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Copyright Law -- One Step Beyond Fair Use: A Direct Public Interest Qualification Premised on the First Amendment

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CONCLUSION

The utility of the six-months rule has suffered from a failure by many courts to properly analyze the basis of the rule. The rule is designed to protect the public's interest in the continued operation of the nation's railroads by assuring payment of operations creditors despite the precarious credit position of many railroads. The courts should not render illusory the protection offered by the rule by the application of inappropriate accounting standards; nor should the rule's purpose be compromised by the improper exclusion of the cost of necessary new purchases, or the inappropriate inclusion of charges for such items as depreciation. The six-months rule has not lost its relevance in the one hundred years since its inception—it has merely been misapplied.

ALAN E. KRAUS

Copyright Law—One Step Beyond Fair Use: A Direct Public Interest Qualification Premised On The First Amendment

In keeping with the copyright clause of the United States Constitution,¹ the purpose of the copyright statute² is to enhance the public welfare by promoting the growth of learning and culture.³ To accomplish this purpose, Congress has accorded the copyright holder certain

This Note has been entered in the Nathan Burkan Memorial Competition.

1. U.S. CONST. art. I, § 8, cl. 8: "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."

2. Copyrights Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C.A. §§ 101-810 (West 1977)). The Copyrights Act of 1976 revised Title 17 of the United States Code (governing copyrights) in its entirety. The new provisions became effective January 1, 1978, except §§ 118, 304(b) and 801, which became effective October 19, 1976. The substantive issues discussed in this Note concerning provisions of the former copyright statute are equally relevant to the new provisions.

3. See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 9 (1909) (copyright act intended "not primarily for the benefit of the author, but primarily for the benefit of the public"). See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), cert. denied, 379 U.S. 822 (1964); HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION—REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961); Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 49 (1955).

quasi-exclusive rights in his copyrighted work,⁴ providing thereby an economic incentive for both the creation and the distribution of intellectual and cultural works.⁵ These rights are not absolute;⁶ traditional copyright qualifications such as the doctrine of fair use⁷ prevent the copyright owner from exercising total control over his work. There remain a few situations, however, in which the traditional qualifications do not prevent the economic interests of the copyright owner from overshadowing the public's interest in the widest possible dissemination of information and commentary.⁸ When the material is of such a nature that it cannot be reduced to an assortment of facts or ideas,⁹ it is clear that the copyright owner may prohibit any use of his copyrighted work that might reasonably be expected to diminish its potential marketability—even though the proposed use may be of benefit to the public welfare.¹⁰ For this reason, both courts and commentators have begun to suggest that the copyright monopoly be further narrowed by adoption of a direct public interest factor,¹¹ founded either on the constitutional purpose of the copyright statute¹² or on the first amendment

4. 17 U.S.C.A. §§ 101-118 (West 1977).

5. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

6. The monopoly given the copyright owner is limited in duration. 17 U.S.C.A. § 302 (West 1977) (life of the author plus 50 years). The copyright statute is not intended to prohibit copying that is neither substantial nor material. A. LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14 (1958), prepared for and reprinted in SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS. (Comm. Print 1960) reprinted in 2 STUD. COPYRIGHT 781, 784 (1963). The copyright does not extend to facts or ideas contained in the copyrighted work. *Id.*; Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43, 50 (1971).

7. The fair use doctrine allows for the reasonable and fair use of copyrighted material. See 2 M. NIMMER, NIMMER ON COPYRIGHT § 145 (1976 & Supp. 1976); Cohen, *supra* note 3. "Fair use may be defined as a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." A. LATMAN, *supra* note 6, at 783 (quoting BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)). The fair use doctrine was codified by the new Copyrights Act at 17 U.S.C.A. § 107 (West 1977). Copyrights Act, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976).

8. See text accompanying notes 64-68 *infra*.

9. See notes 65 & 66 and accompanying text *infra*.

10. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970); *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914).

11. See generally *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968); 1 M. NIMMER, *supra* note 7, § 9.2; Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 991 (1970); Rosenfield, *The Constitutional Dimension of "Fair Use" in the Copyright Law*, 50 NOTRE DAME LAW. 790, 807 (1975).

12. See text accompanying notes 44-50 *infra*.

right of the public to be fully informed.¹³ In the copyright infringement case of *Meeropol v. Nizer*,¹⁴ however, the United States Court of Appeals for the Second Circuit, when presented with the opportunity, refused to recognize or apply this direct public interest qualification. Instead, the court relied upon traditional copyright law concepts and found plaintiffs' economic interest in the copyright superior to defendants' claim of fair use.¹⁵ The court's holding represents a distinct departure from the trend toward recognition of a direct public interest qualification that had begun to emerge in the Second Circuit.¹⁶

The *Meeropol* case concerned *The Implosion Conspiracy*,¹⁷ a book about the Ethel and Julius Rosenberg espionage trial, in which the author, Louis Nizer, quoted from twenty-eight letters that had been published previously in a copyrighted book.¹⁸ The present owners of the copyright to this book of letters (the Rosenbergs' children, Robert and Michael Meeropol) brought suit in federal district court against Nizer and his publishers alleging that Nizer had infringed their statutory copyright.¹⁹ In response, Nizer and his codefendants asserted that their use of the quotations was both fair and reasonable and, therefore, permissible under the fair use doctrine, and on this ground moved for summary judgment.²⁰ After comparing the two books in question, the district court concluded that defendants had successfully established the defense of fair use²¹ and granted their motion for summary judgment.²²

13. See text accompanying notes 51-53 *infra*.

14. 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 727 (1978).

15. *Id.* at 1070.

16. Though the Second Circuit had not adopted an express public interest qualification, the court had begun to give more consideration to the public interest and had revealed some inclination to consider the first amendment's relation to the copyright laws. See, e.g., *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978).

17. L. NIZER, *THE IMPLOSION CONSPIRACY* (1973).

18. *THE DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG* (1953).

19. 560 F.2d at 1063. The original complaint also alleged invasion of privacy and defamation and infringement of common law copyright. The Second Circuit, however, affirmed the dismissal of these claims. *Id.*

20. *Id.* at 1064. Defendants' original motion for summary judgment was denied without prejudice. 361 F. Supp. 1063, 1070 (S.D.N.Y. 1973). Defendants subsequently renewed their motion for summary judgment on the basis of an expanded record. 417 F. Supp. 1201, 1205 (S.D.N.Y. 1976).

As additional defenses, defendants asserted that a significant part of the allegedly appropriated material was already in the public domain, that plaintiffs were not the true copyright owners, and that plaintiffs should be barred by laches from bringing the action. 361 F. Supp. at 1065.

21. 417 F. Supp. 1201, 1214-15 (S.D.N.Y. 1976).

22. *Id.* at 1215. Plaintiffs waived their right to trial by jury against defendants Nizer and Doubleday & Co., Inc. but not as to defendant Fawcett Publications, Inc., *id.* at 1211, leading the trial court to find that the fair use defense was available to Nizer and Doubleday & Co., Inc., both as a matter of law and as a matter of fact.

In analyzing the fair use issue, the court gave primary consideration to the fact that the public interest in understanding all facets of the Rosenberg case would be served by publication of Nizer's book.²³ The potentially adverse effect of the use on the future marketability of the copyrighted letters was not considered sufficient to preclude defendants from invoking fair use as a defense.²⁴

The Court of Appeals for the Second Circuit, however, disagreed with the trial court's resolution of this apparent conflict between the respective interests of the public and the copyright owners. Rejecting the trial court's finding that the public's interest in the historical event was sufficient to establish the fair use defense regardless of the apparent economic harm to the copyright owners,²⁵ the court reversed the grant of summary judgment in defendants' favor and remanded the case.²⁶

The court of appeals' decision is consistent with the traditional application of the fair use doctrine. Though originally developed as a means of qualifying the exclusive rights of the copyright holder and protecting the interest of the public in the dissemination of learning and culture,²⁷ the doctrine of fair use was never intended to benefit the public welfare at the expense of the copyright owner's economic interests.²⁸ In determining whether the use made of copyrighted material in a particular case is a fair use, the courts generally have considered a number of factors;²⁹ it is evident from the case law, however, that the ultimate consideration is whether the unauthorized use tends to diminish or prejudice the potential marketability of the copyrighted

23. *Id.* at 1207.

24. *Id.* at 1210.

25. 560 F.2d at 1070.

26. *Id.* at 1071.

27. Cohen, *supra* note 3, at 49.

28. *See generally* cases cited note 10 *supra*.

29. The factors listed by the Second Circuit in *Meeropol* are the same as those found in the recent codification of the fair use doctrine at 17 U.S.C.A. § 107 (1977):

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

(2) the nature of the copyrighted work;

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

(4) the effect of the use upon the potential market for or value of the copyrighted work.

560 F.2d at 1069.

Commentators on the fair use doctrine have suggested various sets of criteria that are essentially variations of the four factors listed above. *See* B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* 309-10 (2d ed. 1960); Cohen, *supra* note 3, at 53; Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954). These lists have not been particularly helpful, however, because the criteria are defined only in general terms without specification of their relative weights. *See* Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73, 87.

material.³⁰ Consideration of the purpose and character of the use has sometimes served to broaden the application of the fair use exception in the case of so-called "scholarly" works.³¹ It has been acknowledged that the public's interest in the advancement of such fields as science, law, medicine, history and biography often can be served only through the use of previously copyrighted materials.³² This public interest factor, however, has not been found sufficient to support alone the defense of fair use when the subsequent scholarly work might decrease the potential value of the copyrighted work:³³ a use having such an effect cannot be "fair" to the copyright owner because it undermines the economic incentive to discovery and creation that is the very basis of the quasi-monopolistic copyright system.³⁴

Until the *Meeropol* case, however, the Court of Appeals for the Second Circuit had appeared to favor recognition of a direct public interest factor as a possible defense in a copyright infringement action.³⁵ In *Rosemont Enterprises, Inc. v. Random House, Inc.*,³⁶ the court gave scant consideration to the possibility that the future market for copyrighted magazine articles about Howard Hughes might be diminished by the unauthorized use of the articles in a subsequent biography.³⁷ Instead, the court turned its attention to the nature of the materials, focusing on the issues of whether the copying work would serve the public interest in the free dissemination of information and whether its preparation required some use of previously copyrighted materials.³⁸ Though the *Rosemont* court couched its opinion in terms

30. See 2 M. NIMMER, *supra* note 7, § 145, at 646; A. LATMAN, *supra* note 6, at 783; Sobel, *supra* note 6, at 53.

31. See *Loew's, Inc. v. Columbia Broadcasting Sys., 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 an equally divided Court*, 356 U.S. 43 (1958); A. LATMAN, *supra* note 66, at 793.

32. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

33. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

34. See note 78 *infra*.

35. See *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

36. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

37. *Id.* at 310-11. The *Rosemont* court did not disregard the economic harm criterion entirely. Rather, the court maintained that the publication of the biography had not lessened the value of the copyrighted magazine articles. This position has been criticized for failing to take into account the possibility that the copyright owners could have used the articles in publishing a subsequent biography of their own. See 2 M. NIMMER, *supra* note 7, § 145 at 646-47; Sobel, *supra* note 6, at 57.

38. 366 F.2d at 307.

of fair use,³⁹ commentators were quick to see that the decision represented an aberrational extension of the fair use doctrine.⁴⁰ It is evident that defendants' copying of the magazine articles about Hughes did not constitute fair use⁴¹ within the traditional definition of that troublesome term.⁴² The decision is best understood as the adoption of a direct public interest factor.⁴³

The origin of this direct public interest qualification is not certain. The court in *Rosemont* relied heavily on the constitutional purpose of the copyright statute,⁴⁴ but because public interest traditionally has not been recognized as one of the express criteria for determining the availability of the fair use defense,⁴⁵ it seems doubtful that this innovation can be said to stem from the copyright clause of the Constitution.⁴⁶ In addition to setting forth the purpose for copyright, the copyright clause specifically empowers Congress to grant "to Authors . . . the exclusive Right to their respective writings."⁴⁷ In light of the legislative history of the Copyrights Act⁴⁸ and the fact that the fair use doctrine has been codified,⁴⁹ it must be presumed that the traditional judicial interpretation and application of the fair-use doctrine represents what Congress believes to be the proper balance between the constitutional purpose of promoting the arts and sciences and the broad power conferred by the Constitution for serving that purpose.⁵⁰

Another possible source of the direct public interest qualification, one that is not within the power of Congress to affect, is the first amendment.⁵¹ To the extent that the public's right to be fully informed

39. *Id.* at 306-11.

40. *See* 1 M. NIMMER, *supra* note 7, § 9.24, at 28.28; Sobel, *supra* note 6, at 54.

41. *See* note 7 *supra*. There can be little doubt that the unauthorized use of the Hughes material had a detrimental effect on its future economic value.

42. In *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), the court stated that "the issue of fair use . . . is the most troublesome in the whole law of copyright."

43. *See* Sobel, *supra* note 6, at 61.

44. *See* 366 F.2d at 307.

45. *See* note 29 *supra*.

46. *See* U.S. CONST. art. I, § 8, cl. 8, *quoted in* note 1 *supra*.

47. *Id.*

48. *See, e.g.*, S. REP. NO. 22, 94th Cong., 2d Sess. (1976); S. REP. NO. 1361, 93d Cong., 2d Sess. (1974); S. REP. NO. 644, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 2512, 90th Cong., 1st Sess. (1967).

49. Copyrights Act, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (codified at 17 U.S.C.A. § 107 (West 1977)).

50. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659. *See* *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978).

51. U.S. CONST. amend. I, § 2 provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech or of the press."

regarding matters of general import is threatened by the literal application of the copyright laws, the first amendment may be invoked to protect the free dissemination of information and commentary on public issues.⁵² Such an extrapolation of the first amendment would be consistent with the Supreme Court's interpretation and effectuation of the first amendment guarantees of freedom of speech and press.⁵³

The Supreme Court has revealed an intent to construe strictly any law that might have a chilling effect on the first amendment "in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources."⁵⁴ Likewise, the Court has indicated, by implication, that in order for the express guarantees of free speech and press to have any real meaning, a fundamental right to receive such information must be recognized.⁵⁵ These principles reveal the clear intent of the Supreme Court to remove any unnecessary shackles from the first amendment.⁵⁶ Applying these principles to the copyright laws, the primary issue becomes one of determining to what

52. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 311 (Lombard, C.J., concurring). *But cf. McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971) (court dismissed defendants' first amendment argument, insofar as it was distinguishable from traditional fair use defense, as "flying in the face of established law").

53. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

54. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

55. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). The Court's holding, only implicit in the majority opinion, was expressly formulated by Mr. Justice Brennan in his concurring opinion. *Id.* at 308 (Brennan, J., concurring).

56. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defendants were sued for libel after publishing a political advertisement that allegedly contained inaccurate information concerning plaintiff. The Court reversed the judgment in plaintiff's favor because there had been no showing that prior to publication defendants knew or recklessly disregarded the fact that the information was false. The Court held that without proof of scienter such a judgment would have a chilling effect on first amendment rights. *Id.* at 266.

In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), defendants were sued for violating plaintiff's statutory right of privacy by reporting that a highly fictionalized play accurately portrayed an actual experience in plaintiff's life. Again, however, the Court reversed the judgment in plaintiff's favor, holding that "the constitutional protections for speech and press preclude the application of the [statutory right of privacy] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88.

In *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), the Court declared unconstitutional § 305(a) of the Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 305(a), 76 Stat. 833, that required addressees of "Communist political propaganda" to submit a written request for delivery. The Court held that the statute was "an unconstitutional abridgment of the addressee's First Amendment rights." 381 U.S. at 307 (emphasis added). In his concurring opinion, Mr. Justice Brennan emphasized that the addressees were asserting "First Amendment claims in their own right," claims premised on the implicit fundamental right to receive publications, a right that is necessary to make the express guarantees of free speech and press meaningful. *Id.* at 308 (Brennan, J., concurring).

extent the rights of the copyright owner will be allowed to encroach upon the "community right to hear."⁵⁷

It is quite unlikely that the first amendment was intended to negate completely the protection afforded all copyrighted material that happens to be of interest to the public.⁵⁸ Indeed, a broad application of the first amendment guarantee of freedom of speech in the public interest area would undermine the very foundation of the Copyrights Act, for copyrighted works typically are of interest to the public in one way or another. To allow unrestricted infringement of these works would result in the destruction of the economic incentive to create, publish and distribute copyrightable materials that might in any way be of benefit to the public welfare, and the "community right to hear" eventually would become a right without meaning.⁵⁹

Such a crippling application of the first amendment to the copyright laws is, however, unnecessary. The historical qualifications of a copyright owner's exclusive rights more often than not have been utilized successfully to achieve a proper balance between the public's interest in the growth of learning and culture and the copyright owner's interest in preserving the economic value of his work.⁶⁰ Because the facts and ideas set forth in a copyrighted work are not in themselves copyrightable,⁶¹ and because the copyrighted work itself may be used in a fair and reasonable manner,⁶² the public's interests can usually be served without depriving the copyright owner of his just remuneration.⁶³

There are certain types of copyrighted materials, however, that cannot be reduced to an assortment of facts or ideas because it is the form of expression and not merely the substance that is meaningful.⁶⁴

57. See Goldstein, *supra* note 11, at 989 (citing A. MEIKLEJOHN, *POLITICAL FREEDOM* 26-28 (1965)) (the first amendment intended to define "a community right to hear" and not "an individual right to speak").

58. Cf. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) ("the right to communicate information of public interest is not 'unconditional'").

59. See Sobel, *supra* note 6, at 78-79 (public interest best served ultimately by sound system of copyright protection).

60. For a general review of the fair use case law, see 2 M. NIMMER, *supra* note 7, § 145, and Cohen, *supra* note 3.

61. See A. LATMAN, *supra* note 6; Sobel, *supra* note 6.

62. See M. NIMMER, *supra* note 7.

63. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954); HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., *supra* note 3, at 5-6.

64. In other words, the copyrighted material cannot be used in a distilled form and maintain its value; the part which is to be appropriated must be copied verbatim. The fair use doctrine allows for this type of use provided certain criteria are satisfied. See note 29 *supra*. If the fair use criteria cannot be satisfied, however, the copyright owner's monopoly becomes absolute.

As examples, Professor Nimmer lists such graphic works as the Mona Lisa, Michelangelo's Moses and the Zapruder film of President Kennedy's assassination;⁶⁵ arguably this category should include certain literary works as well.⁶⁶ For works of this nature, there is potentially a direct conflict between the copyright owner's quasi-monopolistic rights and the public's right to the widest possible dissemination of information and commentary because under the traditional interpretation of the fair use doctrine the copyright owner has the right to prohibit any use of his copyrighted material that might diminish its future marketability.⁶⁷ When traditional copyright qualifications are inadequate to protect the public's interests, a direct public interest qualification, premised on the first amendment, should be invoked to prevent the suppression of information or commentary that might enhance the public welfare, but that cannot be made available to the public in an effective manner without the use of previously copyrighted material.⁶⁸

The first essential element of this direct public interest qualification is that there must be some legitimate purpose for using the copyrighted material.⁶⁹ Generally, this requirement should be easy to satisfy. Though it is possible that copyrighted material may be appropriated for an improper purpose, such as commercial exploitation, any use of the copyrighted material that is intended to contribute to the intrinsic value of the copying work should qualify as a legitimate purpose.

Obviously, if the subsequent researcher cannot accomplish his purpose in an effective manner without a proscribed use of the copyrighted material, the public will be denied the benefit of that researcher's work. The problem is not that the copyrighted material is not directly available to the public, but that the public may be denied the benefit to be gained by a particular use of the copyrighted material in a subsequent work.

65. 1 M. NIMMER, *supra* note 6, § 9.232 at 28.22-28.23. The unauthorized use of the Zapruder film was the subject of litigation in *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

66. Provided that verbatim copying is necessary to the accomplishment of a legitimate purpose, there is no logical reason for excluding literary works. This should not create problems in the areas of poetry, fiction or drama since the purpose for using such works can be strictly scrutinized. For instance, limited quotation from such works for the purpose of literary criticism and parody has been allowed under the traditional fair use doctrine. See Cohen, *supra* note 3. But wholesale appropriation probably would not be allowed even under the more liberal direct public interest qualification because such a use would serve the same purpose as the original, and thus the only motivation for such copying would be personal profit.

67. See text accompanying notes 30-34 *supra*.

68. See *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 730 (1978); Goldstein, *supra* note 11, at 994.

69. Cf. *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938) (portion of scientific treatise appropriated for purely commercial purpose of promoting the sale of defendant's cigarettes held not legitimate purpose).

The trial court in *Meeropol v. Nizer*, for example, expressed no difficulty in finding that there was a legitimate purpose for using the Rosenbergs' letters.⁷⁰ The court indicated that the letters themselves were part of the historical record of this important event and that any serious discussion of the case would be incomplete without some reference to them.⁷¹ In addition, the trial court found that the letters clearly were used to describe the thoughts and feelings of the Rosenbergs in relation to their trial and sentence.⁷²

On the other hand, the court of appeals in *Meeropol* expressed considerable doubt regarding the legitimacy of defendants' purpose for using the letters.⁷³ Noting that the letters were prominently featured in promotional material for defendants' book,⁷⁴ the court found that the letters may have been used for purposes of commercial exploitation.⁷⁵ It seems, however, that the court was confusing commercial motivation with commercial exploitation.⁷⁶ As the court conceded, the mere fact that an unauthorized use of copyrighted material is commercially motivated is not a sufficient reason for disallowing an otherwise valid fair use defense.⁷⁷ The specific promotional activities are merely elements of the overall commercial motivation.⁷⁸ The use of the letters in promotional advertisements was not alone a proper basis for questioning either the legitimacy of using the letters in the book or the intrinsic value of the book itself.

The second essential element of the direct public interest qualification is that the copying work be of interest to the public.⁷⁹ This does not mean that the copying work must represent a significant scientific or cultural achievement; indeed, the trial court in *Meeropol* found that *The Implosion Conspiracy* could be of some benefit to the public welfare even though it was written for a popular audience and with a

70. 417 F. Supp. 1201, 1214 (S.D.N.Y. 1976).

71. *Id.* at 1212, 1214.

72. *Id.* at 1214.

73. 560 F.2d at 1069-71.

74. *Id.* at 1071.

75. *Id.*

76. *Id.* at 1069.

77. *Id.*

78. The copyright system is based on providing an economic incentive for the creation and publication of new works. The Second Circuit has expressly recognized this underlying premise. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 307; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

79. This is related to the traditional requirements of the fair use doctrine, see note 29 *supra*, and it is of special importance to the direct public interest qualification. See text accompanying notes 44-59 *supra*.

commercial motivation.⁸⁰ So long as there is some public interest in the copying work, this requirement is satisfied.

The final and most critical element is necessity: only if the purpose for using the copyrighted material can be accomplished by no means other than exact appropriation can the unauthorized use come within the sanction of the direct public interest qualification. If other means exist, then the interests of the public can be adequately protected without invoking any additional qualification of the copyright owner's rights. The trial court in *Meeropol* found that the only effective means of using the letters to accomplish the intended purposes was to quote from them directly.⁸¹ In so finding, the court expressly dismissed the suggestion that the thoughts and feelings embodied in the letters could have been presented effectively without copying their expression verbatim.⁸² In other words, the court found that verbatim copying was necessary to protect adequately the public's interest in hearing what Mr. Nizer and his publishers had to say about the Rosenberg case.

The propriety of the trial court in *Meeropol* finding necessity on defendants' motion for summary judgment is, however, open to question. Though there is no reason to question the legitimacy or sincerity of defendants' purposes in using the letters,⁸³ it would seem that reasonable men might differ concerning whether verbatim copying of the letters was really necessary to the accomplishment of those purposes. The defendants first asserted necessity in the use of the letters as historical facts in themselves.⁸⁴ It must be conceded that quotation would be necessary if the letters were found to be an integral component of the historical event. But certainly it is not clear that the letters could properly be considered analogous to historical facts.⁸⁵ Because the letters of

80. 417 F. Supp. 1201, 1209 (S.D.N.Y. 1976). For example, the trial court found that Nizer's book could serve as valuable source material for future studies of the Rosenbergs' case.

81. *Id.* at 1214.

82. *Id.* at 1212. The trial court also found that the use of the letters was properly limited to the accomplishment of the purposes. *Id.* at 1214.

83. Defendants set out the following purposes for using the letters in their book:

(1) as historical facts in themselves for the reason that they were an integral part of an international campaign to secure clemency; (2) to give the reader an insight into those two public figures as individuals . . . whose writing achieved a lasting eloquence; and (3) to provide an emotional base to support Nizer's own view that capital punishment in that case was unwarranted.

Petition for Certiorari at 6, *Nizer v. Meeropol*, 98 S. Ct. 927 (1978) (copy on file in office of *North Carolina Law Review*).

84. See note 83 *supra*.

85. Judge Tyler, the trial judge originally assigned to this case, expressed doubt concerning whether "letters stand on the same footing as 'historical facts', which are the product of research and in turn form the basis for subsequent works." 361 F. Supp. 1063, 1070 (S.D.N.Y. 1973). This

public figures are copyrightable,⁸⁶ while historical facts are not,⁸⁷ it would seem that the two are not analogous. If they were, the letters could be used without restriction, and the copyright on them would be meaningless.

Defendants' second alleged purpose was to provide insight into the character of the Rosenbergs.⁸⁸ Direct quotation from the letters may indeed have been the most effective means of accomplishing that purpose, but whether it was the only effective means is not so certain. It is probably true that reference to certain of the Rosenbergs' letters would be a necessary element in any serious book on their trial;⁸⁹ whether such references would require verbatim copying, however, is a genuine issue of fact that should be decided by the trier of fact after careful comparison of the materials in question. Particularly with regard to literary works, only in the most unusual cases will the need for exact copying be so evident as to warrant summary judgment in favor of the defendant.

The same holds true for defendants' third purpose,⁹⁰ the establishment of an emotional basis for the author's view on capital punishment in the Rosenbergs' case. Though the quotations may have heightened the emotional impact of this theme, only a careful examination of the two works can reveal whether the same sentiments could not have been expressed effectively by paraphrasing the content of the letters.

Thus it appears that even if *Meeropol* had been decided in a jurisdiction in which the direct public interest qualification was recognized, because the necessity element raised a genuine issue of fact the court of appeals' decision to remand would have been appropriate. This is not to say that the use of the letters in this instance was not necessary. On the contrary, there is good reason to believe that verbatim copying was the only effective means of accomplishing at least one, if not all, of the author's purposes for using the letters. But not until this issue is finally resolved can the direct public interest qualification be invoked as a de-

was one reason Judge Tyler denied defendants' original motion for summary judgment. Judge Gagliardi, who succeeded Judge Tyler when he resigned from the bench, however, went so far as to indicate that the letters were at least analogous to historical facts. 417 F. Supp. 1201, 1211 (S.D.N.Y. 1976).

86. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); Note, *Personal Letters: In Need of a Law of Their Own*, 44 IOWA L. REV. 705 (1959).

87. 560 F.2d at 1070. See also A. LATMAN, *supra* note 6, at 784-85.

88. See note 83 *supra*.

89. Even Judge Tyler was willing to concede that some reference to the letters would be required. 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973).

90. See note 83 *supra*.

fense. Unfortunately, in *Meeropol* the Court of Appeals for the Second Circuit, by restricting its analysis of the case to the strict criteria of the traditional fair use doctrine, showed no interest in recognizing the public interest qualification.⁹¹ Because the fair use doctrine was never intended to benefit the public welfare at the expense of the copyright owner's economic interests,⁹² the court could not so easily dismiss the possibility of economic harm to the copyright owner.⁹³ And, having found the possibility of such harm to exist, the court of appeals was compelled to reverse the district court's summary judgment award.

If on remand defendants' use of the letters can be proven to have diminished the future marketability of the copyrighted work, then the fair use defense will be of no avail to defendants even if it can also be proven that the copyrighted material could not be used in an effective manner without infringing the copyright.⁹⁴ If this is to be the case, the public's right to hear a critical part of Nizer's discussion of the Rosenberg trial will be subordinated to the Meeropols' economic interest in exerting total control over the copyrighted letters.⁹⁵ It is to avoid such a constitutionally anomalous result⁹⁶ that the courts need to recognize this direct public interest factor as a legitimate and necessary qualification of the copyright owner's exclusive rights.

Provided the material is of such a type that the public's interest therein cannot be adequately served without infringing the copyright,

91. See text accompanying notes 80 & 81 *supra*.

The court attempted to distinguish its earlier decision in *Rosemont* on the grounds that plaintiffs in that case had not come into court with clean hands and that the amount of copying in *Rosemont* was quantitatively less than that in *Meeropol*. 560 F.2d at 1069. It seems clear, however, that by unequivocally relying on the strict criteria of the fair use doctrine in *Meeropol*, the court was implicitly rejecting the underlying basis of the *Rosemont* decision.

92. See generally cases cited note 10 *supra*.

93. "A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work." 560 F.2d at 1070; see note 10 and text accompanying notes 32-40 *supra*.

The trial court did not disregard the economic harm factor entirely. It merely held that economic harm was not necessarily the determinative issue. 417 F. Supp. 1201, 1214-15 (S.D.N.Y. 1976).

Because of the court of appeals' decision in this case, it is doubtful that the issue of necessity in *Meeropol* will be litigated on remand. Limited by law of the case principles to the traditional copyright qualifications, defendants probably will not be allowed to litigate the issue of necessity directly, though it may come into play as a collateral issue in the fair use defense. Nor is it likely that the issue will be raised again on appeal, as the facts of the case are such that the traditional fair use defense should result in a judgment in defendants' favor. Because of the nature of defendants' use, it seems doubtful that plaintiffs will be able to prove a likelihood of economic harm.

94. See note 10 and accompanying text *supra*.

95. Though the public may have access to the Rosenbergs' letters, they will not have access to that part of Nizer's discussion of the case that depends on the use of the letters.

96. See text accompanying notes 51-57, 67 & 68 *supra*.

the benefit to be gained from allowing the free dissemination of information and commentary far outweighs the possible economic harm to the copyright owner. The public's right to be informed must be the ultimate concern. "We cannot recognize copyright as a game of chess in which the public can be checkmated."⁹⁷

STEVEN L. HOARD

Corporations—*Singer v. Magnavox Co.*: An Expansion of Fiduciary Duty in Freezeout Mergers Under the Delaware Long-Form Merger Statute

Under the law of some states a corporation holding a majority equity interest in another company may merge the two corporations and provide in the merger agreement that certain shareholders be paid cash, rather than securities in the resulting entity, for their interest in the old corporation.¹ In these mergers, denominated "freezeouts,"² the fiduciary duties governing the relationship between majority and minority stockholders are rooted in state law.³ In *Singer v. Magnavox Co.*,⁴ a recent decision concerning shareholder fiduciary duties, the Delaware

97. *Morrissey v. Procter & Gamble*, 379 F.2d 675, 679 (1st Cir. 1967).

1. See, e.g., DEL. CODE tit. 8, § 251 (1974 & Cum. Supp. 1977); N.Y. BUS. CORP. LAW §§ 901, 902 (McKinney 1963 & Supp. 1977).

2. Freezeouts can occur in various contexts. For example, merger freezeouts include the situation in which the controlling shareholders of a public corporation who wish to "go private" form a second company and capitalize it with their equity interest in the public corporation. This new "parent" then merges with its public subsidiary with the terms of the merger providing for the elimination of the equity interest of the minority, often on a cash-out basis. A second type of freezeout occurs when one corporation, by tender offer or otherwise, attempts to acquire the majority interest in a business with which it was previously unaffiliated. After the requisite proportional interest is obtained, the acquiring corporation merges the acquired company with itself or its wholly-owned subsidiary, the terms of the merger providing for the elimination of the minority shareholders of the target corporation. See Greene, *Corporate Freeze-Out Mergers: A Proposed Analysis*, 28 STAN. L. REV. 487, 491-96 (1976).

3. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), in which the Supreme Court held that in short-form mergers the fiduciary relationship between stockholders is a matter of state concern. Specifically, *Santa Fe* rejected the contention that § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1977), require a proper business purpose to exist before a short-form merger comporting with state law will be valid under federal law. The Court suggested that the reasoning behind its holding is also applicable to long-form mergers. 430 U.S. at 478.

4. 380 A.2d 969 (Del. 1977).