

VIDEOTAPING FOR CLASSROOM USE: FAIR OR FOUL?

The accelerated pace of technological development has spawned major adaptations in traditional copyright law.¹ The proliferation of devices that facilitate the reproduction of copyrighted materials taxes the elasticity of copyright laws originally enacted to protect authors² rights in printed works.³ Even the most prescient draftsman of the 1909 Copyright Act could not have anticipated modern developments in communications technology. In 1976 Congress, in recognition of the contemporary problems confronting copyright law, implemented statutory revisions to accommodate twentieth century technological advances.⁴ Nevertheless, the resulting legislation, though salutary in numerous respects,⁵ has proven incapable of resolving many of the

1. The first copyright statute was enacted in 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790). There have been four subsequent revisions: Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870); Act of March 4, 1909, ch. 320, 35 Stat. 1075 (1909); and, Act of Oct. 19, 1976, 90 Stat. 2541 (1977). The present copyright laws are codified at 17 U.S.C. §§ 101-810 (1976 & Supp. V 1981).

In its report on the 1976 Copyright Revision Act, the House Committee acknowledged that changing technological conditions required revision of former copyright laws:

During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

H.R. REP. NO. 1476, 94th Cong. 2d Sess. 65 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5660 [hereinafter cited as HOUSE REPORT 1476].

2. The term "author" derives from the language of article I, section 8 of the Constitution, which gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. In terms of copyright law "author" is construed in a constitutional, rather than literal, sense. The Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), defined "author" as "he to whom anything owes its origin; originator, maker . . ." In this Note, "author" refers to anyone who has created a work in the broader, constitutional sense.

3. The first copyright act covered only maps, charts, and books. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

4. The 1976 Copyright Act, 17 U.S.C. §§ 101-810 (1976 & Supp. V 1981), was the product of 16 years of debate and discussion. The House Report outlines the steps toward revision. *See* HOUSE REPORT 1476, *supra* note 1, at 47-50, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5660-63.

5. Many of the changes in the 1976 Copyright Act were designed to address issues raised by

problems arising from the development of new technologies⁶—problems that tend to aggravate the tension between copyright owners⁷ and subsequent users⁸ of copyrighted works.⁹ As a result, courts have been called upon to adapt the copyright statutes by interpretation to conditions arising from technological innovations.¹⁰ Courts have developed various tests to determine whether unauthorized uses of copyrighted works violate the copyright laws.¹¹ One test courts frequently

rapidly changing technology. *See, e.g.*, 17 U.S.C. § 108 (1976) (allowing libraries or archives to photocopy copyrighted works under certain conditions); *id.* § 110(1) (allowing the performance of audiovisual works in the course of face-to-face teaching activities of a nonprofit educational institution under specified conditions); *id.* § 111(d) (establishing compulsory licensing system for cable television).

6. Many commentators argue that the statutory language of the 1976 Copyright Act is ambiguous and unclear in offering guidelines for dealing with modern duplicating devices. L. SELTZER, *EXEMPTIONS AND FAIR USE IN COPYRIGHT* 19 (1978); Bryer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 316-17 (1970); Ringer, *The Unfinished Business of Copyright Revision*, 24 U.C.L.A. L. REV. 951, 953-55 (1977).

Although Congress anticipated that problems would arise from the use of copyrighted works in computer systems, *see* H.R. REP. NO. 83, 90th Cong. 2d Sess. 6 (1967), the present act does not provide many solutions. *See Impact of Information Technology on Copyright Law in the Use of Computerized Scientific and Technological Information Systems*, TECHNOLOGY AND COPYRIGHT (Bush and Dreyfus, eds. 1979). Some guidance, however, is offered concerning reproduction of computer programs for limited purposes. *See* 17 U.S.C. § 117 (1976 & Supp. V 1981).

7. "‘Copyright Owner,’ with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." 17 U.S.C. § 101 (1976).

8. The Copyright Act does not give the copyright owner control over all uses of his work. Section 106 enumerates five uses over which the copyright owner has exclusive control: (1) reproduction, (2) preparation of derivative works, (3) distribution, (4) performance, and (5) display. 17 U.S.C. § 106 (1976). In this Note, the term "use" will be used to refer to the appropriation of the author's work by another for one of the purposes listed above, and "user" refers to the appropriator. This Note is concerned primarily with the reproduction of copyrighted works. *See infra* note 34.

9. *See infra* notes 28-30 and accompanying text.

10. The Sixth Circuit, in *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411, 411 (1925), observed that "[w]hile statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries." *Id.* Since then, the Supreme Court has ably responded to this challenge. *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (copyright law applied to radio performances of copyrighted songs); *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974) (copyright law applied to the broadcast of copyrighted material on cable television); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (Court stated that it must read 1909 copyright statute in light of technological change).

11. The copyright laws only protect the copyright holder against unauthorized copying. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 218 (1954). Thus, there would be no copyright infringement if an author were independently to produce a work identical to a prior copyrighted work. *See, e.g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669

use is whether the allegedly infringing use¹² is a "fair use" of the copyrighted work.¹³

Under a fair use rubric, certain unauthorized uses of a copyrighted work do not violate the copyright laws because the user's interest in copying the work outweighs the owner's interest in controlling access to it.¹⁴ Historically, courts have applied the fair use doctrine on a case by case basis to accommodate rapidly changing conditions in copyright law.¹⁵ Recent innovations in videotechnology, however, raise issues which arguably transcend the boundaries of traditional fair use.¹⁶

The videotaping¹⁷ of copyrighted television programs for educational purposes is one use of copyrighted materials that tests the param-

(1936) Similarly, the mere unauthorized use of a copyrighted work does not constitute copyright infringement. *See, e.g.,* Produce Reporter Co. v. Fruit Produce Rating Agency, 1 F.2d 58, 61 (1924).

12. Generally, the test for copyright infringement is whether the defendant's reproduction is "substantially similar" to the plaintiff's original. *See* 3 M. NIMMER, NIMMER ON COPYRIGHT § 13-01 to -3 (1982). The test is whether the copy is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's *expression* by taking material of substance and value. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

"Expression" is emphasized above to note that the protection granted to a copyrightable work extends only to the particular expression of an idea, and not to the idea itself. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). The present copyright act codifies the idea/expression distinction. 17 U.S.C. § 102(b) (1976 & Supp. V 1981). Therefore, "if the only similarity between plaintiff's and defendant's work is that of the abstract idea, there is an absence of substantial similarity, and no infringement results." M. NIMMER, *supra*, at 13-19. For further discussion of the idea/expression dichotomy, especially in terms of first amendment defenses to copyright infringement, *see infra* note 66.

13. As a test, "fair use" differs from "substantial similarity." The latter is a threshold test for determining whether there has been a copyright infringement. "Fair use," an affirmative defense to copyright infringement, considers the question of whether an otherwise infringing activity should be excused. *See infra* note 54 and accompanying text.

14. *See infra* notes 50 & 55-66 and accompanying text.

15. *See House Report 1476, supra* note 1, at 5680. *See infra* notes 129-33 and accompanying text.

16. Case law on the subject of videorecording is sparse since the taping of television programs is a relatively new enterprise. *See Note, The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law*, 31 STAN. L. REV. 243, 244 (1979); *Note, Universal City Studios, Inc. v. Sony Corp. of Am.: "Fair Use" Looks Different on Videotape*, 66 VA. L. REV. 1005, 1005 (1980); *Note, Copyright—The Home Video Recording Controversy*, 81 W. VA. L. REV. 231, 233 (1979). Videotaping "refers to the use of videotape in a recorder to record television signals using the videotape in a playback machine or a recorder equipped with the requisite playback equipment." *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1161 (W.D.N.Y. 1982).

17. For a discussion of the problems with applying the fair use doctrine to videorecording, *see infra* text accompanying notes 125-33.

eters of the fair use doctrine.¹⁸ The proliferation of videorecording devices has facilitated access to programs with inherent educational value, and the videotape has become a highly effective instructional tool.¹⁹ The legality of videorecording for educational purposes, however, remains unclear.²⁰

Recently, the District Court for the Western District of New York in *Encyclopaedia Britannica Educational Corp. v. Crooks*²¹ held that the highly organized and systematic videotaping of copyrighted television films broadcast by a public television station violated the copyright laws.²² The court rejected the argument that defendants' videotaping was a fair use of the copyrighted films.²³ *Crooks* is the first decision²⁴

18. Although videorecording for other purposes may test the scope of the fair use doctrine, this Note is only concerned with videorecording for educational purposes.

19. Videotaping capability has been readily available to public education since the early 1960s. During the last ten years, nonprofit educational institutions have been utilizing video taperecorders to tape television programs. *Off-Air Taping For Educational Use: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 150 (1979) (statement of Charles W. Adams, supervisor of media services for Phoenix Union High School District, Phoenix, Ariz.) [hereinafter cited as *Hearings on Off-Air Taping for Educational Use*]. See also *id.* at 74 (statement of Howard Hitchens, Executive Director, Association for Educational Communications and Technology).

20. The 1976 Copyright Act mentions videotaping in several limited contexts. See, e.g., 17 U.S.C. § 108(f)(3) (1976 & Supp. V 1981) (allowing libraries to videotape newscasts for distribution to educators and researchers); *id.* § 118(d)(3) (allowing nonprofit institutions to videotape certain noncommercial television broadcasts for use in face-to-face teaching activities within seven days of the broadcast).

The Act does not, however, resolve the issue of whether videotaping of copyrighted television programs for classroom use is an infringement. Congress intended to leave the problem to the courts while the television industry and educators met to formulate guidelines. The House Report states:

The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved too difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point.

HOUSE REPORT 1476, *supra* note 1, at 71-72, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5685.

21. 542 F. Supp. 1156 (W.D.N.Y. 1982).

22. *Id.* at 1185. Defendants were the Board of Educational Services, First Supervisory District, Erie County, New York [BOCES] and its individual officers and directors. BOCES provided a videotape and film print library which circulated motion pictures on request to member schools.

23. The court also rejected defendant's first amendment defenses of free speech and right of access to information, *id.* at 1180-81.

24. The court actually considered the same issue four years earlier in *Encyclopaedia Britan-*

to apply copyright law to videorecording for educational purposes,²⁵ and the case leaves many questions unanswered. Because the holding is limited to extensive videorecording by an educational corporation, the decision does not necessarily apply to isolated instances of teachers videorecording for classroom uses.²⁶ *Crooks*, therefore, leaves teachers wondering whether they might now be liable for activity that has been previously ignored.²⁷

This Note explores the legality of videorecording by teachers for classroom uses after *Crooks*. Part I examines the underlying purposes of copyright law in the context of the conflicting interests of authors

nica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978). In the first *Crooks* opinion, (*Crooks* I), plaintiffs sought a preliminary injunction to restrain defendants from further videotaping. The court, relying on the presumption of irreparable harm to plaintiffs, applied a stricter standard of fair use. 447 F. Supp. at 251. The court found that defendant's extensive videotaping substantially harmed plaintiffs' market for the films and granted the plaintiffs' motion for preliminary relief. *Id.* at 253.

25. Courts have applied copyright law to videorecording for other purposes. See *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981) (home videotaping constitutes copyright infringement), *cert. granted*, 102 S. Ct. 2926 (1982); *Walt Disney Prods. v. Alaska Television Network*, 310 F. Supp. 1073 (W.D. Wash. 1969) (commercial videotaping for profit constitutes copyright infringement). In *Universal City Studios, Inc. v. Sony Corp.*, the Ninth Circuit rejected the defendant's fair use defense that had prevailed in the district court. 659 F.2d at 969-74. For further discussion of the *Sony* rationales and their relevance to videorecording for educational purposes, see *infra* notes 166-74 and accompanying text.

26. In *Crooks* I, the court stated that, "[t]his case does not involve an isolated instance of a teacher copying copyrighted material for classroom use. . . ." 447 F. Supp. at 252.

27. Several commentators offer different explanations for the failure of film and television companies to prosecute educators. See Halley, *The Educator and the Copyright Law*, 17 COPYRIGHT L. SYMP. (ASCAP) 24, 26 (1969) (ambiguity of the statutory language); Comment, *Education and Copyright Law*, 56 VA. L. REV. 664, 665 (1970) (television companies may be waiting for courts first to determine the extent to which copyright protection extends to television broadcasts).

Teachers may be worried unnecessarily. Section 504 of the Copyright Act, authorizing copyright plaintiffs to sue for either actual or statutory damages (\$10,000-\$50,000), provides teachers with a defense to liability:

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (1) an employee or an agent of a nonprofit educational institution. . . .

17 U.S.C. § 504(c)(2) (1976 & Supp. V 1981).

In an action for damages, the burden of proving that defendant acted in bad faith would be on the plaintiff. HOUSE REPORT 1476, *supra* note 1, at 163, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5779. Nevertheless, the "good faith" exemption applies only to remission of statutory damages. If plaintiffs elect to sue for actual damages, teachers cannot raise the "good faith belief" defense.

Licensing may be the fairest method of accommodating the interests of both copyright owners and users. Nevertheless, this decision is for Congress to make, not the courts; this Note therefore focuses solely on the judicial alternatives.

and users. Part II examines the development of the fair use doctrine as a method of accommodating these interests, and identifies problems inherent in the application of the fair use doctrine to modern technology. The final part of this section suggests that expanding the doctrine to accommodate technological change is consistent with a fundamental purpose of copyright law. Finally, Part III analyzes the *Crooks* decision, including its relevance to teachers' videorecording, and concludes that under certain conditions a teacher's videotaping for educational purposes does not violate the copyright laws.

I. THE PURPOSE OF COPYRIGHT LAW

The Constitution grants Congress the power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁸ The constitutional mandate suggests that the ultimate goal of copyright law is to provide the public with benefits derived from the creations of the arts and sciences.²⁹ Ensuring broad public availability of authors' works, however, requires that authors be adequately rewarded for their intellectual achievements. Arguably, as their economic incentive to create is reduced, the authors' productivity

28. U.S. CONST. art. I, § 8, cl. 8. Actually, the traditional definition of the "progress" Congress sought to promote asserts two primary goals: the encouragement of artistic and scientific endeavor through the creation of monetary incentive, and the facilitation of broad public access to works of aesthetic and scientific interest. Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 719 (1945). Clearly, these goals are contradictory in many ways, and litigation often occurs when they are directly competing. See, e.g., *Mazer v. Stein*, 347 U.S. 201 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

Many courts have held that the ultimate goal is the benefit to the public in the development of art, science, and industry and that protection of economic incentive is a secondary consideration. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), cert. denied, 397 U.S. 822 (1964). See also Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Annot., 23 A.L.R. 3d 139, 168-72 (1969).

29. There is some contrary authority which suggests that the primary purpose of copyright is to protect authors' rights in their works and to ensure that economic incentive is not impaired. See H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 7 (1944). In *Mazer v. Stein*, 347 U.S. 201, 219 (1954), the Supreme Court suggested that protection of the author is the ultimate goal of copyright because "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.'" See also *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 965 (9th Cir. 1981), cert. granted, 102 S. Ct. 2926 (1982) ("the real purpose of the copyright scheme is to encourage works of the intellect, and this purpose is to be achieved by reliance on the economic incentive granted to authors and inventors by the copyright scheme.").

correspondingly diminishes, and the public is deprived of the maximum benefits of authors' intellect.³⁰ Compensating authors for their contribution is, therefore, a *sine qua non* of securing public benefits and meeting the ultimate goal of copyright law.³¹ In most fair use decisions courts must weigh the benefits and disadvantages of an unauthorized use and their effect on the progress of the arts and sciences.³²

The copyright laws offer courts some guidance in this task. Pursuant to the constitutional mandate, Congress granted authors the exclusive right to control five categories of uses of their works:³³ (1) reproduc-

30. Clearly, if authors and inventors do not have limited protection and economic encouragement, they may stop creating, and thus, the "program of the Useful Arts and Sciences" would come to a halt. See *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 23 (2d Cir. 1976). Consequently, adequate legal protection should be provided for one who submits his work to the public. Nevertheless, "courts . . . must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

The Supreme Court has recognized that the statutory grant of the copyright monopoly reflects a balance of competing claims upon the public interest:

The limited scope of the copyright holders' statutory monopoly . . . reflects a balance of competing claims. . . . Created work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The *immediate* effect of our copyright law is to secure a fair return for an 'author's creative labor.' But the *ultimate* aim is, by this incentive, to stimulate artistic creativity for the general public good.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added). See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975); REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE COPYRIGHT LAW 5 (House Comm. Print 1961).

The priority of the commonwealth may justify the copying of an author's copyrighted work, notwithstanding injury to the economic incentive. This proposition has important ramifications for arguments subsequently presented in this Note. See *infra* notes 112-13 and accompanying text.

For further discussion of the competing interests underlying copyright law, see J. MARKE, COPYRIGHT AND INTELLECTUAL PROPERTY 16 (1967); Esezobor, *Concepts in Copyright Protection*, 23 BULL. COPYRIGHT SOC'Y 258, 263 (1976); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1571 (1963); Rosenfield, *The Constitutional Dimension of "Fair Use" In Copyright Law*, 50 NOTRE DAME LAW. 790, 801 (1975).

31. The amount of compensation required to maintain authors' economic incentive is uncertain. Arguably, reducing remuneration to a level that still yields substantial economic gain is justifiable. See *infra* notes 196-98 and accompanying text.

32. See *infra* notes 55-68 and accompanying text.

33. Section 106 of the Copyright Act grants exclusive rights in copyrighted works as follows:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

tion;³⁴ (2) adaptation;³⁵ (3) publication;³⁶ (4) performance;³⁷ and (5) display.³⁸ The present Act, however, also carves out exceptions to these exclusive rights and allows the public to use copyrighted works for the above purposes under certain conditions.³⁹ Because the former Act did not provide similar exemptions, courts were left with the difficult task of interpreting language that, on its face, gave copyright owners absolute control over subsequent uses of their works.⁴⁰ Giving the copyright owner an absolute monopoly over subsequent uses of their

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- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
 - (5) in the case of literary, musical, dramatic, or choreographic works, pantomimes and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1976 & Supp. V 1981).

34. *Id.* § 106(1). As mentioned above, *supra* note 8, this Note focuses specifically on "copying," that is, the reproduction of copyrighted works.

The right "to reproduce the copyrighted work in copies and phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be 'perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.'" HOUSE REPORT 1476, *supra* note 1, at 61, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5675. Videotaping a copyrighted television program obviously constitutes a reproduction.

"[U]nder the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part. . . ." *Id.* Of course, the sanction is limited by the fair use doctrine and statutory exemptions. See *infra* note 38.

35. 17 U.S.C. § 106(2) (1976 & Supp. V 1981).

36. *Id.* § 106(3).

37. *Id.* § 106(4).

38. *Id.* § 106(5).

39. Section 106 is subject to sections 107 to 118 and must be read in conjunction with those provisions. See HOUSE REPORT 1476, *supra* note 1, at 61, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5674.

With respect to reproducing the copyrighted work, sections 107 to 118 limit authors' exclusive rights, 17 U.S.C. (1976 & Supp. V 1981): § 107 (reproduction for purposes such as criticism, comment, news reporting, teaching, scholarship, or research may not infringe the copyright if court determines the reproduction to be a fair use); *id.* § 108(a) (single-copy reproduction by libraries and archives not a copyright infringement under certain conditions); *id.* § 112(a) (single-copy reproduction by licensed transmitting organization, that is, radio stations, not a copyright infringement under certain conditions); *id.* § 114 (reproduction of sound recording for limited purposes not a copyright infringement); *id.* § 117 (reproduction of computer programs not an infringement under certain conditions).

40. The former Act, codified at 17 U.S.C. §§ 1-216 (1970), exempted only licensed reproductions and some noncommercial public performances. *Id.* § 1.

works would unduly restrict the dissemination and use of copyrighted works, defeating the ultimate purpose of copyright law.⁴¹ Courts, therefore, have limited the scope of the statutory monopoly to the extent necessary to guarantee public access to copyrighted works.⁴² In restricting the scope of copyright owners' exclusive rights, courts historically have used a test to determine which "infringing uses"⁴³ of copyrighted works do not violate the copyright laws. This test is known as

41. Congress appears to have limited the exclusive rights granted to authors and inventors by the Constitution, *see supra* note 39 and accompanying text, to enhance public access to their works. *See* HOUSE REPORT 1476, *supra* note 1, at 47, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5660.

42. *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (owner's performance rights do not embrace radio transmission in public restaurant); *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974) (owner's performance rights do not encompass cable television broadcasts).

When interpreting statutes, courts look to the plain meaning of the language. Nevertheless, courts must construe the terms to effect the intent of Congress. Therefore, when the statutory language is apparently inconsistent with its underlying legislative purpose, courts must "look beyond the words to the purpose of the act" to avoid an unreasonable result "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940).

43. In the past, it was unclear whether fair use was an excused infringement or not an infringement at all. *See* Fried, *Fair Use and the New Act*, 22 N.Y.L. SCH. L. REV. 497, 497 n.4 (1977). *Compare* *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1961) (fair use is an excused "technical infringement") *with* *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 604 (7th Cir.) (fair use is a "non-infringing use"), *cert. denied*, 355 U.S. 907 (1957). One commentator suggests that the distinction between "fair use" and an "excused infringement" "is of no practical significance." Cohen, *Fair Use in the Law of Copyright*, *reprinted in* COPYRIGHT AND RELATED TOPICS 59 (1964). Nevertheless, a finding of fair use may depend on distinguishing the two rationales. Courts that treat a fair use as no infringement are more likely to demand strict proof of economic harm to the plaintiff, *see, e.g., American Int'l Pictures, Inc. v. Foreman*, 400 F. Supp. 928, 933 (S.D. Ala. 1975) (plaintiff bears the burden of proving economic harm), while courts that treat fair use as an excused infringement are more likely to forego resort to evidence in their consideration of the economic factor, *see, e.g., Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165, 184 (S.D. Cal. 1955) (copyright owner need show neither damage nor reduced demand for the copyrighted work; yet, competition is a factor to be considered in determining fair use), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided court sub nom. Columbia Broadcasting Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

The distinction between "excused infringement" and "no infringement" was settled by the 1976 Copyright Act. 17 U.S.C. § 107 (1976 & Supp. V 1981) states that "fair use . . . is not an infringement of copyright." Nevertheless, the notion that the plaintiff must bear the burden of proving economic harm has been harshly criticized. *See* M. NIMMER, *supra* note 12, at § 13-84; Comment, *The United States Court of Claims on Copyright: Williams & Wilkins Company v. United States in Perspective*, 26 MERCER L. REV. 1401, 1409 (1975); *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 973-74 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).

the doctrine of "fair use."⁴⁴

Described as an "equitable rule of reason,"⁴⁵ fair use has been defined⁴⁶ as "a privilege in others than the owner of a copyright to use the material in a reasonable manner without his consent notwithstanding the monopoly granted to the owner by the copyright."⁴⁷ "Fair use" is now a statutory defense,⁴⁸ but the doctrine was first enunciated and developed by the federal courts. Though by no means a panacea,⁴⁹ "fair use" has proven a satisfactory means to balance the competing interests of owners and users.⁵⁰

44. The first decision to actually use the words "fair use" was *Lawrence v. Dana*, 15 Fed. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136).

45. *Karil v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941).

46. Actually, courts have had trouble precisely defining fair use. The doctrine has been called "the most troublesome in the whole law of copyright," *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), and "so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Asocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968). The reason courts have been unable to clearly define "fair use" may be that as an "equitable rule of reason" it is incapable of general definition and must be applied on an ad hoc basis. See HOUSE REPORT 1476, *supra* note 1, at 65, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, at 5679. Moreover, a rigid formulation of "fair use" might constrict the flexibility of the doctrine and limit its application in a rapidly changing society. One commentator suggests that flexibility in fair use

necessarily flows from the fact that the "fair use" privilege is predicated upon good faith and fair dealing. It serves the purpose of maintaining a proper balance between the exclusive rights secured to authors under the Copyright Statute and the correlative right of the public to benefit from those contributions to literature, science and the arts for which protection is provided for authors and other creators.

Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832-33 (1970).

47. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2nd Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (quoting H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY § 125 (1944)).

48. 17 U.S.C. § 107 (1976 & Supp. V 1981) provides:

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

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

49. See *infra* note 72.

50. See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1178 (W.D.N.Y. 1982) ("the fair use doctrine provides a means of balancing the exclusive rights of a copyright holder with the public interest in dissemination of information"). Accord *Meeropol v. Nizer*, 560

II. THE FAIR USE DOCTRINE

A. Theoretical Foundations

In *Folsom v. Marsh*,⁵¹ the Circuit Court for the Massachusetts District observed that certain unauthorized uses of copyrighted works did not violate the copyright laws.⁵² The court suggested that an insubstantial taking which did not significantly impair the value of the original work was not a copyright infringement.⁵³ Proof that the copied work was not substantially similar to the original became a *sine qua non* of post-*Folsom* fair use decisions.⁵⁴

The outcome of most fair use decisions can best be explained in terms of the dual purposes of copyright protection.⁵⁵ Courts that based fair use on insubstantial copying were arguably concerned with protecting the author's economic incentive.⁵⁶ Most decisions before the

F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Wainwright Sec. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

51. 9 Fed. Cas. 343 (D. Mass. 1841) (No. 4,901).

52. *Id.* at 347 (dictum). The court held the defendant's copying of substantial portions of plaintiff's biography of George Washington was an infringement of plaintiff's copyright.

53. *Id.*

54. *See Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943). The notion that substantial similarity negates fair use confuses the distinction between infringements and excused infringements. The threshold test for determining copyright infringement is whether the copy is substantially similar to the original. Substantial takings are infringements. *See supra* note 12. Today, fair use is "a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial." M. NIMMER, *supra* note 12, at § 13-56. The degree of similarity bears on the fair use defense, *see infra* notes 99-106 and accompanying text, but does not negate it *per se*. *See Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 689 (S.D.N.Y. 1974), *aff'd*, 500 F.2d 1221 (2d Cir. 1974):

Originally "fair use" was based on the assumption that the user might copy an *insignificant* portion of protected material while freely using unprotected material. The doctrine then developed to permit more than insignificant copying of protected material where such copying was clearly in the public interest and served the underlying purpose of the Copyright Act.

Id. (emphasis in original). *But see* L. SELTZER, *supra* note 6, at 35: "If a use is substantial it cannot be fair use. A substantial taking is the definition of infringement. An excusing of a substantial taking must be an exemption from copyright." Professor Seltzer suggests rephrasing the substantiality factor as the "extent of the use" to avoid confusion. *Id.*

55. *See supra* notes 28-29 and accompanying text.

56. *See, e.g., Perris v. Hexamer*, 99 U.S. 674 (1878); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Folsom v. Marsh*, 9 Fed. Cas. 348 (D. Mass. 1841) (No. 4,901). One explanation for allowing de minimis copying is the notion of implied consent—that in exchange for the grant of copyright protection, copyright owners implicitly consent to copying which does not impair the value of the original. *See Sampson & Murdock Co. v. Seaver-Redford Co.*, 140 F. 539, 541 (1st Cir. 1905); *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp.

1960's, with few exceptions,⁵⁷ applied a variant form of the early *Folsom* test: any harm to the copyright owner negated the fair use defense, regardless of the public interest. Two decisions signaled a shift in emphasis.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,⁵⁸ the Second Circuit held that the defendant's unauthorized duplication of portions of the plaintiff's biography of Howard Hughes did not violate the copyright laws.⁵⁹ The court stated that the defendant's use was a fair use because the public had an overriding interest in reading about a prominent public figure.⁶⁰ Similarly, a federal district court in *Time, Inc. v. Bernard Geis Associates*,⁶¹ held that the public's interest in the murder of John F. Kennedy justified the defendant's unauthorized duplication of several frames of the Zapruder film in its magazine.⁶²

In both cases, the dissemination of information to the general public justified the alleged infringement⁶³ and resulting harm to the copyright owners.⁶⁴ In terms of the incentive/access dichotomy,⁶⁵ *Random*

302, 304 (E.D. Pa. 1938); *Hearings on Off-Air Taping For Educational Use*, *supra* note 19, at 13 (testimony of Prof. Alan Latman, Professor of Law, New York University School of Law).

57. The *Henry Holt* and *Sampson & Murdock* courts emphasized the important purpose of protecting public interest, but only in terms of an implied consent gloss. In each of these cases, the courts suggested that authors impliedly consent to certain copying in the interest of public benefits. In *Henry Holt*, a finding of fair use was predicated on the insignificant appropriation. 23 F. Supp. 302 (E.D. Pa. 1938). Had there been substantial copying (as in *Sampson & Murdock*, 140 F. 539, 541 (1st Cir. 1905)), the court would have ignored the public interest and precluded fair use because substantial copying detracted from the value of the original, and correspondingly reduced the author's economic incentive. Thus, the early cases reveal that protection of the public interest was important only if so doing would not harm the copyright owner.

58. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

59. *Id.* at 311.

60. *Id.*

61. 293 F. Supp. 130 (S.D.N.Y. 1968).

62. *Id.* at 144.

63. See *Hearings on Off-Air Taping for Educational Use*, *supra* note 19, at 15 (testimony of Prof. Alan Latman, Professor of Law, New York University School of Law). See also *Wainright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir.), *cert. denied*, 434 U.S. 1014 (1977); *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978). *But cf.* *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974) (dissemination of information to public is no justification for copying where defendant can demonstrate no significant public interest in the subject matter); *accord* *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980); *Roy Export v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137 (S.D.N.Y. 1980); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970).

64. The *Random House* court observed that plaintiffs failed to show that defendant's magazine article lessened the value of plaintiff's biography. 366 F.2d at 311. Nevertheless, the court

House and *Bernard Geis Associates* both support the proposition that securing public availability of copyrighted works is the primary purpose of copyright law.⁶⁶ Except for early cases⁶⁷ which focused exclusively on economic detriment to the copyright owner, and the cases above,⁶⁸ which concentrated solely on public benefits derived from copying, the outcome of fair use decisions has always been determined by a balancing of various factors.⁶⁹ Though other factors have had some influence,⁷⁰ four are mentioned most often by the courts: the pur-

implied that even if *Rosemont* had proved damages, the public interest would still require a finding of fair use. *Id.*

65. See *supra* notes 28-30 and accompanying text.

66. Some commentators have read *Rosemont* and *Geis* as establishing a public interest-based first amendment privilege to copyright infringement. See, e.g., Note, *Copyright Law—One Step Beyond Fair Use: A Direct Public Interest Qualification Premised on the First Amendment*, 57 N.C.L. REV. 150 (1978); Note, *Constitutional Limitations upon the Congressional Power to Enact Copyright Legislation*, 1972 UTAH L. REV. 534; Comment, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158. But see Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971). Though the *Rosemont* court never explicitly relied on the first amendment in its fair use decision, the language of the opinion suggests first amendment protection: "Whether the privilege [of fair use] may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information. . . ." 366 F.2d at 307. The language used in *Rosemont* is clearly similar to the language used in *New York Times v. Sullivan*, 376 U.S. 254 (1964) to describe the first amendment: "[T]he first amendment . . . [attempts] to secure the widest possible dissemination of information. . . ." *Id.* at 266, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

It is thus apparent that, at least for several courts in the Second Circuit, a finding of fair use satisfies first amendment guarantees. One student author has described the Second Circuit analysis as a "hybrid fair use doctrine in which the public interest in disseminating the copyrighted material is the decisive factor in fair use analysis." Comment, *supra*, at 1173. But cf. Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320, 331-33 (1979):

[T]he effect of a public interest-based first amendment privilege is potentially devastating from the standpoint of copyright protection. Everything is imbued with the public interest to some degree; any privilege, therefore, would be either totally dependent on the subjective values of the judiciary, or so broad in scope that the mere fact of infringement would be proof of public interest.

Id. at 333.

The validity of a first amendment based defense to a copyright infringement claim is beyond the scope of this Note. For a discussion of the extent to which copyright protection conflicts with the first amendment interest in free speech, see Goldstein, *supra* note 28, at 983; Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970). See also Note, *Copyright and the First Amendment*, 33 U. MIAMI L. REV. 207 (1978).

67. See *supra* notes 51-56 and accompanying text.

68. See *supra* notes 58-66 and accompanying text.

69. See M. NIMMER, *supra* note 12, at § 13-57; Fried, *supra* note 43, at 499; Schulman, *supra* note 46, at 833.

70. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) (court considered whether preparation of the copyrighted

pose of the use, the nature of the copyrighted work, the substantiality of the copying, and the effect of the use upon the market for the original.⁷¹

B. *The Fair Use Factors*⁷²

1. *The Purpose of the Use*⁷³

Courts generally reject the fair use defense when the defendant uses

materials requires some use of prior materials dealing with the same subject matter; court actually subsumed this factor and the public interest factor under its consideration of the "nature of the materials"). For other lists of fair use factors, see Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) No. 6, 43, 53 (1955); *Hearings on Off-Air Taping for Educational Use*, *supra* note 19 at 8 (testimony of Prof. Alan Latman). Cohen's "other" factors include: the intent with which the use was made, the amount of the user's labor involved, the user's benefit, and the relative value of the material used. *Id.* at 53.

71. One commentator conducted a survey to determine which of the four factors most often appeared in fair use decisions. See Hayes, *Classroom "Fair Use": A Reevaluation*, 26 BULL. COPYRIGHT SOC'Y 101, 110 n.38 (1978). The survey revealed that contrary to the prevalent opinion, the most frequently mentioned factor is the substantiality of the copying. *Id.* See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

72. In 1976, Congress codified the fair use defense. 17 U.S.C. § 107 (1976 & Supp. V 1981). See *supra* note 47. Section 107 essentially restates the judicially-created doctrine of fair use, including the four factors most often relied upon by the courts. HOUSE REPORT 1476, *supra* note 1, at 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5679-80 ("Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."). Nevertheless, the statutory language extends beyond a mere restatement of the judicial formulation of fair use. For example, the preamble to Section 107 apparently equates fair use with use of the copyrighted work for any of six purposes: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. 17 U.S.C. § 107 (1976 & Supp. V 1981). Moreover, the legislative history includes minimum fair use guidelines for classroom copying in nonprofit educational institutions. See HOUSE REPORT 1476, *supra* note 1, at 68-71, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5681-85. One commentator characterized the congressional treatment of fair use as "nearly a total loss." See L. SELTZER, *supra* note 6, at 18. Seltzer asserted that three defects exist in section 107. First, it does not define fair use; second, failure to order the factors in terms of their priority implies that "there is no general order of priority deriving from the copyright scheme;" and third, it "muddles the distinction" between traditional fair use and statutory exemptions by grouping "criticism, comment and news reporting" with "teaching, scholarship, and research." *Id.* at 19. Seltzer cites concentration on educational photocopying as the primary cause of congressional failure to define fair use clearly. *Id.* at 21. According to Seltzer, this problem should have been resolved by treating traditional fair use, the unauthorized use by a second author of a first author's work, see *infra* notes 83-86 and accompanying text, and the reproduction of an existing work separately. *Id.* at 25. Seltzer arguably takes an overly restrictive view of the fair use doctrine. In his opinion, fair use could not possibly accommodate the problems arising from modern copying devices, and Congress should be responsible for formulating solutions. Others have suggested that fair use can encompass the "reproduction of an existing work." See generally Fried, *supra* note 43.

73. Section 107(1) describes the "purpose" factor: "the purpose and character of the use,

the copyrighted work for commercial gain.⁷⁴ Though some courts have held that a commercial use will not by itself preclude a finding that the copying is reasonable,⁷⁵ evidence that the copying was only for financial gain weighs heavily in the courts' analysis.⁷⁶

Courts, however, are generally more receptive to not-for-profit uses of copyrighted materials for educational,⁷⁷ scientific,⁷⁸ or historical purposes.⁷⁹ These types of uses warrant protection because they tend to further the progress of the arts and sciences.⁸⁰ Nevertheless, evidence of a noncommercial, beneficial use does not necessarily require a finding of fair use.⁸¹ The court must still weigh other factors; evidence that the use unduly impairs the value of the original work might cause the court to reject the fair use defense.⁸²

Despite the laudable purpose of the use, one commentator suggests

including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1976 & Supp. V 1981).

74. *M. NIMMER*, *supra* note 12, at § 13-59. See *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938) ("An advertisement designed with a purely commercial purpose . . . under no circumstances could be considered a work designed for the advancement of . . . science or art").

75. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) ("the mere fact that [a copied book] is published for commercial gain does not, standing alone deny [defendants] of the fair use defense"), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (commercial motive irrelevant if public benefit may be derived from the use), *cert. denied*, 385 U.S. 1009 (1967); *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941) (commercial use irrelevant where defendant's appropriation is insubstantial).

76. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 (5th Cir. 1980) ("commercial use tends to cut against a fair use defense"); *M. NIMMER*, *supra* note 12, at § 13-61 (commercial use raises presumption that use is not "fair").

77. See, e.g., *Simms v. Stanton*, 75 F.6 (C.C.N.D. Cal. 1896); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950).

78. See, e.g., *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

79. E.g., *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096 (2d Cir. 1976). See generally H. HOWELL, *COPYRIGHT LAW* 151-54 (A. Latman ed. 1962); *M. NIMMER*, *supra* note 12, at § 13-61; *Yankwich, What is Fair Use*, 22 U. CHI. L. REV. 203 (1954).

80. See *Fried*, *supra* note 43, at 500 ("[i]f copyrighted material is used in such a way that the arts and sciences are benefited, the purposes of the copyright laws are being furthered despite the apparent invasion of the copyright owner's 'exclusive rights'"). The author calls these types of uses "positive uses" as opposed to "ordinary uses." *Id.* See *infra* note 121.

81. *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (fair use rejected where teacher copied songsheets verbatim and distributed copies to his students); *MacMillan Co. v. King*, 223 F. 862 (D. Mass. 1914) (economics teacher's outline of copyrighted textbook held infringement even when given or lent to students). See Note, *Universal City Studios, Inc. v. Sony Corporation of America: "Fair Use" Looks Different on Videotape*, *supra* note 16, at 1017.

82. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1363 (Ct. Cl. 1973), *aff'd by*

that only "productive uses"⁸³ of the copyrighted work are fair uses.⁸⁴ The argument is that because fair use has traditionally involved a second author's use of a first author's work,⁸⁵ the reproduction of a work in order to use it for its intrinsic purpose can never be a fair use.⁸⁶

2. *The Nature of the Copyrighted Work*

In examining the nature of the copyrighted work, courts generally consider the type of work copied, its intended market, and the availability of the work. Informational works and works of scientific or educational value are more susceptible to fair use copying⁸⁷ than are

an equally divided Court, 420 U.S. 376 (1975) (Cowen, C.J., dissenting). See generally M. NIMMER, *supra* note 12, at § 13-60.

83. See Note, *Universal City Studios, Inc. v. Sony Corporation of America: "Fair Use" Looks Different on Videotape*, *supra* note 16, at 1013 (defines "productive uses" as uses incorporating "the copyrighted material in a developmental process, that is, in creating a second work or in carrying on research or education").

84. The productivity of the use is not a factor in the fair use analysis, but only a threshold consideration. *Id.* at 1014. If a court finds that the defendant has used the work for its ordinary purpose, it need not apply the fair use analysis because the nonproductive use precludes fair use by operation of law. *Id. But cf. Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981) (finding home videotaping of copyrighted television programs an ordinary use, but court considered the fair use factors), *cert. granted*, 102 S. Ct. 2926 (1982); Fried, *supra* note 43 at 500-01 (while ordinary uses do not hasten the progress of arts and sciences, courts should still weigh other factors before rejecting the fair use defense).

85. L. SELTZER, *supra* note 6, at 24.

86. *Id.* Seltzer's intrinsic purpose theory is anachronistic. Though fair use may never have permitted the use of a copyrighted work for its ordinary purpose, contemporary public interest arguably warrants expanding the doctrine to include such uses. Recent innovations in technology have necessarily enlarged the scope of the public's interest in access to copyrighted materials. The idea that the reproduction of a work for its intrinsic purpose can never be a fair use ignores both the technological constraints of the past and the expectations of a modern society. Seltzer criticizes the court in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975), for applying fair use to photocopying. L. SELTZER, *supra* note 6, at 25. He fails to consider, however, that the benefit to the arts and sciences from the copying may justify the finding of fair use even though the copying was merely an ordinary use.

87. See, e.g., *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 664 (7th Cir.) (courts more receptive to unauthorized uses of educational, scientific and historical works), *cert. denied*, 355 U.S. 907 (1957); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) (historical works may be used with greater license than purely created works). Cf. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975) (scientific works similarly subject to fair use). "The traditional approach to fair use thus looks to the nature of the work to see whether the work promotes learning. If it does, and the copier's purpose is to promote learning, then courts are likely to find fair use." M. NIMMER, *supra* note 12, at § 13-63. See generally Note, *Copyright Infringement and The First Amendment*, 79 COLUM. L. REV. 320, 326 (1979).

creative works.⁸⁸ The public interest in the dissemination of information presumably justifies additional access to didactic works.⁸⁹ The public interest in disseminating purely entertaining material is not, however, clearly discernable.⁹⁰ Despite its didactic nature, if the copyrighted work serves only a limited market, copying the work is more difficult to justify.⁹¹ Such uses presumptively impede the viability of those markets.⁹² In contrast, the copying of works intended for wide public distribution may have only a *de minimis* impact on the broader market.⁹³

The availability of the work also weighs in the fair use analysis.⁹⁴ If

88. M. NIMMER, *supra* note 12, at § 13-63; L. SELTZER, *supra* note 6, at 33-34. "If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted." *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 972 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).

89. *See Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 145 (S.D.N.Y. 1968). *See also supra* notes 64 & 66 and accompanying text. *But cf.* *Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) ("fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright wherever it determines the underlying work contains material possible of public performance"). In *Iowa State* the defendants videotaped plaintiff's copyrighted film about Olympic wrestler Dan Gable and broadcast portions of it over their television network. The court rejected defendants' argument that the public interest in the dissemination of information about an important public figure justified the unauthorized reproduction. The court declined to extend *Rosemont Enters., Inc. v. Random House, Inc.* to encompass appropriation of plaintiff's mode of "expression" when defendants could have used the "facts" and still disseminated the same information. 621 F.2d at 61. For discussion of the idea/expression dichotomy, *see supra* note 12.

90. *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 733 (S.D.N.Y. 1974) (insufficient public interest in Rudolph Valentino to justify defendant's broadcasting plaintiff's movie over public television station), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1978).

91. For example, "textbooks and other material prepared primarily for the school markets would be less susceptible to reproduction for classroom use than material prepared for public distribution." M. NIMMER, *supra* note 12, at § 13-62.

92. Clearly, the copied work will directly compete with the original within its limited market. *See Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 975 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982). If the author must compete with unauthorized reproductions of his own work, he has no incentive to continue creating.

93. *But cf. id.* (presumption of economic injury raised by unauthorized uses of works with broad public market). This is not to say that the unauthorized use will have no effect upon the broader market, for plaintiff may show actual damages at trial. Nevertheless, the presumption of damages is stronger in the limited market.

94. *See S. REP. NO. 473, 94th Cong., 1st Sess.*, 64 (1975):

A key though not necessarily determinative factor in fair use is whether or not the work is available to the potential user. If the work is . . . unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case.

a copyrighted work is out of print⁹⁵ or otherwise unavailable, the defendant has stronger justification for using the work.⁹⁶ The public interest in access to the works of the arts and sciences demands that copyrighted materials be made available to the public.⁹⁷ If these works are not made available, the public has a legitimate claim to their access.⁹⁸

3. *The Substantiality of the Copying*⁹⁹

The amount and substantiality¹⁰⁰ of the copying has always been an important factor in determining fair use.¹⁰¹ Generally, as the substantiality of the copying increases, the likelihood of the use being fair decreases.¹⁰² Although one court has upheld the reproduction of an

95. The Senate Report, however, notes that courts must consider whether there are accessible reproduction services which provide copies of out-of-print works. The presence of such services detracts from defendant's justification for copying the out-of-print works. *Id.*

96. *Id.*

97. *See Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). One reason the court of claims held the photocopying of medical journal articles a fair use was that older issues were unavailable from journal publishers. Because the scholarly material was generally unavailable, the court expressed concern that scientific and medical personnel would be denied access to the important knowledge which articles contained unless photocopying was permitted. *Id.* at 1356.

98. Nimmer notes, however, that in the case of unpublished works, the availability argument does not justify copying because it is the author's "deliberate choice" not to publish the work. M. NIMMER, *supra* note 12, at § 13-63. The author's first right of publication outweighs any public right to availability. *Id.*

99. Section 107(3) describes the substantiality factor: "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3) (1976 & Supp. V 1981).

100. "Substantiality" includes both the quantitative and qualitative degree of copying. The copying of as few as three lines from a work may be sufficient to defeat the fair use defense if those three lines constitute a core component of the copyrighted work. *See Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

101. *See, e.g., Folsom v. Marsh*, 9 Fed. Cas. 343, 348 (C.C.D. Mass. 1841) (No. 4,901) (fair use was precluded where "so much [of the work] is taken that the value of the original is sensibly diminished"). *Cf. Perris v. Hexamer*, 99 U.S. 674, 676 (1878) (a less than substantial reproduction is a fair use of the author's work.) Early fair use opinions muddled the distinction between substantial similarity as a threshold infringement test, and substantiality as a fair use factor. *See supra* notes 13 & 54. Nevertheless, the general rationale for disfavoring substantial copying is equally persuasive today. The substantiality of the copying also bears on the determination of economic harm to the copyright owner. *See infra* notes 119-22 and accompanying text.

102. *See, e.g., Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 454 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th

entire work,¹⁰³ verbatim or virtually complete copying usually precludes a finding of fair use.¹⁰⁴ Nevertheless, because courts are required to consider the fair use factors in concert,¹⁰⁵ substantial copying should not negate per se the fair use defense.¹⁰⁶

Cir. 1937); *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F. Supp. 686, 690 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974).

103. In *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982), the district court found that "[w]hen considered with the nature of the material and the noncommercial private use, this taking of the whole still constitutes fair use, because there is no accompanying reduction in the market for 'plaintiff's original work.'" *Id.* at 454. The Ninth Circuit, however, rejected the *Sony* district court reasoning, stating that excessive copying "precludes a finding of fair use," even if the plaintiff suffers no economic harm. 659 F.2d at 973. See also *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 184 (S.D. Cal. 1955) ("mere absence of competition or injurious effect upon the copyrighted work will not make a use fair"), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).

In *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975), the court of claims found that the public benefit derived from photocopying scientific journals justifies reproduction of the entire article. *Id.* at 1362-63. Prior to the *Williams & Wilkins Co.* decision, courts followed the holding of a 1937 decision, stating that there is no support for "the proposition that wholesale copying of copyrighted material can ever be fair use." *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (defendants taking plaintiff's alphabetical listings in telephone directory and rearranging them numerically in a different directory). Similarly, in *Wihitol v. Crow*, 309 F.2d 777 (8th Cir. 1962), the court held that total reproduction is impermissible under the fair use doctrine, even if the copying is done to further educational or artistic goals. See *infra* note 115 and accompanying text. In *Williams & Wilkins Co.*, which involved photocopying of copyrighted articles in their entirety, however, the court of claims stated that the doctrine that a complete copying was never a fair use is "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice." 487 F.2d at 1353. Moreover, the court concluded that there is no "inflexible rule excluding an entire copyrighted work from the area of 'fair use'." Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others." *Id.*

104. *M. NIMMER*, *supra* note 12, at § 13-64. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (excessive copying precludes fair use even if the other fair use factors point to a contrary result); *Public Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960) (fair use will not justify publication in book form of verbatim copies of author's speeches), *vacated for insufficient record*, 369 U.S. 111 (1962); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (no support for "the proposition that wholesale copying and publication of copyrighted material can ever be a fair use"); *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981) ("reprinting of approximately 92% of plaintiff's story precludes the fair use defense"). Cf. *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 973 (9th Cir. 1981) (copying entire work "weighs against a finding of fair use"), *cert. granted*, 102 S. Ct. 2926 (1982).

105. *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982).

106. *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982) (rejecting plaintiff's argument that the "substantiality" of off-the-air taping necessarily precludes fair use). *But cf.* *Public Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262, 272 (D.C. Cir. 1960)

4. *Economic Effect of the Copying*¹⁰⁷

Many commentators treat the economic effect of the copying as the most important factor in determining fair use.¹⁰⁸ Courts are likewise most concerned with the possible economic detriment to the copyright owner.¹⁰⁹ Protecting the author's economic incentive justifies the courts' differential treatment of this factor. If a reproduction of the copyrighted work serves as a substitute for the original and supplants the potential market for the work, the author's economic rewards will necessarily decline.¹¹⁰ Any reduction in the author's remuneration for his works correspondingly reduces his incentive to create and deprives the public of the benefits of the arts and sciences.¹¹¹

Nevertheless, an overriding public interest in increased access to copyrighted works often justifies at least a *de minimis* reduction of the author's economic incentive.¹¹² The argument may be phrased in terms of allocating costs. If the public benefit derived from the copying is greater than the economic harm to the author, the author should bear the cost of reduced economic rewards. Similarly, if the harm to the author exceeds any possible benefits derived from the copying, the pub-

(court implied that substantial copying can never be a fair use), *vacated for insufficient record*, 369 U.S. 111 (1962).

107. Section 107(4) describes the economic effect factor: "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4) (1976 & Supp. V 1981).

108. *See, e.g.*, M. NIMMER, *supra* note 12, at § 13-64 ("[i]f one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important, and indeed, central fair use factor"); L. SELTZER, *supra* note 6, at 32 ("[the factor] of first importance [is] the factor that the statute puts last"). *But see* Fried, *supra* note 43, at 499-501. Fried suggests that the purpose of the use has been as decisive in fair use decisions as the economic effect of the use upon the copyright owner. *Id.* at 499.

109. *See* Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963, 973-74 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982); Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1169-74 (W.D.N.Y. 1982); Bruzzone v. Miller Brewing Co., 202 U.S.P.Q. (BNA) 809, 812 (N.D. Calif. 1979); Mura v. Columbia Broadcasting Sys., Inc., 245 F. Supp. 587, 590 (S.D.N.Y. 1965).

110. M. NIMMER, *supra* note 12, at § 13-64 to -72; L. SELTZER, *supra* note 6, at 18-26.

111. *See supra* notes 28-29 and accompanying text.

112. *See supra* note 28 and accompanying text. In *Williams & Wilkins, Co.*, the court of claims held the benefit to medical science from photocopying medical journals and distributing them to scientists and physicians would be lost if the photocopying were not permitted. 487 F.2d at 1353. *Cf.* MCA, Inc. v. Wilson, 211 U.S.P.Q. (BNA) 577, 579 (2d Cir. 1981) ("[t]he less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use").

lic should bear the cost of limited access to the author's works.¹¹³

In determining whether the plaintiff has suffered economic harm from the defendant's unauthorized use, courts consider whether the use "tends to diminish or prejudice the potential sale of the plaintiff's work."¹¹⁴ This inquiry requires a comparison of the plaintiff's actual market for the copyrighted work with a hypothetical market—the market that would have existed had defendant not copied the work.¹¹⁵ If the plaintiff's actual market is smaller than the hypothetical market, the plaintiff has been economically injured by the defendant's copying.¹¹⁶

Plaintiffs, however, do not have to prove actual damages,¹¹⁷ that is, the precise number of sales lost because of the defendant's unauthorized use. Instead, the plaintiff need only demonstrate that the probable effect from the use will be economically harmful to him.¹¹⁸ One way of

113. One commentator argues that such balancing redistributes costs implicitly fixed in the copyright scheme itself. Because Congress enacted the copyright laws, only Congress can reallocate those costs. L. SELTZER, *supra* note 6, at 37.

114. *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970). Other courts have made similar inquiries. *See, e.g., Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977) (whether the use has the intent or effect of fulfilling the demand for the original work), *cert. denied*, 434 U.S. 1014 (1978); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (S.D.N.Y.) (whether the use has tended to interfere with the marketability of the copyrighted work), *aff'd*, 623 F.2d 252 (2d Cir. 1980). *Cf. Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 974 (9th Cir. 1981) (whether the "cumulative effect of mass reproduction of copyrighted works made possible by videorecorders . . . tends to diminish the potential market for plaintiff's works"), *cert. granted*, 102 S. Ct. 2926 (1982).

115. *Fried*, *supra* note 43, at 504.

116. *Id.* *See Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 974 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1169-74 (W.D.N.Y. 1982).

117. *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 974 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982); M. NIMMER, *supra* note 12, at § 13-84. *But cf. Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (plaintiff's inability to demonstrate actual damages led court to conclude that defendant's use was "fair"). One commentator harshly criticized the *Williams & Wilkins* court for imposing too great a burden on copyright plaintiffs. *See M. NIMMER, supra* note 12, at § 13-84. Nimmer suggested that the court of claims confused the issues of liability and damages. In light of the New Copyright Act, which was not effective until after the *Williams & Wilkins* decision, Nimmer was apparently correct.

Section 504 gives copyright owners the choice of suing for actual or statutory damages. 17 U.S.C. § 504 (1976 & Supp. V 1981). By providing statutory damages as an alternative, Congress recognized the difficulty of proving actual losses: "under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages." HOUSE REPORT 1476, *supra* note 1, at 161, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5777.

118. *Fried, supra* note 43, at 505.

determining probable effects is by considering whether the copied work serves the same function as the copyrighted work.¹¹⁹ If so, there is a greater probability that the copyright owner will be economically harmed.¹²⁰ Courts have rejected the fair use defense where the evidence indicated that both the plaintiff's and defendant's works served identical functions.¹²¹ By implying, however, that parity of functions necessarily precludes fair use, courts have employed a test that uses the existence of economic harm to decide the broader issue of fair use.¹²²

119. See M. NIMMER, *supra* note 12, at § 13-65 to -72 ("[if] the defendant's work, though containing substantially similar material, performs a different function than that of the plaintiff's the defense of fair use may be invoked"). Under this "functional test" courts essentially consider whether the copied work fulfills the same consumer need or demand as the copyrighted work. *Id.* E.g., *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941) (court found defendant's unauthorized reproduction of plaintiff's songs in its magazine article a fair use because plaintiff's songsheets were intended for singing, and defendant used the songs for literary presentation).

120. E.g., *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982); *Wihitol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979).

121. See, e.g., *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 361 (N.D. Ga. 1979) (defendant's unauthorized use "does not warrant 'fair use' protection because it has the same function as [plaintiff's work] under the 'functional test' and therefore is likely to harm the potential market for or value of the copyrighted work"). One commentator stated that the defense of fair use is "not available [if] the defendant's work serves the same function as that of the plaintiff's." See M. NIMMER, *supra* note 12, at § 13-70. *But cf.* *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (public interest in defendant's use warrants fair use finding notwithstanding similarity of functions), *cert. denied*, 385 U.S. 1009 (1967).

Another commentator accepted the functional test as a valid method for determining whether the defendant's unauthorized use will have a detrimental effect upon the copyright owner. See Fried, *supra* note 43, at 504. According to Fried, however, a court's finding that both the plaintiff's and the defendant's works serve identical functions is only a finding that the unauthorized use has a detrimental effect; the court must still decide the broader fair use issue. *Id.* at 509. Thereafter, the court must review whether defendant's use was positive or ordinary. If the use is ordinary, the court can deny the fair use defense on the basis of detrimental effect alone. If the use is positive, the court must consider "how much the use benefits and harms the progress of the arts and sciences." *Id.* at 509 n.53. If the degree of harm (reduced economic incentive) exceeds the public benefits (increased access), the court must reject the fair use defense. Under this type of fair use analysis, the court accommodates the interests of both owners and users.

122. Under the functional test any harm, regardless of degree, has apparently the same bearing on fair use. One commentator, however, distinguishes harm which "imperils the existence" of an enterprise and harm which only "limits the profits of a still profitable concern":

The harm in the two cases affects the purposes of the copyright laws in differing degrees. The harmful effects of the use in the first situation are direct and immediate—the publication ceases to exist (or will cease to exist in the foreseeable future) and useful information is no longer being published. On the other hand, when the publication will clearly continue to exist, the harmful effects of the use are more indirect. While they lessen the economic incentive to write or publish in the future, the threat of immediate harm is not present. Under any weighing test that determines the issue of fair use, the benefit needed

Basing fair use on a test that only considers whether the copyright owner has been economically harmed not only ignores the importance of the other statutory factors,¹²³ but also undermines the utility of the fair use doctrine.¹²⁴

C. *Applying the Traditional Fair Use Doctrine to Nontraditional Uses*

Recent technological innovations have spawned nontraditional¹²⁵ uses of copyrighted materials. Modern duplicating devices like the videorecorder facilitate the reproduction of copyrighted works in their entirety. According to one commentator, however, the reproduction of a work in its entirety can never be a fair use,¹²⁶ and only one court has ever deemed "fair" the verbatim reproduction of copyrighted materials.¹²⁷ Strict adherence to the traditional use theory presumably would preclude fair use in all cases involving nontraditional uses of copy-

to outweigh direct harm would have to be greater than that needed in cases where the harmful effects are only indirect.

Fried, *supra* note 43, at 509 n.53.

123. If "fair use" reflects a balancing of the interests of both copyright owners and users, *see supra* note 65, any test which ignores the interests of one group is inherently defective.

124. Such a formulation fails to recognize that fair use involves a balancing process. HOUSE REPORT 1476, *supra* note 1, at 5679.

125. Seltzer argued that fair use has always concerned the use by a second author of a first author's work. L. SELTZER, *supra* note 6, at 24. *See supra* notes 72 & 83-86 and accompanying text. Seltzer based his statement on the 1961 Report of the Register of Copyrights, which lists uses traditionally deemed fair uses:

- Quotation of excerpts in a review or criticism for purposes of illustration or comment;
- Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations;
- Use in a parody of some of the content of the work parodied;
- Summary of an address or article, with brief quotations, in a news report;
- Reproduction by a library of a portion of a work to replace part of a damaged copy;
- Reproduction by a teacher or student of a small part of a work to illustrate a lesson;
- Reproduction of a work in legislative or judicial proceedings or reports;
- Incidental or fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported.

REPORT OF THE REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 1ST SESS., 24 (Comm. Print. 1961).

126. *See* L. SELTZER, *supra* note 6, at 24. Seltzer actually stated that the reproduction of a work for "its own sake" can never be a fair use. *Id.* Arguably, then, the reproduction of a work for a productive use should be a fair use, regardless of whether the work is copied in its entirety. *See* Note, Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape, *supra* note 16, at 1013.

127. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). Seltzer criticized the Williams & Wilkins court for relying on cases in which copyrighted works were not reproduced in their entirety, but rearranged in some manner. L. SELTZER, *supra* note 6, at 25.

righted materials notwithstanding the benefits flowing from the use.¹²⁸ Given the nature and purpose of the fair use doctrine this is an unpalatable result.

Congress intended to make the fair use doctrine flexible.¹²⁹ Accordingly, Congress directed courts to apply the doctrine on a case-by-case basis,¹³⁰ without applying arbitrary rules or fixed criteria.¹³¹ Congress purposely refrained from "freezing the doctrine in the statute"¹³² and instead chose to enumerate broad fair use criteria adaptable to rapidly changing technology.¹³³

The idea that the reproduction of a copyrighted work in its entirety can rarely be a fair use constricts the intended flexibility of fair use. Such a myopic view of the doctrine ignores two possibilities: that the reproduction may be used for purposes which are arguably productive,¹³⁴ and that even if the use were not productive, the reproduction may yet be a fair use because it furthers the progress of arts and sciences.¹³⁵

III. A FAIR USE ARGUMENT FOR TEACHERS' VIDEORECORDING OF COPYRIGHTED TELEVISION PROGRAMS FOR CLASSROOM USE

A. *Special Role of Educational Copying*

The new copyright laws reflect congressional solicitude for educational copying. The impetus for much of the 1976 revision was the widespread reproduction of printed materials by teachers for use in classroom lessons.¹³⁶ The drafters attempted to reconcile copyright

128. If the entire work were reproduced, there would be no need for courts to examine countervailing public interests.

129. HOUSE REPORT 1476, *supra* note 1, at 65, 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5679, 5680.

130. *Id.*

131. *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

132. HOUSE REPORT 1476, *supra* note 1, at 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5680.

133. Many commentators assert that Congress failed to adequately define fair use. They conclude that congressional failure to give courts more direction has left the doctrine attenuated today. *See, e.g.,* Hayes, *Classroom Fair Use—A Reevaluation*, 26 BULL. COPYRIGHT SOC'Y 101 (1978).

134. Note, *Universal City Studios, Inc. v. Sony Corporation of America; "Fair Use" Looks Different on Videotape*, *supra* note 16 (some modern uses of copyrighted works, even though verbatim reproductions, may be fair uses).

135. *See supra* notes 63-64 and accompanying text.

136. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally*

owners' interest in controlling reproduction of their works with the inherent educational value in the classroom use of reproductions of copyrighted materials.¹³⁷ The resulting legislation exempted previously unauthorized uses of copyrighted materials for educational purposes with certain limitations.¹³⁸

Congress enacted section 107 in order to provide further protection for certain educational uses of copyrighted materials.¹³⁹ The House Report on the copyright laws includes guidelines for the fair use of printed materials and musical works in the classroom.¹⁴⁰ Congress also recognized the need to establish fair use guidelines for audiovisual materials.¹⁴¹ Educators and broadcast representatives met¹⁴² to discuss the problems arising from off-the-air taping for educational purposes, but no guidelines resulted. The Committee concluded its report by encouraging all interested parties to meet again to formulate guidelines for the fair use of copyrighted television programs. Both parties have

divided Court, 420 U.S. 376 (1975), was probably the most significant source of inspiration for section 108, establishing guidelines for library photocopying.

137. As early as 1967, Congress recognized a need to balance these interests:

The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that a potential destruction of incentives to authorship presents a serious danger.

H.R. REP. NO. 83, 90th Cong., 1st Sess., 31 (1967).

Congress, however, did not want to enact a specific exemption freeing all reproductions by educators from copyright infringement in light of the potential damage to copyright owners who depend on sales to educational institutions. *Id.* at 68-69. Nevertheless, Congress recognized a need for greater certainty and protection for teachers. *Id.* at 69. In an effort to meet this need Congress amended 17 U.S.C. § 504(c) (1976 & Supp. V 1981) to provide innocent teachers and other nonprofit users of copyrighted materials with broad insulation against unwarranted liability for infringement. *Id.* at 67.

138. For a list of educational uses, see *supra* note 20.

139. In determining fair use, courts must consider whether the unauthorized use is for "non-profit educational purposes." 17 U.S.C. § 107 (1976 & Supp. V 1981).

140. HOUSE REPORT 1476, *supra* note 1, at 68-71, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, at 5681-85. The purpose of the guidelines is to articulate minimum standards of fair use under section 107, not to otherwise limit uses determined to be fair by judicial decision. *Id.* at 68.

141. The problem of off-the-air taping for non-profit classroom use of copyrighted audiovisual works incorporated in a television broadcast has proved difficult to resolve. The committee believes that the fair use doctrine has some limited application in this area. . . . Nothing in section 107 . . . is intended to change or prejudice the law on the point.

Id. at 72.

142. Between 1970 and 1975, both parties held discussions on the propriety of videorecording in the classroom setting, and concluded that guidelines would not necessarily be helpful. NATIONAL COMMISSION ON THE NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, PRELIMINARY REPORT 19 (1976).

since unsuccessfully attempted to reach agreement.¹⁴³

Absent legislative guidance, the resolution of the problems arising from videotaping for classroom use remains with the courts. Recently, a federal district court in New York applied the fair use doctrine to educational videocopying. The court in *Encyclopaedia Britannica Educational Corp. v. Crooks*¹⁴⁴ concluded that "systematic and highly organized" videotaping of public television educational programs violated the copyright laws.¹⁴⁵ The plaintiff, Encyclopaedia Britannica Educational Corporation (EBEC),¹⁴⁶ produced, licensed, and distributed educational materials, including films and videocassettes, to educational institutions¹⁴⁷ and public television stations. The defendant, Board of Educational Services, First Supervisory District, Erie County, New York (BOCES), was a nonprofit organization that provided educational services to schools within the Erie County District. As part of its services, BOCES videotaped educational programs broadcast by the local public television station¹⁴⁸ and distributed the videotapes upon request to teachers within the district.¹⁴⁹ The plaintiff alleged that the defendant's massive videotaping operation infringed its copyrights in certain films.¹⁵⁰ The defendant argued that its videotaping was protected under the fair use doctrine. BOCES contended that students

143. At a conference at Airlie House, Virginia, in July 1977, under the direction of the Register of Copyrights, educators and broadcast personnel discussed possible accommodation of copyright problems raised by off-air videotaping by educators. The parties examined possible licensing alternatives including blanket licenses, per-program licenses, a tax levy on blank tapes, and compulsory licensing. No definite solution was found, but the parties pledged continued efforts to reach an agreement. *Hearings on Off-Air Taping For Educational Use*, *supra* note 19, at 75.

144. 542 F. Supp. 1156 (W.D.N.Y. 1982).

145. *Id.* at 1185.

146. Only two other cases have involved videorecording. In *Walt Disney Prods. v. Alaska Television Network, Inc.*, 310 F. Supp. 1073, 1075 (W.D. Wash. 1969), the court held that off-air taping of television programs for subsequent commercial distribution was not a fair use and violated the copyright laws. In *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982), the Ninth Circuit held that videotaping of television programs for home viewing was not a fair use.

147. Encyclopaedia Britannica offered a licensing agreement permitting schools to videotape Britannica films which the schools already owned. While other school districts had entered into this agreement, defendant had not. 542 F. Supp. at 1165.

148. BOCES generally videotaped all programs broadcast by the local public television station during the daytime hours. The entire programs were videotaped. 542 F. Supp. at 1162.

149. BOCES maintained an extensive videotape library from which teachers could choose by catalog the films they wanted. The library contained 4,500 videotaped programs during the 1976-77 school year. *Id.*

150. There were 19 films involved. 542 F. Supp. at 1167.

demanded access to programs of inherent educational value, and that the public interest in this access would justify any harm to plaintiff-copyright owners.¹⁵¹ Even if the plaintiff were economically harmed, defendant argued, such harm would be de minimis, allowing the plaintiff to still maintain a profitable business.

The *Crooks* court agreed that the defendant's videotaping was well-intended and that the copied films had inherent educational value.¹⁵² Nevertheless, the extent and scale of the copying outweighed its benefits.¹⁵³ The court observed that the plaintiff's market for the educational films was unduly hindered by the defendant's wide scale copying. Plaintiff already offered licensing agreements and made the films available in videotape format.¹⁵⁴ The special educational nature of the films suggested that the plaintiff's market was limited; any copying, even if only minimal, would have severe economic consequences.¹⁵⁵ The court also rejected the "still profitable business" argument¹⁵⁶ and suggested that although the plaintiff continued to show profits, its profits might have been larger but for the defendant's massive copying.¹⁵⁷

What impact will the *Crooks* decision have on individual instances of teachers videotaping programs for subsequent classroom viewing? The decision arguably can be limited to its specific facts. The court recognized the importance of videotaping programs of educational value but was understandably concerned with the extent and scale of the copying. Nevertheless, the same court in the earlier *Crooks* decision¹⁵⁸ intimated that isolated incidents of videotaping for subsequent

151. *Id.*

152. 542 F. Supp. at 1174.

153. "[A]lthough the purpose and character of the use here is clearly educational and non-commercial, the massive scope of the videotape copying and the highly sophisticated methods used by the defendant . . . cannot be deemed reasonable even under the most favorable light of fair use for non-profit educational purposes." *Id.* at 1175.

154. The existence of licensing arrangements weakened defendant's "availability" argument. In *Williams & Wilkins*, defendants successfully defended their massive copying of scientific journal articles because the journal articles were otherwise unavailable. See 487 F.2d at 1356-57. In *Crooks*, however, defendants could have purchased videotapes of the films directly from the plaintiffs.

155. 542 F Supp. at 1169-73.

156. See *infra* note 196 and accompanying text.

157. 542 F. Supp. at 1173. Nimmer suggested that the focus of the economic harm factor should be on the potential market for plaintiff's works; this focus would require courts to consider what plaintiff's market would have constituted had defendants not distributed the copied works. See *supra* note 114 and accompanying text.

158. See *supra* note 24 and accompanying text. In 1978, plaintiffs sought and were granted a

classroom viewing might be a fair use.¹⁵⁹ Moreover, the plaintiffs in *Crooks* were film distributors, and the films were specifically produced for and distributed to educational institutions. The question remains whether the rationale of the *Crooks* court can extend to videotaping of commercial television programs broadcast by the major television networks for broad public dissemination. In contrast to the copying of programs intended for dissemination in a narrow market, the copying of major television network programs, though still of educational value, would engender less harm to the prospective plaintiffs, the commercial television industry. The *Crooks* decision, therefore, should not control beyond its specific facts. While the court's reasoning offers some guidance, fair use analysis should determine whether isolated instances of videotaping television programs for classroom viewing is a fair use.

1. *Productive Use or Use for Intrinsic Purpose*

The threshold question of any fair use analysis is whether the alleged infringing use is productive or is a use of the original work for its intrinsic purpose.¹⁶⁰ The *Crooks* court did not reach this threshold question,¹⁶¹ however, because the scope of the defendant's copying obviated analysis of this issue. Nevertheless, discussion of the productive use/intrinsic purpose dichotomy is extremely important because the resolution may determine the viability of the fair use doctrine in a modern technological society.

Some commentators assume that fair use has always involved the reproduction by a second author of a first author's work for incorporation in his own work and has never involved the ordinary use of the work.¹⁶² Under these premises, if videotaping television programs for subsequent viewing is considered an ordinary use of the copyrighted work, then such videotaping can never be a fair use even if subsequent application of the four fair use factors warrants a fair use finding. To avoid defeat at this threshold stage, defendants must prove that vide-

preliminary injunction enjoining defendants from further videotaping until the legality of the copying was determined. 447 F. Supp. 243 (W.D.N.Y. 1978).

159. 447 F. Supp. at 252.

160. See *supra* notes 83-86 and accompanying text.

161. In fact, most courts do not specifically address the productive use/intrinsic purpose dichotomy but analyze the four use factors instead.

162. See text accompanying notes 83-86.

otaping for educational purposes is not an ordinary use and is in some sense a productive use,¹⁶³ or that the traditional fair use doctrine must now be discarded in light of overriding public interests.¹⁶⁴ Because the court in *Universal City Studios, Inc. v. Sony Corp.*,¹⁶⁵ recently found videotaping in certain contexts a use of the copyrighted television program for its intrinsic purpose,¹⁶⁶ a court must somehow distinguish this decision in order to permit teacher videotaping.

In *Sony*, the Ninth Circuit held that videotaping for subsequent home viewing was not a productive use of the copyrighted television program.¹⁶⁷ A teacher's videotaping of a television program for subsequent classroom viewing, however, is arguably a productive and not an ordinary use of the television program.¹⁶⁸ By showing a videotape of an educational program in the classroom, a teacher is fulfilling part of his responsibility to educate students.¹⁶⁹

The reasons behind taping for home viewing and taping for classroom viewing are significantly different. Though convenience is im-

163. The productive use theory extends beyond Seltzer's intrinsic purpose theory. One commentator suggests that a seemingly ordinary use of the copyrighted work might in some sense be a productive use and thus possibly a fair use. Productive use implies that the work is used for purposes other than those for which the work, in its original form, was intended. See Note, *Universal City Studios, Inc. v. Sony Corporation of America: "Fair Use" Looks Different on Videotape*, *supra* note 16, at 1012-14.

164. Even if videotaping television programs for subsequent classroom viewing is a use of the program for its intrinsic purpose, and thus possibly not a fair use, twentieth century technology arguably warrants an expansion of traditional fair use. See *Impact of Information Technology on Copyright Law in the Use of Computerized Scientific and Technological Information Systems*, TECHNOLOGY AND COPYRIGHT 24 (Bush & Dreyfus, eds. 1979). Consistent with the congressional directive, courts must apply flexibly the fair use doctrine. See *supra* notes 129 & 130 and accompanying text. Perhaps, then, courts should disregard Seltzer's ordinary use theory in the case of videotaping.

165. 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).

166. See *id.* at 970.

167. See *supra* note 166. Under the Seltzer theory, the court would not have had to consider the fair use factors because it would have necessarily concluded that the use cannot be fair if it is not productive. See L. SELTZER, *supra* note 6, at 24. Nevertheless, the court proceeded to examine each fair use factor and concluded that home videotaping was not a fair use. 659 F.2d at 972-75.

168. In a sense, a classroom viewing of the videotape of a television program is an ordinary use, if the ordinary use of a television program is merely viewing the program. The fact that a student views the videotape just as he would view the original broadcast, however, should not determine whether the use is fair; the classroom viewing serves an entirely different purpose than home viewing. Classroom viewing serves educational purposes; the viewing of the original broadcast serves entertainment purposes.

169. Teaching requires access to a wide variety of materials, including television programs. *Hearings on S. 1361 Before the Subcomm. On Patents, Trademarks, and Copyrights of the Senate*

portant to both users, it is of primary importance to the home viewer¹⁷⁰ and only of ancillary importance to the teacher. Entertainment is the major function of home videotaping, but the function of videotaping for classroom viewing is clearly educational in nature. Students do not view the videotape shown in the classroom merely for its entertainment value, as they would if they were watching the program at its original broadcast time without teacher direction. In a sense, the teacher is like a second author.¹⁷¹ He recognizes the educational value of a particular television program and incorporates the videotape into his own original work, the classroom lesson.¹⁷² This argument is subject to attack, however, because the teacher usually incorporates the entire television program into the daily lesson.¹⁷³

The traditional intrinsic purpose theory, therefore, may not accommodate videotaping for classroom use. Indeed, reference to fair use as "never having involved"¹⁷⁴ the reproduction of a work for its intrinsic purpose, relies on late nineteenth and early twentieth century development of the doctrine. Rigid application today of fair use principles developed during a period unaware of videotape technology immobilizes the fair use doctrine. If courts are to apply fair use flexibly, they should reconsider the productive use/intrinsic purpose dichotomy—or at least

Comm. on the Judiciary, 93d Cong., 1st Sess., 189 (1973) (statement by Alfred Carr, Legislative Consultant, NEA).

One educator suggests a list of five factors which distinguishes a good teacher.

- (1) The good teacher takes advantage of television productions that have instructional value in his/her classroom;
- (2) The good teacher previews a given television program before using it with his/her class;
- (3) The good teacher prepared himself/herself and prepares the class in advance of the program;
- (4) The good teacher presents the program under the best psychological and environmental circumstances possible. (Among other things this means that the teacher must use the program at the time needed and not at the time scheduled by the television station).
- (5) The good teacher reshows the program in whole or in part when necessary to recheck on areas of disagreement or to clarify issues which were not clear to students in their initial viewing.

Hearings on Off-Air Taping for Educational Use, *supra* note 19, at 67-68 (statement by August W. Steinhilber, Ad Hoc Committee on Copyright Law).

170. 659 F.2d at 970.

171. See L. SELTZER, *supra* note 6, at 24.

172. See *Hearings on Off-Air Taping for Educational Use*, *supra* note 19, at 75.

173. Professor Seltzer argues that reproduction of a copyrighted work in its entirety is always use of the work for its intrinsic purpose and therefore not a fair use. See L. SELTZER, *supra* note 6, at 24.

174. *Id.*

accord it less weight than the traditional intrinsic purpose theory suggests—because the public interest in education might warrant even the ordinary use of a copyrighted work.

Undoubtedly, videotaping for classroom viewing is a use worthy of protection.¹⁷⁵ The purpose of a teacher's videotaping ostensibly is to promote learning.¹⁷⁶ The nature of education and instructional methods have changed dramatically.¹⁷⁷ Today, teachers find tremendous educational value in various methods of instruction.¹⁷⁸ If a picture is worth a thousand words then a series of visual images must be invaluable.¹⁷⁹ The subtleties of a carefully selected television program can have a powerful impact upon a student and leave an impression unobtainable from a mere lecture on the facts of the television program. Few would argue that the purpose behind videotaping for classroom viewing is not laudable.

2. *Nature of the Work*

Most television programs broadcast by the major commercial networks are works of entertainment value, intended for dissemination to a diverse viewing public. An insightful teacher, however, might see significant educational value in programs offered solely for entertainment purposes as well as in multipurpose programming.¹⁸⁰ Although a television program might not be considered educational at first glance, it might have latent educational value to the discerning teacher.¹⁸¹ Moreover, television programs are rarely available for immediate classroom viewing unless reproduced by a videorecorder.¹⁸² Teachers have

175. Many courts have so noted. See, e.g., *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d at 970; *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. at 1174.

176. Obviously, a teacher who owns a videorecorder can just as easily record a television program for personal home viewing; however, the classroom presentation is strictly for educational purposes.

177. The school has become more of a concept than a place. *Hearings on H.R. 223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., 275 (1975) (statement of James A. Harris, President NEA). See generally L. CHEMIN, *THE TRANSFORMATION OF THE SCHOOL* (1961); D. HEATH, *HUMANIZING SCHOOLS* (1971).

178. See generally W. WITTICH & C. SCHILLER, *INSTRUCTIONAL TECHNOLOGY: ITS NATURE AND USE* 3-41 (5th ed. 1973).

179. See *Hearings on Off-Air Taping for Educational Use*, *supra* note 19, at 181-84.

180. See *id.* at 152.

181. *Id.*

182. There is currently no educational market for most programs on television. *Id.* (testimony of Charles W. Adams, Supervisor of Media Services for Phoenix Union High School District,

no control over a network's broadcast schedule; many programs that have great educational potential are aired at times when few, if any, students can view them.¹⁸³ Moreover, there is little post-broadcast market for television programs;¹⁸⁴ even if teachers could purchase television programs for subsequent classroom viewing, the "teachable" moment—when the program would provide the most relevant and effective supplement to the curriculum—may have passed¹⁸⁵ long before the videotapes arrive.¹⁸⁶ Consideration of this factor suggests that the nature of television programs, when used by teachers in the above fashion, poses no bar to a finding of fair use.

3. *Substantiality of the Copying*

Although the teacher usually videotapes the television program in its entirety, the substantiality of the copying should not itself preclude a fair use defense. Though verbatim copying historically has precluded a

Phoenix, Ariz.). Moreover, the few prepared videotapes are prohibitively expensive for the average school. *Id.* at 74 (testimony of Howard Hitchens, Executive Director, Association for Educational Communications and Technology).

183. One educator observes several impediments to students viewing the program at home:

- (1) Students cannot view it at home in the evening because other family members either want another program or do not want to watch an educational program;
- (2) Many students are regularly employed and not at home when the program is aired;
- (3) Extra-curricular activities, such as sports require students to participate in the evenings.

Id. at 75 (testimony of Howard Hitchens, Executive Director, Association for Educational Communications and Technology).

184. *See supra* note 182.

185. "Usually it will be impossible for a teacher to obtain a copy of a television broadcast from a producer for showing to students within a day or so of the airing, although that may be the only way to take advantage of the impact of the program." *Hearings on Off-Air Taping For Educational Use, supra* note 19, at 68. Further, excellent programs are aired during the first semester and the subject may be taught in the second semester. *See id.* at 75 (testimony of Howard Hitchens, Executive Director, Association for Educational Communications and Technology).

186. One factor included in the House fair use guidelines for educational copying of printed materials was "spontaneity." *See* HOUSE REPORT 1476, *supra* note 1, at 69, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5682. Congress indicated that "spontaneity" justified a teacher making multiple copies of printed materials for classroom use. *Id.* The Report defines "Spontaneity" as:

- (i) The copying is at the instance and inspiration of the individual teacher and
- (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Id. The "spontaneity" argument similarly can be extended to accommodate the teacher's need to do their own videotaping.

finding of fair use¹⁸⁷ courts recently have suggested that verbatim copying does not necessarily defeat the fair use defense.¹⁸⁸ Even in the *Crooks* decision, the district court rejected the plaintiffs' contention that off-the-air videotaping constitutes such a substantial copying that it could never fall within the fair use doctrine.¹⁸⁹

4. *Economic Effect of the Copying*

Broadcast representatives concede the good intentions of educators and recognize the value of television programs as instructional tools.¹⁹⁰ They argue, however, that absent a licensing agreement, such videotaping should be disallowed because of the harm to their potential market for the original program.¹⁹¹ Obviously, it is impossible to prove the actual harm to a copyright owner's market from the single showing of a videotape to a classroom of students.¹⁹² Even probable harm is difficult to ascertain.¹⁹³ Because television companies currently have no post-broadcast educational market for most television programs, computing damage to the copyright plaintiff is practically impossible.¹⁹⁴ One method of proving probable economic harm, however, is by determining whether the copied work fulfills the same function or serves the

187. See *supra* note 104 and accompanying text.

188. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

189. 542 F. Supp. at 1179.

190. See *Hearings on Off-Air Taping For Educational Use*, *supra* note 19, at 95 (statement of John McGuire, Executive Secretary Screen Actors Guild).

191. See *id.* at 39 (statement of James Popham, Assistant General Counsel, National Association of Broadcasters). Mr. Popham concedes, however, that the market for educational uses of broadcasts "barely exists at the present time." *Id.*

192. The argument of broadcast representatives is based on speculation. See *id.*

193. See *Hearings on Off-Air Taping For Educational Use*, *supra* note 19, at 150 (testimony of Charles W. Adams, Supervisor of Media Services for Phoenix Union High School District, Phoenix, Ariz.); *id.* at 74 (testimony of Howard Hitchens, Executive Director, Association for Educational Communications and Technology); Note, *The Legal Problems of Video-Cassettes and Audio-Visual Discs*, 23 BULL. COPYRIGHT SOC'Y 152, 154-57 (1976). Recall, however, that Nimmer argues that copyright plaintiffs need not prove actual harm. They must only show some interference with their market for the original; the burden then shifts to the defendant to prove that the plaintiff has not been significantly harmed. See M. NIMMER, *supra* note 12, at § 13-65 to -72.

194. The cumulative impact test applied by the *Sony* court is inapposite here. In *Sony*, the Ninth Circuit observed that the cumulative effect of individual home videotaping of television programs would be to severely interfere with the plaintiff's rerun market for their television shows. 659 F.2d at 972. In the educational context, however, there can be no harmful cumulative impact of individual classroom copying when there is no educational market for the taped programs.

same market as the copyrighted work.¹⁹⁵

In one sense, the videotape viewed by students serves as a substitute for the copyrighted television program because it replaces the students' lost opportunity to view the program when it was originally aired. In this sense the tape fulfills a convenience purpose. If this were the only reason for the copying, the videotaping undoubtedly would not be a fair use. The teacher's use of the videotape, however, goes beyond merely replacing the students' lost viewing time. It is part of an instructional program designed to maximize students' learning. The reproduction, therefore, serves a different market than the original broadcast. The intended market for the original is the home viewer; the market for the teacher's videotape is the student viewer. The function of the original broadcast is to entertain; the function of the videotape is to educate. Application of this functional test demands a fair use finding.

Assuming *arguendo* that subsequent student viewing of the videotaped television program might harm the television industry,¹⁹⁶ such harm is indirect¹⁹⁷ and justified by the overriding public benefit derived from the videotaping. One commentator distinguishes cases in which the detrimental effect of the copying imperils the existence of an enterprise from cases in which the unauthorized copying merely limits the profits of a still profitable business.¹⁹⁸ Notwithstanding the minimal impact of teacher videotaping, the television industry most likely will thrive and prosper. It is therefore unlikely that videotaping by teachers for later use in the classroom will reduce the television industry's economic incentive to create television programs. If the creator's economic incentive is not jeopardized and the public has an interest in the videotaping, the courts should find the use fair. Even if the economic incentive is marginally reduced, the television industry justifiably may have to bear this harm in light of the overriding benefit to society that would result from videotaping for classroom use.¹⁹⁹ Congress should

195. See *supra* notes 110-14 and accompanying text.

196. Admittedly, the teacher's videorecording will replace any videotape or videodisc created by the copyright owner for distribution to an educational market. However, this market is virtually nonexistent. See *Hearings on Off-Air Taping for Educational Use, supra* note 19, at 65.

197. See *supra* note 122 and accompanying text.

198. *Id.*

199. It is important to remember that any fair use analysis involves a balancing process. See *supra* note 69 and accompanying text. Therefore, it is not inimical to copyright law that the copyright owner suffer some economic detriment, if the public benefits from the allegedly infringing-

perhaps heed the cry of television representatives and implement some type of licensing scheme.²⁰⁰ In the meantime, however, courts are responsible for applying existing law—the fair use doctrine.

CONCLUSION

Society demands two things from the copyright scheme: that copyright owners will receive appropriate economic rewards for their work and that the public will have access to these works.²⁰¹ The fair use doctrine recognizes that certain uses unanticipated by the copyright scheme will be fair, notwithstanding any reduction in the author's economic incentive to create, because they further the progress of the arts and sciences. Until Congress decides either to modify the fair use doctrine, exempt heretofore unauthorized uses, or compel licensing agreements, courts will continue to resolve conflicts between copyright owners and unauthorized users of their works. Balancing these interests, however, requires courts to consider that such interests are not static; change in technology has meant that the interests of authors and users have necessarily changed since the fair use doctrine first emerged. Cognizant of such change, courts thus far have stretched the fair use doctrine to accommodate unanticipated uses of copyright works. Some commentators argue that this expansion has attenuated fair use.²⁰² Yet Congress has reiterated the importance of fair use as a flexible judicial tool.²⁰³

Faced with the dilemma of destroying the force of fair use or condemning admittedly laudable activities such as videotaping for instructional purposes, courts are forced to decide the issue before Congress legislates a solution. As this Note demonstrates, application of the traditional fair use factors suggests that such videotaping is a fair use, having first cleared the productive use/intrinsic purpose hurdle.

ing use. *See supra* notes 28-29 and accompanying text. Absent a showing that a teacher's videorecording of a television program for use in classroom exercises will inevitably extinguish the economic incentive of the copyright owner, the ultimate goal of public access to copyrighted works, to promote learning, need not yield to the interests of the copyright owner.

200. A compulsory licensing scheme was established for cable television. 17 U.S.C. § 111 (1976 & Supp. V 1981). Similar licensing schemes exist between television companies and educational institutions for distribution of public affairs broadcasts to schools. *See Hearings on Off-Air Taping for Educational Use, supra* note 19, at 45 (statement of Joe Bellon, Columbia Broadcasting System).

201. *See supra* notes 28-32 & 40-41 and accompanying text.

202. *See supra* note 72.

203. *See supra* note 29 and accompanying text.

Courts might be hesitant to follow the liberal fair use analysis posited in this Note. Until Congress provides a better solution, however, an expanded fair use doctrine can best accommodate the interests of copyright owners and users.

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