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COMMENT

THE RODNEY KING BEATING — BEYOND FAIR USE: A BROADCASTER’S RIGHT TO AIR COPYRIGHTED VIDEOTAPE AS PART OF A NEWSCAST

I. INTRODUCTION

It was a typical day in a television newsroom, just hours before a newscast. Deadlines were fast approaching. The producer, as well as an assortment of writers and editors all hurried through their routines deciding what stories would be included in the newscast and how each story would be presented. The producer sat at her computer, reading wire copy and trying to figure out what stories would be aired. She was agitated, tense, and visibly uncomfortable. There was a gang shooting on the southside, a fire up north — what to lead with? Should the reporter be live at the scene?

Police scanners, fire scanners, a dozen televisions tuned to local stations, satellite feeds, incoming video signals from remote crews all seemed to grow louder as airtime neared. Controlled chaos. Then, someone screamed “look at the satellite feed” and the newsroom stopped cold.

It was the first look at the graphic video of a black man being beaten by several white cops. It was on a satellite feed coming from an affiliated station in Los Angeles.

The producer shouted; “we’ve got to use this video. Call L.A. — find out what’s going on! We need to know who this guy is and when this tape was shot!” It was now minutes before air time. An editor threw a tape into a recorder. The newsroom watched. The assignment manager, unable to reach the Los Angeles station, yelled across the room; “I don’t know who’s tape this is. I don’t know the whole story — it looks like a black/white thing. It’s too hot to run right now, we’ve got to wait until we know more.”

Silence. The tape was hot, replete with racial implications. The producer knew, regardless of the specific details, it was a huge story. “Go
with it. It may be an arrest gone bad or the most blatant case of police brutality we've ever seen, but it's news! We'll have every minority group calling us — it'll make people go nuts! Every station in the country's got it and is going to run it. We're leading with it!"¹

On March 4, 1991, this scene was played out in hundreds of television newsrooms across the country. And, a piece of videotape, recorded by a man who just happened to be looking out of his apartment window at the time Rodney King was being arrested, became one of the most influential and widely seen images in television history.²

Even though the above example of how television news operations gain access to video and audio material is quite dramatic, the newsroom scene and the decision making process it illustrates is typical. Every day, news managers must decide what is the important news of the day. Once they decide what stories they must tell, they must also figure out how to tell those stories effectively.

Choosing what stories to air and deciding how to tell them is not an easy task. Broadcast journalists are constantly bombarded with information. Computer databases are continuously updated with information provided by wire services.³ Video and audio material comes into the newsroom from a myriad of sources.⁴ There is a lot of material from which to choose. Unfortunately, those choices must be made quickly. Often, news managers must make decisions about the content of their newscasts before they have sufficient time to fully consider the legal

¹. The account of newsroom activities leading to the airing of the videotape of the Rodney King beating comes from the personal recollection of the writer who is a television news editor by trade. The facts were corroborated by other industry professionals including Paul M. Davis, News Director for WLVI-TV and Amy Burkholder, Executive News Producer for WGN-TV. The author would like to thank Julian Herzfeld without whose support, law school would not be possible.

². The videotape, recorded by George Holliday, became the basis of several lawsuits and subsequently sparked devastating riots in Los Angeles. The videotape was also the subject of copyright infringement litigation. See Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993).

³. A typical television news operation subscribes to at least one international wire service, such as United Press International or Associated Press. Local, regional and specialty wire services (sports and financial news services for example) are also available.

⁴. Some of the more common sources of audio and video material include: in-house camera crews employed by the local television station; networks (ABC, CBS, NBC, CNN, and FOX) which supply programming and news material to their owned and operated stations as well as allied stations (with whom the network has contractual relations); affiliates which are independent services or groups of commonly owned independent (not network related) stations that supply material, usually via satellite, under contract; and independent stringers who are commercial, free-lance news suppliers (usually sole proprietors who own professional, broadcast quality cameras and other videotape recording equipment).
ramifications of those decisions. For example, many news managers decided to air the videotape of the Rodney King beating before they knew who actually owned the videotape. The videotape was news — it was socially important and many news managers felt compelled to get it on the air as soon as possible. So, in many instances, news managers did not obtain permission from the videographer before they aired the tape. This lead to charges that the videographer’s copyright was violated.

Copyright or freedom of the press — broadcasters may need to make the choice. There may be occasions when news managers feel an obligation to exercise their First Amendment right to inform the public about a particular news event and feel compelled to use unauthorized material in order to tell that story effectively. Thus, on occasion, broadcasters may intentionally violate copyright law by airing someone’s videotape without authorization. In order to accommodate the broadcaster’s First Amendment right or obligation, the law has permitted the press to make some reasonable yet unauthorized uses of material that would otherwise be protected under copyright law through what has become known as the Fair Use Doctrine.

5. Interview with Paul M. Davis, News Director for WLVI-TV, Past President of the Radio-Television News Directors Association, and former News Director for WGN-TV and WCIA-TV, in Chicago, Illinois (Oct. 21, 1993).
6. Id.
7. Id. See also International News Service v. Associated Press, 248 U.S. 215, 235 (1918) (stating “[t]he peculiar value of news is in the spreading of it while it is fresh”).
8. U.S. CONST. art. I, sec. 8 gives Congress the power to grant authors and inventors exclusive rights to their works. This constitutional grant has been embodied in a series of Copyright Acts. Copyright is defined as “an intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a specified period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.” BLACK’S LAW DICTIONARY 336 (6th ed. 1990).
10. While the Constitution grants freedom of the press and expression, see infra note 11, many journalists feel that because they are in a position of public trust, they not only have a right to relate the news, but have an obligation to do so. Interview with Amy Burkholder, Executive News Producer for WGN-TV, in Chicago, Illinois (Oct. 21, 1993).
11. The Constitution states; “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I.
12. See Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) (asserting that the First Amendment guarantees a right to gather, publish, and distribute a “robust variety of information”).
14. See infra notes 47 - 81 and accompanying text (explaining the current state of copyright law).
15. Davis, supra note 5.
16. Fair use is “a privilege in others than the copyright owner to use the copyrighted material in a reasonable manner without the owner’s consent, notwithstanding the monopoly granted to the owner.” BLACK’S LAW DICTIONARY 598 (6th ed. 1990). The Fair Use Doctrine was codified in 1976 as 17 U.S.C. § 107.
The Fair Use Doctrine has traditionally provided news organizations with a limited defense to a charge of copyright infringement. Nevertheless, emerging technology has complicated the application of the Fair Use Doctrine to broadcast news. The recent developments in satellite and microwave transmission technology as well as increased use of videotape (including home video) have allowed broadcasters greater access to material, access to more types of material, and provided the means to disseminate this material faster and to a wider audience than ever before. Thus, the nature of 'the press' has changed beyond what was likely envisioned by the framers of the Constitution or the drafters of the most recent version of the Copyright Act.

More information is now disseminated by more television news outlets than in the past, and the Fair Use Doctrine may not provide broadcast journalists with protection sufficient to maintain this increased information flow. However, a recent district court decision suggests that a "First Amendment Exemption" may provide broadcasters with a greater measure of protection by allowing them to air socially important material as part of a newscast.

19. Dan Berkowitz, Assessing Forces in the Selection of Local Television News, 35 J. BROADCASTING & ELECTRONIC MEDIA 245, 246 (1991). Professor Berkowitz reasoned that "the advent of microwave and satellite news-gathering technology has liberated rather than constrained television journalists, allowing them a greater freedom to gather news in distant locations or at times closer to the start of a newscast." Id.
21. RALPH L. HOLINGER, MEDIA LAW 422 (2d ed. 1991). News and information of public interest is not only provided by 1,450 local television stations; 675 VHF stations (operating on channels 2 - 13) and 775 UHF stations (operating on channels 14 - 69), but cable outlets such as CNN, C-Span, FNN, and CNBC as well. Id.
23. Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993). The plaintiff in this case was George Holliday, the man who shot the videotape of the Rodney King beating. George Holliday charged copyright infringement against five defendants; CNN, ABC, NBC, CBS and KTLA. The defendants were granted summary judgment by Judge Irving Hill. Id. Judge Hill did not issue a written opinion in this case. However, on June 10, 1993, he announced his tentative finding from the bench and adopted these findings as his final judgment on June 11, 1993. Id. Transcript of June 11 at 99. George Holliday appealed. But in May 1994, after the appeal was filed and before oral arguments began, the case was settled. The appeal was dismissed on June 9, 1994.
24. Id. Transcript of June 10 at 108.
25. Id.
Recognition of this First Amendment Exemption may have great impact on the news media and it may well expand the limits of what is considered acceptable news-gathering practice. In addition, it may have a profound effect on what material a broadcaster may choose to incorporate into a newscast and by what means that material may be obtained.

This comment will analyze whether this First Amendment Exemption is an expanded view of the Fair Use Doctrine or an alternative defense. This comment will focus on three areas. First, it will analyze the mechanics of television news and the current application of the Fair Use Doctrine to copyrighted material incorporated into a newscast. Second, this comment will examine possible future trends — are we moving toward recognition of an expanded view of the Fair Use Doctrine or of a new First Amendment Exemption defense? And third, this comment will examine the limits of the First Amendment Exemption defense and offer some possible solutions to the constitutional conflict between copyright and free press.

II. BACKGROUND

A. TELEVISION NEWS AND THE NEWS GATHERING PROCESS

The fundamental purpose of television news is to stimulate debate, educate, inform, challenge, and touch the viewer emotionally and viscerally. In order to achieve this purpose, the broadcaster must engage the viewer and motivate him to watch. Accordingly, the broadcaster must present an informative, compelling, and entertaining newscast. And since viewer interests are diverse, so must be the information contained in a newscast. Thus, a newscast is made up of many separate news stories each containing information and exemplifying video and audio elements.

26. Davis, supra note 5.

27. Transcript of June 10 at 111, Holliday, (No. CV 92-3287 IH). Judge Hill obviously knew the potential impact of this decision. He stated: "I do not lightly make that kind of holding. I would confine this First Amendment exception to very exceptional, cataclysmic, very, very vital situations or depictions where words cannot serve the democratic purpose.” Id.

28. Davis, supra note 5; Burkholder, supra note 10. See also New York Times v. US, 403 U.S. 713, 717 (1971) (holding that the role of the press is to “bare the secrets of government and inform the people”).

29. Davis, supra note 5.

30. Id. The grand purpose of television news and the quest for ratings are inexorably entwined. There is a circular logic to this concept — there must be enough viewers to produce sufficient advertising revenues to provide the resources necessary to produce an effective newscast that will draw in viewers. Id.

material obtained from a variety of sources.\textsuperscript{32}

1. The Mechanics of News Gathering

A broadcast news operation may obtain video and audio materials from in-house camera crews, networks,\textsuperscript{33} affiliates,\textsuperscript{34} commercial news stringers,\textsuperscript{35} public relations firms, private individuals, and even competitors.\textsuperscript{36} A number of factors influence a broadcaster's decision to air a particular story.\textsuperscript{37} These factors include: news judgment (what the broadcaster thinks is important or newsworthy);\textsuperscript{38} industry competition; visual impact; deadlines; and economics.\textsuperscript{39}

2. The Economics of Producing a Newscast

To a large degree, economic factors\textsuperscript{40} govern broadcasters' decisions

\textsuperscript{32} Typically, an hour newscast contains 45 - 50 separate news stories and 60 - 70 pieces of videotape having an aggregate air time of approximately 25 minutes. Information regarding the amount of videotape used in a newscast was obtained through the author's own statistical analysis. The data came from an examination of daily newscast documents from a major market independent station (WGN-TV in Chicago). The evening newscast rundowns (the roadmap of the news cast) and video source data were compared over a 30 day period (September 1 through September 30, 1993). The data was assessed based on the number of stories and air time. The total amount of videotape material was broken down by source and percentages were then calculated. The results: 62\% of all videotape material used came from in-house camera crews; 28.5\% from affiliates; 5\% from stringers; 3\% from public relations firms or other sources that supplied material for free; 1\% from other, non-affiliated television stations; and less than 1\% from amateur videographers.

\textsuperscript{33} See explanation supra note 4.

\textsuperscript{34} Id.

\textsuperscript{35} These free-lance camera crews have been described as the "paparazzi of the underworld." Steven Braun, Video Crews Sell a Vision of Nightly Street Crime: Risk-taking Freelance Cameramen Feed TV Stations & Help Shape Public's Image of Urban Violence, L.A. Times, Dec. 19, 1991, at Al. News stringers often operate at night and "race from crime scene to crime scene until dawn, capturing raw footage of the night's horrors for sale to television news shows the next day." Id. See also definition supra note 4.

\textsuperscript{36} Sometimes competing stations have a reciprocal tape trading relationship whereby one station supplies videotape to another under certain circumstances — in the event of equipment failure for example. Interview with Roger DeWert, Assignment Editor for WGN-TV News, in Chicago, Il. (Oct. 25, 1993). Often tape is supplied on the condition that the originating station has a right of first airing. Id.

\textsuperscript{37} Berkowitz, supra note 19 at 249.

\textsuperscript{38} Burkholder, supra note 10. See also Davis, supra note 5. Newsworthiness is a difficult concept to define. A determination that an event is newsworthy often depends on factors such as relevance, social importance, local impact, emotional or visceral impact, economic impact and entertainment value. Id.

\textsuperscript{39} Berkowitz, supra note 19 at 245, 249.

\textsuperscript{40} A newscast is expensive to produce. A typical large market independent station (defined, for the purposes of this comment as a station that is not affiliated with one of the three major networks: ABC, CBS, or NBC) has an average monthly news budget of approximately $600,000. Interview with Gloria Brown, Business Manager for WGN-TV, in Chi-
about what news items will be included in a newscast. Broadcasters often use a cost/benefit analysis in determining what story will air; how important is the story and how much is a broadcaster willing to pay to tell it effectively? Costs of obtaining news footage from sources outside the local station range from zero to hundreds of dollars. Some sources give permission and get paid — frequently pursuant to a standard licensing agreement. Other sources voluntarily offer material free of

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41. Berkowitz, supra note 19 at 249.
42. Id. Professor Berkowitz reasoned that "as long as a media organization strives to remain financially viable, resources will be constrained to some extent, so that news selection results from the precarious balance between news judgments and resource allocations." Id. at 245.
43. A television news operation will generally pay up to $150 for use of an individuals videotape (regardless of whether that individual is a commercial stringer or an amateur home videographer). See Transcript of June 10 at 103, Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993) (stating that the television industry standard fee for use of stringer videotape is "between nothing and $150"). The average stringer fee is around $100. Sylvia Rubin, The Home Video News Amateurs' Tapes Get on TV, San Francisco Chron., Apr. 3, 1991, at B3. For example, WGN-TV pays stringers a standard $125 fee.
44. Typically, television stations utilize both exclusive and non-exclusive standard licensing agreements. In the case of WGN-TV, both types of agreements are used, but the standard fee of $125 remains the same regardless of whether there is an exclusive agreement in force. Brown, supra note 40.

WGN's Nonexclusive News Video Agreement provides:

For valuable consideration, you grant WGN Continental Broadcasting Company (WGN-TV, Chicago) the right to broadcast the Video described below, which you have offered to WGN. WGN will have the nonexclusive right to edit and broadcast the Video over television or any other media and to license, exchange or otherwise make the Video available to third parties for their use as television news material. You represent and warrant to WGN that you are the sole owner of the Video, and that you have the right to grant these rights to WGN. The rights granted in this agreement are irrevocable and will continue for the duration of the copyright of the video.

WGN's Exclusive News Video agreement provides:

For valuable consideration, you agree to transfer and sell to WGN . . . all rights to the Video described below, which you have offered to sell WGN. The Video described below, commissioned as a contribution to WGN's news programs, will be
And, sometimes material obtained from others is used without permission or compensation. A broadcaster does not have unlimited resources. Therefore, the bottom line often prevails — the cheaper the footage, the more likely it will air.

Economic considerations aside, a broadcaster has an interest in gaining broad access to video and audio material in order to achieve his purpose of educating and informing the public. However, a videographer usually has an interest in profiting from his creative work. How to protect these, at times, conflicting interests raises the subject of copyright law as applied to television news.

**B. Copyright Law**

Copyright is a property concept that protects certain creative works by granting a monopoly to creators, for a limited period of time, over the uses that can be made of that protected work. Copyright law establishes the conditions under which creators of expressions can protect their work from, among other things, unauthorized reproduction. The origins of copyright law date back to 17th century England. The basis of copyright law in the United States is found in the federal Constitution. The drafters of the Constitution realized that inventors, artists and other creators had a right to derive benefit from their efforts. Thus, they provided for that right in Article I, section 8, and expressly considered a work made for hire. Upon signing of this Agreement, the Video will become the exclusive property of WGN. You represent and warrant to WGN that you are the sole owner of the Video, and that you have the right to grant these rights to WGN. The rights granted in this agreement are irrevocable.

45. Sources may be motivated to give video material to a broadcaster because of the public relations value of having their tape aired. Davis, supra note 5. They may have personal motives such as community mindedness or personal recognition. Id. For example, George Holliday’s motivation getting his videotape of the Rodney King beating on the news was because he just wanted to do the right thing. Transcript of June 10 at 48, Holliday, (No. CV 92-3287 IH). In Holliday, the plaintiff just wanted his tape aired and “didn’t look on it as a way to make any money but as a public service.” Id. See also telephone interview with Vincent Cox, Attorney for KTLA in Holliday v. CNN (Oct. 9, 1993); and infra notes 102 - 133 and accompanying text describing the facts of the Holliday case.

46. Davis, supra note 5.

47. See supra note 8 (defining copyright).

48. Holsinger, supra note 21 at 552.

49. See Baird, supra note 22 at 492. Copyright originally began as a form of censorship enforced by the Star Chamber Decree enacted by Charles I. Id. The Star Chamber Decree was modified by the English Licensing Act of 1667 and later by the Statute of Anne in 1709, resulting in a doctrine similar to that later adopted in the United States. Id.


51. Holsinger, supra note 21 at 552. Moreover, because of their influence on society, inventors and artists deserve protection. Zechariah Chafee, Jr., Reflections on the Law of Copyright, 45 COLUM. L. REV. 503, 507 (1945). “Authors, musicians, painters are among the greatest benefactors of the race. So we incline to protect them.” Id.
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granted Congress the authority to promote science and art "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 52

The policy behind copyright law is twofold. 53 First, the law should protect the creator's property rights. 54 Second, and more importantly, the law should allow the public reasonable access to creative works in order to foster public debate, promote free speech, and advance science and the arts. 55 Thus, copyright law should seek a reasonable balance between individual rights and the public interest. 56 Congress has attempted to achieve this balance by enacting a series of Copyright Acts. 57 However, emerging technology can upset this balance — at times favoring the rights of the creator and at other times favoring the rights of the user. 58 For example, a computer software developer may include copy protection in his product, making it difficult for a user to copy, thus favoring the rights of the creator. On the other hand, satellites, computers, and videotape recorders make it very easy for one broadcaster to

53. Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990). In this comment, U.S. Court of Appeals Judge Leval (2d Cir.), acknowledged that copyright law is designed to protect the public, not just individual inventors and authors. Id. at 1107. "The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors." Id. at 1109. See also: Mazer v. Stein, 347 US 201, 219 (1954) (stating that the philosophy behind the copyright clause "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors").
55. Id. In Sony, the Supreme Court stated: "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. ... the limited grant is a means by which an important public purpose may be achieved." Id. at 429. The Court further reasoned that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius ..." Id. See also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (reasoning that "[c]reative 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"); Fox Film Corp. v. Doyal 286 U.S. 123, 127 (1932) (stating that the policy behind copyright is not to reward the creator, but rather to safeguard the "general benefits derived by the public from the labors of authors").
56. Chafee, supra note 51 at 507. Professor Chafee asserted that "we must be sure that a particular provision of the Copyright Act really helps the author — that it does not impose a burden on the public substantially greater than the benefit it gives to the author." Id.
57. The first Copyright Act was adopted in 1790, the last in 1976. See Holsinger, supra note 21 at 552.
58. Mills, supra note 18 at 313.
copy and exploit another's video or audio material, thus favoring the rights of the user.

Technological change has been largely responsible for developments in copyright law. Technological change has been largely responsible for developments in copyright law. Successive Copyright Acts have attempted to keep pace with emerging technology and maintain a balance between owners' and users' rights. But, technological change usually outpaces legal developments. Thus, the rapid technological transformation of the television news industry may well exceed the bounds of current law.

1. The Current Copyright Act

The most recent version of the Copyright Act attempts to protect original expressions that are fixed in any tangible medium "now known or later developed". This requirement is important because once an expression is fixed in a form that can be communicated to others, it be-

59. Sony, 464 U.S. at 430. "From its beginning, the law of copyright has developed in response to significant changes in technology." Id.

60. Id. at 429. In Sony, the Supreme Court justified the repeated amendments to the Copyright Act on the ground that technological changes force the scope of copyright protection to be constantly re-defined. Id. Defining the scope of copyright protection "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of information, and commerce on the other hand. . . ." Id.

61. M. Ethan Katsh, The First Amendment and Technological Change: The New Media Have a Message, 57 GEO. WASH. L. REV. 1459 (1989). Professor Katsh reasoned that "[r]apid and complex technological change presents a significant challenge for the courts . . . [t]he rate of technological change has outstripped the ability of the law, lurching from one precedent to another, to address new realities." Id. at 1493 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1007 (2d ed. 1988)). Katsh concluded that "the rapid development and subsequent obsolescence of new technologies will lead to an expanded and more vigorous system of expression, but also to a less stable and coherent First Amendment framework." Id.

62. Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U.C.L.A. L. REV. 1180 (1970) [hereinafter Nimmer, First Amendment]. In this often cited article, Professor Nimmer reasoned that "technological advances such as photocopying machines, computers, and various forms of television . . . together with the public's increasing appetite for education and culture, requires a constant rethinking of the place of copyright and the proper scope of the first amendment within our burgeoning society." Id at 1204.


64. 17 U.S.C. § 102(a) (1993) defines the subject matter of copyright:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
comes vulnerable to unauthorized copying. The Copyright Act also delineates five exclusive rights that form the copyright holder's "bundle of rights:" the creator or copyright holder has the exclusive right to reproduce his work; create derivative works; distribute, sell, lease or loan copies of his work; perform his work; and publicly display his work. The creator or copyright holder may exercise or license each of these five rights separately.

However, if the copyright holder's rights were enforced without exception, the results would be absurd — strict application of copyright law would suppress creativity rather than encourage it. This is because all creative and intellectual works are built, at least in part, on foundations

1. Literary works;
2. Musical works, including any accompanying words;
3. Dramatic works, including any accompanying music;
4. Pantomimes and choreographic works;
5. Pictorial, graphic, and sculptural works;
6. Motion pictures and other audiovisual works;
7. Sound recordings; and
8. Architectural works.

Id. This section of the Copyright Act lists eight categories of expressions that are subject to copyright protection: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; sound recordings; and architectural works. Id. However, these categories are not exclusive. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) [hereinafter House Report]. The list of protected categories does not exhaust the scope of protected works. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. Id. The Copyright Act does not protect the ideas, principles or procedures embodied in the protected expression. 17 U.S.C. § 102(a) (1993). See also infra notes 82 and 311-315 and accompanying text (discussing the idea/expression dichotomy). Thus, the Copyright Act seeks to provide a flexible definition of the subject matter entitled to copyright protection. But, only time will tell if this definition is flexible enough to keep pace with emerging technologies.

65. Holsinger, supra note 21 at 559.
72. House Report, supra note 64. "These exclusive rights, which comprise the so-called 'bundle of rights', are cumulative and may overlap in some cases. Each of the five enumerated right may be subdivided indefinitely and . . . may be owned and enforced separately." Id.
73. Jay Dratler, Jr., Distilling the Witches' Brew of Fair Use in Copyright Law, 43 U. Miami L. Rev. 233,237 (1988). Professor Dratler reasoned that if the exclusive rights of copyright holders were to be "enforced without exception, cultural and intellectual life as we know it would grind to a halt." Id. at 237. For example, "[l]overs could not recite copyrighted poems. . . [t]eachers could not copy news reports of interest to their students . . . researchers could not copy scientific articles to build on the work of their predecessors." Id. at 238.
raised by others. "There is no such thing as a wholly original thought or invention." In addition, socially important intellectual activities, such as the reporting of news events, are "explicitly referential" — the significance of newsworthy events can only be related through direct attribution to the participants of the event.

Thus, to avoid the absurd results that may occur from the strict application of copyright law, courts have created three rules that permit some secondary uses of others' creative works. First, raw facts are not protected by copyright. Second, copyright protects only original expressions of ideas, not the ideas themselves. Third, notwithstanding the need to protect the creator's property rights, some reasonable yet unauthorized uses of copyrighted material are not only encouraged, but protected by the Fair Use Doctrine.

2. The Fair Use Doctrine

The Fair Use Doctrine permits one creator to borrow limited amounts of another creator's work without seeking permission. For over a century, courts have excused certain otherwise infringing uses of

74. Chafee, supra note 51 at 511. "The protection given the copyright-owner should not stifle independent creation by others." Id. Professor Chafee eloquently stated that "[t]he world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author has a complete monopoly of everything in his book..." Id.

75. Leval, supra note 53 at 1109. Judge Leval noted that "all intellectual creative activity is in part derivative." Id. "Each advance stands on the building blocks fashioned by prior thinkers." Id.

76. Id. Judge Leval explained that "philosophy, criticism, history, and even the natural sciences require continuous re-examination of yesterday's theses." Id.

77. Id. at 1116. Judge Leval insisted that "[q]uotation can be vital to the fulfillment of the public-enriching goals of copyright law." Id.

78. Leval, supra note 53 at 1109.


80. 17 U.S.C. § 102. The Copyright Act protects expressions, not ideas. Id. See also Feist Publications v. Rural Telephone Service, 499 U.S. 340, 341 (1991) (holding that a work is copyrightable only if the expression of its facts have been put together "in such a way that the resulting work as a whole constitutes an original work of authorship"); International News Service v. Associated Press, 248 U.S. 215, 235 (1918) (holding that "the news of current events may be regarded as common property", i.e., the ideas relating to news events cannot be copyrighted - only expressions of those ideas can be protected).

81. Leval, supra note 53 at 1110.

82. See the definition of Fair Use supra note 16.

83. Holsinger, supra note 21 at 562.
copyrighted material, when made for the purpose of scholarly research or comment, as reasonable or "fair" uses. The Fair Use Doctrine first gained judicial recognition in 1841, in *Folsom v. Marsh*. And, for over one hundred years, courts relied on the factors described in *Folsom* to limit the harsh effects which strict application of copyright law would have on the creative process.

In 1976, Congress codified the Fair Use Doctrine in 17 U.S.C. section 107 (section 107). Section 107 provides that the reasonable use of a copyrighted work for purposes such as research, criticism, or news reporting is not an infringement of copyright. Section 107 also provides guidelines for a court to use in determining whether a particular use is fair. The section enumerates four factors, distilled from the holdings of a long line of cases beginning with *Folsom*, that must be considered when making a "fair use" analysis:

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.

Thus, the Copyright Act establishes liability for copyright infringement, but leaves it to the courts to determine whether a particular use is "fair"
and therefore immune under section 107.91

3. Application and Enforcement of Current Copyright Law in the Television News Context

Rarely have the courts found a reputable news organization guilty of copyright infringement.92 As a result, newsroom managers often ignore copyright issues when deciding what stories to air and how those stories will be presented.93 Even if copyright concerns do arise, newsroom managers will often, at least temporarily, put those concerns aside in order to get the story on the air as soon as possible.94 Many newsroom decision makers prefer to air the material when it is "hot" and deal with any legal ramifications later.95 The reality is that a broadcaster must be caught using someone else’s material before he can be charged with copyright infringement.96 If he’s not caught, he does not need to invoke the Fair Use Doctrine or any other defense.

4. The Broadcaster's Dilemma

Deadlines in television news are notoriously tight. Often, a broadcaster may wish to use someone else’s videotape to tell a particular story but has insufficient time to seek permission from the creator or copyright holder.97 The broadcaster may have obtained the videotape from a satellite feed or other secondary source and may not know the creator’s or copyright holder’s identity.98 In this situation, under current law, the broadcaster has three options: (1) use the material in question and hope the Fair Use Doctrine supplies a defense; (2) try to tell the story without

91. Baird, supra note 22 at 510. The Fair use Statute was drafted to "reflect the state of judicial doctrine of 1976 but was expressly created in order not to limit subsequent interpretations ... In effect, Congress gave the courts free reign to define fair use." Id.
92. Holsinger, supra note 21 at 588. A prime reason why courts rarely hold against news organizations in copyright infringement suits is that effective enforcement is difficult. Id. There are thousands of potential infringers including local television stations, networks, and cable outlets. Id. at 422, 473. It is physically and economically infeasible to monitor every news outlet. Davis, supra note 5. Therefore, the broadcast industry has traditionally relied on self-policing based on the nebulous concept of journalistic integrity. Id.
94. Id.
95. Id. See also Davis, supra note 5.
96. Baird, supra note 22 at 516. The Fair Use Doctrine does not work in the broadcast news context because it ignores basic economic sense — the methods of enforcement are financially unworkable. Id. “The current fair use doctrine, as applied to news broadcasts ... results in economically driven 'law breaking' and economically inefficient 'law enforcement'.” Id.
97. Davis, supra note 5.
98. Id.
using the material in question; or (3) not air the story. Consequently, the broadcaster is faced with the dilemma of deciding whether to knowingly violate copyright law, substitute a less effective means of relating the information, or not tell the story at all — an option not in the public's best interest.

How should a broadcaster resolve this dilemma? Holliday v. CNN provides a timely vehicle for examining the application of current copyright law to television news.

C. Holliday v. CNN

On March 3, 1991, at about 12:30 a.m., the plaintiff, George Holliday, saw the police action against Rodney King. Holliday grabbed his home video camera and, from the balcony of his apartment, shot nine minutes and twenty-one seconds of videotape showing several police officers subduing and arresting King. Holliday was not a professional videographer — he was a plumber by trade. Approximately an hour and a half after taping the police action, Holliday attempted, but was unable, to contact CNN's Newshound program.

On March 4, 1991, Holliday telephoned Los Angeles television station KTLA and was told that the station was interested in seeing his tape and that he should bring the tape to the station. Compensation for use of Holliday's tape was not discussed during this phone conversation. Later that day, Holliday dropped the tape off at the station and again, nothing was mentioned regarding any money to be paid to Holliday by the television station. KTLA showed about ninety seconds of the Holliday tape during its 10:00 p.m. newscast — this was the first public airing of the tape. After the tape aired on KTLA's 10:00 p.m.

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100. 1 Melville B. Nimmer & David Nimmer, ON Copyright 72 (Release No. 33 1993) [hereinafter Nimmer, Copyright]. The late Professor Melville Nimmer saw the potential of censorship as an evil of great proportion. Id. Free speech is not only an end in itself, but a “safety valve against violent acts.” Id. “Though free speech is no guarantee against violence, it remains true that men are less likely to resort to violence to achieve given ends if they are free to pursue such ends through meaningful, non-violent forms of expression.” Id.
102. Id. Transcript of June 10 at 36.
103. Id.
104. Id.
105. Transcript of June 10 at 37, Holliday (No. CV 92-3287 IH). CNN's Newshound program exhibits events videotaped by amateurs who are paid by CNN for their tape. Id.
106. Id.
107. Id.
108. Id. at 38.
109. Transcript of June 10 at 38, Holliday (No. CV 92-3287 IH).
newscast, CNN (who is in an affiliate relationship with KTLA) asked for and received a satellite feed of Holliday's raw tape.\(^{110}\) CNN then telephoned Holliday seeking permission to air the tape.\(^{111}\) Holliday agreed to allow CNN to air the tape in exchange for the standard "Newshound" fee of $150.\(^{112}\)

On March 5, 1991, ABC and CBS contacted Holliday seeking permission to air the tape — neither network discussed money with Holliday.\(^{113}\) Holliday told both ABC and CBS they could air the tape, but that they had to get it from KTLA. Both networks then obtained copies of the tape.\(^{114}\) Later that day, Holliday met with news managers at KTLA and accepted a $500 check for the rights to the tape.\(^{115}\) In the meantime, NBC attempted but failed to contact Holliday.\(^{116}\) NBC then called KTLA and KTLA refused to give NBC authority to use the tape.\(^{117}\) NBC eventually contacted Holliday directly and agreed to pay him $500 for the use of the tape.\(^{118}\) By the morning of March 5, 1991, Holliday's tape had been transmitted via satellite several times. Hundreds of television outlets had access to those satellite feeds and many decided to incorporate the tape into their newscasts.\(^{119}\) Only CNN, NBC and KTLA had paid Holliday for the use of his tape.\(^{120}\) Yet, this tape was aired countless times by countless news organizations and would become perhaps the most famous and widely seen videotape in history.\(^{121}\)

On June 1, 1992, Holliday initiated a lawsuit claiming copyright infringement against CNN, KTLA, ABC, CBS, and NBC.\(^{122}\) The case never went to trial. On June 11, 1993 (the second day of a pre-trial hearing), Judge Irving Hill granted summary judgment in favor of all defendants on four alternative grounds: first, that the plaintiff had consented to each defendant's use of the videotape; second, that the plaintiff was estopped by his conduct from claiming copyright infringement; third, that each defendant was exculpated from liability under

\(^{110}\) Id. at 43.
\(^{111}\) Id.
\(^{112}\) Id.
\(^{113}\) Transcript of June 10 at 43, Holliday (No. CV 92-3287 IH).
\(^{114}\) Id.
\(^{115}\) Id. at 48.
\(^{116}\) Id.
\(^{117}\) Transcript of June 10 at 48, Holliday (No. CV 92-3287 IH).
\(^{118}\) Id. at 52.
\(^{119}\) Id. See also Davis, supra note 5; Cox, supra note 45.
\(^{120}\) Holliday, No. CV 92-3287 IH.
\(^{121}\) Id. at 110. See also Davis, supra note 5.
\(^{122}\) Transcript of June 10 at 59, Holliday (No. CV 92-3287 IH).
\(^{123}\) Id. at 69.
\(^{124}\) Id.
\(^{125}\) Transcript of June 10 at 69, Holliday (No. CV 92-3287 IH).
the facts of the case by the Fair Use Doctrine; and fourth, that the First Amendment precluded any copyright infringement recovery by the plaintiff against any of the defendants.

Judge Hill reasoned that because the public’s access to the videotape was of such great social importance, the news media’s First Amendment right to free access and expression superseded Holliday’s copyright. However, Judge Hill cautioned that this novel First Amendment defense should be limited to cases like Holliday where the only way the news media could tell the complete story of the Rodney King beating was by showing the videotape.

In both his fair use analysis and his reasoning behind the First Amendment defense, Judge Hill emphasized the fact that the subject matter in this case was of great social importance. The scope of the Fair Use Doctrine is wider, Judge Hill reasoned, when the “information conveyed relates to matters of high public concern.” In addition to the four statutory factors that go into a fair use analysis, public interest must also be considered. Therefore, Judge Hill determined that even if a defense based on fair use failed, an alternative defense based on a First Amendment Exemption should be recognized to allow the news media greater latitude to use available technology in reporting stories of great social concern. Clearly, Judge Hill invoked this novel First Amendment Exemption because he was not satisfied that existing law protected the right of the news media to report important stories.

The remainder of this comment will explore two points: first, the pros and cons of an expanded Fair Use Doctrine — one that includes the notion of public interest; and second, the application and limitations of a defense for copyright infringement based on a First Amendment Exemption.

126. Id.
127. Id.
128. Id. at 110.
129. Transcript of June 10 at 109, 110, Holliday (No. CV 92-3287 IH). Judge Hill stated that “no amount of words describing what went on, the idea of the beating, could substitute for the public insight gained through looking at the pictures, the film itself.” Id.
130. Id. at 92. Judge Hill asserted that “the film shot by the plaintiff dramatized in actual motion pictures, apparently for the first time in our history, what has been a consistent civic, moral and governmental problem for decades, the alleged mistreatment of minorities in our urban areas by police.” Id. at 110.
131. Id. at 92 (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)).
132. Id. at 93.
133. Transcript of June 10 at 111, Holliday (No. CV 92-3287 IH).
III. ANALYSIS

Current law does not adequately protect the rights of the press to report news using available technologies. This legal inadequacy is largely due to an inherent Constitutional conflict that pits the public's First Amendment rights of free expression\textsuperscript{134} and access to information\textsuperscript{135} against an individual's copyright.\textsuperscript{136} This comment will demonstrate how the conflict can be effectively resolved, or at least circumvented, if a First Amendment analysis is used in one of two ways — as a balancing factor in a fair use determination under the Copyright statute or as a separate defense in copyright infringement cases involving the news media.

A. CONFLICT BETWEEN FIRST AMENDMENT AND COPYRIGHT

1. Sources of Conflict

The Constitution, by virtue of the Copyright Clause,\textsuperscript{137} empowers Congress to grant authors and inventors exclusive rights to their works.\textsuperscript{138} However, the Constitution, by virtue of the First Amendment,\textsuperscript{139} precludes Congress from making any law that interferes with freedom of expression.\textsuperscript{140} Even though the Copyright Clause and the First Amendment appear to be contradictory, they are not irreconcilable.\textsuperscript{141} There is historical evidence that these constitutional provisions were meant to coexist.\textsuperscript{142} Nevertheless, the contradiction between the Copyright Clause and the First Amendment has given rise to questions of supremacy.\textsuperscript{143} In other words, which constitutional provision should

\begin{flushleft}
\textsuperscript{134} U.S. Const. amend. I.
\textsuperscript{135} Id. See Branzburg v. Hayes, 408 U.S. 665 (1972) (Stewart, J. dissenting). In Branzburg, Justice Stewart argued that "[a] corollary of the right to publish must be the right to gather news . . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information, the right to publish would be impermissibly compromised." Id. at 727, 728. See also cases cited infra note 160.
\textsuperscript{136} U.S Const. art. I, § 8. See also supra note 52 and accompanying text (quoting Copyright Clause); supra note 8 (defining copyright).
\textsuperscript{137} U.S. Const. art. I, § 8.
\textsuperscript{138} Id.
\textsuperscript{139} U.S. Const. amend. I.
\textsuperscript{140} Id.
\textsuperscript{141} Hoberman, supra note 99 at 576. Hoberman reasoned that the Copyright Clause and the First Amendment were meant to compliment each other. Id. "Since it is well established that an express repeal is necessary to invalidate a prior provision of the Constitution, it appears that the copyright clause was intended to coexist with the first amendment. Moreover, the Constitution and the first ten amendments were prepared by the same men and ratified within a few years of one another, suggesting an intentional policy of coexistence." Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. Hoberman used the term "primacy" to describe the supremacy issue. Id.
\end{flushleft}
control in a given situation?

In situations involving the news media and the public's access to information regarding important news events, the supremacy issue should be resolved in favor of the First Amendment.\textsuperscript{144} Two arguments support this conclusion. First, freedom of expression is a "natural right guaranteed by the Constitution,"\textsuperscript{145} while copyright is merely a "privilege or a franchise."\textsuperscript{146} Because a natural right is ethically binding on society, it should prevail over a man-made privilege.\textsuperscript{147} Second, the structure of the Constitution indicates that the First Amendment should prevail; the very nature of an amendment is to modify the powers previously granted in the body of the Constitution.\textsuperscript{148} Thus, any inconsistent provision found in the body of the Constitution should be superseded by later amendments.\textsuperscript{149}

The Supreme Court, in \textit{New York Times v. U.S.},\textsuperscript{150} supported the idea that the First Amendment was intended to modify the Constitution\textsuperscript{151} and should therefore be considered pre-eminent.\textsuperscript{152} Here, in his concurrence, Justice Black reasoned that the wording of the First Amendment should be literally construed.\textsuperscript{153} He emphasized that the phrase "Congress shall make no law..." means that \textit{absolutely} no law shall be made, and any law that is made in contradiction to this mandate

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} See also \textsc{Nimmer, Copyright, supra note 100.}
\item \textsuperscript{145} \textsuperscript{Id.} supra note 99 at 575. A natural right is defined as a right based on the innate moral feeling of human kind and viewed as ethically binding in human society. \textsc{The Random House Dictionary of the English Language} 1281 (2d ed. 1987).
\item \textsuperscript{146} \textsuperscript{Id.} supra note 99 at 575.
\item \textsuperscript{147} \textit{Id.} See also \textsc{Nimmer, Copyright, supra note 100.} Professor Nimmer also used natural law reasoning to resolve the supremacy issue in favor of the First Amendment. \textit{Id.} at 71. "The ideal of free speech, if not the reality has been so much a part of our national ethos, that, like motherhood and love, few stop to question just why it is desirable." \textit{Id.}
\item \textsuperscript{148} \textsuperscript{Id.} supra note 99 at 575.
\item \textsuperscript{149} \textsuperscript{Id.} First Amendment, supra note 62 at 1182. In this article, Professor Nimmer stated that "the first amendment is an amendment, hence superseding anything inconsistent with it which may be found in the main body of the Constitution. This, of course, includes the copyright clause. In any event, even were the original Constitution and the Bill of Rights to be viewed as a single instrument, the copyright clause may not be read as independent an uncontrolled by the first amendment." \textit{Id.}
\item \textsuperscript{150} \textit{Id.} New York Times v. U.S., 403 U.S. 713 (1971).
\item \textsuperscript{151} \textit{Id.} at 716. In \textit{New York Times}, Justice Black reasoned that "(t)he Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly." \textit{Id.}
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 717. Justice Black opined that the framers of the First Amendment "wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law... abridging the freedom... of the press... ' Both the history and the language of the First Amendment support the view that the press must be left free to publish news whatever the source, without censorship, injunctions, or prior restraints." \textit{Id.}
\item \textsuperscript{154} \textit{U.S. Const. amend. I.}
\end{itemize}
is unconstitutional.\textsuperscript{155} Therefore, the portions of the Copyright Act that limit freedom of expression or of the press, in Justice Black’s view, are not merely superseded by the First Amendment, they are unconstitutional.\textsuperscript{156}

Copyright laws do limit freedom of expression to some degree.\textsuperscript{157} Thus, if the First Amendment were to be literally construed (per Justice Black), copyright laws would be wholly unconstitutional.\textsuperscript{158} However, courts have rarely taken the absolutist approach, and not every law which interferes with freedom of speech or of the press is seen as unconstitutional in view of the First Amendment.\textsuperscript{159} Thus, the question becomes; what does the First Amendment really protect?

2. Scope of First Amendment Protection

In the last fifty years, the Supreme Court has interpreted the rights of free speech and press broadly, and has developed a doctrine designed to protect the right of the public to receive as well as disseminate information.\textsuperscript{160} This broad interpretation of the First Amendment that includes a right of access to information may expand the scope of what constitutes ‘free speech’ beyond what the framers of the Constitution en-

\begin{itemize}
\item \textsuperscript{155} \textit{New York Times}, 403 U.S. 713, 719 (1971).
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textsc{Nimmer, Copyright, supra} note 100. Professor Nimmer explained that there are some acceptable limitations on free expression. \textit{Id.} at 64. For example; perjury in a judicial proceeding, agreements that violate anti-trust laws, and fraudulent statements should not be immune from legal penalties merely because they are forms of expression. \textit{Id.} at 65.
\item \textsuperscript{158} \textit{Id.} at 64. Professor Nimmer stated that “[i]t cannot be denied that the copyright laws do to some degree abridge freedom of speech, and if the First Amendment were literally construed, copyright would be unconstitutional. . . No one can responsibly adhere to the position that the First Amendment must be literally construed so as to invalidate all laws which in any degree abridge speech.” \textit{Id.} at 64, 65.
\item \textsuperscript{159} \textit{Id.} Professor Nimmer concluded that “no one really believes that every law which abridges speech falls before the First Amendment.” \textit{Id.} at 64.
\item \textsuperscript{160} \textsc{Hoberman, supra} note 99 at 573. \textit{See, e.g.}, \textit{Board of Education v. Pico}, 457 U.S. 853, 866 (1982) (explaining that precedents have focused on the First Amendment’s “role in affording the public access to discussion, debate, and the dissemination of information and ideas”); \textit{Branzburg v. Hayes}, 408 U.S. 665, 726 (1972) (describing “the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press”); \textit{Stanley v. Georgia}, 394 U.S. 557, 564 (1969) stating that “the right to receive information and ideas . . . is fundamental to our free society”); \textit{New York Times v. Sullivan}, 376 U.S. 254, 268-272 (1964) (stating that the First Amendment “was fashioned to assure unfettered interchange of ideas . . . [t]he interest of the public here outweighs the interest of . . . any other individual . . . protection of the public requires not merely discussion, but information”); \textit{Martin v. City of Struthers}, 319 U.S. 141, 146-147 (1943) (holding that “[f]reedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society . . . that it must be fully preserved”).
\end{itemize}
In the past, courts often denied the public and the press access to information by restricting entry to places like courtrooms and jails. Moreover, dissemination was limited by the technology of the time. The public was accustomed to having information restricted and limited in this manner.

Now, the news media utilizes technologies that permit access to places and informational materials, including copyrighted materials, that were previously inaccessible. Emerging technologies, such as videotape, satellite transmission, microwave technology, and computers all increase the amount and types of information available to the public. This technology also increases the ease and speed with which information is received and disseminated. As a result, the public is now accustomed to increased access to more types of information than ever before. The public expects to receive timely and complete information; therefore, restricting access to this information may appear contrary to the First Amendment.

A First Amendment interpretation that includes the right of access to information may affect news gathering in two opposing ways. On one hand, a broad interpretation of the First Amendment may give broadcasters greater latitude to make unauthorized use of copyrighted mate-

161. Katsh, supra note 61 at 1470. Professor Katsh reasoned that the First Amendment was fashioned according to “the Framer’s experience with the communications environment in this country in the late 1700’s.” Id. Arguably, because technology has drastically changed the communication environment, some of the foundation on which the First Amendment stands has eroded. Id. at 1473.

162. Id. at 1485.

163. Id. at 1481.

164. Id. at 1473. Professor Katsh reasoned that developments in electronic communications have eliminated “many constraints of time and space that have been obstacles to communication in the past. As a consequence, the movement and growth of information is greatly accelerated.” Id. In addition, Katsh argued that “[t]he growth of information is accelerated also by broadening geographical distribution. Electronic information is designed to be usable at a distance.” Id. at 1474. Thus, “[t]he mass media audiences of the electronic age are far larger than the mass audiences of the print era.” Id.

165. Katsh, supra note 61 at 1474.

166. Id. at 1479. Professor Katsh claimed that society’s values have changed along with communications technology: there is “a greater value placed on information, and a diminished ability to inhibit the flow of data and ideas.” Id. Moreover, society demands ever increasing amounts of information to drive our “information dependent-economy.” Id.

167. Id. at 1485. Professor Katsh reasoned that “[i]n the past, courts have often denied access to persons and places. The new media, however, undermine many restrictions by providing access to informational sources that were previously inaccessible. As many practical limitations on access are overcome by technological means, expectation about access change, and the legitimacy of refusing access will appear questionable in many contexts.” Id. Professor Katsh also predicted that the issue of access to information will become a hot legal topic in the near future. Id. at 1487.
rial in a newscast. The broadcaster is given superior means to gather and disseminate news through greater access to more material at a faster speed and lower cost. The broadcast industry views this right of access as a benefit that allows stories to be told more effectively. Consequently, the current industry trend is to air questionable material when it is 'news' and to worry about copyright infringement later.

On the other hand, a broad interpretation of the First Amendment may have a chilling effect on potential videotape suppliers. A First Amendment interpretation that includes an unlimited right of access to information may have a negative impact on the amount of material that is made available to broadcasters. If an individual cannot expect to make a profit selling his home videos to news organizations, he may decide not to provide that tape to such organizations. He may even decide not to videotape an event at all. Also, this interpretation may have a negative impact on a broadcaster's decision to enter into any agreement for the use of an individual's videotape. If the initial use is the only use the copyright owner may realistically negotiate, the owner may demand exorbitant fees. If the cost of obtaining the right to use the tape is too high, a broadcaster will merely decide not to use it. Consequently, the public may be deprived of information that it is constitutionally entitled to have.

B. LIMITATIONS ON JUDICIAL AND LEGISLATIVE SOLUTIONS

Courts and legislators have attempted to resolve the conflict between the Copyright Clause and the First Amendment by creating two
legal doctrines: the idea/expression dichotomy\textsuperscript{175} and the Fair Use Doctrine.\textsuperscript{176} Application of these doctrines may resolve some issues associated with the constitutional conflict on a short-term basis, but in the long run, they are largely ineffective because they do not directly confront the constitutional conflict.\textsuperscript{177}

1. The Idea/Expression Dichotomy

Copyright law is intended to increase and not to impede the "harvest of knowledge."\textsuperscript{178} The cornerstone of copyright law is the notion that expressions are protected; ideas, facts and news events are not.\textsuperscript{179} However, emerging technologies have occasionally created situations where that line is no longer bright.\textsuperscript{180} In rare instances, like the Rodney King beating, only the actual image recorded on videotape tells the complete story.\textsuperscript{181} Here, the expression and the idea cannot be separated.\textsuperscript{182} Thus, in this type of situation, the idea/expression dichotomy cannot resolve the conflict between the Copyright Clause and the First Amendment.

2. The Fair Use Doctrine

Fair use is a privilege that allows those other than the copyright owner to use the copyrighted material in a reasonable manner without the copyright owner's consent.\textsuperscript{183} The common law Fair Use Doctrine

\textsuperscript{175} See supra note 80 and accompanying text (explaining that ideas cannot be copyrighted).

\textsuperscript{176} See supra note 16 (defining Fair Use).

\textsuperscript{177} Hoberman, supra note 99 at 576. Both the Fair Use Doctrine and the idea/expression dichotomy are ineffective "primarily because they have ignored their obvious roots in the tension between the copyright clause and the first amendment. The result is a tortuous body of law which relies on unworkable exceptions to copyright law to protect essential free speech rights." Id.


\textsuperscript{180} Nimmer, Copyright, supra note 100 at 85.

\textsuperscript{181} Transcript of June 10 at 109 - 110, Holliday (No. CV 92-3287 IH).

\textsuperscript{182} Id. In this situation, the idea of police officers using force against a suspect "contributes almost nothing to the democratic dialogue, and it is only its expression [the videotaped image] which is meaningful." Nimmer, First Amendment, supra note 62 at 1197. See Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (characterizing a particular expression as "so integral to the idea" it conveyed "as to be inseparable from it"). See also Id. (Brennan, J., dissenting). In Harper & Row, Justice Brennan argued that "some leeway must be given to subsequent authors seeking to convey facts because those 'wishing to express the ideas contained in factual works often can choose from only a narrow range of expression.'" Id. at 585, 586 (quoting Lansberg v. Scrabble Crossword Players, 736 F.2d 485, 488 (9th Cir. 1984)).

\textsuperscript{183} Harper & Row, 471 U.S. at 549.
involved a balancing process in which a number of variables were evaluated to determine whether other interests or rights should override the rights of the creator or copyright holder. But, the common law Fair Use Doctrine did not provide black-letter rules for determining fair use. Even so, this common law doctrine was codified in 1976 under section 107 of the Copyright Act. Congress intended section 107 to merely codify the common law. Section 107 is not supposed to limit or expand common law concepts of fair use. And Congress admits that the statute, like the common law doctrine, does not offer a black-letter rule for determining fair use.

In analyzing the language of section 107, four points are apparent. First, the fair or reasonable use of a copyrighted work is a complete defense to a charge of copyright infringement. Second, use for a purpose specified in the first sentence of section 107 (criticism, comment, news reporting, teaching, scholarship, or research) is not necessarily fair or reasonable. The specified purposes are merely examples of purposes that might qualify for the fair use privilege. Moreover, even if the use is for a purpose specified in section 107, a four-factor test must still be applied. Third, courts must use each of the four factors detailed in


185. Dratler, supra note 73 at 235. "The doctrine has no crisp outlines, no precise standards, and no obvious center or core." Id. See also Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980) (quoting Dellar v. Samuel Goldwin, Inc., 104 F.2d 661 (2d Cir. 1939) and describing the question of Fair Use as "the most troublesome in the whole law of copyright"); Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (complaining that the common law Fair Use Doctrine "is so flexible as virtually to defy definition").


187. House Report, supra note 64. The Fair Use section "is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in anyway." Id. at 66.


189. House Report, supra note 64. "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." Id. at 65.

190. 17 U.S.C. § 107 (1993). See also Dratler, supra note 73. Dratler reasons that "fair use is a complete defense to an action for copyright even if all the legal prerequisites for a claim of infringement otherwise are met." Id. at 257.


192. Dratler, supra note 73 at 257.


194. Id.
the second sentence of section 107 when making any fair use analysis. And fourth, the four factors specified in section 107 are not exclusive.

Even though the language of section 107 indicates that Congress intended to provide a clear basis for determining fair use, courts have not consistently interpreted section 107. A limited number of post-1976 Supreme Court cases exist which deal with the issues surrounding fair use in a news-gathering context, but none specifically deal with a broadcaster's unauthorized use of copyrighted material in a newscast. Lower federal courts have ruled on a number of cases dealing with fair use and news-gathering as well, but few deal specifically with broadcast news (or the associated technologies). Moreover, these lower court decisions are inconsistent. This inconsistency is largely due to the differing weight courts place on each statutory factor and the inclusion of

195. 17 U.S.C. § 107 (1993). Simply stated, the four factors are; the purpose of the use, the nature of the use, the amount of the taking, and the effect on marketability. *Id.*

196. Dratler, *supra* note 73. The term “shall” indicates that the four factors are mandatory even though other factors may be considered. *Id* at 258. See also *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (1970) (stating that an analysis of all four factors listed in the Fair Use Statute is mandatory and that they “are factors which must be evaluated in concert”).


other, non-statutory, factors when conducting a fair use analysis.\textsuperscript{203}

Section 107 does not indicate the relative weight that a court should give to each factor.\textsuperscript{204} “The factors do not represent a score card that promises victory to the winner of the majority.”\textsuperscript{205} Rather, the factors direct a court’s attention to different angles of a fair use problem.\textsuperscript{206} Section 107 requires a court to examine a problem from the various angles and determine whether, on balance, the goals of copyright law would be served by a finding of fair use.\textsuperscript{207} Thus, a fair use determination is quite subjective because courts differ in their interpretation of the significance of each factor used in the analysis.\textsuperscript{208} A factor-by-factor examination of the Fair Use section, using \textit{Holliday v. CNN}\textsuperscript{209} as an example, will show that the Fair Use Doctrine may fail to protect both the right of the press to report news using available technologies and the right of the public to have access to information regarding important news events. This is because section 107 does not expressly require the relative social impact, importance, or newsworthiness of the particular news story to be included in a fair use analysis.

3. Applying the Fair Use Section to Broadcast News

a. Marketability of the Copyrighted Work

Courts have frequently placed most emphasis on marketability, the fourth statutory factor.\textsuperscript{210} Section 107 requires a court to consider “the effect of the use upon the potential market for or value of the copyrighted work.”\textsuperscript{211} Courts readily find a negative effect on marketability in cases where the unauthorized use competes directly with the use made or planned by the copyright owner.\textsuperscript{212} But, courts have more difficulty as-

\textsuperscript{203}  Dratler, \textit{supra} note 73 at 259. \textit{See also} Goldstein, \textit{supra} note 86 at 197 (stating “[a] use that is fair one day may be unfair the next”).

\textsuperscript{204}  17 U.S.C. § 107 (1993). \textit{See also} Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (5th Cir. 1980) (observing that the “statute does not indicate how much weight is to be accorded each factor”).

\textsuperscript{205}  Leval, \textit{supra} note 53 at 1110.

\textsuperscript{206}  \textit{Id}.

\textsuperscript{207}  \textit{Id} at 1111.

\textsuperscript{208}  Goldstein, \textit{supra} note 86 at 213. Courts enjoy relative freedom in administering the fair use defense. \textit{Id} at 198.

\textsuperscript{209}  Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993).

\textsuperscript{210}  Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (1980). Here, the court stated that “[o]ur research indicates that of these four factors, Courts have generally placed most emphasis on the fourth factor, the effect of the use upon the potential market for or the value of the copyrighted work.” \textit{Id}. \textit{See}, \textit{e.g.}, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985) (stating that the fourth factor “is undoubtedly the single most important element of fair use”).


\textsuperscript{212}  Goldstein, \textit{supra} note 86 at 233. \textit{See}, \textit{e.g.}, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (reasoning that because the defendant intended to com-
sessing the effect on marketability when the unauthorized use does not directly compete with that of the copyright owner.\textsuperscript{213}

In a television news context, unless a copyright owner intends to televise his work himself (i.e., to directly compete with a news organization), the analysis of the marketability of a copyrighted work should turn on whether the unauthorized use will have a negative impact on the owner's profit-making potential or on the value of the owner's work in markets other than broadcast news.\textsuperscript{214} In \textit{Holliday}, Judge Hill reasoned that the plaintiff received fair compensation for his videotape because he received more than the standard fee\textsuperscript{215} which news operations pay for the use of videotape.\textsuperscript{216} Moreover, the broadcast news media's repeated use of the videotape actually increased the potential market for

\begin{itemize}
  \item \textsuperscript{213} Goldstein, supra note 86 at 234. Some courts have attempted to distinguish uses that "the copyright owner may reasonably be expected to make, or license others to make, from those it could not reasonably be expected to make." \textit{Id.} at 236. But, decisions are not consistent. \textit{See, e.g.}, Encyclopedia Britannica v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1978) (finding injury to the marketability of plaintiff's programs for distribution to public schools). \textit{But see} Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding no harm to the marketability of plaintiff's programs where defendant videotaped broadcasts for home use).
  \item \textsuperscript{214} Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993). \textit{See, e.g.}, Iowa State University v. American Broadcasting Co., 621 F.2d 57, 61 (2d Cir. 1980) (holding no fair use where network's unauthorized use of plaintiff's film "usurped an extremely significant market" for the sale of the film); Zachini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977) (holding no fair use where station aired videotape of plaintiff's entire for-profit performance because "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value").
  \item \textsuperscript{215} Holliday, No. CV 92-3287 IH. \textit{See supra} note 43 for a description of stringer fee arrangements.
  \item \textsuperscript{216} Transcript of June 10 at 104, \textit{Holliday} (No. CV 92-3287 IH). Judge Hill concluded that Holliday "received the fair monetary value of his film as of the day it was shot, and first delivered to any defendant." \textit{Id.} Moreover, the market value told to the plaintiff included "the buyer's estimate of the potential that the film has for future broadcasting as well as for the first and present broadcast." \textit{Id.} at 104, 105. Holliday was told that the maximum standard stringer fee was normally about $150, so, according to Judge Hill, Holliday "gladly accepted the $500 offered him by KTLA . . . obviously considering it something of a windfall . . . ." \textit{Id.} at 103.
\end{itemize}
the plaintiff’s work “because it created such a sensation after having been repeatedly played all over the world.”

Thus, the Holliday court found this factor favored the defendants.

b. The Amount of the Taking

Some courts have focused on the third statutory factor, the amount of the taking. Section 107 requires a court to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” This is more of a qualitative, rather than quantitative, balancing test that weighs the user’s gain against the copyright owner’s loss. In cases where the value of the defendant’s unauthorized use outweighs the copyright owner’s loss, and the costs of obtaining the owner’s authorization would be prohibitive, courts will find fair use even if the defendant made use of the plaintiff’s entire work. Conversely, in cases where the portions used are of “critical importance to the work as a whole and taken by the infringer in order to save the time and expense incurred by the copyright owner,” courts will not find fair use even if the amount used is only a small part of the owner’s work. The ‘amount used’ factor is closely related to both the ‘marketability’ and the ‘purpose of the use’ factors.

In a television news context, an analysis of the amount used factor should turn on whether the amount of copyrighted material used is greater than is necessary to tell a particular news story effectively.

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217. Id. at 105.
218. Id. at 107.
219. See, e.g., Walt Disney Productions v. Air Pirates, 518 F.2d 751, 756 (9th Cir. 1978) (stating that “this Court and others have also consistently focused on the substantiality of the taking”).
221. Goldstein, supra note 86 at 230, 231. Professor Goldstein stated that “qualitative measures outweigh quantitative measures in determining the weight to be given the third factor.” Id. at 231.
222. Id. See, e.g., Sony Corporation of America v. Universal City Studios, Inc. 464 U.S. 417 (1984) (rejecting the argument that the use of an entire work can never be fair use).
224. See, e.g., Iowa State University v. American Broadcasting Co., 621 F.2d 57 (80) (holding defendant’s use of 2.5 minutes of plaintiff’s 28 minute film was not fair).
225. Dratler, supra note 73 at 310. The amount of the copyrighted expression that is used should be assessed in relation to the market effect of the use and the purpose of the use. Id. “If the expression has significance as a ‘fact’ or news, then the court should determine whether the user took more of it than was reasonably necessary to convey the ‘fact’ or the newsworthy aspects of the expression. That determination, however, properly rests under the rubric of the third statutory factor, the ‘amount taken.’” Id. at 309.
226. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (holding that television station’s unauthorized showing of entire human cannonball act, lasting only fifteen seconds was not fair use because it did more than illustrate the news story — it
In *Holliday*, the defendants used approximately 5% of the entire videotape shot by the plaintiff, but this was the “heart of the plaintiff’s work.” However, Judge Hill reasoned that the use of the tape was necessary to tell the story because “no amount of words describing what went on, the idea of the beating, could substitute for the public insight gained through looking at the pictures.” On balance, this factor favored the plaintiff. Even so, Judge Hill accorded very little weight to this factor.

**c. Nature of the Copyrighted Work**

The second statutory factor, “the nature of the copyrighted work,” refers to both the physical characteristics and the function of the copyrighted work. Courts generally focus on two subfactors when analyzing this factor: first, whether the work was “factual or creative,” and second, whether the work was “published or unpublished,” thus indicating whether the public has or will have access to the work. Clearly these subfactors are related to two other statutory factors; the market value of the copyrighted work and the purpose of the unauthorized use.

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228. Id. at 102.

229. Id. at 109, 110.

230. Id. at 102.

231. Id. at 102. Judge Hill determined that this factor, as applied to the facts of *Holliday*, “seems to be of considerably less importance that the other factors.” Id. One reason for Judge Hill’s conclusion might be that a broadcaster will inevitably use the most valuable or significant portion of the work because that is the portion that most effectively illustrates the story. Davis, *supra* note 5.


234. *Id.* See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985) (reasoning that “[t]he fact that a work is unpublished is a critical element of its ‘nature’ . . . the scope of fair use is narrower with respect to unpublished works”). Publishing refers not only to printed works, but also to any means used to make information public, “to circulate [or] make known to people in general.” *Black’s Law Dictionary* 1233 (6th ed. 1990).

235. Leval, *supra* note 53 at 1119. Judge Leval reasoned that “[p]ublication for public edification is, after all, a central concern of copyright. Thus a work intended for publication is a favored protegee of the copyright.” *Id.* But, Leval saw access, rather than publication as the core of this second statutory factor; as long as the public will have access, “[t]he fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication.” *Id.* at 1122.
Accordingly, courts usually analyze the nature of the copyrighted work in relation to other statutory factors, specifically the 'purpose of the use' factor and the 'marketability' factor. In addition, the first sub-factor, whether the work is factual or creative, ties the notion of the idea/expression dichotomy to the statutorily required fair use analysis.

In a television news context, the analysis of the nature of the copyrighted should turn on whether the material used is factual, whether those facts are newsworthy, and whether use of the work is necessary to tell a particular news story effectively. In Holliday, the nature of the videotape was clearly factual and newsworthy. Judge Hill admitted that the published/unpublished distinction is not clear-cut in broadcast news situations. He reasoned that both the language of section 107 and its legislative history indicate that broadcasting does not necessarily constitute a previous publication. Even so, Judge Hill felt this factor weighed in favor of the defendants.

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236. Goldstein, supra note 86 at 226.
237. Id. Goldstein observed that when the purpose of the use serves the public interest, as in the reporting of news events, "[c]ourts give greater scope to the fair use of factual works than they give to the fair use of more creative works on the ground that the enforcement of rights in factual works poses a greater risk of inhibiting the free flow of information than does the enforcement of rights in fictional works." Id. In light of the fact that the primary goal of copyright law is to promote the progress of science and the arts, Goldstein contended that when courts balance the nature of the copyrighted work against the purpose of the unauthorized use, they will "give little leeway" to uses that are not scientific or informational. Id. at 227.

238. Id. Goldstein also observed that even though the copyrighted work is factual in nature, courts will be reluctant to find fair use if it appears that there is a valuable market for the information contained in the owner's work and the unauthorized use will deprive the owner of all or part of that market. Id.

239. See supra note 179 and accompanying text (explaining the idea/expression dichotomy). See also infra notes 288, 310 (describing the merger of idea and expression).

240. See Iowa State University v. American Broadcasting Co., 621 F.2d 57 (2d Cir. 1980). In Iowa State, the court tied the 'purpose of the use' factor to the idea/expression dichotomy. Id. at 60. The Iowa State court reasoned that "[t]he public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts." Id.

241. Dratler, supra note 73 at 305. See also definition supra note 38.
242. Dratler, supra note 73 or 306. See e.g., Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968). In Geis, the court held that the defendant's unauthorized use of frames of the plaintiff's film showing the assassination of President Kennedy was fair because the event depicted in the film was newsworthy. Id. at 146. The Geis court stated that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy." Id.

243. Transcript of June 10 at 100, Holliday (No. CV 92-3287 IH).
244. Id. at 98.
245. Id.
246. Id. at 101.
d. **Purpose of the Use**

A few courts have placed their emphasis on the first statutory factor, the purpose of the use.\(^{247}\) Section 107 requires a court to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."\(^{248}\) Section 107 also requires a court to consider whether the use of a copyrighted work promotes the goals of copyright law.\(^{249}\) Courts readily find this first factor favors the defendant (i.e., the unauthorized user) if the use is productive and generates a public benefit beyond that produced by the original work.\(^{250}\) This "transformative"\(^{251}\) use may be found where the unauthorized use is made in a different manner or for a different purpose than the original work.\(^{252}\) In *Sony Corporation of America v. Universal City Studios*,\(^{253}\) the Supreme Court emphasized section 107's commer-

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\(^{247}\) See, e.g., Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that uses having commercial or profit-making purposes are presumptively unfair); Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 97 (1971) (reasoning that fair use turns on whether the purpose of the use was commercial).


\(^{249}\) Leval, *supra* note 53 at 1110. Judge Leval stated that "the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." *Id.* Thus, a fair use analysis must be made in "the light of the governing purpose of copyright law." *Id.* See also *supra* notes 54, 55 and accompanying text (discussing the objectives of copyright law).

\(^{250}\) Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 479 (1984). In *Sony*, the Court established that the uses stipulated in section 107 and other uses recognized as fair in case law reflect "a common theme: each is a productive use, resulting in some added benefit to the public beyond that produced by the first author's work." *Id.* "The fair use doctrine, in other words, permits works to be used for 'socially laudable purposes.'" *Id.* at 479. See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966) (holding that unauthorized use of copyrighted articles in a biography about Howard Hughes was fair use because the biography was "laudatory" and reasoning that any biography "must recite the events of [the subject's] life because biography in itself is largely a compilation of the past"); Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171 (1980) (holding that unauthorized use of copyrighted work in comparative advertisement was fair use); Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) (holding unauthorized use of copyrighted work for the purpose of scholarship was fair use); Italian Book Corp. v. American Broadcasting Co., 458 F. Supp. 65 (S.D.N.Y. 1978) (holding that news report of event incidentally showing copyrighted performance going on in background was fair use).

\(^{251}\) Leval, *supra* note 53 at 1111.

\(^{252}\) *Id.* Examples of transformative uses include; "criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea in the original in order to defend or rebut it." *Id.* However, a transformative use is no guarantee that a fair use defense will be granted. *Id.* In Judge Leval's words; "[t]he transformative justification must overcome factors favoring the copyright owner." *Id.*

\(^{253}\) *Sony*, 464 U.S. 417.
cial/non-commercial distinction. However, in Harper & Row, Publishers, Inc. v. Nation Enterprises, the Court redefined the significance of this distinction as being a matter of exploitation.

In the television news context, an analysis of the 'purpose of the use' factor should turn on whether the broadcaster perverts the goals of journalism by exploiting copyrighted material for profit. In Holliday, Judge Hill reasoned that the commercial nature of the use did not preclude a finding of fair use. In addition, the defendants' use differed in manner and purpose from Holliday's. Furthermore, Judge Hill reasoned that the defendants did not stand to profit from exploitation of the videotape "except in terms of broadcasting an interesting and provocative news program on the day that the tape was shown." Thus, Judge Hill found this factor favored the defendants.

e. Other Factors

Fair use is an "equitable rule of reason." As such, the statutory factors are not exclusive. Thus, courts have looked to other factors, in addition to those articulated in section 107, to determine whether a par-

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254. See Id. at 451 (stating that "every commercial use of copyrighted material is presumptively unfair").
256. Id. In Harper & Row, the Supreme Court stated that "[t]he crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Id. at 560. See also Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (discussing purpose of the use in terms of exploitation).
257. See supra note 28 (describing the purpose of broadcast news).
258. Transcript of June 10 at 97, Holliday, (No. CV 92-3287 IH).
259. Id. at 97 (citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) and holding defendant's use was not exploitation).
260. Id. Judge Hill reasoned that the commercial/noncommercial distinction was not relevant to the facts of the instant case: "[t]his is not the kind of a case, and we have them in the books, in which the defendant steals the copyrighted material such as a book written by the plaintiff, copies the book and sells the copies, and thus profits from every single copy which it sells, and thus ruins the plaintiff's market for his book . . . although our defendants are commercial enterprises, their use of the material in our case was not to make a sale of it at all." Id. at 96, 97.
261. Id. at 97.
262. Id. at 98.
263. House Report, supra note 64 at 65. "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." Id. See also Stewart v. Abend, 495 U.S. 207 (1990) (stating that fair use is an equitable rule of reason that permits courts to avoid rigid application of copyright law when such application would stifle creativity).
ticular use of copyrighted material is fair.\textsuperscript{265} Some courts have accorded these other factors significant weight in determining fair use.\textsuperscript{266} Some courts have included bad faith\textsuperscript{267} or the intent/motive\textsuperscript{268} of the user in a fair use analysis. One court even examined the unauthorized use of copyrighted material in terms of the effect the use may have on future creative works.\textsuperscript{269} Several courts have included the constitutional desirability of a particular use as a factor in a fair use analysis.\textsuperscript{270} In addition, and central to the thesis of this comment, several recent cases\textsuperscript{271} indicate that courts are beginning to recognize the importance of a First Amendment component in a fair use analysis.\textsuperscript{272}

In \textit{Harper & Row, Publishers v. Nation Enterprises},\textsuperscript{273} the Supreme Court included First Amendment considerations in making a fair use de-

\textsuperscript{265} Dratler, \textit{supra} note 73 at 333.
\textsuperscript{266} Id. at 258.
\textsuperscript{268} See, \textit{e.g.}, Mura v. Columbia Broadcasting System, Inc., 245 F. Supp. 587 (C.D.N.Y. 1969) (holding that the intent of the user is relevant in determining fair use).
\textsuperscript{269} See Greenbie v. Nobel, 151 F. Supp. 45 (1957) (explaining, pre-section 107, that a fair use issue should be analyzed in terms of whether the unauthorized use of copyrighted material will have a chilling effect on development of science and the creative arts).
\textsuperscript{270} See Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966). Although this case is pre-section 107, it provides good arguments for dealing with the idea of public interest as a separate factor in a fair use analysis. \textit{Id.} In \textit{Rosemont}, the court discussed the right of the public to be informed about important public figures, in this case Howard Hughes, and included this right in the fair use calculus. \textit{Id.} at 309. The court reasoned that:

Hughes has long been a newsworthy personality. Any biography of Hughes, of necessity, must recite the events of his life because biography in itself is largely a compilation of the past. Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner. \textit{Id.} \textit{See also} Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) (holding that public interest in having complete information about the assassination of President Kennedy outweighed plaintiff's copyright).

\textsuperscript{272} Vergobbi, \textit{supra} note 172 at 43 (citing \textit{Rosemont}, 366 F.2d 303; \textit{Geis}, 293 F. Supp. 130; and \textit{Meeropol}, 560 F.2d 1061). Professor Vergobbi reasoned that the decisions in \textit{Rosemont}, \textit{Geis} and \textit{Meeropol} "represent a departure from traditional fair use concepts." \textit{Id.} "As such, they reveal an outline of what may be seen as a permissible use, keyed to the desirability of ensuring full and free disclosure of public concerns." \textit{Id.}
\textsuperscript{273} Harper & Row, 471 U.S. 539.
termination. But, the Court refused to go so far as to make the First Amendment issue a separate factor. However, the dissent indicates that the First Amendment should be an additional, possibly controlling, factor and perhaps even a separate defense.

In Holliday, the First Amendment was the factor against which the other statutory factors were weighed. Judge Hill set up his fair use analysis by first looking at the public interest in having the "widest possible dissemination" of the facts relating to the Rodney King beating. Moreover, even though Judge Hill did not state that the First Amendment was a fifth factor in the fair use analysis, he used it as such.

274. Id.
275. Id. Justice O'Connor reasoned that a fair use analysis based on the traditional four-factor test was sufficient, even though the Court discussed the issue of the public interest in disseminating socially and historically important information. Id. at 556 - 59. Justice O'Connor further stated that "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." Id. at 560. Thus, the Supreme Court held that the idea/expression dichotomy provided sufficient protection for the news media to exercise its First Amendment rights. However, this holding cannot be applied where the idea and the expression of that idea merge. See infra notes 311, 312 and accompanying text (discussing idea/expression merger).

276. Id. at 579 (Brennan, J., dissenting). In his dissent, joined by Justices White and Marshall, Justice Brennan reasoned that the majority's opinion did not further the goals of copyright law. Id. Justice Brennan stated:

The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. . . . The copyright laws serve as the 'engine of free expression' . . . only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas. To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right.

Id. at 579, 589, 590. Thus, it is clear that Justice Brennan felt First Amendment rights could not be superseded by copyright. See Rosemont, 366 F.2d 303, 307 (holding that fair use turns initially on whether the distribution of copyrighted materials "would serve the public interest in the free dissemination of information").

277. Transcript of June 10 at 93, Holliday, (No. CV 92-3287 IH).
278. Id.
279. Id.
280. Id. Prior to his factor-by-factor analysis under section 107, Judge Hill established that the First Amendment weighed heavily in the overall finding of fair use in the Holliday case. Id. at 92. Judge Hill reasoned that "the scope of fair use is . . . undoubtedly wider when the information conveyed relates to matters of high public concern' . . . our case falls within that language." Id. (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)). Furthermore, Judge Hill reasoned that "[i]n looking at this case as a whole, it must be remembered that there was a great national public interest demonstrated for decades before these pictures [Holliday's videotaped images] were shot in the subject of police treatment of minorities in America's cities." Id. at 94. "Under the circumstances,
Although a fair use analysis, under section 107, requires a court to examine each unauthorized use from a number of angles, its application to broadcast news may fall short unless the First Amendment rights to disseminate and receive socially important information are also weighed against the other statutory factors. Thus, a First Amendment component should be included in every fair use analysis. With respect to broadcast news situations, it should be a mandatory fifth factor against which the other statutory factors must be weighed.

In the alternative, a separate First Amendment defense, beyond fair use, should be available to the news media that would provide a privilege to report important news stories. On rare occasions, the social significance of a news story will be so great that a news organization must be permitted to report that story using the most effective means available, including the unauthorized use of videotape, even if the broadcaster cannot claim fair use under section 107. This privilege is exemplified by the First Amendment Exemption discussed in Holliday.

C. FIRST AMENDMENT AS A SEPARATE DEFENSE

While news reporting may be seen as a 'purpose' under section 107 because the First Amendment provides explicit protection for the press, news reporting can also be defended on grounds separate from the Fair Use Doctrine. When making a fair use analysis, based on the statutory factors, a court must consider the market impact the unauthorized use of videotape, even if the broadcaster cannot claim fair use under section 107. This privilege is exemplified by the First Amendment Exemption discussed in Holliday.

Citing Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) and Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)), Hoberman stated; “the public interest underlying the fair use doctrine is actually the public interest in gaining access to ideas.” Furthermore, Hoberman reasoned that without a First Amendment component (or separate First Amendment defense), “fair use will remain a popular judicial tool without any definition, workable statutory structure, or articulable raison d’etre.”

281. Hoberman, supra note 99 at 588 (citing Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) and Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)). Hoberman stated; “the public interest underlying the fair use doctrine is actually the public interest in gaining access to ideas.” Id. Furthermore, Hoberman reasoned that without a First Amendment component (or separate First Amendment defense), “fair use will remain a popular judicial tool without any definition, workable statutory structure, or articulable raison d’etre.” Id.

282. Nimmer, Copyright, supra note 100. See also Hoberman, supra note 99 at 594. Hoberman insisted that the need for a separate First Amendment defense has become “abundantly clear.” Id.

283. Hoberman, supra note 99 at 594. “Although assertions of a first amendment privilege traditionally have been rejected in copyright cases . . . [c]ourts can no longer rely on a variety of flawed exceptions to copyright law to ensure the free flow of information in today’s technologically-oriented world.” Id.

284. Transcript of June 10 at 108, Holliday, (No. CV 92-3287 IH) (stating that a First Amendment exemption is a separate defense for copyright infringement).


286. Nimmer, Copyright, supra note 100 at 77, 78. See also Transcript of June 10 at 108, Holliday (No. CV 92-3287 IH).
ized use will have on the copyrighted work. As a result, fair use is usually limited to uses that do not materially impair the marketability of the copyrighted work. The First Amendment Exemption, where appropriate, may be invoked despite the fact that the marketability of the copyrighted work is impaired.

The theory behind this First Amendment Exemption is essentially that, in a very few situations, either the idea and expression contained in a copyrighted work are inextricably merged, or the expression of the idea has greater social import than the idea. In these situations, the unauthorized use of the expression, for the purpose of educating or informing the public, should not subject the user to liability for infringement of the creator's copyright.

Several courts, while basing their decisions on fair use, also discussed the First Amendment notions of the public's right of access to socially important information. These cases provide a historical basis for a First Amendment defense exempting news from copyright infringement claims. In addition, two decisions that rejected a separate First Amendment defense noted that the defense might be available in certain circumstances.

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289. NIMMER, COPYRIGHT, supra note 100 at 90.
290. Id. at 84. See Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1184 (5th Cir. 1980) (stating that "[u]nder limited circumstances, a first amendment privilege may and should exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts"). See also Gates Rubber Co. v. Bando American, Inc., 798 F. Supp. 1499 (D. Colo. 1992) (quoting Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971)). "When the 'idea' and its 'expression' are thus inseparable, copying the expression will not be barred, since protecting the expression would confer a monopoly of the 'idea' upon the copyright owner." Id.
291. NIMMER, COPYRIGHT, supra note 100 at 85. See, e.g., Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1990). In Holliday, Judge Hill reasoned that no written or verbal account of the Rodney King beating (the idea) could match the impact of the visual account (the expression) contained in Holliday’s videotape. Id. transcript of June 10 at 109.
292. Transcript of June 10 at 109, Holliday (No. CV 92-3287 IH).
293. Vergobbi, supra note 172 at 40. See Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966). See also Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968). In Geis, the defendant made unauthorized use of still frames of Abraham Zapruder’s infamous film of the Kennedy assassination to illustrate a book about alternate assassination theories. Id. The Geis court, even after reasoning that the public interest in having the “fullest information available” about the assassination was paramount, actually relied on the fair use doctrine rather than a First Amendment exemption. Id. at 143.
294. Hoberman, supra note 99 at 594. See Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (stating that “[s]ome day, legitimate in-depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and ‘an emerging constitutional limitation on copyright contained in the
These circumstances include the rare situation where the only way the news media can accurately describe a particular news event is by using a copyrighted work.\footnote{Nimmer, Copyright, supra note 100 at 86.}

\textit{Holliday} illustrates that rare fact pattern.\footnote{Cox, supra note 45.} Accordingly, Judge Hill held that the defendants were entitled to summary judgment based on a First Amendment Exemption.\footnote{Transcript of June 10 at 110.} Judge Hill reasoned that the use of the videotape depicting the beating of Rodney King was imperative to the full presentation of the facts of the event.\footnote{Id. at 113.} Furthermore, Judge Hill reasoned that because the idea of the beating was so socially important, any restriction of access to the expression contained in the videotape would be tantamount to censorship forbidden by the First Amendment.\footnote{Id. at 111.}

Thus, in those extremely rare situations where there is no distinction between the idea or fact and the expression, and the information is of such social importance as to qualify for the First Amendment Exemption, the defendant should have an alternative defense.\footnote{Transcript of June 10 at 108.} This defense should exist even if the Fair Use Doctrine cannot be applied because the four-factor test required under section 107 is not met or the fair use analysis fails to include a First Amendment component.\footnote{Id. at 108.}

\section*{D. Limiting the Scope of the First Amendment Defense}

\subsection*{1. The Defense Should Be Limited to Actual News Events and to \textit{News Photography}}

The First Amendment Exemption should apply only to breaking or "spot news."\footnote{Spot news consists of spontaneous newsworthy events such as plane crashes, fires, shootings, floods, police beatings, etc. Stations are unable to plan coverage for spot news, thus they tend to rely heavily on stringers to supply videotape of these events.} Unauthorized use of copyrighted materials showing planned events, where a broadcaster has sufficient time to schedule camera crews and otherwise arrange for the coverage of the event, should not come within the scope of this exemption or defense. Further, this exemption should be limited to otherwise unavailable materials depicting so-
cially important news events.\textsuperscript{303} The First Amendment Exemption should also be limited to "news photography,"\textsuperscript{304} which are those visual and audio materials that are important because of their factual, rather than artistic content, and without which the story could not be told.\textsuperscript{305} Professor Nimmer suggested a First Amendment Exemption should apply to the use of copyrighted works "where the 'idea' of a work contributes almost nothing to the democratic dialogue and it is only its expression which is meaningful."\textsuperscript{306} For example, Nimmer cited the exclusive photographs of the Vietnam My Lai massacre and the home movie, shot by Abraham Zapruder, of the assassination of President Kennedy as works which qualify for a First Amendment Exemption.\textsuperscript{307}

In \textit{Holliday}, Judge Hill reasoned that the videotape of the King beating was one of those very rare combinations of idea and expression, analogous to the Zapruder film or the My Lai photographs, that deserves special treatment.\textsuperscript{308} The public had a right to know about the King beating and the only way it could get the full story was by seeing the tape.\textsuperscript{309} Thus, as Judge Hill held, \textit{Holliday} presents a fact pattern which qualifies for a First Amendment Exemption.\textsuperscript{310}

\textsuperscript{303} Transcript of June 10 at 111, \textit{Holliday} (No. CV 92-3287 IH) (limiting a First Amendment exemption to "very exceptional . . . depictions where words cannot serve the democratic purpose"). \textit{See also} Davis, \textit{supra} note 5. This exemption should not be used for everyday news coverage. \textit{Id.} It should be reserved for those events which have great social import and not for events which have only entertainment value. \textit{Id.} The decision to apply this exemption would be based on a broadcaster's journalistic integrity, but ultimately, the courts would end up deciding what is socially important. \textit{Id.}

\textsuperscript{304} \textit{Nimmer, Copyright, supra} note 100 at 87. Professor Nimmer defined 'news photography' as an image on film or videotape or "analogous processes . . . [w]here the event depicted in the photograph, as distinguished from the fact that the photograph was made, is the subject of news stories appearing in [news media] throughout the country." \textit{Id.}

\textsuperscript{305} \textit{Id.}

\textsuperscript{306} \textit{Id.} at 85. \textit{See also} Los Angeles News Service v. Tullo, 973 F.2d 791 (9th Cir. 1992) [Hereinafter LANS]. In LANS, the plaintiff, a commercial videographer, claimed copyright infringement against a news clipping service that sold copies of television news shows which contained the plaintiff's work. \textit{Id.} Here, the court rejected the First Amendment exemption because:

[T]here was no showing that other depictions and reports of the plane crash and train wreck were unavailable or omitted information vital to the public understanding of the events, and because the record establishes that LANS' tapes were shown on local television programs immediately after the events and were freely available to the public, we conclude that the problem perceived by Professor Nimmer was not present in this case, and we reject, as indeed would Professor Nimmer, [defendant's] contention that the First Amendment precluded liability for infringement of LANS' copyrights.

\textit{Id.} at 797.

\textsuperscript{307} \textit{Nimmer, Copyright, supra} note 100 at 86.

\textsuperscript{308} Transcript of June 10 at 109, 110, \textit{Holliday} (No. CV 92-3287 IH).

\textsuperscript{309} \textit{Id.}

\textsuperscript{310} \textit{Id.} at 111.
2. The Defense Should be Limited to Situations Where the Idea and Expression Cannot be Separated

Occasionally, in a copyrighted work, an idea and the expression of that idea merge and become inseparable. When this merger occurs, unauthorized use of the expression should not be barred by copyright law. In a news context, this merger can create the situation where a copyrighted work must be used in order to fully present the information relevant to a news story. For example, the photographs of the My Lai massacre had such visual impact that they "made a unique contribution to an enlightened democratic dialogue." The public needed access to those photographs in order to fully comprehend the heinous acts that happened in Vietnam. Furthermore, the photographs guaranteed the truth — any denial of the incident or even any attempt at minimizing the number of deaths would be "devastatingly refuted by the photographs in a way that verbal reports on the deaths simply could not do."

In Holliday, Judge Hill likened the videotape of the Rodney King beating to the photographs of the My Lai massacre. Judge Hill reasoned that the idea and the expression of that idea were merged in the videotape and that "no amount of words describing what went on, the idea of the beating, could substitute for the public insight gained through looking at the [videotape]." Thus, the First Amendment Exemption applies to Holliday because the requisite merger of idea and expression was present.

In Harper & Row, Publishers, Inc. v. Nation Enterprises, the

311. Hoberman, supra note 99 at 590. "Judicial analyses have ... failed to acknowledge that idea and expression often merge, becoming virtually indistinguishable." Id. Hoberman reasoned that problems associated with the idea and expression merger are "particularly acute in the area of graphic works, where the visual impact of a photograph, for example, may be inseparable from the idea." Id.

312. See Gates Rubber Co. v. Bando American, Inc., 798 F. Supp. 1499, 1517 (D. Colo. 1992) (stating that copying an expression will be permitted when the idea and expression of that idea are merged).

313. Nimmer, Copyright, supra note 100 at 86. These photographs graphically depicted the massacre of more than three hundred unarmed Vietnamese civilians by U.S. soldiers on March 16, 1968.

314. Id. "The photographic expression, not merely the idea became essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs." Id.

315. Id.

316. Transcript of June 10 at 109-110, Holliday (No. CV 92-3287 IH). Judge Hill reasoned that "in terms of national interest and democratic dialogue, the King beating may be as important or even more important than My Lai." Id. at 110.

317. Id. at 109-110.

Supreme Court rejected the idea of a separate First Amendment defense because the Court reasoned that the bright line distinction between ideas and expressions provided sufficient protection against copyright infringement. But, this reasoning cannot be applied to cases like *Holiday*, where the idea and the expression are one in the same. Even though the Supreme Court did not decide the issue of idea/expression merger, in *Harper & Row*, the Court implied that such a merger can occur. Thus, the *Holiday* case can and must be distinguished from *Harper & Row*.

3. The Defense Should Be Limited to Legitimate News Uses Where There is No Other Way to Tell the Story

The First Amendment Exemption should apply only to those uses of copyrighted material where the story requires illustration of the facts and the social impact surrounding the event. Once the reasonable person can comprehend the story, any further use of the copyrighted material becomes gratuitous and should not be afforded protection under this First Amendment defense. Moreover, this defense should be limited to those uses of copyrighted material that are essential to the public understanding of the relevant facts of the event. For example, if a

319. Id. at 559.

320. See id. at 555-556 (extending the notion of a First Amendment privilege to fair use and stating the scope of fair use is "undoubtedly wider when the information conveyed relates to matters of high public concern"). But see id. at 579 (Brennan, J., dissenting). Justice Brennan reasoned that the majority's holding was too constricting. Id. Justice Brennan tacitly supported the idea of a separate First Amendment defense. Id. See also supra note 276 (detailing Brennan's reasoning behind a First Amendment defense).

321. Baird, supra note 22 at 514. Baird compared television newscasts to other types of television shows and reasons that the current structure of copyright law cannot accommodate a newscast's factual nature. Id. "Unlike most shows [newscasts] are not entertainment, simply the production of fact . . . news being what it is, the usefulness of such broadcasts is severely limited by time. People do not want to watch last week's news. Copyright laws should be rewritten to reflect this." Id. at 515.

322. Id. See Nimmer, *Copyright*, supra note 100 at 88 n. 64. Where the use of a copyrighted work is no longer essential to the expression of the idea, the First Amendment defense is no longer appropriate. Id. See, e.g., Wainwright Securities v. Wall Street Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977) (stating "the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source"). In addition, Professor Nimmer suggested that a compulsory licensing scheme may provide a means to effectively limit the First Amendment defense to appropriate uses. NIMMER, *COPYRIGHT*, supra note 100 at 88. Unfortunately, a full examination of this licensing scheme is beyond the scope of this comment.

323. Leval, supra note 53 at 1114. Copying or quoting assures that ideas are correctly reported. Id. at 1113, 1114. Judge Leval questioned whether the original author's idea can be accurately relayed if a commentator is required to express that idea in her own different words. Id. at 1114.
statement contained in a political speech defames a particular race or
the writings of a politician contain admissions of sexual misconduct, the
news media must quote the speech or writings in order to effectively re-
port the story.324 "To permit less would require the news media to resort
to second-best expression."325 On the other hand, the First Amendment
Exemption should not be available to those uses of copyrighted material
that merely embellish a story that could be told without using the mate-
rial in question.326

In Holliday, Judge Hill noted that the plaintiff's videotape was the
only depiction of the Rodney King beating.327 Judge Hill reasoned that a
First Amendment Exemption should be granted in this case because "the
whole issue of policy involving treatment of minorities by police cannot
be framed or depicted in this democratic society without the visual depic-
tion supplied by this tape. Words are simply not enough to frame the
moral and political issues."328 Thus, the First Amendment Exemption
applies to Holliday because the Rodney King beating was a legitimate
news story and the only way the defendants could tell the complete story
was by showing the plaintiff's videotape.

VI. CONCLUSION

This comment has shown that, on rare occasions,329 copyrighted
videotape (or other images) depicting an important event may contain

324. See Dratler, supra note 73 at 298, 299. "If a speech or publication is newsworthy,
they [reporters] have little choice but to summarize, paraphrase, or quote it verbatim
in order to convey its content. To the extent the expression employed is newsworthy, report-
ers should have license for a certain amount of irreducible 'copying'.” Id.

325. Id. at 299.

326. See, e.g., Roy Export Co. v. Columbia Broadcasting System, Inc., 672 F.2d 1095 (2d
Cir. 1982). Here, the defendant, CBS, used a clip from the plaintiff's copyrighted film as
part of an obituary about Charlie Chaplin. Id. at 1097-1098. The court held that CBS
should not be entitled to use the clip without compensating the plaintiff because "[t]he
showing of copyrighted films was not essential to CBS's news report of Charlie Chaplin's
death or to its assessment of his place in history; public domain films were available for
this purpose, and the public is already familiar with his work.” Id. at 1100. This court
acknowledged that a narrow First Amendment Exemption might be available on extraordi-
inary facts, but reasoned that the facts is this case "could not support the invention or appli-
cation of even a limited privilege.” Id. See also Zacchini v. Scripps-Howard Broadcasting,
433 U.S. 562 (1977) (holding that a news operation went beyond reporting an event when it
showed plaintiff's entire performance).

327. Transcript of June 10 at 113, Holliday (No. CV 92-3287 IH).

328. Id.

329. Holliday v. CNN, No. CV 92-3287 IH (C.D. Cal. June 11, 1993); Time, Inc. v. Ber-
and accompanying text (describing the film of the assassination of President Kennedy and
photographs of the My Lai massacre as two examples of copyrighted material that would
qualify for a First Amendment Exemption).
such truth, power, and sheer information, that the only way the news media can effectively report that event is by showing the videotape. When this occurs, the videographer's property right and the public's right of access to information collide. This situation clearly illustrates the constitutional conflict between the freedom of expression and access to information guaranteed by the First Amendment, and the limited monopoly of expression granted in the Copyright Clause that courts have struggled to resolve for over one hundred years. While courts have historically resolved this conflict by invoking the idea/expression dichotomy and the Fair Use Doctrine, several recent cases and a number of commentators suggest that these legal doctrines do not provide the news media with sufficient protection to report important news stories using available technology. This is because the Fair Use section of the Copyright Act does not require First Amendment considerations to be factored into a fair use analysis. Consequently, a few brave judges (like Irving Hill) are now beginning to incorporate a First Amendment component into fair use determinations. In addition, there seems to be an emerging trend toward recognizing the importance of a separate First Amendment defense for copyright infringement. This First Amendment Exemption may be available to the news media even if a defense under the Fair Use Doctrine is unavailable.

An expanded interpretation of the Fair Use Doctrine that requires a First Amendment component as part of the statutory analysis or the recognition of a First Amendment Exemption may resolve the conflict between copyright and First Amendment rights. However, giving broadcasters a greater privilege to make unauthorized use of copyrighted material may affect the quality of broadcast news. On one hand, a greater privilege may give broadcasters greater access to more material, thus resulting in better coverage of news events. On the other hand, a greater privilege may reduce the amount of material made available to broadcasters because individuals may lose the profit-making incentive to videotape news events. Consequently, any amendment to the Fair Use section or a newly created First Amendment Exemption must be carefully drafted and confined, as Judge Hill stated in *Holliday*, to very exceptional, cataclysmic, very, very vital situations or depictions where

330. See Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (recognizing, for the first time, the Fair Use Doctrine).


332. See Nimmer, COPYRIGHT, supra note 100; Dratler, supra note 73; Vergobbi, supra note 172; Hoberman, supra note 99; Baird, supra note 22.

333. *Holliday*, No. CV 92-3287 IH. See supra notes 102 - 133 and accompanying text (describing the facts of this case).
words cannot serve the democratic purpose." In these situations, as in *Holliday*, where the importance of the event can only be realized through the unauthorized use of copyrighted material, the public's First Amendment right outweighs the individual creator's copyright. Therefore, the news media must have access to the copyrighted work because, in these exceptional situations, a picture is worth more than a thousand words.

*LESLIE ANN REIS*

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