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Constitutional Dimension of Fair Use in Copyright Law

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THE CONSTITUTIONAL DIMENSION OF "FAIR USE" IN COPYRIGHT LAW

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> MR. BORK [Solicitor General]: . . . fair use, after all, is basically a constitutional doctrine. . . .
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> QUESTION [MR. JUSTICE REHNQUIST]: Are you suggesting that Congress would be constitutionally obligated to incorporate a doctrine of fair use into the copyright law?
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> MR. BORK: That is debatable. I have seen it debated both ways, Mr. Justice Rehnquist. . . .
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> QUESTION: I thought you said a moment ago that fair use is constitutionally—
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> MR. BORK: The courts have derived their power to evolve a doctrine of fair use from the constitutional value, the constitutional principle. Whether or not the court could second-guess Congress' decision about what would promote, rather than retard, I don't know. Certainly that's not involved in this case.[1]

This article will attempt an affirmative and more precise answer to Mr. Justice Rehnquist's question: Fair use has a constitutional dimension which must be protected by both the Congress and the courts.

I. Introduction

The Copyright Act grants authors what appears to be exclusive rights[2] and provides remedies for infringements of those rights.[3] However, the courts have subjected this presumed exclusivity to a wholly judicial doctrine of "fair use," whereby certain uses and copying are "fair" and therefore permissible without the author's consent.[4] Effectively, then, the copyright proprietor does not have a complete monopoly despite the statutory language.[5]

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1 Typed transcript of oral argument of Dec. 7, 1974, at 39-40, before the United States Supreme Court in Williams and Wilkins Co. v. United States, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975).

2 17 U.S.C. § 1 (1970).

3 17 U.S.C. § 101 (1970).

4 2 M. NIMMER, COPYRIGHT § 145 (1974); Williams and Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 43 U.S.L.W. 4314 (U.S. Feb. 25, 1975); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968). *See also* G. BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944); B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967) (" 'use' is not the same thing as 'infringement' ").

5 *See, e.g.*, Fortnightly Corp. v. United Artists Television, Inc. 392 U.S. 390, 393 (1968); Orient Ins. Co. v. Daggs, 172 U.S. 557, 566 (1869). *See also* Dennis v. United States, 341 U.S. 494, 508 (1951).

This judicial doctrine of fair use, developed in the face of a seemingly exclusive copyright privilege, recognizes the public interest against monopoly; a leading early commentator once stated of fair use, "The recognition of this doctrine is essential to the growth of knowledge. . . ."[6]

Notwithstanding the traditional restrictive view of fair use,[7] it is here submitted that fair use—the right of reasonable access to copyrighted materials—has constitutional protection both directly and under the penumbra of the first and ninth amendments. This constitutional dimension protects the right of reasonable access to our cultural, educational, scientific, historical, technical, and intellectual heritage.

An attempt to place fair use in its proper constitutional framework, however, immediately uncovers a conflict between the public's constitutional right of reasonable access to copyrighted materials and the copyright owner's statutory privilege under the copyright law. In the latter situation, the Constitution grants copyright owners no rights. It merely authorizes Congress, under severe limitations, to enact copyright legislation. At most, the copyright owner has a statutory privilege, not a constitutional right.

This article proposes a conceptual clarification of the constitutionally protected right of fair use, a resultant reformulation of some basic copyright law principles, and a contribution to the survival of the copyright system itself.

II. Preliminary Constitutional Considerations

Before exploring the specific relationship of copyright to the first and ninth amendments, it is fruitful to consider two preliminary constitutional principles.

A. *Copyright Owners*

Article I, § 8 of the Constitution grants no rights to authors. It merely grants power to Congress to enact copyright legislation. In the very first case in which the Supreme Court considered this problem, the Court specifically rejected the argument that the constitutional provisions did not create a right but merely protected one already in existence.[8]

A long and uninterrupted line of cases holds unequivocally that, apart from

6 E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 386-87 (1879).

7 *See Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess., at 118, 122-24 (1965); 2 NIMMER, *supra* note 4, at 644.

8 Wheaton v. Peters, 33 U.S. 591, 661, 663 (8 Pet.) (1834). To the same effect, *see* Mazer v. Stein, 347 U.S. 201, 214 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909).

The House Committee's Report on the current Copyright Law of 1909 also made the same point:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909). *See also* statement of House floor manager of 1909 bill, 43 CONG. REC. 3765 (1909) ("there is no property right in writings").

common law protection for unpublished works, copyright protection is completely and solely a statutory matter[9] and that copyright is only a privilege or a franchise.[10] It is settled law that any copyright right is simply a creature of statute,[11] wholly a matter of congressional discretion to grant or to withhold.[12] In connection with copyrights, "the Constitution is permissive" not mandatory.[13] The conditions upon which copyright is granted are wholly within the constitutional power of Congress to prescribe.[14] In fact, the history of copyright law shows that an author has no constitutional property right in or to copyright protection and that any right an author obtains is a discretionary privilege to be granted or withheld by Congress, which has the power to annex whatever conditions it deems wise and expedient.[15] The very first copyright law, enacted in 1790, gave protection only to maps, charts, and books, and that only for a 14-year period plus renewal of 14 years. It did not cover periodicals, drawings, works of art, musical compositions, dramatic compositions—to name but a few. Even the present and far more extensive law is not all-inclusive and places limits on authors' copyright privileges. Congress limited both the number of years during which an author may exercise copyright monopoly privileges and the uses to which the copyright owner's privileges attach. The courts have also developed a further limitation through the doctrine of fair use. Two years ago the Supreme Court held that the constitutional copyright provision does not provide exclusive federal control over copyrights.[16]

None of the foregoing is intended to disparage the constitutional grant of authority to the Congress to enact copyright legislation. This laudable purpose, however, is restricted by other constitutional considerations. Copyright is a privilege conferred by statute and not a right guaranteed by the Constitution.

B. *Constitutional Protections*

That the articulation or enforcement of the constitutional right of reasonable access through fair use might appear novel is no defense against its validity. Chief Justice Burger has stated that it makes no difference "that it has taken this Court nearly two centuries to 'discover' a constitutional mandate."[17] The

9 Miller Music Corp. v. Daniels, Inc. 362 U.S. 373, 375 (1960); Bentley v. Tibbals, 223 F. 247, 248 (2d Cir. 1915); Grant v. Kellogg Co., 58 F. Supp. 48, 52 (S.D.N.Y. 1944), *aff'd*, 154 F.2d 59 (2d Cir. 1946); Bobbs-Merrill Co. v. Strauss, 210 U.S. 339, 346 (1908).

10 Local Landmarks v. Price, 170 F.2d 715, 718 (5th Cir. 1948).

11 American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907); Bobbs-Merrill Co. v. Strauss, 210 U.S. 339, 346 (1939); White-Smith Music Pub. Co. v. Apollo, 147 F. 226, 227 (2d Cir. 1906), *aff'd* 209 U.S. 1, 15 (1908). *See also* Loew's Inc. v. C.B.S., 131 F. Supp. 165, 173 (S.D.Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd by equally divided court*, 356 U.S. 43 (1958).

12 Krafft v. Cohen, 117 F.2d 579, 580 (2d Cir. 1941); Keene v. Wheatley, 14 F. Cas. 180, 185 (No. 7644) (C.C.E.D. Pa. 1861).

13 Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972).

14 Wheaton v. Peters, 33 U.S. 591, 663-64 (8 Pet.) (1834). *See also* Application of Cooper, 254 F.2d 611, 616 (C.C.P.A. 1958), *cert. denied*, 358 U.S. 840 (1958); Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 496 (E.D. Wis. 1941). *See* NIMMER, *supra* note 4, at 14.

15 H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909).

16 Goldstein v. California, 412 U.S. 546, 553, 558 (1973).

17 Coleman v. Alabama, 399 U.S. 1, 22 (1970).

Supreme Court elsewhere reinterpreted a 200-year-old and admittedly[18] settled doctrine of American legal history, in what Mr. Justice Powell called "a change in focus in the Court's approach"[19] and the need for "a fresh look at the question."[20] Only in 1972 did the Supreme Court find constitutional infirmity in capital punishment under the eighth amendment although admittedly it had "been employed throughout our history."[21] It was not until 1973 that it was held that antiabortion statutes were unconstitutional[22] and that a six-member jury in civil proceedings complied with the seventh amendment.[23] Not until 1974 did the Supreme Court rule that the President of the United States has no absolute right of executive privilege[24] and only in 1975 did the Supreme Court rule that high school students were entitled to due process prior to suspension from school,[25] that a "live" theatre charged with obscenity was entitled to the first amendment's protection against impermissible prior restraint,[26] and that the due process protection of the fifth amendment forbids "gender-based differentiation" between men and women in social security benefits.[27]

The very fact that constitutional protection for fair use has not been previously decided is in itself an aid now. The Constitution of the United States was made for an undefined and expanding future.[28] As the question of constitutional protection for fair use would now be a new one before the Court, it would be at liberty to decide the issue upon reason, unfettered by an inveterate course of precedent upon it.[29] As the ancient lawgiver Maimonides put it, the gates of interpretation are never closed.[30]

In this regard, it is important to recognize that the Constitution's "adaptability" to new circumstances and situations is especially true as to the liberties protected by the first amendment. As Mr. Justice Frankfurter once said: "Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. . . . Like currency words sometimes appreciate or depreciate in value."[31] In constitutional interpretation, it is necessary to go far beyond the meaning of the phrase in isolation to its "guiding history."[32]

18 Johnson v. Louisiana, 406 U.S. 356 (1972).
19 *Id.* at 372 n.9 (Powell, J., concurring).
20 *Id.* at 376. *See also* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Brown v. Board of Educ., 347 U.S. 483 (1954).
21 Furman v. Georgia, 408 U.S. 238 (1972).
22 Roe v. Wade, 410 U.S. 113 (1973).
23 Colgrove v. Bettin, 413 U.S. 149 (1973).
24 United States v. Nixon, 418 U.S. 683 (1974).
25 Goss v. Lopez, 95 S. Ct. 729 (1975).
26 Southeastern Promotions, Ltd. v. Conrad, 43 U.S.L.W. 4365 (U.S. March 18, 1975).
27 Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393 (U.S. March 19, 1975). *See also* Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157; Forrester, *The Feminists—Why Have They Not Yet Succeeded?* 61 A.B.A.J. 333 (1975).
28 Hurtado v. California, 110 U.S. 516, 531 (1884).
29 Conner v. Long, 104 U.S. 228, 243 (1881).
30 THE GUIDE OF THE PERPLEXED 327-28 (S. Pines ed. 1963).
31 Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537-38 (1947).
32 Chapman v. United States, 365 U.S. 610, 619 (1961) (Frankfurter, J., concurring). "Reasoning which in one age would make no impression whatsoever, in the next age is received with enthusiastic applause." I. LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE vii (1865).

As such, the purpose of constitutional provisions becomes the controlling feature in their application:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.* This is peculiarly true of constitutions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. . . . *Rights declared in words might be lost in reality.* And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.[33]

The courts have long been responsive to the special need for guarding the Bill of Rights, and especially first amendment rights, "with a jealous eye."[34] The extraordinary genius of the Bill of Rights is its adaptability to the problems of each successive generation. The present generation's special and urgent problem is the protection and assurance of the American people's right of reasonable access to its cultural heritage. The history of the struggle for freedom of press and speech bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it through reasonable access and fair use. Today, freedom of press embodies reasonable access through fair use of the nation's heritage.

III. The First Amendment and Reasonable Access to Copyrighted Matter

The first amendment's guarantee of freedom of the press protects the right of reasonable access to copyrighted material against a monopolistic construction of the statutory copyright privilege. In balancing a copyright proprietor's statutory privileges against the constitutional protection for the public's right to know, read, and hear, the balance must be struck in favor of the constitutional right. Established by statute, the copyright privilege does not prevail against the constitutional guarantee of the first amendment.[35]

A. *People versus Publishers*

Fair use is a right of the American people. The Bill of Rights exemplified

33 Weems v. United States, 217 U.S. 349, 373 (1910) (*emphasis added*). *Cf.* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

34 AFL v. Swing, 312 U.S. 321, 325 (1941). *Cf.* Brennan, *The Supreme Court & the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 1-2 (1965).

35 "Because Congress is granted authority to legislate in a given field, it does not follow that such a grant immunizes Congress from the limitations of the Bill of Rights, including the Bill of Rights." Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech & Press?* 17 U.C.L.A.L. REV. 1180, 1182 (1970). For an argument that the same person cannot avail himself of both copyright and first amendment rights, *see* Brief for Respondent City of Los Angeles at 10, 17, Smith v. California, 375 U.S. 259 (1963) (judgment vacated and case remanded in light of State court's opinion).

a clear rationale that a free press was the only instrumentality for protecting the public's right to know.[36]

Throughout American history this concept of the press as an instrumentality of the American people has been pervasive in judicial readings of the first amendment. Mr. Justice Sutherland, in connection with a claim of abridgement of freedom of press, wrote that "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information."[37]

Freedom of press is a right of the American people; the press is merely a trustee of that right. Freedom of press was not designed as a special privilege for the publishing business but rather as an extension of the personal rights of each American. It guarantees an individual's rights and was thus joined in the first amendment with the rights of free speech, assembly, and petition.

The courts have characterized freedom of speech and press as fundamental personal rights and liberties, thus reflecting the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free governments by free men.[38] As such, it is imperative to recognize that the first amendment's guarantee of freedom of press is "not for the benefit of the press so much as for the benefit of us all."[39] Free press is only a shorthand way of saying that the press must be free because of the right of all Americans to be informed.[40]

B. *The Right of Access and the Bill of Rights*

Rights of access, as such, have been increasingly recognized by the Supreme Court as an integral part of the rights guaranteed by the Bill of Rights.[41] These rights of access are ancillary to, and come within the penumbra of, rights pro-

36 "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." Associated Press v. United States, 326 U.S. 1, 20 (1945).

37 Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

38 Schneider v. State, 308 U.S. 147, 161 (1939).

39 Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). *See also* United States v. Powell, 171 F. Supp. 202, 205 (N.D. Cal. 1959).

40 Arthur Hays Sulzburger of the New York Times addressed this issue:

> Perhaps we ought to ask ourselves now just what freedom of the press really is. . . . Freedom of press—or, to be precise, the *benefit* of freedom of the press—belongs to everyone, to the citizens as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community that is accorded to other citizens. He enjoys an explicitly defined independence because it is the only condition under which he can fully perform his role, which is to inform fully, fairly and comprehensively. The crux is *not* the publisher's freedom to print; it is rather the citizen's right to know! What I would point out is that freedom of the press is your right as citizens and not mine as a publisher.

Address to Trustees of New York Public Library, Nov. 13, 1956 at 9 (privately printed).

41 These rights of access include: the right of "suitable access to social, political, aesthetic, moral and other ideas and experiences," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); the right to "receive information and ideas," Kleindienst v. Mandel, 408 U.S. 753, 760, 762-65 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); the right to receive printed matter, Lamont v. Postmaster General, 381 U.S. 301 (1965); the right of access to certain religious publications, Cruz v. Beto, 405 U.S. 319 (1972); the right of access to the courts, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); the right of addressees of letters to read the letters without censorship, Procunier v. Martinez, 416 U.S. 396 (1974).

tected by the Bill of Rights or other provisions of the Constitution. Likewise, the right of reasonable access through fair use to copyrighted materials pertaining to the cultural, historical, educational, scientific, technical, and religious heritage of the nation comes within the penumbra of the right of free press guaranteed by the first amendment.

C. *The Right of Free Press and Speech and the Right to Read and Hear*

The first amendment would be sterile today if its sanctions were limited to the mere act of printing or writing; the *Zenger* case decided that over 200 years ago.[42]

The Supreme Court has ruled that freedom of press protects not only the publisher's right to print[43] and publish[44] and the distributor's right to circulate,[45] but also the public's "right to receive information and ideas,"[46] and to read and hear.

In *Butler v. Michigan*,[47] a state statute made a criminal offense of the publication, sale, and distribution of any literature "tending to the corruption of the morals of youth." The statute was challenged as an unconstitutional infringement of freedom of press and due process under the first and fourteenth amendments. The state's Attorney General denied that the statute abridged either the free press clause of the first amendment or the due process clause of the fourteenth amendment. And the Attorney General of Texas, *amicus curiae*, claimed that the book there in question was not within the protection of the first amendment's freedom of press. The Court unanimously found the statute unconstitutional, holding that the incidence of its enactment served to reduce the adult population of Michigan to reading only what was fit for children and thereby arbitrarily curtailed a liberty of the individual, an indispensable condition for the maintenance of a free society.[48]

In 1961 the Court included the right to know as one of the protections afforded by the first amendment. In so holding, it reasoned that the first amendment enlarges rather than limits freedom in literature, the arts, politics, economics, law, and other fields. Its basic aim was to unlock all ideas for argument, debate, and dissemination.[49] Such unlocking of ideas requires reasonable ac-

42 As far back as 1644, Milton's *Areopagitica* was a defense of "the liberty of unlicensed printing," R. McKeon, R. Merton & W. Gellhorn, The Freedom to Read 43 (1957). *See also Ex parte* Jackson, 96 U.S. 727, (1877), *cited with approval,* Lovell v. Griffin, 303 U.S. 444, 452 (1938).

43 Lovell v. Griffin, 303 U.S. at 452; Winters v. New York, 333 U.S. 507, 509 (1948). *See also* Marsh v. Alabama, 326 U.S. 501 (1946).

44 Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

45 *Ex parte* Jackson, 96 U.S. 727 (1877); Winters v. New York, 333 U.S. 507 (1948).

46 Kleindienst v. Mandel, 408 U.S. 753 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

47 352 U.S. 380 (1957).

48 *Id.* at 383-84.

49 Times Film Corp. v. Chicago, 365 U.S. 43, 81 (1961). *See also* Kleindienst v. Mandel, 408 U.S. 753, 771 (1972) (Douglas, J., dissenting). A similar protection for the right to learn emanates from the fourteenth amendment. Meyer v. Nebraska, 262 U.S. 390 (1923).

cess to materials subject to copyright protection through fair use.[50]

In 1965, the Supreme Court specifically proclaimed the right of school teachers to read, as part of their first amendment rights.[51] In 1969, the Court protected "the right to read"[52] itself; moreover, in 1974, the Court further broadened this constitutional protection by also finding it within the constitutional guarantee for free speech under the first amendment. In *Procunier v. Martinez,*[53] the Court confronted the censorship of mail written by prisoners. Writing for the Court, Mr. Justice Powell said:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. . . . Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.[54]

Thus, the Constitution protects more than freedom to print or write; without reading by the public, publication would be of little value. The constitutional protections for freedom of press and speech were designed to achieve an end: the right of the public to read. In order to accomplish this end—which the Supreme Court has ruled to be included within the constitutional protection of each individual—it is necessary to have reasonable access. And this freedom must, at the very least, include freedom of access to materials affecting the educational, cultural, historical, political, scientific, and religious background of the nation.[55]

The reach of the first amendment is well illustrated by *Kleindienst v. Mandel*[56] where both the majority and minority agreed that the first amendment guaranteed access to hear, to receive information, to learn, and to know.[57]

See also Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). *See also* Hobson v. Hanson, 269 F. Supp. 401, 480, 488, 492, 512-13 (D. D.C. 1967), *appeal dismissed,* 393 U.S. 801 (1969), where the Court struck down a school board's "track system" of assigning pupils as being contrary to their right to learn. The decision was based on the equal protection clause.

50 Cardozo put it well: "There is no freedom without choice and there is no choice without knowledge. . . . Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and beget. . . . At the root of all liberty is the liberty to know." B. CARDOZO, LEGAL PARADOXES 104 (1928).

51 Lamont v. Postmaster General, 381 U.S. 301, 307 (1965).

52 Stanley v. Georgia, 394 U.S. 557, 565 (1969).

53 Procunier v. Martinez, 416 U.S. 396 (1974).

54 *Id.* at 408.

55 *See* Goldstein, *Copyright & the First Amendment,* 70 COLUM. L. REV. 983, 995 (1970).

56 408 U.S. 753 (1972).

57 Mr. Justice Blackmun spoke for the Court at 762-63:

> In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas":
>
> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .' *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943). . . ." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

He also cited Thomas v. Collins, 323 U.S. 516, 534 (1945) as protecting the right of workers "to hear what he [a labor organizer] had to say."

For the *right to hear* as being within the penumbra of the freedom of speech provision of the first amendment, *see also* Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Pickings v. Bruce, 430 F.2d 595, 598-99 (8th Cir. 1970); Brooks v. Auburn Univ., 412 F.2d 1171, 1172 (5th Cir. 1969); ACLU v. Radford, 315 F. Supp. 893 (W.D. Va. 1970); Smith v. University of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968).

There, in a comment peculiarly appropriate to fair use, Mr. Justice Blackmun stated for the Court:

> The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches . . . . While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in the light of the discussion that follows . . . — we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.[58]

The Court's previous decisions concerning the "right to receive information" were accepted by the dissenting opinions as well.[59]

Increasing attention has been given of late, especially by Mr. Justice Brennan,[60] to Meiklejohn's concept that the key to the first amendment is not the speaker's words but the hearers' minds.[61] The comments of both majority and minority in *Kleindienst,* concerning the right to hear, as part of the first amendment, apply with equal force to the right to read through the right of access to copyrighted reading matter. But, it may be asked, where is there anything in the first amendment about the right to read? The same type of question was faced directly by Mr. Justice Brennan in a case where the very issue of the right to read was involved and where the Court specifically stated that the first amendment rights of school teachers protected their right to read.[62] In a concurring opinion, Mr. Justice Brennan said:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[63]

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58 Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

59 Mr. Justice Douglas wrote that "The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. *Martin v. City of Struthers,* 319 U.S. 141, 143; *Stanley v. Georgia,* 394 U.S. 557, 564." *Id.* at 771. Mr. Justice Marshall's dissenting opinion, in which Mr. Justice Brennan joined, stated:

> As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak . . . the right to speak and hear —including the right to inform others and be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. *Id.* at 775.

See also Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher,* 28 RUTGERS L. REV. 41, 42 (1974).

60 Brennan, *The Supreme Court & the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 1-2 ((1965).

61 A. MEIKLEJOHN, POLITICAL FREEDOM 25-28 (1960).

62 Lamont v. Postmaster General, 381 U.S. 301 (1965).

63 *Id.* at 308.

In a similar situation concerning the right of association, Mr. Justice Powell answered that "the Constitution's protection is not limited to direct interference with fundamental rights. . . . We are not free to disregard the practical realities."[64] Mr. Justice Powell then extended "the practical realities" to a constitutional recognition that the right to read a letter written by a prisoner is guaranteed to the addressee of that letter by the free speech guarantee of the first amendment.[65]

In this context, fair use is the legal vehicle developed by the courts for effectuating the public's access to copyrighted matter, a right guaranteed under the first amendment's protection of the right to read, the right to hear, and the right to know.

IV. The Ninth Amendment and the Right to Know, Read, and Hear

The ninth amendment to the Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This is the reserved right of the American people to all rights not specifically granted by the Constitution: the right to all unenumerated rights. The framers of the Constitution believed that there existed certain additional, fundamental rights which stand alongside those fundamental rights specifically contained within the first eight amendments. Viewed in this way, these other valuable fundamental rights should not be abrogated merely because they have not been enumerated. In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] as to be ranked as fundamental."[66] Thus, the inquiry is whether a right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[67]

There is strong historical justification for the belief that the framers of the Bill of Rights intended the ninth amendment to apply "where the asserted right appears to the court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights";[68] that is, constitutional formulations must not be narrowly interpreted. Along this line, a leading legal commentator has indicated that, whatever else the amendment may cover, it provides for "the right to have access to information."[69]

64 Healy v. James, 408 U.S. 169, 183 (1972).
65 Procunier v. Martinez, 416 U.S. 396, 408 (1974).
66 Griswold v. Connecticut 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).
67 *Id.* at 493-94.
68 Redlich, *Are There "Certain Rights Retained by the People"?* 37 N.Y.U.L. REV. 787, 808 (1962). *See also* State v. Abellano, 50 Hawaii 384, 390, 393, 441 P.2d 333 (1968) (Levinson, J., concurring):

> The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity and existence of man in a free society.
>
> . . .
>
> The Ninth Amendment is the place to which we must turn for protection of individual liberty from infringements not enumerated and perhaps not contemplated by the founding fathers.

69 Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People,* 51 MARQ. L. REV. 121, 139 (1967). The author noted that "[r]elated to this right to

As to the impact of the copyright provision of the Constitution on the ninth amendment in *Ashwander v. TVA*[70] the Supreme Court indicated that "[T]he Ninth Amendment . . . does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations. . . ."[71]

As such, the ninth amendment's reach starts, at the least, from the Constitution's limited scope of the grant for copyright legislation and from the inherent limitations so clearly illustrated by the judicial development of the doctrine of fair use, notwithstanding the seemingly complete monopolies granted by the copyright laws.

Under the ninth amendment, "rights may arise or appear by reason of limitations placed upon or by limits of granted powers."[72]

> A person has the right not to have government act where it lacks power. In addition, he has other rights, which deny government power to act where otherwise it might. For example, the government has the power to regulate bankruptcy proceedings [U.S. Constitution, Art. 1, Section 8], but it lacks power to regulate them in such a way that a property owner is deprived of property without due process of law [*Louisville Bank v. Reedford,* 295 U.S. 555 (1935)]. Though government has the power to preserve its own existence [*Dennis v. U.S.,* 341 U.S. 494, 501 (1951)], that power is tempered by the rights guaranteed by the first and fifth amendments [*Aptheker v. Secretary of State,* 378 U.S. 500 (1964)]. Similarly, where a person has an inherent right, recognized by the ninth amendment, it protects him against some exercise of power which might otherwise be proper. . . . It is in areas where government has power to act that it is important to the individual to have positive rights.[73]

The balancing of various constitutional provisions seemingly applicable to the same set of facts is a common judicial experience.[74] Thus, notwithstanding the copyright clause, the ninth amendment guarantees and protects the right to read the cultural heritage of the nation and authorizes reasonable access to such heritage through fair use of copyrighted materials. These rights and their effectuation through the fair use doctrine come within what Mr. Justice Douglas, speaking for the Court in *Griswold* and specifically mentioning the ninth amendment, called "penumbras, formed by emanations from those [Bill of Rights] guaranties that help give them life and substance."[75]

V. Effect of the Constitutional Dimension of Fair Use

If fair use does have constitutional protection under the first and ninth amendments, two effects arise from this restructured constitutional perspective:

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information is the right to know as encompassed in academic and cultural freedom. A college professor or school teacher has the right to pursue knowledge."

70 297 U.S. 288 (1936).

71 *Id.* at 330-31.

72 Kelsey, *The Ninth Amendment of the Federal Constitution,* 11 IND. L.J. 309, 311 (1936).

73 Comment, *The Ninth Amendment,* 30 ALBANY L. REV. 89, 99 (1966).

74 *See, e.g.,* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); California v. LaRue, 409 U.S. 109, 115 (1972).

75 381 U.S. 479, 484 (1965).

(1) The need for balancing of rights, with the public interest having priority over the copyright proprietor, and (2) a shift of the burden of proof from the alleged infringer to the alleger of infringement.

A. *Balancing Interests: Public Interest in Reasonable Access Through Fair Use Outweighs the Statutory Privilege of a Copyright Proprietor*

Balancing has a unique role in copyright matters. As Story said in one of the very early cases: "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be . . . almost evanescent."[76]

Even without constitutional assistance, the Court of Claims in *Williams & Wilkins* "gave the benefit of the doubt" to nonprofit users rather than to the copyright owners in evaluating fair use.[77]

1. Primacy of the Public Interest in Copyright Law

The Congress, the courts, the Register of Copyrights, and legal commentators have all affirmed the primacy of the public interest over the copyright proprietor's interest.

The House Report on the present law stated that copyright was enacted "not primarily for the benefits of the author, but primarily for the benefit of the public."[78] The Supreme Court has stated that "the copyright law . . . makes a reward to the owner of secondary consideration."[79] The Register of Copyrights reported to Congress that "within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail."[80] Goldstein put it thus:

> [W]hether a use is fair is determined on the basis of a number of factors, predominantly on the strength of the public interest in free access. . . . Copyright and trademark law . . . have also experienced a marked shift toward wider public access.[81]

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76 Folsom v. Marsh, 9 F. Cas. 342, 344 (No. 4901) (C.D.D. Mass. 1841). Holmes warned courts of this sort of special problem:

> I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

77 The Williams and Wilkins Co. v. United States, 487 F.2d 1345, 1359 (Ct. Cl. 1973).

78 H.R. REP. No. 2222, 60th Cong. 2d Sess. 9 (1909).

79 Mazer v. Stein, 347 U.S. 201, 219 (1954). *Accord*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); United States v. Loew's Inc., 371 U.S. 38, 46 (1962).

80 COPYRIGHT LAW REVISION, Report of the Register of Copyrights, House Comm. Print, 87th Cong., 1st Sess. 6 (1961).

81 Goldstein, *The Competitive Mandate: From* Sears *to* Lear, 59 CALIF. L. REV. 873, 890, 893 (1971). *See also* Goldstein, *Copyright & the First Amendment*, 70 COLUM. L. REV. 983 (1970) (Supreme Court's tilt toward public interest in libel and privacy cases).

In balancing the copyright owner's mere statutory privilege and the user's constitutional rights, the decision must lean to the user.[82]

With particular reference to the judicial doctrine of fair use, the courts gave as a justification for their doctrine the constitutional requirement to subordinate the interest of the copyright proprietor to the public interest.[83] Nevertheless, until recently, a specific application of the determination of the public interest was not dispositive on whether a particular use had been fair.[84] Failure to accord fair use its proper constitutional status and protection is an actual intrusion into a constitutionally protected area resulting in conspicuous rejection or unrecognized suppression of reasonable access through fair use.

2. Strict Construction of Copyright Monopoly

According to the Supreme Court, copyright is a monopoly.[85] "Copyrights," the Attorney General of the United States has stated, "are forms of monopolies."[86] Even at its best, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge."[87]

Insufficient attention has been paid to the power of censorship inherent in the copyright concept. Copyrights

> may be used to suppress rather than to exploit access to ideas and developments. By pyramiding ownership of many individual copyrights in a particular area, a single person can establish an "enterprise monopoly." This runs contrary to the thrust of the First Amendment. With the establishment of an "enterprise monopoly," its owner would have procured not only the capacity to regulate the timing and pricing of public access to its inventory, but also an ability to control, in rough proportion to the size of his copyright aggregation, the selection of works made available to the public.[88]

This facet of copyright protection revives earlier conceptions that copyright was

82 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). *See also* Rosemont Enterprises Inc. v. Random House Inc., 366 F.2d 303, 309 (2d Cir. 1966); Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

83 Berlin v. E. C. Publications, Inc., 329 F.2d 541, 543-44 (2d Cir. 1961), *cert. denied*, 379 U.S. 822 (1964); Rosemont Enterprises Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966); Greenbie v. Noble, 151 F. Supp. 45, 67 (S.D.N.Y. 1957).

84 *See* Sobel, *Copyright and the First Amendment: A Gathering Storm*, 19 COPYRIGHT LAW SYMPOSIUM 43 (1971). And this despite statutory recognition in the copyright law itself, such as, for example, authorization for nonprofit performance of certain works publicly, 17 U.S.C. § 1(c), (e) (1971), and the judicial recognition of "fair use" as an exercise in balancing in behalf of the public interest in access without control by the copyright proprietor. *See* Goldstein, *Copyright & the First Amendment*, 70 COLUM. L. REV. 983, 1101 (1970).

85 "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

86 H.R. REP. No. 1742, on H.J. Res. 676, 87th Cong., 2d Sess. 6 (1962).

87 Hudon, *The Copyright Period: Weighing Personal Against Public Interest*, 49 A.B.A.J. 759 (1963).

88 Kritzer, *Copyright Protection for Sports Broadcasts and the Public's Right of Access*, 15 IDEA 385, 397 (1971). Goldstein thus described the situation: "Dispensed by the government, copyright still constitutes the grant of a monopoly over expression. The threat, which derives specifically from copyright's restraint upon what may be said and heard in the public, has not been noticed by the Supreme Court." Goldstein, *Copyright & the First Amendment*, 70 COLUM. L. REV. 983, 983-84 (1970).

a means of censorship designed to prevent the distribution of heretical literature.[89] However, the constitutional dimension of fair use protects against such blatant censorship[90] and refutes the claim of copyright proprietors that fair use really depends upon whether the reasonable copyright owner would consent to the use in contention.[91] Copyright proprietors have no consensual or other authority under copyright law to deny the public its first amendment rights to reasonable access through fair use, nor to oust the public's constitutional rights through suppression or demands for ransom (*e.g.*, "royalties") sanctioned by government protection for an exclusive legal monopoly.

Whether denominated fair use or first amendment protections, the public's constitutional right of reasonable access must be protected by both the Congress and the courts. The constitutional rights of the public to reasonable access to copyrighted materials through fair use is a protection against control or suppression by nonconsent or by economic demands of the copyright owner. The Supreme Court has expressed its antipathy to broadening the scope of the copyright owner's monopoly.[92]

In *Williams & Wilkins,* the publisher argued that whatever may have been legal prior to photocopying, the whole context has changed (to the presumed detriment of the user's legal rights) with the advent of the photocopying machine. This is erroneous in constitutional terms. That the photocopy apparatus was not contemplated in 1909, when the present copyright law was enacted, gives the copyright owner no greater monopoly than he would have had with earlier systems of reproducing copies.[93] The Copyright Office submitted an amicus brief in *Mazer v. Stein,*[94] arguing that the method of reproduction does not affect the copyrightability of a work:

> Literary works which in an earlier era would perhaps have been reproduced by hand on illuminated parchment or in other single copies have not become less copyrightable by virtue of their present reproduction in thousands of copies by manufacturing techniques involving the use of movable types, plates, etc. Similarly, painting masterpieces once reproduced on canvas or as murals in single copies are now frequently reproduced in color plates

89 Note, *Constitutional Limitations Upon the Congressional Power to Enact Copyright Legislation,* 1972 UTAH L. REV. 534, 536. *See* B. Kaplan, *An Unhurried View of Copyright,* 2-9 (1967). The monopoly holder has no obligation to maintain the work in print or otherwise available or even to grant permission for royalties.

90 "Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." Southeastern Promotion, Ltd. v. Conrad, 43 U.S.L.W. 4365, 4368 (1975).

91 Study No. 14, S. Comm. on the Judiciary, 86th Cong., 2d Sess., in COPYRIGHT LAW REVISION (Comm. Print 1960).

92 The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe.

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393-95 (1968). *See also* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967).

93 *See, e.g.,* United States v. Midwest Video Corp., 406 U.S. 649, 650 (1972), where the Court held that the FCC had jurisdiction over CATV "was developed long after enactment of the Communications Act of 1934." *See also* Chief Justice Burger's concurring opinion at 675.

94 347 U.S. 201 (1954).

> for distribution in thousands of individual copies or in periodical or book form. *Neither the mechanical and manufacturing processes used in this reproduction* [*nor*] *the number of copies . . . would appear to affect the copyrightability or essential nature of the work itself.*[95]

It would seem that the same proposition constitutionally applies to fair use and that reasonable access through fair use does not become an infringement because it is done by photoduplicators rather than by hand.

Thus, in terms of balancing rights, the monopoly-granting power of the Congress under the copyright provision must be construed in a manner consonant with two fundamental considerations: (1) Congress' monopoly-granting power in copyright is very limited and must be strictly construed, and (2) the copyright-granting power of Congress must be subordinate to rights of reasonable access through fair use which are protected by the first and ninth amendments.

B. *The Copyright Proprietor's Burden of Proof: To Show Alleged Infringement Not Protected by the First or Ninth Amendment*

Without its constitutional dimension and protection, fair use has been relegated to the status of an affirmative defense, with the user being required to carry the burden of proof that the use was not an actionable infringement.[96] Thus, the whole defense of the public interest and constitutional right is thrown on the alleged infringer.[97] Significant procedural effects attach to the legal conclusions that copyright is merely a statutory privilege whereas fair use has constitutional protection. Once fair use has been properly vested with its appropriate constitutional status, the burden of proof shifts to the copyright proprietor to prove that an alleged infringement is not protected as a fair use under the first and ninth amendments. This allocation of the burden of proof is an appropriate adjustment between a statutory privilege (copyright) and a constitutionally guaranteed right (fair use).

VI. Fair Use and the Survival of the Copyright System

The recognition of the proper constitutional status of fair use may become one of the major means for protecting the copyright system from collapse. The

95 Brief for the Copyright Office at 30-31, Mazer v. Stein, 347 U.S. 201 (1954) (emphasis supplied).

96 B. RINGER & P. GITLIN, COPYRIGHTS 68-69 (rev. ed. 1965); NIMMER, *supra* note 4. *But see* opinion of the Court of Claims in *Williams and Wilkins* where the court stated: "[W]e conclude that plaintiff has failed to show that the defendant's use of the copyrighted material has been 'unfair'. . . ." 487 F.2d at 1362.

97 Goldstein described this situation:

> The infringer is, in any case, the sole proponent of the generalized interest in access; for the courts to prejudice his position with assumptions of infringement's intrinsic badness would significantly impede vindication of the public interest. . . . Sanction of the fair use defense—which accredits the public interest in access to didactic expressions—recognizes the alleged infringer's standing to assert this public interest.

Goldstein, *Copyright & the First Amendment,* 70 COLUM. L. REV. 983, 1056 (1970). *See also* Kaplan's comment, which has become a *vade mecum* of the Supreme Court: "The fundamental [is] 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged. . . ." B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 57 (1967).

copyright system is in real trouble today. Among the major causes of its current disarray are the unwarranted assumption that it is necessarily relevant to *all* intellectual creativity and its apparent inability to cope with the strains of accommodating commercially derived copyright concepts with noncommercial creativity and nonprofit uses.[98] Developments may already have passed copyright by and made it irrelevant, or at least ineffective, in coping with modern technological developments (such as TV, CATV, satellites and computers), in being a meaningful vehicle for solving major issues of national social policy (nonprofit educational, library, and research uses of copyrighted materials), and in serving as an aid in international cooperation (especially with developing countries).[99] A collapse of the copyright concept will not be the first time that the Founding Fathers failed to anticipate, in the original Constitution, the course of future history.[100] It is too early to predict whether, but not too soon to fear that, copyright may fall into this category of historical relics. On the other hand, judicial and legislative recognition of the constitutional primacy of fair use over statutory copyright monopoly, at the very least as to reasonable noncommercial and nonprofit educational, research, and scholarly uses of copyrighted materials, might substantially help to alleviate the strains and thus perhaps protect the copyright concept from obsolescence in this area of intellectual works and uses.

Serious disenchantment has set in with the very concept of the copyright system. Kaplan expressed it thus:

> Copyright is likely to recede, to lose relevance, in respect of most kinds of uses of a great amount of scholarly production which now sees light in a mélange of learned journals and in the output of university presses. . . . For many of the uses available through the machine, exaction of copyright payments will be felt unnecessary to provide incentive or headstart—especially so, when the works owe their origin, as so many will, to one or another kind of public support.
>
> I am suggesting that copyright or the larger part of its controls will appear unneeded, merely obstructive, as applied to certain sectors of production and that here copyright law will lapse into disuse and may disappear. For the rest, copyright will persist to serve its historic purposes.[101]

Another commentator even suggested that "it would be possible . . . to do without copyright" and that the publishing industry could operate quite profitably, and more beneficially to the book users, without the artificial protection of copyright law.[102]

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98 Note the language "untainted by any commercial gain from the reproduction" in the *Williams and Wilkins* case, 487 F.2d at 1354.

99 *See* Ringer, *The Role of the United States in International Copyright — Past, Present, and Future*, 56 GEO. L. J. 1050, 1079 (1968).

100 For example, public election of U. S. Senators, voting by 18-year-old persons, abolition of slavery, authority for income taxation, etc. For changes without textual amendment of the Constitution, see notes 12-18 *supra* and accompanying text.

101 B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 120-21 (1967). *See also* Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 283-4, 321 (1970).

102 Breyer, *supra* note 101, at 291-322. *But see* Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Prof. Breyer*, 18 U.C.L.A. L. REV. 1100 (1971); Breyer, *Copyright: A Rejoinder*, 20 U.C.L.A. L. REV. 75 (1972).

Let there be no misunderstanding. This article proposes neither abolition nor discard of the copyright system. On the contrary, what is suggested is a constitutional means for rescuing it from its accelerating slide into honorable oblivion as an antiquated concept which no longer seems to serve the needs of at least some of its purported beneficiaries. In the fields of nonprofit academic and educational creativity, copyright protection is not normally or substantially a significant or even relevant factor. Part of the difficulty in coping with the present situation is the failure of copyright law to differentiate between copyright in commercial enterprises and copyright in nonprofit and noncommercial intellectual activity.

The copyright law has become—or is fast becoming—irrelevant to the preponderance of creativity in nonprofit education, research, and scholarship. One of the most persistent characteristics of creativity in noncommercial education, research, and scholarship is the creator's desire for wide and untrammeled dissemination and circulation of his writings, regardless of financial royalties. This noncopyright motivation is a key to the bulk of current nonprofit intellectual creativity; the traditional wisdom that copyright is a necessary incentive is therefore irrelevant to nonprofit intellectual creativity.[103] More bluntly, a substantial part of the copyright system's difficulties, in connection with nonprofit and noncommercial uses, is its erroneous assumption of its own necessity as an incentive to creativity. In its present contours, copyright law is really a largely ignored relic of the past insofar as such nonprofit creativity is concerned. Nor will the revision bill in its present form[104] rescue copyright law from either its ineffectiveness or further breakdown, at least in the realm of nonprofit intellectual creativity and noncommercial uses of copyrighted works.

Consequently, either a new system or a meaningful differentiation of the commercial copyright system is necessary both for the viability of copyright and for noncommercial intellectual creativity; there has to be a new concept[105] or at least a separate system[106] for nonprofit uses by noncommercial education, research, and scholarship—within or without the copyright orbit. In any event,

103 In *Williams and Wilkins, amicus* briefs by the Association of Research Libraries (at 18-45) and by the American Library Association (at 14-20) argued that the Copyright Act was never intended to prohibit the copying of printed works for private use. And the Brief for the United States, respondent in the case, said (at 17 n.26) that "the copying of material for private use may well be outside the scope of the Copyright Act *ab initio;* at least, the fact that the copy is made for personal use and not for commercial benefit is strong support for the conclusion that it is a non-infringing fair use." The Brief of the United States also stated that the Supreme Court "has implied it shares this view" in *Goldstein v. California,* 412 U.S. 546, 555 (1973).

104 S. 22 and H. R. 2223, 94th Cong., 1st Sess.

105 At least for nonprofit uses by education, research and scholarship, such a "new system" cannot be a *compulsory* licensing requirement, since that would force the American people to pay for what they have the *right to* know, read or hear through the constitutional protection for reasonable access. A *mandatory* licensing system would destroy fair use.

106 There is a long-established precedent *within* the present copyright law for a separate system by means of an exemption from copyright for nonprofit uses of copyrighted materials. Under 17 U.S.C. § 1(c) certain nonprofit uses and reproduction of lectures, sermons, addresses or similar production or other nondramatic literary works are exempted from copyright coverage. And 17 U.S.C. § 1(e) gives the copyright owner of a musical composition only the right, in this connection, "to perform the copyrighted work publicly for profit." The 1909 law thus provides an "outright exemption" for such nonprofit uses of copyrighted materials, HOUSE COMM. ON THE JUDICIARY, 90th Cong., 1st Sess., REPORT ON COPYRIGHT LAW REVISION to accompany H.R. 2512 (March 8, 1967) at 26; SEN. COMM. ON THE JUDICIARY,

the time is long past for copyright to drop its irrelevant pretensions. One of these irrelevant pretensions is the continuous failure to recognize the constitutional dimension of fair use and to accord it the resultant appropriate legal status. It is encouraging, however, that some of the leading scholars have come to recognize the "emerging constitutional limitation on copyright contained in the first amendment."[107]

None can guarantee that such belated recognition will, of itself, save the copyright system, but it could conceivably go a long way toward coping with one of the most serious strains which now undermine the copyright concept. One thing is reasonably sure: Failure to accord such recognition promptly enough to prevent irreversible decay could render the copyright system permanently unfruitful and irrelevant for noncommercial educational, scholarly, and research uses.

VII. Conclusion

Fair use in copyright has constitutional protection under the first and ninth amendments and can assure the public of reasonable access to its heritage, notwithstanding the purported exclusive right of the copyright proprietor under statute. Such constitutionally protected fair use has priority over the mere statutory privilege accorded to the copyright owner by the permissive and nonmandatory action of the Congress in enacting copyright legislation under the copyright clause.

In the balancing between the constitutional right of access through fair use and the copyright law, the balance must tilt toward the constitutionally protected right to reasonable access. Fair use is the vehicle for effectuating this constitutional protection for the primacy of the public interest over the interest of the copyright proprietor.

Since copyright conveys only a statutory privilege while fair use enjoys constitutional protection, the burden of proof must shift from the alleged infringer to the alleger of infringement.

The copyright system is in danger of collapse because of its growing irrelevance to modern technological and social developments affecting intellectual creativity, especially in connection with the reasonable use of copyrighted materials for nonprofit and noncommercial education, research, and scholarship. Either a new concept or a separate system for such nonprofit uses must arise and it may or may not be copyright.

Prompt and practical recognition of the constitutional status of fair use as a means of assuring the public's access to copyright materials (especially for nonprofit and noncommercial education, research, and scholarship) may help to turn the tide against the growing obsolescence and irrelevance of the copyright system for large areas of intellectual creativity, productivity, and use.

93rd Cong. 2d Sess., REPORT ON COPYRIGHT LAW REVISION, to accompany S. 1361 (July 3, 1974) at 112.

An Ad Hoc Committee (of Educational Institutions and Organizations) on Copyright Law Revision proposed a limited educational exemption (to include restricted copying) for nonprofit educational purposes, as a reasonable means of retention and effectuation of the "not-for-profit" concept of the current law. See *Hearings, supra* note 7 at 120, 129.

107 Nimmer, *supra* note 35, at 1200. *See also* 1 M. NIMMER, COPYRIGHT § 9.2 (1974).