paramount Film Service, Ltd., 1 Ch. 593, 608 (1934).
87 Continental Cas. Co. v. Beardsley, 151 F. Supp. 28, 31-32 (S.D. N.Y. 1957).