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Copyright versus the First Amendment: Forecasting an End to the Storm

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COPYRIGHT VERSUS THE FIRST AMENDMENT: FORECASTING AN END TO THE STORM*

*by James L. Swanson***

I. INTRODUCTION

The goals of copyright law and the First Amendment seem complementary. The copyright clause of the United States Constitution 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 . . . ."[1] Copyright gives authors an economic incentive to create works of value for the public. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[2] This guarantee of free speech and press appears to protect the expression that copyright coaxes into existence. The First Amendment allows authors to disseminate their works free from governmental censorship, prior restraint or penalty. An author's "exclusive right" to profit from his creativity would be of little value absent the right to offer his works to the public. Copyright gives authors the incentive to create; the First Amendment gives them the right to communicate. For nearly two centuries, the systems of copyright and free expression have served each other and the public.[3]

But all is not well between copyright and the First Amendment.

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This article is dedicated to the memory of the late Professor Melville B. Nimmer, UCLA School of Law. While he might have disagreed with some of the conclusions I reach, I am grateful to Professor Nimmer for encouraging me to ask skeptical questions about the arguments made by advocates, commentators and judges to justify a First Amendment exception to copyright law.

I also want to thank Wesley J. Liebeler, Andrea E. Mays, Gary Stiffelman, Lionel S. Sobel, David Nimmer and Judge Douglas H. Ginsburg for helpful comments.

1. U.S. CONST. art. I, § 8, cl. 8.

2. U.S. CONST. amend. I.

3. Congress enacted the first Copyright Act on May 31, 1790, and the First Amendment became effective in 1791.

Some courts and commentators have argued that copyright, rather than promoting the First Amendment, actually hinders free speech by monopolizing expression.[4] Critics have questioned whether the traditional doctrine of "fair use" provides the public with adequate access to copyrighted works.[5] They have argued that, in our age of mass communication, there is sometimes no substitute for use of an author's original expression.[6] According to this view, when a copyrighted work is of great public interest or importance, the informational needs of the many must outweigh the property rights of a few.[7] Critics also fear that some authors will misuse the copyright monopoly to withhold works from the public entirely. Copyright may then serve as an accomplice to censorship, rather than as an engine of free expression.[8] To eliminate the alleged tension between copyright and free speech, commentators have urged the creation of an explicit First Amendment immunity against infringement claims. While there are almost as many different plans as there are commentators, one theme is common to all of them—the subordination of copyright law to the First Amendment.

In 1969, Lionel Sobel warned of a constitutional "storm" between copyright and the First Amendment looming on the horizon.[9] According to Sobel, recent cases had "insidiously injected" free speech doctrines into the law of fair use.[10] Sobel predicted that this new development in the law portended a "coming clash between First Amendment 'free speech and press' principles and copyright clause exclusive-right principles."[11] With the benefit of hindsight, this essay evaluates the accuracy of Sobel's prediction and tracks the path taken by the gathering storm since he first identified it almost twenty years ago. In the context of an increasing demand for a First Amendment exception to copyright, this essay reviews the history of the issue from the 1960's to the present, and ventures its own prediction for the future.

Part I of the essay identifies the goals of the First Amendment and shows that copyright law already promotes those goals through the idea and expression dichotomy, the fair use doctrine, and other specific provi-

4. *See generally* notes 65-147 and accompanying text.

5. *See generally* notes 65-147 and accompanying text.

6. *See generally* notes 65-147 and accompanying text.

7. *See generally* notes 128-39 and accompanying text.

8. *See generally* notes 88, 93-99, 153-54 and accompanying text.

9. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971) (National Second Prize Award Essay, Nathan Burkan Memorial Competition, 1969).

10. *Id.* at 44.

11. *Id.* at 80.

sions contained in the Act. Part II identifies the origins of the copyright/First Amendment storm and analyzes the justifications made by judges and commentators for creating a free speech privilege to the rights granted by copyright. Part III outlines the numerous plans designed to achieve that goal and explains why they are flawed. Part IV argues that we must not, under any circumstances, recognize a First Amendment privilege to copyright law and permit infringement in the name of free speech. The article concludes by looking to all the relevant signs and forecasting an end to the copyright versus First Amendment "storm."

II. THE EXISTING BALANCE BETWEEN COPYRIGHT AND THE FIRST AMENDMENT

Any law regulating speech—including the law of copyright—must contend with the First Amendment. But before we can identify areas of potential conflict between free speech and copyright, it becomes necessary to discuss the principles underlying the First Amendment. Until we know what the First Amendment protects, it is impossible to know whether copyright interferes with its functions. The literature on free speech is vast and controversial, and this article makes no pretense of pushing First Amendment analysis to it limits here.[12] Instead, the article outlines the fundamental free speech values that few scholars dispute. Once the functions and boundaries of the system of freedom of expression are defined, a First Amendment critique of the Copyright Act will be possible.

A. Functions of the First Amendment

Alexander Meiklejohn argued that freedom of speech is a precondition to self-government.[13] According to his interpretation, the purpose of the First Amendment "is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[14] Interested initially in only political speech, Dr. Meiklejohn came to de-

12. I leave for another day a discussion of various theories of the left which claim that the First Amendment is a source of oppression, not freedom. *See generally* Bachmann, *The Irrelevant First Amendment,* 7 COMM. & L.J. 3 (1985); Kairys, *Freedom of Speech,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140 (D. Kairys ed. 1982); Tushnet, *Corporations & Free Speech,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 253 (D. Kairys ed. 1982).

13. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

14. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

fine the spectrum of speech related to self-government broadly.[15] He assigned First Amendment protection to "education . . . the achievements of philosophy and the sciences . . . literature and the arts."[16]

Professor Thomas Emerson identified four values promoted by the First Amendment: individual self-fulfillment, the attainment of truth, public participation in social and political decision-making, and maintaining a balance between stability and orderly change.[17] Professor Nimmer identified three First Amendment functions that incorporate most of the values discussed by Meiklejohn and Emerson: enlightenment, self-fulfillment, and safety valve.[18] The enlightenment function, analogous to Emerson's "truth" function, provides the public with access to all relevant data. By protecting free expression, the First Amendment assures that ideas, opinions and information will be disseminated freely for consideration, debate, acceptance or rejection, and decision-making. To the extent that the public is not free to discuss any facts, ideas or individuals, the democratic process suffers.

The self-fulfillment function looks inward and recognizes the psychological need of individuals to satisfy themselves through free expression of their ideas.[19] This function is based upon the premise that "the nature of man is such that he can realize the fulfillment of self only if he is able to speak without restraint."[20] Self-fulfillment can be vicarious; the First Amendment recognizes the rights of audiences as well as those of speakers.[21] Speech which resonates within the self and strikes a responsive chord can fulfill the unarticulated needs of an audience.

The safety valve function is based on the premise that people free to express their views (especially dissenting views) and able to receive uncensored communications are less prone to violence.[22] Suppression leads to frustration and frustation may lead to violence.[23] The safety valve function channels thought into expression, not violence.

Despite its preeminence, the First Amendment is not an absolute

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15. For the leading article advocating the view that the First Amendment protects only political speech, see Bork, *Neutral Principles & Some First Amendment Problems,* 47 IND. L.J. 1 (1971). Like Dr. Meiklejohn, Judge Bork eventually rejected this narrow interpretation of the First Amendment.

16. Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245, 255.

17. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-8 (1970).

18. M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02–.04 (1984).

19. For a complete analysis of this function, see *id.* § 1.03.

20. *Id.* at 1-49.

21. *See generally, id.* at 1-20 to 1-22.

22. For a brief review of this function, see *id.* § 1.04.

23. The safety valve function is not central to the copyright-First Amendment controversy, as copyright does not prevent people from expressing their own views.

that forbids all laws affecting speech. This literal interpretation of the First Amendment, which never gained widespread acceptance, would grant promiscuous protection to all speech, under any circumstances.[24] Compelling interests permit the state to curb free speech when necessary. Familiar limitations on speech include the laws of libel, fraud, perjury, conspiracy, national security, patent and copyright. In each case, the state regulates speech to promote socially useful goals.[25]

B. A First Amendment Critique of Copyright

Having identified the essential First Amendment values which any valid restriction on speech must outweigh, we are now prepared to address the hitherto unanswered question: Does the Copyright Act violate the First Amendment?[26] Contrary to assertions made by those who claim that copyright inhibits free speech, the Copyright Act is remarkably sensitive to First Amendment values. The Act favors speech in numerous ways. It protects expression but not ideas, it excludes certain works from the schedule of copyrightable subject matter, it limits the duration of protection, and it denies authors absolute dominion over their works through the doctrine of fair use. In these and other ways, copyright law accomodates free speech interests.

1. The Idea/Expression Dichotomy

A copyright regime that allowed authors to monopolize ideas would clearly interfere with the functions of the First Amendment. Little communication or innovation would occur if people could not build upon the ideas of others. As Professor Nimmer argued, "the market place of ideas would be utterly bereft, and the democratic dialogue largely stifled, if the only ideas which might be discussed were those original with the speakers."[27] But the Copyright Act ensures that this will not happen, for it states explicitly that "in no case does copyright protection for an original work of authorship extend to any idea . . . ."[28] While copyright protects

24. Justice Black was the leading proponent of the absolutist position. *See* Cahn, *Justice Black and First Amendment "Absolutists": A Public Interview,* 37 N.Y.U.L. REV. 549 (1962); NIMMER, *supra* note 18, § 2.01, at 2-3 ("Indeed, the absolutist view has never been fully accepted by any member of the Supreme Court other than Justice Black." (footnote omitted)).

25. *See generally* NIMMER, *supra* note 18, § 2.01, at 2-1 to 2-8; W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 467 (1985).

26. It was settled some time ago that the First Amendment does not render the Copyright Clause of the Constitution inoperative. *See* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech & Press?* 17 UCLA L. REV. 1180, 1181-82 (1970); PATRY, *supra* note 25, at 462-66.

27. M. NIMMER, NIMMER ON COPYRIGHT § 1.10[B] at 1-72 (1985).

28. 17 U.S.C. § 102(b) (1984).

an author's expression, it allows others to use the ideas underlying that expression. For example, an author who writes a biography of Abraham Lincoln cannot prevent others from writing about Lincoln. Nor can a writer who expresses a new theory explaining the Kennedy assassination stop anyone else from advocating the same theory in a subsequent book. The unprotected status of ideas serves the First Amendment well, for "it is exposure to ideas, and not their particular expression, that is vital if self-governing people are to make informed decisions."[29]

The success of the idea/expression dichotomy as a balance between free speech and copyright depends upon, of course, how one chooses to define "idea" and "expression." An overbroad concept of "expression" might restrict access to ideas in addition to protecting an author's expression, thereby frustrating the goals of the First Amendment. On the other hand, copyright obviously protects more than an author's exact words.[30] But how much more? Determining at what point protection ends and public domain begins becomes more difficult when one considers that the so-called "line," dividing idea from expression, may not exist. Some commentators have argued that *all* expressions are ideas and that no idea can exist independent of its expression.[31] According to this interpretation, when we draw the "line," we are really deciding how specific an idea must be before we will grant ownership of it through copyright. Once an idea reaches a certain level of generality—and this can vary from case to case—we determine that it has entered the common pool which is available to all and owned by no one.[32] The idea/expression dichotomy is simply a shorthand way of describing that point on the continuum where ideas become too general to receive protection.

Shorthand or not, the results of drawing the line between what is copyrightable and what is not are usually satisfactory. Drawing the line may be more difficult in some cases than in others, but, as Professor Nimmer observed, "on the whole . . . it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests."[33]

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29. NIMMER, *supra* note 27, § 1.10[B], at 1-75.

30. Otherwise, as Judge Learned Hand cautioned, "a plagiarist would escape by immaterial variations." Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930).

31. *See, e.g.*, Libott, *Round the Prickly Pear: The Idea Expression Fallacy in a Mass Communications World,* 14 UCLA L. REV. 735 (1967), *reprinted in* 16 COPYRIGHT L. SYMP. (ASCAP) (1968).

32. *Id.*

33. NIMMER, *supra* note 27, § 1.10[B], at 1-76.

2. The Uncopyrightability of Facts

If the notion of copyrighting ideas offends First Amendment values, then the copyrighting of facts would be even more intolerable. But once again the Copyright Act leans in favor of free speech by excluding facts from its subject matter. The Act states that copyright protection may subsist only in "original works of authorship."[34] Facts fail to overcome this hurdle. While an author may be the first to unearth a fact, or the first to reveal it to the public, the fact cannot qualify as his original work of authorship. Professor Nimmer explained the rationale succinctly: "No one may claim originality as to facts. Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an 'author'. . . ."[35] To dispel any doubts about the matter, the Act goes on to state that "in no case does copyright protection . . . extend to any . . . discovery . . . ."[36] As a result, no author can claim ownership of newsworthy, historical, biographical, scientific or other facts that he discovers. The claim that copyright law does not protect facts is not however entirely true. A line of cases provides for the protection of the selection and arrangement of facts in directories, compilations and similar repositories of factual information.[37] A few courts have extended this protection to works of history and biography, but this is clearly the minority view.[38] Some commentators, however, believe that copyright law should afford greater protection to factual works than it does at present.[39] According to this view, the value of some works derives more from the facts they contain than from their expression. The uncopyrightability of facts renders these works vulnerable to appropriation by opportunists who plunder the fruits of the first author's effort and research. The initial author becomes the victim of those who reap where they have not sown. In response to this

34. 17 U.S.C. § 102(a) (1984).

35. NIMMER, *supra* note 27, § 2.11[A], at 2-158.

36. 17 U.S.C. § 102(b) (1984).

37. For an analysis of the copyrightability of factual works, see NIMMER, *supra* note 27, § 2.11[A]–[F], at 2-157 to 2-169.

38. *Id.* at 2-167.

39. For discussion of the issue, see Hill, *Copyright Protection for Historical Research: A Minority View,* 31 COPYRIGHT L. SYMP. (ASCAP) 45 (1984); Note, *Recent Development: Copyright Law & Factual Works—Is Research Protected?,* 58 WASH. L. REV. 619 (1983); Taylor, *The Uncopyrightability of Historical Matter: Protecting Form Over Substance & Fiction Over Fact,* 30 COPYRIGHT L. SYMP. (ASCAP) 33 (1983); Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works,* 81 COLUM. L. REV. 516 (1981); Gorman, *Copyright Protection for the Collection & Representation of Facts,* 76 HARV. L. REV. 1569 (1983).

perceived inequity, some commentators have urged that factual works be given greater protection.[40] If this controversial "sweat-of-the-brow" theory of copyright, which seems to reward earnestness and labor as much as originality, were ever to become controlling law, it would do so at the expense of free speech. At present, however, copyright protects only a narrow range of "fact" works from copying, and even then it does not create a property right in the facts per se.

3. The Uncopyrightability of Government Works

No expression is more relevant to the vitality of the democratic dialogue than works of the United States Government. Presidential speeches, congressional debates, judicial opinions and agency reports are the raw material of politics.[41] Wide dissemination of these works serves the enlightenment function of the First Amendment by giving people access to information about the conduct of their government. If governmental officials and organizations could monopolize their literary output, copyright might well be used to withhold certain works from the public. The cloak of copyright might help silence criticism of the government, prevent exposure of official misconduct, and exclude the public from participating in the resolution of important issues. The "Pentagon Papers" might never have been published if the government controlled the copyright to the documents.[42]

The Copyright Act preempts these scenarios by providing that "Copyright protection . . . is not available for any work of the United States Government . . . ."[43] Therefore, anyone may reprint any government work without risking liability for infringement.[44] The exclusion of government works from the list of copyrightable subject matter does not, of course, guarantee public access to all such works. Our officials may invoke national security, executive privilege and other doctrines to restrict access to material. Indeed, the extent to which the government can impose secrecy on its works without violating the First Amendment is

40. *See supra* note 39 and accompanying text.

41. One commentator has argued that federal contractors inhibit the democratic dialogue by copyrighting works produced at the behest of the federal government. *See* Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Works,* 84 COLUM. L. REV. 425 (1984).

42. The Supreme Court refused to order a prior restraint of publication of the papers in New York Times v. United States, 403 U.S. 713 (1971). For a discussion of the case, see Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case,* 26 STAN. L. REV. 311 (1974).

43. 17 U.S.C. § 105 (1984).

44. This license may not, however, apply to certain works commissioned by the government. *See* Note, *supra* note 41.

the subject of vigorous debate today.[45] While government secrecy may be a problem for the democratic dialogue, it is not a problem created or caused by copyright law.

4. Other Accommodations: Originality Requirement, Limited Duration, First Sale Doctrine, Lending Right

Several other features of copyright law serve the interests of free speech. According to the Act, only "original works of authorship" are eligible for copyright protection.[46] The originality requirement asks only that the protected expression be original to the author; it does not require that the expression be unique. By this provision, the Act leaves the door open for independent and even simultaneous creation by another author who did not have access to the first author's work.[47]

The limited duration of copyright protection—the life of the author plus fifty years—ensures that all works will ultimately repose in the public domain.[48] The Copyright Clause of the U.S. Constitution prohibits perpetual copyright, but otherwise gives Congress complete discretion to fix the specific term of protection.[49] While Professor Nimmer was surely correct to conclude that an absurdly long term "limited" to one-thousand years would be unconstitutional, it is by no means clear that Congress could not have codified a term of life plus seventy-five years, one-hundred years, or even longer.[50] Although no recent commentator has advocated perpetual copyright, several have criticized the current term for favoring the interests of proprietors over those of the public.[51] On the whole, however, the consensus view is that the term of life plus fifty years

45. *See generally* Fein, *Access to Classified Information: Constitutional Statutory Dimensions*, 26 WM. & MARY L. REV. 805 (1985); Comment, *Symposium: National Security & Civil Liberties*, 69 CORNELL L. REV. 685 (1984); Comment, *Freedom of Speech, National Security Democracy: The Constitutionality of National Security Decision Directive 84*, 12 W. ST. U. L. REV. 173 (1984); Halperin & Hoffman, *Secrecy & the Right to Know*, 40 LAW & CONTEMP. PROBS. (Summer 1976).

46. 17 U.S.C. § 102(a) (1984).

47. NIMMER, *supra* note 27, § 2.01.

48. The term may vary slightly for joint works, anonymous works, pseudonymous works and works made for hire. *See* 17 U.S.C. § 302 (1984).

49. The Copyright Clause requires only that the protection granted to authors and inventors be for "limited times." Congress is free to interpret that requirement as it chooses. Graham v. John Deere Co., 383 U.S. 1, 6 (1966). ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of Article I power.")

50. NIMMER, *supra* note 27, § 1.05[A], at 1-34.

51. For a representative view, see Goldwag, *Copyright Infringement & The First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1, 4 (1979), *reprinted in* Note, 79 COLUM. L. REV. 320 (1979).

strikes the appropriate balance between competing public and private interests.[52] It is long enough to give authors of any age a healthy incentive to create and brief enough to provide total and free access to the common literary, artistic and scientific heritage of the past. The first sale doctrine and the lending right encourage the broad dissemination of copyrighted works by denying authors control over the physical embodiment of their copyrighted expression.[53] For example, a copyright proprietor cannot prevent an individual who has purchased a copy of his latest book from reselling that copy, lending it to a friend, or giving it away. Nor can the author stop a used bookstore from buying and reselling the book. A library is free to purchase ten copies of a best-selling novel and lend them to two-hundred and fifty patrons during the next year. By permitting maximum dissemination of physical copies of a copyrighted expression without interference from the author, the Act gives increased circulation to that material.[54]

5. Fair Use

The fair use doctrine allows certain uses to be made of copyrighted works without the consent of the author. Fair use is perhaps the most written about and certainly the most complex subject in copyright law. It is noteworthy that virtually every work on the subject begins by repeating the now famous line that described the fair use doctrine as "the most troublesome in the whole law of copyright."[55] The literature on fair use is rich, and it is impossible to do it justice in a brief summary.[56] Instead, this essay discusses the key elements of the doctrine and then emphasizes what fair use is *not*.

Fair use is a defense to copyright infringement. Some courts have confused the doctrine with a finding that the copied material was not copyrightable in the first place, but the accepted view is that fair use enters the scene only after infringement of copyrighted expression has occurred. Professor Nimmer made the distinction clearly:

> [T]he crucial problem of fair use . . . arises where it is established by admission or by the preponderance of the evidence

52. NIMMER, *supra* note 27, § 1.05[d], at 1-36.

53. 17 U.S.C. § 202 (1984). Section 202 states explicitly that "ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied."

54. Certain provisions in the Act restrain the exploitation of physical copies of works. For example, the rights to perform or display a copyrighted work publicly remain exclusive to the author. 17 U.S.C. §§ 106(4), (5) (1984).

55. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir. 1939).

56. For the best treatments of fair use, *see generally* PATRY, *supra* note 25; NIMMER, *supra* note 27, § 13.05[A]-[F]; L. SELTZER, EXEMPTIONS & FAIR USE IN COPYRIGHT (1978).

> that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity. The result must necessarily constitute infringement unless the defendant is rendered immune from liability because the particular use which he has made of plaintiff A's material is fair use: In this more meaningful sense fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial.[57]

Fair use originated as a judge-made, common law defense, but is now codified in the Copyright Act, which specifies four factors to determine whether a use is fair. The factors are: the purpose and character of the use, the nature of the copyrighted work, the proportion of the work that was taken, and the economic impact of the use on the copyright proprietor.[58] The preceding list is not exclusive; Congress intended only to codify existing law and allow for its evolution.[59] Courts have applied different tests to different categories of works that have included book reviews, photocopying, parody, satire and various educational uses.[60] In brief, the law of fair use permits minimal takings that are not detrimental to the system of copyright law. It is important to consider what fair use is not. The doctrine is not a "free speech" exception to copyright, although it does have the effect of promoting First Amendment goals by encouraging the creation of subsequent works which criticize or build upon earlier expressions. Fair use is functional—it allows minimal takings only insofar as they promote the progress of the arts and only to the degree that they do not undermine the exclusive rights of authors guaranteed by copyright law.

II. THE ORIGIN AND EVOLUTION OF THE ALLEGED CONFLICT BETWEEN COPYRIGHT AND THE FIRST AMENDMENT

The demand for a First Amendment exception to copyright is a distinctly modern phenomenon. The issue was apparently never litigated in the courts nor raised in the commentary during the first one-hundred and seventy-five years that copyright law and the First Amendment coexisted in America.[61]

Neither did the issue attract the attention of the major First Amend-

57. NIMMER, *supra* note 27, § 13.05, at 13-62.

58. 17 U.S.C. § 107 (1984).

59. NIMMER, *supra* note 27, § 13.05[A], 13-65.

60. *See generally id.* § 13.05[A]-[F].

61. Copyright law and the First Amendment have coexisted for 195 years, and the first "free speech" case was brought 20 years ago. *See infra* notes 65-67 and accompanying text.

ment or copyright scholars: none of the important works published in this century prior to 1970 even mentioned a copyright-free speech conflict, let alone pursued the issue.[62] The fact that the leading authorities on intellectual property and free speech failed to notice a potential conflict between the First Amendment and copyright did not mean, of course, that the potential for conflict did not exist. But their omission of the topic from their books and treatises does underscore the fact that the debate over creating a First Amendment-based privilege to copyright lacks a firm tradition in the law of intellectual property. It was not until two cases in the 1960's adopted First Amendment reasoning to excuse infringement that copyright scholars took note of the storm gathering before their eyes. We return now to the beginning, to the cases that started it all: *Rosemont Enterprises, Inc. v. Random House, Inc. ("Rosemont")*[63] and *Time Inc. v. Bernard Geis Associates ("Geis")*.[64]

A. The First Cases

In 1965, Howard Hughes learned that Random House was planning to publish an unauthorized biography of his life.[65] In an attempt to disrupt the project, Hughes formed a corporation, Rosemont Enterprises ("Rosemont"), and assigned to it the exclusive right to publish his autobiography. Attorneys for Rosemont then warned Random House that Hughes would "make trouble" if the unauthorized book was published. To stop publication, Rosemont brought suit against Random House in 1966 for unfair competition and invasion of privacy. Shortly thereafter, Rosemont obtained a set of the galley proofs of the forthcoming biography and learned that the author had drawn heavily from three copyrighted articles about Hughes that appeared in *Look* magazine in 1954. Rosemont purchased the copyrights to the *Look* articles three days

62. Chafee's FREEDOM OF SPEECH (1920) and FREE SPEECH IN THE UNITED STATES (1941) do not identify copyright as a threat to free speech. DeWolf's AN OUTLINE OF COPYRIGHT LAW (1925) and Ball's THE LAW OF COPYRIGHT AND LITERARY PROPERTY (1944) are both silent on the issue. The first edition of NIMMER ON COPYRIGHT (1963), then and now the leading treatise, did not identify the conflict. Professor Emerson's THE SYSTEM OF FREEDOM OF EXPRESSION (1970), one of the most influential books ever written about the First Amendment, does not even contain the word "copyright" in its index. Alexander Meiklejohn, whom Archibald Cox once described as "perhaps the foremost American philosopher of freedom of expression," (A. COX, FREEDOM OF EXPRESSION 2 (1981)) did not perceive copyright as endangering the First Amendment in FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948) or in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

63. 256 F. Supp. 55 (S.D.N.Y. 1966), *rev'd*, 366 F.2d 303 (2d Cir. 1966).

64. 293 F. Supp. 130 (S.D.N.Y. 1968).

65. For a detailed factual history, see PATRY, *supra* note 25, at 72-76.

before the Random House biography was published and instituted a copyright infringement suit against the publisher within the week.

The district court found that the material taken from the *Look* articles "was substantial in both the quantitative and qualitative sense," and granted a preliminary injunction to Rosemont.[66] The court of appeals, however, reversed the district court and vacated the injunction:

> By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents. . . . "Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy." Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner.[67]

The notion of equating fair use with public interest was refined two years later in a suit involving use of the Zapruder film of the assassination of President Kennedy.[68] Professor Josiah Thompson, author of *Six Seconds in Dallas*,[69] was a member of the cottage industry that specialized in criticizing the central finding of the Warren Commission—namely, that there was no evidence of a conspiracy to kill the President.[70] In his book, Thompson advanced the thesis that three assassins, not one, fired on the presidential limousine. To support his conclusion, Thompson attempted to prove that President Kennedy and Governor Connally were not hit by one bullet, but by two separate bullets fired so rapidly in succession that Lee Harvey Oswald would not have had time to reload and fire the second shot.[71]

To illustrate his thesis, Thompson wanted to publish frames from the Zapruder film which he claimed showed that Governor Connally was not wounded by the same bullet that struck the President. Time-Life, the owner of the copyright in the film, refused to grant permission to reproduce the frames. Thompson and his publisher, Bernard Geis, included illustrations of the frames anyway, and Time-Life sued for

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66. *Rosemont*, 256 F. Supp. at 64.

67. *Rosemont*, 366 F.2d at 309.

68. Shortly after the assassination, Time, Inc., the publisher of *Life* magazine, purchased the copyright to the home movie.

69. J. THOMPSON, SIX SECONDS IN DALLAS (1967).

70. For an introduction to the industry, see S. WHITE, SHOULD WE NOW BELIEVE THE WARREN REPORT? 1-9 (1968).

71. The frames of the Zapruder film functioned as a clock of the assassination. According to Thompson, the film proved that too little time had elapsed between shots for Oswald to have shot both the President and the Governor.

infringement.[72]

The district court held that the copying was fair use because it did not injure the value of the film and because the book did not compete with the plaintiff's magazine or the film itself.[73] In a telling passage, however, the court revealed that the public interest figured prominently in its decision:

> In determining the issue of fair use, the balance seems to be in favor of defendants.
>
> There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained with sketches of the type used at page 87 of the Book and in the Saturday Evening Post, the explanation actually made in the Book with copies is easier to understand.[74]

B. The Scholarly Response

A trio of articles followed *Rosemont* and *Geis*. In an article written in 1969 and published in 1971, Lionel Sobel attacked the reasoning of the decisions for incorporating First Amendment values into the fair use doctrine.[75] Although neither court stated explicitly that it had created a new First Amendment exception to copyright, it was obvious that both courts allowed free speech values to distort their application of the fair use test. Sobel made the point bluntly:

> The courts were so taken with the importance to the public of the particular materials in question, they rode roughshod over the copyright law and permitted what amounted to nothing less than wholesale theft . . . . [Now] there are cases on the books which stand for the principle that when the public interest in access to certain materials is great enough, the copyright holder does not have the exclusive rights he otherwise would have had.[76]

The danger, as Sobel saw it, was that courts would apply different fair use tests to different works, depending on the degree of public interest in the copyrighted material. In other words, the more important the

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72. In an unsuccessful attempt to avoid being sued for infringement, Bernard Geis published charcoal drawings of the frames, rather than the actual photographic images.

73. *Geis*, 293 F. Supp. at 146.

74. *Id.*

75. Sobel, *supra* note 9, at 61.

76. *Id.* at 70.

work, the less copyright protection it deserved. This ad hoc standard would pervert the incentive function of copyright, which bestows the highest rewards on authors who create the most popular expressions.[77] Before *Rosemont* and [*Geis*], fair use permitted *minimal* takings to promote the creation of new works. Those cases expanded the doctrine to justify *substantial* takings in the name of the public interest. Sobel concluded that the alleged conflict between copyright and free speech was illusory and that "*Rosemont* and [*Geis*] were incorrect in suggesting that the First Amendment operates in some fashion to restrict the scope of copyright protection."[78] To create a First Amendment-based exception to the exclusive rights enjoyed by authors would degenerate into ad hoc balancing and undermine the structure of copyright law. Despite the effectiveness of his rebuttal, Sobel was guarded in his prediction for the future and warned that the possibility of a coming clash between copyright and free speech was "not as far-fetched as one might suppose."[79]

Professor Nimmer echoed many of Sobel's points in his seminal article published in 1970.[80] Nimmer reviewed the history and goals of copyright and the First Amendment and concluded that the two bodies of law were not in opposition. He identified the idea-expression dichotomy as the key balance between copyright and free speech interests: "It is exposure to ideas, and not their particular expression, that is vital if self-governing people are to make informed decisions."[81] The intrusion of First Amendment values into copyright may lie in the "failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the First Amendment."[82]

Nimmer believed that both *Rosemont* and *Geis* failed to make the distinction. He pointed out that the defendant in *Rosemont* was free to copy facts and ideas from the *Look* magazine articles. Howard Hughes could not have stopped the public from learning about his life any more than the original author of those articles could have prevented others from writing about Hughes. No matter how many copyrights he purchased, Hughes could never "own" his biographical facts. But instead of copying only information, the defendant copied a substantial

77. *Id.* at 76-78.

78. *Id.* at 80.

79. *Id.*

80. Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970), *reprinted in* Nimmer, *Copyright & the First Amendment: The Inaugural Donald C. Brace Memorial Lecture*, 17 BULL. COPYRIGHT SOC'Y 255 (1970).

81. Nimmer, *supra* note 80, at 1191.

82. *Id.* at 1200.

portion of the copyrighted expression from the *Look* articles. And according to Nimmer, "insofar as they chose to avoid the expenditure of time and skill necessary to evolve their own expressions, and instead copied the plaintiff's expression, there can be no First Amendment justification for such copying."[83]

Professor Nimmer also argued that *Geis* concealed its First Amendment reasoning under the guise of fair use.[84] But at that point he departed from Sobel's view that the use amounted to theft and instead introduced his concept of the "wedding" of idea and expression.[85] Nimmer argued that it was impossible to separate the idea of the Zapruder film from the expression:

> [I]n the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility. Again, it was only the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue."[86]

To support his argument, Nimmer fashioned a hypothetical example around the photographs of the My Lai massacre. He claimed that the photographs made a "unique contribution to an enlightened democratic dialogue" and that "the photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode."[87]

Nimmer concluded by siding with the public interest over the right of the proprietor: "It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs."[88] As a solution to the perceived dilemma, Nimmer proposed that use of so-called "news photographs" be privileged by the First Amendment.[89] Nimmer realized, however, that he had introduced a concept into copyright law that might grow into the exception that devoured the rule; therefore, he was careful to limit his proposed exception to what he thought was a narrow category. He explicitly rejected the idea of a First Amendment privilege based on a public-interest standard or on the mere wedding of idea and expression that was characteris-

83. *Id.* at 1203.
84. *Id.* at 1200.
85. *Id.* at 1196-1200.
86. *Id.* at 1198.
87. *Id.* at 1197.
88. *Id.* (citation omitted).
89. *Id.* at 1199.

tic of *all* graphic works.[90] Finally, to ameliorate the economic harm done to copyright owners, Nimmer proposed a compulsory license rather than an outright taking.[91]

In the last of our trio of articles, Paul Goldstein identified copyright as a serious threat to free speech.[92] Unlike Sobel and Nimmer, Goldstein argued that private property was an enemy of free expression. According to this interpretation, copyright owners possess monopoly power which they could use to regulate the content, time of release and price of expression.[93] Furthermore, the copyright monopoly conflicts with the public's First Amendment "right to hear."[94] Copyright law allows proprietors to withhold works from the public entirely, or to "delimit the size and economic status of the audience" by fixing the number of copies printed and setting the price.[95] Even more ominously, "the holder of an enterprise monopoly . . . has an additional, affirmative power to provide for the broad dissemination of copyrighted material consistent . . . with his own social, political and economic views."[96] This result was more likely if the proprietor engaged in "copyright aggrandizement" and accumulated many copyrights.[97] It was an enterprise monopoly, says Goldstein, that Howard Hughes tried to build in *Rosemont* by aggregating the copyrights to articles and manuscripts about his life.[98] *Geis* demonstrated the harm that free speech can suffer when a copyright owner refuses to license a work and chooses to withhold it from the public.[99]

Goldstein called for an explicit First Amendment privilege to copyright based upon a public interest standard: "Copyright's monopoly boundaries must be susceptible to expansion or contraction according to the relative urgency of the public interest . . . as the . . . public interest . . . increases, so the property interest protected by the copyright ought correspondingly to diminish."[100] Goldstein proposed that infringement be excused when the appropriated material is "relevant to the public interest" and the infringer's use "independently advances" that interest.[101] No infringement should be actionable without proof of economic harm—

90. *Id.*
91. *Id.*
92. Goldstein, *Copyright & the First Amendment*, 70 COLUM. L. REV. 983 (1970).
93. *Id.* at 989.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1039.
98. *Id.* at 986.
99. *Id.*
100. *Id.* at 1016.
101. *Id.* at 988.

"no matter how unscrupulous an infringer's conduct may appear."[102] And even when harm is shown, courts should not grant equitable relief.

C. *1970-1985: The Rising of the Storm and its Climax in* Harper & Row, Publishers v. Nation Enterprises

The preceding articles, which inaugurated the scholarly debate on the copyright-First Amendment problem, staked out three alternative positions. The conservative, Sobel, maintained that the conflict was illusory, and insisted that a First Amendment privilege to infringe would undermine the system of the copyright law. The moderate, Nimmer, joined with most of Sobel's analysis but tentatively proposed an explicit First Amendment exception for a narrow category of newsworthy works in which idea and expression had merged. The radical, Goldstein, attacked the property right underpinnings of copyright law and demanded a broad, public-interest-based privilege to the copyright monopoly.

During the next several years, courts and commentators wrestled with the issues raised by Sobel, Nimmer and Goldstein. Defendants in the infringement suits began to raise the First Amendment defense, but with notable lack of success.[103] The unreceptivity of the courts to the new doctrine did not, however, halt the procession of commentary from the academy. Articles on copyright and the First Amendment appeared occasionally, without causing undue excitement.[104]

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102. *Id.* at 1030.

103. *See, e.g.,* Dallas Cowboy Cheerleaders v. Scorecard Posters, 600 F.2d 1184, 1188 (5th Cir. 1979) ("[T]he First Amendment is not a license to trammel on legally recognized rights in intellectual property."); Iowa State University Research Found., Inc. v. A.B.C., 621 F.2d 57, 61 (2d Cir. 1980) ("[T]he public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts."); H.C. Wainwright v. Wall Street Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976), *aff'd,* 558 F.2d 91 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978) ("[T]he public has a right to know them in the particular form in which an author assembles and expresses them"); Roy Export Co. Establishment v. Columbia Broadcasting Sys., 672 F.2d 1095 (2d Cir. 1982) (death of Charlie Chaplin does not excuse infringing news broadcast of film clips). An explicit-amendment privilege to copyright law has been recognized only once, and that decision was affirmed on other grounds without reaching the First Amendment question. Triangle Publications, Inc. v. Knight-Ridder Newspapers, 445 F. Supp. 875, *aff'd on other grounds,* 626 F.2d 1171 (5th Cir. 1980).

104. They include, in order of their appearance: Patterson, *Private Copyright & Public Communication: Free Speech Endangered,* 28 VAND. L. REV. 1161 (1975); Rosenfeld, *The Constitutional Dimensions of "Fair Use" in Copyright Law,* 50 NOTRE DAME L. REV. 790 (1975); Note, *The First Amendment Exception to Copyright: A Proposed Test,* 1977 WIS. L. REV. 1158; Denicola, *Copyright & Free Speech: Constitutional Limitations on the Protection of Expression,* 67 CALIF. L. REV. 283 (1979); Goldwag, *Copyright Infringement & The First Amendment,* 29 COPYRIGHT L. SYMP. (ASCAP) 1 (1979), *reprinted in* Note, *Copyright Infringement & the First Amendment,* 79 COLUM. L. REV. 320 (1979); Note, *Constitutional Law-Commercial Speech-Copyright & the First Amendment: Triangle Publications v. Knight-Ridder*

But then, in 1979, a suit was filed that crystallized the copyright-versus-free speech debate as it wound its way slowly up to the United States Supreme Court. That suit was *Harper & Row, Publishers v. Nation Enterprises*—the Gerald Ford memoirs case.[105] When the Court handed down its opinion in 1985, it did more than merely decide whether *The Nation's* copying of three-hundred words from President Ford's copyrighted manuscript was permissible "fair use"; the Court also signalled that the end of the copyright-First Amendment "storm" may be near.

One caveat before turning to *Harper & Row*—for two reasons, this essay does not provide a long and detailed recitation of the facts and history of the case. Excellent summaries already exist, and there is no need to repeat here what is available elsewhere.[106] More importantly, it

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Newspapers, 1979 WIS. L. REV. 242; Campbell, *Copyright & News Values: An Accommodation*, 25 COPYRIGHT L. SYMP. (ASCAP) 121 (1980); Goetsch, *Parody as Free Speech-The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Kulzick & Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A.L. REV. 57 (1980); Brittin, *Constitutional Fair Use*, 28 COPYRIGHT L. SYMP. (ASCAP) 141 (1982); Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity & Copyright Cases*, 57 TUL. L. REV. 836 (1983); Note, *Copyright, Free Speech, & the Visual Arts*, 93 YALE L. J. 1565 (1984); Comment, *A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict*, 35 EMORY L. J. 163 (1986).

105. Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985).

106. *See generally*, T. BRENNAN, *Harper & Row v. The Nation*, COPYRIGHTABILITY & FAIR USE, DEPT. OF JUSTICE ECONOMIC POLICY OFFICE DISCUSSION PAPER (1984); Comment, *Copyright & the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984); Comment, *The Stage of Publication As a "Fair Use" Factor: Harper & Row Publishers v. Nation Enterprises?*, 58 ST. JOHN'S L. REV. 597 (1984); Mandelbaum, *The Nation: Overprotection of the First Amendment in Fair Use Analysis*, 32 J. COPYRIGHT. SOC'Y 138 (1984); Note, *Harper & Row Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright & First Amendment Interests*, 79 NW. U.L. REV. 587 (1984); Note, *Two Approaches to the Fair Use Doctrine: A Look at the Harper & Row, Publishers, Inc. v. Nation Enterprises, Decisions*, 2 ENT. & SPORTS L.J. 89 (1984); Comment, *Harper & Row v. The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?*, 19 COLUM. J.L. & SOC. PROBS. 253 (1985); Crowley, *A First Amendment Exception to Copyright for Exigent Circumstances*, 21 CAL. W.L. REV. 437 (1985); Goroff, *Fair Use & Unpublished Works: Harper & Row v. Nation Enterprises*, 9 ART & L. 325 (1985); Comment, *Harper & Row, Publishers v. Nation Enterprises: Copyright Protection of Unpublished Works Written by Public Officials*, 9 HARV. J. L. & PUB. POL'Y 221 (1986); Francione, *Facing the Nation: The Standards for Copyright, Infringement, & Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); Note, *Copyright: The Public Figure Expansion of the Fair Use Doctrine Rejected*, 25 WASHBURN L.J. 385 (1986); Olson, *Copyright & Fair Use: Implications of Nation Enterprises for Higher Education*, 12 J.C. & U.L. 489 (1986); Note, *Copyright & The First Amendment: Nurturing the Seeds for Harvest-Harper & Row, Publishers v. Nation Enterprises*, 65 NEB. L. REV. 631 (1986); Note, *Fair Use of Copyrighted Work Under Harper & Row Publishers, Inc. v. Nation Enterprises*, 61 TUL. L. REV. 415 (1986); Note, *Harper & Row, Publishers, Inc. v. Nation Enterprises: Pirating Unpublished Copyrighted Works-Does the Fair Use Doctrine Vindicate First Amendment Rights?*, 19 J. MARSHALL L. REV. 501 (1986); Note, *Harper & Row, Publishers v. Nation Enterprises — Rewriting the Fair Use Criteria?*, 6 N. ILL. U.L. REV. 379 (1986); Note, *When "Fair is Foul:" A Narrow Reading of the Fair Use Doctrine in Harper &*

is not necessary to relitigate *Harper & Row* or to argue that the taking by *The Nation* magazine was or was not fair use. This essay is not so much interested in the facts of this one case as it is in the scholarly response that *Harper & Row* excited. The case functioned as a lightning rod that attracted all possible arguments in favor of creating a First Amendment privilege for copyright infringement.[107] Some proposals were new; others were variations of older plans. Examining these arguments uncovers the common themes—and exposes the weaknesses—shared by *all* proposals to create a free speech exception to copyright law. Before we begin that undertaking, however, some familiarity with *Harper & Row* is useful.

In 1979, Gerald Ford was on the verge of completing his memoirs for Harper & Row. To stimulate public interest in the forthcoming book, Harper & Row sold *Time* magazine the right to publish 7,500 words from the memoirs for a fee of $25,000.00.[108] The excerpts were to focus on the Watergate scandal and Ford's pardon of Richard Nixon. A few weeks before the *Time* article was to appear, *The Nation* magazine obtained an unauthorized, advance copy of the memoirs.[109] *The Nation* rushed into print with a 2,500-word article largely about Watergate, Nixon and the pardon, and caused *Time* to cancel its licensing agreement with Harper & Row.[110] Harper & Row sued *The Nation* for copyright infringement, alleging that the magazine appropriated 300 words of former President Ford's expression. The district court held for Harper & Row, but the Court of Appeals for the Second Circuit reversed, excusing the copying as "fair use."[111] The court was heavily influenced by the politically significant nature of Ford's book, and reasoned that the purpose of copyright law was not to withhold information from the democratic dialogue.[112] The Supreme Court reversed the court of appeals and held that the copying by *The Nation* impaired the incentive function of the Copyright Act and inflicted economic harm upon the proprietor.[113] The Court also concluded that *The Nation* deprived Harper & Row of the right of first publication, an exclusive right of copyright owners. After applying traditional fair use doctrine and reaching a finding of in-

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Row, Publishers, Inc. v. Nation Enterprises, 72 CORNELL L. REV. 218 (1986); Note, *Harper & Row Publishers, Inc. v. Nation Enterprises: A Distortion of the Fair Use Doctrine*, 24 HOUS. L. REV. 363 (1987).

107. *See generally infra* notes 116-47 and accompanying text.

108. *Harper & Row*, 471 U.S. at 542-43.

109. *Id.* at 543.

110. *Id.*

111. *Id.* at 544-45.

112. *Id.* at 545.

113. *Id.*

fringement, the Court addressed the First Amendment defense that *The Nation* raised.[114] Justice O'Connor, writing for the majority, rejected a free speech defense for infringement and concluded that the theory "would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure."[115]

III. Establishing a First Amendment Privilege for Infringement: A Survey of Recent Proposals

Many of the articles written about *Harper & Row* assume the need for a First Amendment privilege and then devise plans to fulfill that need. Although no two authors advocate identical plans, in either justification or methodology, they do emphasize several recurring themes: they choose expediency over adherence to principles, they confuse special interest with public interest, they underestimate the value of secure property rights as an incentive to creativity, and they ignore the transaction costs that administering a First Amendment privilege would impose. As this essay focuses on the commentary generated by *Harper & Row*, it also discusses the various free speech exceptions in the context of other plans that predate the case and that inspired some of the current proposals. To avoid the overlap that would attend a review of all the comments and articles one by one, I have organized them in groups according to the type of privilege they propose.

A. Necessity

One commentator on *Harper & Row* encouraged courts to consider "the necessity of the taking in order for the defendant to make his contribution to the public debate of an issue."[116] Mere public interest in the copyrighted expression does not satisfy this criteria, lest public interest alone justify total and verbatim copying. Instead, the author requires the user of the expression to make an independent contribution to the democratic dialogue: "The reproduction of copyrighted expression must be permitted to the extent necessary to enable a speaker effectively to communicate his *own* ideas."[117] According to this interpretation, the *Geis* court erred by focusing on public interest in the facts of the Kennedy assassination, rather than on the inability of the defendant to "accurately

114. *Id.*

115. *Id.* at 557-58.

116. Comment, *Copyright & The First Amendment: Where Lies the Public Interest?*, 59 Tul. L. Rev. 135, 156 (1984).

117. *Id.* (emphasis added).

offer his ideas to the public" without access to the film.[118] Similarly, the court of appeals in *Harper & Row* failed to consider whether the defendant "*needed* to appropriate the copyrighted expression."[119] The author concludes that it was not necessary for *The Nation* magazine to copy Gerald Ford's copyrighted expression because the article was simply an abstract of a forthcoming book—the magazine did not "need" Ford's words to communicate any ideas of its own.[120]

The necessity-based, First Amendment privilege possesses several problems. The most obvious is how we define *when* taking copyrighted expression is truly "necessary" to communicate an idea. When is copying helpful, and when is it essential? Self-interested defendants will argue that every taking was essential and that they could not possibly have explained their ideas without copying the plaintiff's work. The necessity test encourages infringement and will lead to more copyright litigation, thereby taxing the resources of courts and parties. Furthermore, the author neglects to set an outside limit on how much of the original work can be copied in the name of necessity. Could the defendant in *Geis* have copied every single frame of the Zapruder film and argued that total copying was "necessary" to explain his novel theory? Finally, the plan fails to specify an efficient method of administering the necessity exception. Presumably the courts would be forced to administer the taking system, and the copyright owner would not be compensated when the infringement was necessary.

The notion that the First Amendment should privilege certain "necessary" uses recurs in the commentary on *Harper & Row*. Indeed, even two authors who argue that *The Nation* magazine infringed the copyright of a book on the verge of publication concede that necessity might justify a taking in another case. The first commentator states that "the First Amendment may well suggest an appropriate defense to a copyright infringement charge under certain circumstances . . . ."[121] David Goroff seconds that view and writes that "the First Amendment [may], on rare occasions, justify the use of an unpublished work . . . but the key component in any First Amendment defense is necessity; there must be some showing that the borrowed material is not and has no prospect of being available elsewhere."[122] Although Goroff's narrower necessity test

118. *Id.* at 157.

119. *Id.* (emphasis in original).

120. *Id.* at 158.

121. Comment, *The Stage of Publication As a "Fair Use" Factor: Harper & Row Publishers v. Nation Enterprises*, 58 ST. JOHN'S L. REV. 597, 608 (1984).

122. Goroff, *Fair Use & Unpublished Works: Harper & Row v. Nation Enterprises*, 9 ART & L. 324, 346 (1985).

stresses the unavailability of the copyrighted work, it is still vague. Moreover, it denies a copyright owner autonomy over the decision of when, if ever, to release his work. Presumably, the necessity test would permit wholesale copying from an author who did not intend to publish his work.

The necessity test is not new to *Harper & Row* and can be traced back to a student note written in the 1970's.[123] The author proposed that the First Amendment excuse infringement whenever the defendant's expression (which the author calls the "base idea") is protected speech and whenever that base idea cannot be expressed without using the plaintiff's copyright.[124] This plan, like the other, is flawed by its vague standards. How is it possible to know when copying is "necessary" to communicate the defendant's ideas? Even the author recognized the difficulty when he admitted that "determining a standard for deciding when the protected speech cannot be expressed without the copyrighted material is somewhat of a problem."[125] This plan encourages defendants to perpetrate mass infringement in the name of "necessity." While frivolous claims may lose out in the end, they still impose costs on plaintiffs who must enforce their copyrights and on courts that must try the cases. In conclusion, the necessity privilege amounts to little more than the following proposition: "If a speaker cannot convey an idea 'effectively' without infringing copyrighted expression, that infringement shall be privileged." Such a test would prove impossible to define or control.

B. Public Interest

Another group of commentators has proposed a public-interest exception to copyright protection. Although these proposals share the same rationale—that the rights of the copyright owner must yield when the public interest in having access to the original expression reaches a critical mass—each one defines public interest differently.

One commentator on *Harper & Row* argues that "news reporting of copyrightable . . . material composed by present or former public officials reflecting on recent events relating to their public duties" is of particular interest.[126] According to the author, such material is of "peculiar value

123. Note, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158.

124. *Id.*

125. *Id.* at 1184.

126. Comment, *Harper & Row v. The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?*, 19 COLUM. J.L. & SOC. PROBS. 253, 256 (1985).

to the political process,"[127] and is "especially related to core First Amendment values."[128]

By focusing on the status of the copyright owner, this plan mimics the law of libel, which applies different standards of liability to news reporting about public and private figures. Just as the press needs more breathing space to write about public officials, so it needs greater access to the copyrighted works of former officials, "because of the peculiar relationship of the author and the subject matter to the political process."[129] Put another way, public officials "should expect to sacrifice certain interests for the benefit of an informed public."[130] To avoid problems of overbreadth and vagueness, the author of this proposal limits its reach by stating that it does not apply to all "political" or "newsworthy" expression, or even to all expressions of former officials. Instead, he suggests that infringement be privileged by the First Amendment only when the idea/expression dichotomy collapses in works by those officials.

This plan has several weaknesses. It makes an inapt analogy between the law of libel and the law of copyright by failing to recognize that reputation is not a property right, while copyright is. Furthermore, the plan is susceptible to quick expansion, resting on the somewhat vague principle that "the First Amendment requires a higher standard of protection for news reporting as it contributes to a core of national political discourse."[131] Many types of writing, not only works by former officials, contribute to the democratic dialogue. Indeed, the author of the proposal foreshadows its expansion by speaking of "public officials" early in the article and then discussing "public officials" and "public *figures*" later.[132] The plan does not limit the extent of permissible taking and fails to explain how to determine when so-called "linguistic fusing" of idea and expression occurs.[133] The standard is apparently liberal, for the author suggests that President Ford's exact *expression* of events and ideas may be as valuable to political discourse as the information it communicates.[134]

Another commentator on *Harper & Row* has proposed a broader public-interest standard that combines the concepts of necessity and

127. *Id.* at 261.
128. *Id.* at 263.
129. *Id.* at 264.
130. *Id.* at 299.
131. *Id.* at 303.
132. *Id.* at 298.
133. *Id.* at 295.
134. *Id.*

newsworthiness.[135] According to the author, the tension between free speech and copyright "involves the exigent circumstances of a daily newspaper or news broadcast and . . . occurs when there is no time to arrange for a license or purchase of a copyrighted work before its use is necessitated by the public interest requirements of the First Amendment."[136] The author believes that reporters working under deadline pressures deserve a special privilege to take the copyrighted works of others to avoid "chilling" the media.[137] To keep his privilege under control, the author proposes to limit its application to daily news media during the initial phase of a news story.

The many defects of this plan are obvious. The author presumes that, but for the "exigent" circumstances that do not allow for time to contact the copyright owner, proprietors would license or sell their property. In fact, an owner may not want to allow a use by a particular newspaper or television station. The author ignores the copyright owner's autonomy and economic interest. Furthermore, how does one define "necessary"? Is a use "necessary" whenever a media outlet decides it wants to use a copyrighted work? And how does one define "initial phase" and "news story"? These vague notions invite repeated litigation, which the author will complicate by introducing "expert testimony" from unbiased journalists on what constitutes an authentic "news story."[138] This will, we are assured, guarantee that cases turn on "journalistic standards" and not the "whims of a judge"![139]

C. *When Idea and Expression Merge*

In his amicus brief supporting *The Nation*, Professor Nimmer expanded the reach of his theory of the merger of idea and expression to include written works.[140] According to Nimmer, "the 300 copyrightable words arguably present a situation where ideas and expression are inextricably intermingled and where, therefore, the First Amendment interest should be held to outweigh the copyright interest."[141] Nimmer argued that because the book of Ford's memoirs was a first-person autobiogra-

135. Crowley, *A First Amendment Exception to Copyright for Exigent Circumstances*, 21 CAL. W.L. REV. 437 (1985).

136. *Id.*

137. *Id.* at 440.

138. *Id.* at 460.

139. *Id.*

140. Brief of the Gannett Company, Inc., Los Angeles Times, Newsweek, Inc., The New York Times Company & the Washington Post, Amici Curiae In Support of Nation Enterprises at 30, *Harper & Row*, 471 U.S. at 539.

141. *Id.* (footnote omitted).

phy, the "idea" of Ford's behavior "is in part wedded to what he has to say about such conduct . . . ."[142] Therefore, "without some quotations of Mr. Ford's precise words, the 'ideas' of his mental processes in connection with a given incident cannot adequately be conveyed."[143]

A First Amendment privilege based on the merger of idea and expression is flawed. First, the exception would prove impossible to contain, as its expansion by commentators has shown. What started as a narrow exception for news photographs has been applied to *all* graphic images,[144] to interesting political speech,[145] and now to any autobiography. Secondly, and more importantly, the so-called merger of idea and expression may be a myth. Recall the Zapruder film in *Time Inc. v. Bernard Geis Associates*.[146] For a true collapse of idea into expression to exist, one would not be able to communicate the information that President Kennedy was shot through the back and the head while riding in an open car without showing the Zapruder film. Note that we have just conveyed a description of the assasination without use of the film. Eyewitness testimony tells us of the raised arms, the violent impact on the head, and Mrs. Kennedy's actions after the fatal impact. Our verbal description may not be as vivid or shocking as the film, but it *is* possible to understand how Kennedy was assassinated without viewing the film. The film may be the best record of what happened, but it is not the only record.

The same is true of Professor Nimmer's example of the My Lai photos.[147] We do not need the photos to state that in May 1968, American soldiers shot over one-hundred men, women and children in a Vietnamese village. Their bloodied corpses were strewn around the village and on the roads. Again, we have just communicated the idea of My Lai. Our audience may not believe us, or may not be outraged without visual evidence, but we *have* communicated the facts. Although we may prefer photographs, we can tell the story without them—which is exactly what history has done for thousands of years.

If it is possible to communicate ideas without copying visual images, it is possible to do so without appropriating written expression. Like Howard Hughes, Gerald Ford did not "own" the facts or information contained in his memoirs. *The Nation* was free to take the information

142. *Id.*
143. *Id.* at 31.
144. Note, *Copyright, Free Speech & the Visual Arts,* 93 YALE L.J. 1565 (1984).
145. *See supra* notes 129-34 and accompanying text.
146. *See supra* notes 68-74 and accompanying text.
147. *See supra* notes 88-90 and accompanying text.

from Ford and write its own narrative. Copying the precise expression may make a certain idea easier to understand but, contrary to Professor Nimmer's assertion, it was possible to have access to President Ford's ideas without appropriating his exact expression.

IV. THE CONSEQUENCES OF ESTABLISHING A FIRST AMENDMENT DEFENSE TO COPYRIGHT INFRINGEMENT

The difficulties inherent in proposals to create a free speech privilege to copyright suggest that the real problem lies not in how to define the privilege, but in attempting to establish one in the first place. Proposed exceptions are defined vaguely, would prove difficult to contain, and would impose significant transaction costs on courts and litigants. For practical reasons alone, we must reject them. But in rejecting the existing plans, we must recognize that they are dangerous not because they will not work, but because they threaten to undermine the whole structure of copyright law. Under any guise and abetted by any justification, a First Amendment privilege to commit copyright infringement will cause more harm than good.

A. A First Amendment Privilege Diminishes the Autonomy of Authors

The Copyright Act gives authors the exclusive right to decide when, where and in what form to publish their expressions.[148] A First Amendment privilege renders these exclusive rights considerably less exclusive. The justifications of "necessity," "newsworthiness" or "public interest" would deprive an author of the right to decide when to release his work to the public for the first time.[149] Protected by these free speech excep-

148. 17 U.S.C. § 107 (1984).

149. These privileges might also be used to compel an author to publish a work that he never intended to make public. The privileges would subvert one of the essential elements of copyright law, as expressed by Zechariah Chafee: "The author has the power to keep a copyrighted work off the market entirely. It is right for him to decide whether what he has created shall be published or not." Chafee, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 725 (1945).

Under a "public interest" or "necessity" regime, J.D. Salinger might have failed in his attempt to suppress the biography that contained portions of his private, unpublished correspondence. Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987)(remanding with directions to issue a preliminary injunction barring publication of the biography in its present form). Salinger's motive to "censor" his correspondence by withholding it from the public should be irrelevant with respect to the security of his property rights. If the copying cannot qualify as "fair use," then it is an infringement which the First Amendment should not privilege.

The Salinger case attracted considerable publicity. For a sampling, see Delbanco, *Holden Caulfield Goes to Law School*, NEW REPUBLIC, March 9, 1987, at 27; Kaplan, *Significance of Salinger Biography Ruling Debated*, NAT'L L.J., February 16, 1987, at 6; *Whose Mail is it*

tions, an unauthorized publisher could disseminate excerpts without permission, even before the author published the work himself. Indeed, this is exactly what happened in *Harper & Row*.[150] Furthermore, authors of copyrighted expression that triggered the free speech privilege could no longer prevent their works from appearing in certain publications or media. Under current copyright law, an author need not license his work to a publication of which he disapproves. Under a First Amendment-based compulsory license, the author would no longer have a choice.

Several advocates of a free speech exception to copyright would not allow an author to object to *any* unauthorized use of his expression unless he met the burden of proving that the use inflicted economic "harm."[151] Such a standard would reduce an author's control over his work dramatically. First, it is often difficult to prove the extent of economic harm that attends an act of infringement. More importantly, few authors would undertake the burden of proving economic harm whenever the costs of litigation might exceed the amount of recovery.[152] Knowing this, petty infringers could chip away the value of copyrighted works with impunity. The loss in any one case may not be large, but in aggregate the cost to authors will be enormous.

Under a free speech regime, copyright proprietors will no longer have the right to withhold their works from the public. The new order will not tolerate an author's attempt to "censor" speech that the public has a "right" to hear. The peculiar notion that the public has a "right" to possess copyrighted expression is the most insidious claim made by advocates of the free speech exception, and has been condemned by defenders of copyright. David Ladd, former United States Register of Copyrights, warned that "the main attack on copyright is that it is in opposition to the free flow of information and the public's right to know and use."[153] Alan J. Hartnick, former president of the Copyright Society

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Anyway: J.D. Salinger Bests a Biographer in Court, NEWSWEEK, February 9, 1987, at 58; *Return to Sender: Salinger Throws a Writer's Block,* TIME, February 9, 1987, at 62; Yardley, *The Catcher in the Right,* WASHINGTON POST, February 9, 1987, at D2; Streitfeld, *Salinger's Biography Battle: The Author's Protest Delays 'A Writing Life,'* WASHINGTON POST, August 6, 1986, at D1.

150. *See supra* notes 108-15 and accompanying text.

151. *See, e.g.*, Goldstein, *Copyright & the First Amendment,* 70 COLUM. L. REV. 983 (1970). For criticism of the harm requirement, see Jochnowitz, *Proof of Harm: A Dangerous Prerequisite for Copyright Protection,* 10 COLUM. J.L. & ARTS 153 (1985); Ladd, *The Harm of the Concept of Harm in Copyright: Thirteenth Donald C. Brace Memorial Lecture,* 30 J. COPYRIGHT SOC'Y 421 (1983).

152. Entertainment litigation is expensive, and for many copyright owners the issue is not "will I win," but rather "what will it *cost* to win?"

153. Ladd, *Securing the Future of Copyright: A Humanistic Endeavor,* 9 ART & L. 413, 418 (1985).

of the U.S.A., seconded the warning by stating that "the coming legal battle will utilize the fair use doctrine to attempt to subvert copyright under the claim that the rigid application of copyright principles acts as a censor and unreasonably impedes the public's right to receive information."[154]

B. A Free Speech Exception Attacks the Property Right Basis of Copyright Law

A First Amendment exception to copyright undercuts an author's property right in his expression by depriving him of the right to exclude others and the opportunity to exploit the work in its most highly valued use. Copyrighted expression that is vulnerable to uncompensated taking loses much of its value, for the value of *all* property derives from the ability of its owner to exclude others from taking it. Advocates of the First Amendment exception are well aware of this. Indeed, to some commentators, undermining the sanctity of property rights is the mission, not merely the unavoidable consequence, of the free speech exception to copyright. In a special issue titled "The Ethics of Disclosure," published less than a month after it ran the memoirs story, *The Nation* questioned "the propriety of public officials exploiting public papers for private enrichment."[155] The editorial expressed alarm over the "commercialization of the Presidency,"[156] and noted with distaste that "the newspapers and magazines demand exclusivity in exchange for their money."[157] *The Nation* concluded with a strong endorsement of the public interest: "Our own view is that the President's papers belong to the public. It is unseemly that they become the object of big-money bidding by the media."[158] Six years later, after the Supreme Court ruled against *The Nation*, the magazine published a more vigorous attack on private property:

> The decision is the latest in a series of obstacles the courts have placed in the way of the free flow of ideas, and in many ways it is the most troubling. The suit was brought by publishers who claim to care about the First Amendment, but they have displayed a greater concern for property rights. The challenge now is to overcome this new private-sector censorship, if not

154. Hartnick, *Book Review: The Fair Use Privilege in Copyright Law*, 8 COMM. & L. 61, 62 (1986).

155. *Cornering History*, THE NATION, May 5, 1979, at 483.

156. *Id.*

157. *Id.* at 485.

158. *Id.*

through litigation then through legislation . . . .[159]

A commentator who advocated a First Amendment privilege for works of art that appropriate visual images claimed that infringement should be protected because it is a "political statement."[160] According to the author, appropriation "manifests a rejection of private property in favor of a more communitarian conception of society."[161] Her rejection of the property-right basis of copyright law was complete:

> [T]he act of appropriation . . . reveals that society (and its legal system) is laden with assumptions that financial incentives promote individual creating, and that property interests supercede society's right of access to ideas and information . . . .
>
> In addition the act of appropriation supports communitarian values through its symbolic rejection of the "myth" of individual expression . . . . [T]he artist asserts that conceptions of individual expression, creativity, and genius are outmoded in a mass society.[162]

Professor Chafee anticipated this attitude toward intellectual property over forty years ago when he observed that "a good deal of the attack on the assignee-owner of patents and copyrights seems to me based on a dislike of the whole system of private property."[163] One wonders whether Chafee would have classified the supporters of a First Amendment privilege to commit copyright infringement as devotees of free speech or enemies of private property.

A taking accomplished via compulsory license is no less objectionable than an uncompensated use, even though in the former case some fee is presumably paid to the proprietor. Property loses value whenever its owner is not free to charge what he wishes for it. A compulsory licensing scheme substitutes an artificial price for the market price, and prevents the proprietor from selling his work to the highest bidder. David Ladd cautioned against such interference with the market:

> Whatever one thinks of the comparative merits of national economic planning and free markets, or of government as an instrument of wealth distribution, our government should abstain as much as possible from intervention in the copyright world, and willingly forbear from setting or affecting the value or price of works of authorship. Otherwise, the government skews the

159. *Monopolizing the News,* THE NATION, June 1, 1985.
160. Note, *Copyright, Free Speech, & the Visual Arts,* 93 YALE L.J. 1565, 1578 (1984).
161. *Id.*
162. *Id.* (footnote omitted).
163. Chafee, *Reflections on the Law of Copyright: I,* 45 COLUM. L. REV. 503, 510 (1945).

> copyright world, and thus what the people will hear. Better to trust the sum of consumers' choices in what they will pay to see and hear. If the government does intervene, we are harmed in a more grievous way than in being denied a free copy or a cheap copy, and the instant gratification of maximum distribution.[164]

C. *The Appropriation of Expression in the Name of Free Speech Will Undermine the Incentive Function of Copyright*

By diminishing the autonomy of authors and attenuating the value of intellectual property rights, a First Amendment privilege to copyright reduces the incentive to create new works. The incentive function is the cornerstone of copyright law, as the Supreme Court made clear in *Mazer v. Stein*: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful arts.' "[165]

The current system of copyright law gives authors the incentive to create works of value to the public, because it is precisely those works which will sell the largest numbers of copies and bring the highest rewards to their creators. Authors would have less incentive to create if they could not capture the full economic value of their expression.[166] Uncompensated takings and compulsory licenses clearly interfere with an author's right to profit from his work.

In addition to affecting the incentives of authors, a free speech privilege will affect the incentives of those who purchase or license copyrighted expression. Newspapers and magazines will be less inclined to pay for the right to publish excerpts of a forthcoming book if they know that a rival can appropriate the expression and even beat them into print

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164. Ladd, *The Harm of the Concept of Harm in Copyright: Thirteenth Donald C. Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y 421, 431 (1983) (footnote omitted).

165. 347 U.S. 201, 219 (1954).

166. For a dissenting view on the necessity of copyright protection as an incentive, see Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, & Computer Programs*, 84 HARV. L. REV. 281 (1971). For a defense of copyright as incentive, see Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971), *reprinted in* 19 BULL. COPYRIGHT SOC'Y 99 (1971) and 21 COPYRIGHT L. SYMP. (ASCAP) 1 (1974). Finally, for the response, see Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972). For a discussion of the economic importance of well-defined property rights in general, see Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1-44 (1966); Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J.L. & ECON. 11 (1964); Demsetz, *Toward a Theory of Property Rights*, AMERICAN ECONOMIC REVIEW, May 1967 at 347-73.

in the name of free speech. Purchasing the exclusive right to publish will no longer guarantee the buyer that it will be the first or only publisher of the material. As Professor Chafee noted, the power to exclude others induces authors to engage in the risk of creating and publishers to undertake the risk of bringing material to the market.[167]

D. The Spectre of the Socialization of Copyright

The socialization of copyright, a term introduced by Professor Monroe Price, refers to a process by which the exclusive rights of authors are subordinated to the goal of public access via compulsory licenses.[168] The First Amendment privilege to commit infringement threatens to accelerate the socialization of copyright by elevating public access above all other copyright values. The trend is clear in the commentary—recognition of one free speech privilege incites the demand for the next one. The history of Professor Nimmer's privilege, based on the merger of idea and expression, is instructive on this point. Nimmer suggested a compulsory license for a narrow category of graphic works—news photographs. Later commentators expanded his plan: first to cover all graphic images, and then to cover *written* expression. By the time of *Harper & Row*, even Professor Nimmer was willing to apply his one narrow test to Gerald Ford's memoirs.[169]

As early as 1976, Barbara Ringer, former United States Register of Copyrights, predicted that the copyright law of the future would emphasize public interest over private property. The new regime would still compensate authors in some way, but would not allow them to control when and where their works were published.[170] And once we routinely appropriate copyrighted expression in the name of the public interest, we are not far from taking it for any public purpose. Indeed, we have al-

167. Chafee, *supra* note 163, at 732. Chafee observed, correctly, that when property rights are transient, "the total absence of any monopoly might easily deter anybody from publishing." *Id.* To illustrate the importance of secure property rights as an incentive to bring works to the market, Chafee recalled the history of Tolstoy's writings. "When Leo Tolstoy's scruples against private property led him to throw all his writings into the public domain, immense confusion followed. Many publishers and translators were worried by the absence of legal protection against unscrupulous or incompetent rivals. Consequently, no complete English edition appeared until forty years later when George Bernard Shaw headed a great group of eminent writers, who urged public support of the projected Oxford University Press Centenary Edition, so as to give it as much of a monopoly through prestige as if it were protected by copyright." *Id.* at n.30.

168. Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT. L. J. 105, 110 n.27 (1985).

169. *See supra* notes 140-43 and accompanying text.

170. *See* Note, *supra* note 168, at 111.

ready taken the first step in that direction. Several states have enacted so-called "Son-of-Sam" laws to deprive criminals of their literary property rights on the rationale that it is good public policy to demonstrate that crime does not pay.[171] When the socialization of copyright is completed, the rights of authors will be vulnerable to the tyranny of the majority.

E. A Free Speech Exception to Copyright Will Harm the First Amendment

The free speech privilege poses several threats to the First Amendment. The privilege undermines the First Amendment by creating a new right out of whole cloth.[172] Advocates of the free speech exception invoke the "right to hear" doctrine. In fact, while there may be a right to hear from a willing speaker, there is no First Amendment right to hear from one who chooses not to speak. The "right to hear" or "right to know" relates to access to trials, publications and government information, not access to copyrighted expression.[173] Furthermore, advocates of the exception to copyright forget that the First Amendment *does* recognize a right not to speak.[174] Basing a free speech privilege to copyright

171. *See generally* Note, *The Son-of-Sam Laws: When the Lunatic, the Criminal, & the Poet Are of Imagination All Compact*, 27 ST. LOUIS U.L.J. 207 (1983); Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686 (1983); Note, *Criminals-Turned-Authors: Victim's Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979); Note, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978). That is not to argue that it would necessarily be socially optimal to allow all individuals to exercise the rights they are deprived of by such "Son of Sam" laws. Such laws are merely an example of such taking, by the State, of a private property right.

172. A leading constitutional scholar has warned that courts should "think carefully before extending the protective principles of the First Amendment to types of communication that have not traditionally been considered essential to the maintenance of an open society." Blasi, *The Pathological Perspective & the First Amendment*, 85 COLUM. L. REV. 449, 479 (1985). According to Blasi, "we must constantly take care not to trivialize the meaning of free speech," and must avoid "the attitude all too prevalent in our recent constitutional experience, that doctrinal expansion is a good in itself, that creative analogy is its own reward." *Id.* at 480 (citations omitted). For a thoughtful analysis of the consequences of creating new First Amendment rights, see Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

173. Lewis, *A Public Right to Know About Public Institutions: The First Amendment As Sword*, 1980 SUP. CT. REV. 1; Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980).

174. Wooley v. Maynard, 430 U.S. 705 (1977); Schnapper v. Foley, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 948 (1982)("The First Amendment interests . . . are not based upon a desire for pecuniary gain, but upon the author's freedom to speak or remain silent as an end in itself"); Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348, 296

law on the "right to hear" would pervert First Amendment theory, which in reality supports the copyright proprietor's right to withhold his expression from the public.

An exception to copyright might undermine the enlightenment function of the First Amendment by reducing the size of an audience for a copyrighted expression. In *Harper & Row*, several million readers of *Time* magazine lost the opportunity to read key excerpts from President Ford's memoirs because *The Nation*, a magazine of small circulation, published them first. Had *The Nation* not interfered with *Time's* serialization, more people would have had access to Ford's expression. The unauthorized appropriation prevented a copyrighted work from rising to its most highly valued use, a use which, not coincidentally, would have disseminated the work to the greatest number of people.

Finally, adopting a free speech exception to copyright risks trivializing the First Amendment and transforming it into a burglar's tool to be used by one competitor against another. Return again to the facts of *Harper & Row*. *The Nation* magazine was presumably unable or unwilling to pay more than *Time* for the right to publish excerpts from President Ford's memoirs.[175] The issue was not whether the public would have access to the memoirs, for *The Nation* knew that *Time* planned to publish excerpts, and that the book itself would be available within a few weeks. Instead, the dispute was over which member of the "fourth estate" would be the first to communicate excerpts of the memoirs to the public. *The Nation* publication served its own interests, but not those of the public. The democratic dialogue would have been served best by the orderly and coordinated publication of authorized excerpts, followed by

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N.Y.S.2d 771, 778 (1968) ("[C]opyright, both common law and statutory, rests on the assumption that there are forms of expression . . . which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor . . . the essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.").

175. It is more likely that *both* factors determined *The Nation's* reservation price and consequent actions. To have paid for the excerpt would have violated the magazine's political principles, and would have depleted its bank account. In 1986, the magazine could not afford to pay the judgment in favor of Harper & Row. *See* Baer, *Collecting "The Nation's" Debt*, AMERICAN LAWYER, Jan–Feb. 1986, at 8. For a discussion of competition for the right to "free speech," see generally Liebeler, *A Property Rights Approach to Judicial Decision Making*, 4 CATO JOURNAL 783, 797-803 (1985). The argument that *The Nation* could not "afford" to bid for the rights to the excerpt rests on very shaky economic grounds. This is to argue that *The Nation* did not possess sufficient resources (wealth) to purchase the rights. Such an argument would require a change in the distribution of wealth to accomplish the "desired" remedy.

the memoirs in book form. Supporters of free speech must be sensitive to misuse of the First Amendment. Trivializing the system of freedom of expression reduces respect for it, and for that reason we must be aware of the possibility that a First Amendment privilege to commit copyright infringement may be a tool of self-interest masquerading as public interest.

V. CONCLUSION

Establishing a free speech privilege to commit copyright infringement is not necessary to promote the goals of the First Amendment and will, in the end, harm both the systems of copyright and freedom of expression. A free speech privilege would weaken the incentive function of copyright by undermining the property right foundation on which the law of intellectual property rests. The privilege encourages opportunistic behavior by defendants who will justify the most outlandish acts of infringement in the name of "public interest," "newsworthiness," "necessity" or the "right to know." The free speech exception would prove difficult to contain—one exception sets the precedent for the next one.

Rejecting the First Amendment privilege will not impair the democratic dialogue. The exaggerated claims of *The Nation* magazine notwithstanding, copyright proprietors cannot "corner" history. Ideas, facts and information are not the subject matter of copyright, but are available to all. Although the First Amendment recognizes the rights of audiences, it does not permit the coercion of an unwilling speaker. The right to free speech does not include the right to take the speech of others for free. That logic can only lead to the socialization of copyright, where authors are subject to the tyranny of the majority.

The copyright-First Amendment storm predicted almost twenty years ago did arrive, but it did not overwhelm the system of copyright law. Copyright has proven resilient. Congress has failed to legislate a free speech privilege and the courts have refused to create one. In *Harper & Row*, the Supreme Court forecasted the end of the storm by declining to introduce a First Amendment privilege into the law of copyright. In that case, the Court recognized that the present systen of copyright—undisturbed by a free speech privilege to infringe—remains the best balance between the desires of the few to profit from their creativity and the rights of the many to enjoy freedom of expression.