

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 3 *Volume III*
Number 2 *Volume III Book 2*

Article 9

1993

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Recommended Citation

Michael W. Baird, *Copyrighting Newscasts: An Argument for an Open Market*, 3 Fordham Intell. Prop. Media & Ent. L.J. 481 (1993).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol3/iss2/9>

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NOTES

Copyrighting Newscasts: An Argument for an Open Market

INTRODUCTION

Is it proper to allow a number of small thefts, while prosecuting only the larger takings? If the law against small misappropriations cannot be enforced, should it be law at all? These questions arise directly out of the application of the Copyright Act¹ to television news broadcasts.

Copyright law is at once crystal clear and frustratingly vague. This is primarily due to the wide range of materials given copyright protection. While in some cases copyright is straight forward, a result of well written statutes and logical case law, other areas are relatively new, and therefore tentative in definition. Also, there is little case law for these new areas, requiring ill-fitting rules to be drawn from the body of existing copyright law. Changes in technology have traditionally prompted revision in copyright law. The current application of copyright law to news broadcasts demonstrates the possibilities for ambiguities and presents a strong cause for redefining the requirements for copyright protection.

The Eleventh Circuit pioneered the definition and application of copyright law with regard to television news. This volatile area of copyright seemed to be resolved by the circuit's decisions in 1984.² However, in a recent interlocutory decision, the Eleventh Circuit reversed its stand on the issue.³ Although the decision that created this situation was later vacated, the logic of the Eleventh

1. 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991).

2. *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983), *rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *on remand*, 618 F. Supp. 469 (N.D. Ga. 1985), *aff'd*, 792 F.2d 1013 (11th Cir. 1986).

3. *CNN, Inc. v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471 (11th Cir.), *vacated*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed per curiam*, 959 F.2d 188 (11th Cir. 1992).

Circuit reopened the law of television copyrights to review, especially in the area of news coverage.

The Copyright Act of 1976 ("the 1976 Act")⁴ defines publication as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."⁵ Specifically excluded from the definition of publication are public performances or displays of a work, such as when the work is broadcast or transmitted.⁶ This change made it possible for television stations to defend against simultaneous recording or rebroadcast by a competitor. The broadcaster is thus protected by copyright; however, no legal action is possible until the work is registered with the Register of Copyrights.⁷ Accordingly, a work cannot be registered until it is "fixed in any tangible medium of expression."⁸ This effectively prevents other stations from rebroadcasting material from a primary station without permission. With the development of improved technology and the concurrent rise of easy-to-use video cassette recorders (VCRs), however, virtually anyone with a VCR can now simultaneously record television broadcasts.

The advent of the new technology also created a novel type of video "news clipping" service. Like their print media predecessors, these monitoring services provide the news of the day to interested clients. Typically, a video clipping service constantly monitors all newscasts. The service then contacts members of the public appearing in the newscasts and offers to sell them a tape of the relevant segment. Alternatively, the service may have a standing order with a client to provide automatically copies of segments in which the client is interested. Many of these services also provide news synopses or news in a digested form, tailored to fit a client's needs.

4. 17 U.S.C. §§ 101-810.

5. 17 U.S.C. § 101 (1988).

6. *Id.*

7. 17 U.S.C. § 411(a) (1988).

8. 17 U.S.C. § 102(a) (1988). The 1976 Act requires that a fixed work be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Live broadcasts are deemed "fixed" if they are fixed simultaneously with their transmission. 17 U.S.C. § 101.

Herein lies the infringement conflict. Stations produce and copyright newscasts, but members of the public are able to record them at virtually no cost. The recorded copies are then sold at a profit, with no hint of royalties to the station. The problem with prosecuting this type of infringement is that the typical offense is small, in the \$40-\$100 range.⁹ However, the recent incorporation of the Berne Convention into United States copyright law allows punitive damages of up to \$20,000 for each offense.¹⁰ This seems overly harsh. The alternative is to obtain an injunction preventing any recording, but this too can be overly restrictive.

This Note discusses the conflict and offers possible resolutions. Part I will give a brief overview of copyright law as it relates to television and, specifically, to newscasts. Part II will summarize the current positions of the courts on this issue through analysis of the two major cases involved in this question, *Pacific & Southern Co. v. Duncan*¹¹ and *CNN, Inc. v. Video Monitoring Services of America, Inc.*¹² Part III will demonstrate why the commonly applied "fair use" doctrine of balancing regulatory interests against proprietary interests is of little help in providing a remedy in these sorts of cases. Part IV will argue for placing news broadcasts outside of copyright protection altogether and present a new approach to protecting such material by taking into account the economic and social realities of the situation.¹³

I. THE LAW—PAST AND PRESENT

Copyright is at once a constitutional right and a legal necessity.

9. See, e.g., *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186, 1189 (N.D. Ga. 1983); *Cable News Network, Inc. v. Video Monitoring Services of America, Inc.*, 940 F.2d 1471, 1474 (11th Cir. 1991).

10. 17 U.S.C.A. § 504(c)(1) (Supp. 1992).

11. 572 F. Supp. 1186 (N.D. Ga. 1983), *rev'd in part*, 744 F.2d 1490 (11th Cir. 1984).

12. 940 F.2d 1473 (11th Cir. 1991).

13. For an earlier treatment of the question of news broadcasts and copyright, see Joan C. Steiger, Note, *Copyright Law—Videotaping Live Television News Broadcasts For Commercial Purposes* *WXIA-TV v. Duncan*, 8 MED. L. REP. (BNA) 2075 (N.D. Ga. June 28, 1982), 6 W. NEW ENG. L. REV. 225 (1983).

The Constitution grants Congress the power to enact copyright law.¹⁴ Congress, in turn, has enacted copyright law and has taken the responsibility of clarifying it from time to time.

A. The Origin of Copyright

The origin of copyright law is couched in English equity and statutory law.¹⁵ The Statute of Anne was passed by Parliament in 1710 in response to the iron-fisted censorship of the Licensing Act of 1662.¹⁶ The Statute attempted to wrest control of the publishing industry from the Crown-controlled Stationers and place more power in the authors of works.¹⁷

The United States originally passed legislation on copyright law in 1790, granting copyrights only to authors of maps, charts, and books.¹⁸ However, as society advanced and new forms of communication and media developed, copyright case law grew as well. With the advent of the first mechanical recording devices, such as the phonograph and motion pictures, copyright law expanded to include recorded works of music or voice.¹⁹ With the birth of the radio, television, and home recording devices, the law expanded yet further.²⁰ Finally in 1976, the law was completely overhauled, taking into account live broadcasts and the various forms of fixation.

For a work to be copyrighted, it must be original and in a fixed form.²¹ The originality requirement limits the copyrightability of

14. "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

15. Stephen S. Zimmerman, Comment, *A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict*, 35 EMORY L.J. 163, 171 (1986).

16. *Id.* at 176.

17. *Id.*

18. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51-52, reprinted in 1976 U.S.C.C.A.N. 5659, 5664-65.

19. *Id.*

20. *Id.* at 53, 1976 U.S.C.C.A.N. at 5666.

21. 17 U.S.C. § 102 (1988 & West Supp. 1992). Section 102 reads as follows:

(a) 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 commu-

a factual work, such as an encyclopedia or news broadcast. Only its presentation or form may be copyrighted. Neither ideas nor facts may be copyrighted, regardless of their novelty. Theoretically, copyright law promotes the free flow of ideas and information, while providing incentive to authors to be productive. Without copyright, there would be little or no incentive for an author to produce an original work, to put the time, thought and effort into a new creation.

First, the original author would suffer. As soon as the new work was put on sale, any free rider²² could immediately copy the work and sell it at a great profit—a greater profit, perhaps, than even the creator of the work. Despite the author's time and labor, his hard-earned profits would be going to the free rider.

Second, society at large would suffer. It would pay to be a scavenger instead of an originator. Much less effort has to be invested in order to feed off another's work. With no copyright law, there would be a great number of imitators, and little incentive to create original works.

On the other hand, it is possible to extend copyright protection too far. Suppose, for example, that copyright was absolute. That is, all works belong to the author regardless of their nature and without time limit. If an author were able to copyright facts or ideas, the consequences would border on the absurd. Authors of

nicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (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. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

22. An "economic free rider" is a person who profits from the works of others with little or no extra work. The term comes from a classic economics example. Picture a bus. As long as the bus is full of paying passengers, the driver is happy, and may allow one passenger to ride for free. However, when everyone wants to be a free rider, no one pays the driver, and the bus goes nowhere.

history books would be able to claim rights against any later history books that repeated the same facts. Newton could have copyrighted his laws in perpetuity, thus being able to claim rights against anyone who used his principles in later theories or scientific journals. Today's copyright law not only regulates those who would use works, but also those who create them.²³ Picture a seesaw: on one side, those who create works, and on the other, those who would use them. Copyright is given the task of promoting both sides, without favoring one over the other—a delicate balancing act indeed.

Copyright law was simpler when fewer categories of copyrightable materials existed. Generally, if something could be written down, it could be copyrighted (aside from the aforementioned factual exceptions).²⁴ At the turn of the century, however, a number of decisions made copyrightability dependent on the type of medium in which the work was fixed.²⁵ These cases created a system of artificial categories to determine the copyrightability of certain works.²⁶ That is, while some works were obviously reproduced, the method of reproduction was not addressed in the then-current copyright law. The works were thus deemed unprotected by copyright. This in turn created a highly inequitable system. Congress remedied the situation in 1909 by adding the fixation requirement to the copyright law.²⁷ Instead of depending on the form of the medium, copyright law was made to depend on the permanence or

23. See generally, L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 8-12 (1987) [hereinafter Patterson, *Free Speech*].

24. For examples of non-copyrightable subject matter, see 17 U.S.C. § 102(b) (examples of non-copyrightable subject matter) (reproduced *supra* note 21).

25. See, e.g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). This case dealt with the perforated music rolls for player pianos. Makers of player pianos also sold perforated rolls of paper, which, when inserted in the player piano mechanism, caused the piano to play particular tunes. The owner of the copyright on the music claimed infringement; the court decided that since the rolls were only holes punched in paper, and could not be read by eye, no copyright protection existed. *Id.* at 18; see also *Stern v. Rosey*, 17 App. D.C. 562 (1901).

26. See H.R. REP. NO. 1476, *supra* note 18, at 52, reprinted in 1976 U.S.C.C.A.N. at 5665.

27. *Id.*

stability of the fixation.²⁸ By encompassing works "fixed in any tangible medium of expression, now known or later developed,"²⁹ the new law included original works that were in non-traditional formats.

B. Copyright and Television

The development of live television brought a plethora of new problems. In the early years of live television, only television studios had the capability of recording shows, so there was no possible copyright infringement issue. Studios eventually acquired technology, however, that allowed them to record programs electronically onto video tape. This also enabled the studios to record broadcasts other than their own, and then the difficulties arose.

The main issue was not whether a program was copyrightable. For the most part, live television programs were treated like motion pictures. The true problem was that of fixation.

Logically, copyrightable materials must be in a tangible form, or "fixed" in some manner.³⁰ Without this requirement, proving copyright infringement would be impossible and cases would consist entirely of hearsay and dubious evidence. Typically, copyright protection goes to the first person to "fix" and register an original work. However, fixation of live broadcasts can be made simultaneously by all those recording the show, including home viewers. The solution was to recognize statutorily that fixation occurred in the originating studio simultaneously with transmission of the broadcast.³¹

II. THE PROBLEMS AND CASES

A. Dealing with Videotaping Generally

If television broadcasting is copyrighted, how is it that recording devices are permitted outside of the originating studios? In-

28. 17 U.S.C. § 102.

29. *Id.*

30. *Id.* § 102(a).

31. *Id.* § 101 (definition of "fixed"). See *supra* note 8.

deed, why is the general public allowed to make copies of broadcasts at all? These questions were answered by the United States Supreme Court in the *Betamax* case.³²

Sony developed the Betamax, a video tape recorder that enabled the general public to videotape programs off the air. Universal Studios ("Universal") claimed that some people had used the Betamax to record a number of Universal's copyrighted works. Universal further claimed that Sony was liable because it had produced the Betamax machine knowing that it would be used for copyright infringement. The Ninth Circuit ruled against Sony, holding that off-the-air home videotaping of copyrighted television shows, despite its non-commercial and private nature, constituted infringement.³³

The Supreme Court reversed, holding that the question was not whether the Betamax could be used to infringe copyrights, but whether it could be used for significant, non-infringing purposes.³⁴ The Court reached three conclusions. First, the primary use of videotaping was for "time-shifting," that is, recording a program so that it could be watched later. The Court found that because time shifting actually enlarged the audience for a specific television show, the broadcaster had no reason to complain.³⁵ Second, Universal was "unable to prove that the practice [of videotaping transmissions for home use] ha[d] impaired the commercial value of their copyrights or ha[d] created any likelihood of future harm."³⁶ Third, allowing home videotaping was "consistent with the First Amendment policy of providing the fullest possible access to infor-

32. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). For an in-depth treatment of the *Betamax* decision, and its effect on home video taping, see Joni Lupovitz, *Beyond Betamax and Broadcast: Home Recording from Pay Television and the Fair Use Doctrine*, 2 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 69 (1992).

33. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 969 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

34. 464 U.S. at 442.

35. *Id.* at 421.

36. *Id.* However, Justice Blackmun took an entirely different approach in his vigorous dissent, stating that "a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work." *Id.* at 482 (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(E)(4)(c), at 13-84 (1983)).

mation through the public airwaves."³⁷

The *Betamax* decision was the end result of a chain of videotaping cases, beginning with *Walt Disney Productions v. Alaska Television Network*,³⁸ which held that videotaping copyrighted entertainment broadcasts for later retransmission by a cable operator was an infringing action. A later case, *Encyclopedia Britannica Educational Corp. v. Crooks*,³⁹ held that although videotaping educational programming for educational purposes by a school district could be fair use, there must also be an element of spontaneity. Therefore, systematic recording of such programming was considered infringement.⁴⁰

B. Moving on to the News

1. A Blow for Free Markets

Precedents in the narrow field of copyrighting newscasts are sparse, consisting of only two cases. Nevertheless, these cases are invaluable in pointing out the basic conflicts in this area. The first decision in this chain is *Pacific & Southern Co. v. Duncan* ("*Duncan I*").⁴¹ Ms. Duncan was the operator of TV News Clips, a self-styled news clipping service.⁴² Her business consisted of recording segments of local newscasts, and then contacting the person who was the subject of a particular segment. She would sell a copy of the recorded segment to the featured person for a fee of \$65 and \$25 for additional copies.⁴³ In this particular case, Pacific & Southern, doing business as WXIA-TV, produced a seg-

37. *Id.* at 425 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 454 (C.D. Ca. 1979)). The district court referred to the holding in *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102, in which the Supreme Court held that Jesse Jackson's keynote speech at the 1976 Democratic National Convention was not protected by copyright.

38. 310 F. Supp. 1073, 1075 (W.D. Wash. 1969).

39. 542 F. Supp. 1156 (W.D.N.Y. 1982).

40. *Id.* at 1175.

41. 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1490 (11th Cir. 1984).

42. 572 F. Supp. at 1189.

43. *Id.*

ment about a new jogging trail at a local junior college. Ms. Duncan recorded the segment and sold it to the college.⁴⁴ WXIA-TV duly registered the segment and the newscast and brought an action for copyright infringement against Ms. Duncan.⁴⁵

Ms. Duncan pleaded two defenses. First, she claimed that copyright protection for newscasts violated the First Amendment, as it restricted the free flow of information.⁴⁶ Newscasts, she argued, were unique in that they were not truly fixed, and the station was under no duty to preserve them in a permanent form or to make copies readily available.⁴⁷ By performing this activity privately, Ms. Duncan claimed that she was in fact advancing the basic purpose of the First Amendment. She argued that prohibiting copying would "be tantamount to sanctioning monopolization of information."⁴⁸

This argument was summarily rejected by the district court as irrelevant. The court found that while the factual basis of news cannot be copyrighted, the method of expression may be.⁴⁹ It determined that the idea-expression line was distinct in this case, and that the news covered was "soft," and thus not representative of an overriding First Amendment interest.⁵⁰ Finally, the court recognized that to date, most issues of this nature had been resolved by application of the "fair use doctrine," and that no circuit had recognized a First Amendment exception to copyright.⁵¹

44. *Id.*

45. *Id.*

46. *Id.* at 1192.

47. *Id.* WXIA-TV kept a tape of the entire broadcast for one week and then destroyed it. However, the station kept tapes of individual news items for indefinite periods. The station also kept complete written transcripts of each of its newscasts, as well as the scripts. WXIA-TV also offered taped copies of its newscasts for sale to the general public, but at the somewhat higher price of \$100 per tape. *Id.* at 1190-91.

48. *Id.* at 1192.

49. *Id.* at 1193.

50. *Id.*

51. *Id.* The reasoning is that copyrightable works are "carved out" of works protected by the First Amendment. Fair use is an exception to copyright, not an expansion of copyright. The Supreme Court treated this question in a perfunctory manner. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

The court also rejected Ms. Duncan's second argument that her recording of the newscasts constituted fair use.⁵² When deciding fair use, a court must apply a four-part test, laid out in § 107 of the Copyright Act.⁵³ However, the court never reached this test. It decided that Ms. Duncan failed to meet the preliminary requirements of the section, specifically, whether the use was clearly for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research."⁵⁴ The court thought (and indeed, Ms. Duncan admitted) that the purpose was strictly commercial and did not satisfy any of these initial requirements.⁵⁵

Consequently, Ms. Duncan lost the case. However, the court assessed the damages at only \$35, the amount she received for the sale of the clip. The court stated that any further punishment would not serve the aims of copyright.⁵⁶ The punishment was extraordinary in its mildness. The court pointedly refused to exercise its options of fining Ms. Duncan up to \$10,000, enjoining her from further monitoring, and awarding attorney's fees to WXIA-TV.⁵⁷ The district court denied the injunction for three reasons: (1) the sales did not seriously threaten WXIA-TV's creativity, so an injunction would not further the aims of copyright law; (2) an injunction could threaten the First Amendment value of the tapes that

52. *Duncan I*, 572 F. Supp. at 1195.

53. The section reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1988 & Supp. III 1991) (emphasis added).

54. *Duncan I*, 572 F. Supp. at 1195 (quoting 17 U.S.C. § 107).

55. *Id.*

56. *Id.* at 1196-98.

57. *Id.* at 1197.

Ms. Duncan made available to the public; and (3) since WXIA-TV had abandoned its copyright on several portions of the newscasts, a decree fair to both parties distinguishing between abandoned and unabandoned portions would be too difficult to formulate.⁵⁸ This simple act by the district court demonstrated its reluctance to punish Ms. Duncan for something that, although technically illegal, did not offend its sensibilities.

WXIA-TV's damage was *de minimis*. True, it did offer to sell tapes of broadcasts itself, but at the greatly inflated price of \$100 per tape. It was not actively marketing its tapes, nor did it project any revenue from the sale of such recordings.⁵⁹ Ms. Duncan, on the other hand, embodied the American spirit of free enterprise, and, taking something that was relatively worthless, turned it into a commodity and a full-time business. One can understand why the court was reluctant to punish Ms. Duncan for her actions. While the court reasoned that greater punishment would serve no good end, its underlying message was that the wrong done to WXIA-TV was so small that enforcing an injunction against Ms. Duncan would be inequitable.

2. Turnabout Is Fair Play

The Eleventh Circuit did not agree with the district court.⁶⁰ On appeal ("*Duncan I Appeal*"), the circuit court agreed that Ms. Duncan was guilty of copyright infringement, but found the remedy granted to WXIA-TV was incomplete.⁶¹

There is an interesting aside to the circuit court's initial review of *Duncan I*. In a brief statement in dictum, the court summarily declined to treat TV News Clips as a newspaper clipping service because it did not purchase the same copy that it sold to its clients.⁶²

58. *Id.* at 1196.

59. *Id.* at 1198.

60. *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984).

61. *Id.* at 1500.

62. *Id.* at 1494 n.6. This reasoning is based on the Eleventh Circuit's interpretation of § 109 of the Copyright Act, which allows the owner of a copy to dispose of it by any

The circuit court thought it was improper for the district court not to consider the four-part test of § 107.⁶³ However, in considering the question itself, the circuit court found no evidence of fair use, and it therefore upheld the judgment.⁶⁴ The circuit court also rejected Ms. Duncan's claim of First Amendment rights because although WXIA-TV wished to restrict the use of its broadcasting, it did not make tapes inaccessible to the public.⁶⁵ Anyone attempting to purchase the tapes simply had to take a more difficult (and costly) route. Ms. Duncan was not the only supplier of the service.

The circuit court applied the following reasoning. WXIA-TV had been granted copyright. There were only two ways to enforce the copyright. The first was to find out which programs had been copied, to register the programs, and then to take legal action. In this case, each suit would amount only to a very small award; so, the cost of bringing the lawsuits would have been prohibitive. The second option was to obtain an injunction prohibiting TV News Clips from copying any WXIA-TV material for resale, an act that is for the most part illegal anyway.⁶⁶ The circuit court found that the district court's reasons for refusing the injunction were legally insufficient and held that the district court abused its power in not granting an injunction.⁶⁷

The district court stated that the precise wording of an appropriately limited injunction against Ms. Duncan was not apparent. The Eleventh Circuit, however, found that an injunction was the only correct remedy for the established legal rights, despite the difficulty in formulating it.⁶⁸ After the case went back to the district court on remand, the Eleventh Circuit reaffirmed the applicability of the

means, including sale. This is commonly referred to as the "first sale doctrine." 17 U.S.C. § 109 (1988 & Supp. III 1991). The circuit court refused even to consider the point that Ms. Duncan might actually be the legal owner of the videotaped copy. This will be discussed *infra* at Part IV.A.1.

63. *Duncan I Appeal*, 744 F.2d at 1495.

64. *Id.*

65. *Id.* at 1498.

66. 17 U.S.C. § 502 (1988) (court may "prevent or restrain infringement of copyright").

67. *Duncan I Appeal*, 744 F.2d at 1499, 1500.

68. *Id.* at 1500.

injunction.⁶⁹

There is a fundamental tension underlying the Eleventh Circuit's decision to grant the injunction against Ms. Duncan. Such an injunction directly contradicts the copyright goal of promoting distribution of information. Granting it has the effect of prohibiting the copying of works that do not yet exist. Supposing that Ms. Duncan is the only person currently capable of such infringement, the injunction has the further effect of doing away with the need to register the works before an action can be brought. While it is true that a cause of action exists before a work is registered, an infringer cannot be punished until the work is registered. An injunction like the one above bypasses this safeguard. The remedy would then lie in common law, *i.e.*, contempt, and not in copyright. At common law, the copyrightability of a work is assumed, obviating the need to register or even produce original works.

3. Free Market Returns

The next case in the video clipping chain is that of *CNN v. Video Monitoring Services of America, Inc.*⁷⁰ Video Monitoring Services ("VMS") performed essentially the same function as Ms. Duncan's TV News Clips, except on a national scale. VMS monitored newscasts nationally and then sold recordings of certain portions to third parties.⁷¹

In the course of this business, VMS continuously taped the programming of plaintiff Cable News Network ("CNN") twenty-four hours a day, seven days a week.⁷² In 1988, VMS sales of CNN broadcasts numbered 2,502 transactions, bringing in approximately \$300,000.⁷³ VMS was not licensed by CNN to perform this job; indeed, CNN contracted with Radio TV Reports, a VMS competitor, to supply all requested news clips.⁷⁴ Additionally, CNN

69. *Pacific & S. Co. v. Duncan*, 792 F.2d 1013 (11th Cir. 1986) ("*Duncan II*").

70. 940 F.2d 1471 (11th Cir. 1991).

71. *Id.* at 1474.

72. *Id.*

73. *Id.*

74. *Id.*

had a number of "in-house" recording operations that provided tapes of broadcasts for educational and other purposes.⁷⁵

Obviously, not all of CNN's broadcasts were live. Pre-recorded portions included commercials and videotapes of newsworthy events that had recently occurred.⁷⁶ These segments were often closely interspersed with live broadcasting.⁷⁷ In the case of videotaped news, there was sometimes a live voice-over explaining the situation and providing additional facts.⁷⁸ Other portions were entirely pre-recorded with no live element at all. These included "human interest" pieces that did not require constant updating, and special affairs shows, such as the "Crossfire" segment which was the basis for the instant case.⁷⁹

CNN learned that VMS made and sold unlicensed copies of CNN broadcasts. Several times, counsel for CNN orally requested VMS to stop copying CNN transmissions.⁸⁰ VMS continued the taping. On March 12, 1985, CNN sent VMS a letter instructing it to discontinue taping CNN broadcasts.⁸¹ VMS responded that it relied on videotaping as part of its monitoring process and that individually monitoring each newscast "would be physically and economically impossible."⁸² When VMS declined to cease operation, CNN filed a four-count complaint.⁸³

75. See *id.* at 1473. CNN's transmissions consist not only of news but of a number of special programs as well. These programs include forums for public debate, such as "Crossfire," as well as talk shows, like "Larry King Live." When CNN transmits, two tapes are made of the broadcast. The first is made by a production assistant and is erased after one week. The second is made by the engineering department and is retained for three and a half years. It is then erased. Some specific programs, however, have multiple recordings made. "Crossfire" and "Larry King Live" are in this category. These additional tapes are kept for one year, but certain selected segments have no termination date. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1473-74.

79. *Id.* at 1474.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1475 & 1476 n.6. CNN claimed ownership of the copyright in the October 17, 1988, edition of "Crossfire" ("the Segment"). *Id.* at 1474. CNN claimed that VMS had copied the Segment and sold the copy. *Id.* CNN produced as evidence of the copy-

This Note is concerned with the count claiming infringement of copyright. CNN filed a request for a preliminary injunction enjoining VMS from future taping of all CNN transmissions, as per the 1984 ruling of *Duncan I Appeal*. The district court granted this motion, enjoining VMS "from copying or selling copies of any of [plaintiff's] programming."⁸⁴

VMS then filed a motion on February 21, 1990, to clarify and amend the judgment. VMS claimed that the language of the injunction was improper and overly broad because it prohibited far more activity than would allegedly infringe CNN's copyrights.⁸⁵ The district court denied VMS's motion to clarify the order, which the court felt was nothing more than a thinly veiled attempt to delay the judicial process.⁸⁶ Thereafter, VMS filed an appeal of the injunctive order to the Eleventh Circuit.⁸⁷

The Eleventh Circuit reviewed the precedent set by the holding in *Duncan II*.⁸⁸ CNN was convinced that the cases were similar enough to be treated in the same fashion. However, the circuit court drew a distinction between the two cases.⁸⁹ Although both cases dealt with the issue of unauthorized use of copyrighted newscasts, the court in *Duncan II* specifically declined to address the issue of providing "news summaries," instead of the actual tapes, to clients.⁹⁰ Unlike the *Duncan II* injunction, which prohibited TV News Clips from recording broadcasts for resale, the order requested by CNN prohibited all unauthorized recording, whether for re-

right its certificate of registration of the Segment, which classified the program as a "motion picture" (conforming to 17 U.S.C. § 101) and a "work made for hire," making the station the author of the work. *Id.* at 1475.

The complaint against VMS consisted of four counts: unauthorized publication or use of communications, deceptive trade practices, common law unfair competition, and misappropriation. *Id.* at 1475 & 1476 n.6.

84. *Id.* at 1476. The injunction became effective on the condition that CNN post an \$80,000 bond securing against the possibility that it would lose the case. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1476-77 (citing *Pacific & S. Co. v. Duncan*, 792 F.2d 1013 (11th Cir. 1986)).

89. *Id.*

90. *Id.* (citing *Duncan II* at 1015).

sale or merely "monitoring."⁹¹

Accordingly, the circuit court found that the scopes of the two injunctions were significantly different, and thus it declined simply to apply the *Duncan II* standard.⁹² Moreover, the circuit court felt that the recent Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*⁹³ significantly changed the application of copyright law, mandating a close review of decisions prior to the Supreme Court's ruling.⁹⁴

The circuit court in *VMS* first evaluated the requirement of jurisdiction in the case.⁹⁵ For a court to have jurisdiction in a matter, the § 411 registration requirement of the Copyright Act must be met.⁹⁶

The court then determined that the scope of the remedy for copyright infringement was constrained and dictated by the scope of what was actually registered for copyright.⁹⁷ Here, only a thirty-

91. *Id.*

92. *Id.*

93. 111 S. Ct. 1282 (1991). The defendant in *Feist* published a competing telephone directory, copying telephone numbers from plaintiff's directory. The Supreme Court ruled that there was no copyright infringement because telephone numbers are entirely factual, and therefore not under copyright protection. The Supreme Court also rejected the "sweat of the brow" theory that some property right had been engendered by plaintiff's work in compiling the phone numbers. *Id.* This is in direct opposition to the Supreme Court's holding in *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), which recognized that industrious news-gathering created at least a limited "quasi-property" right.

94. *VMS*, 940 F.2d at 1477. The circuit court applied a four-part test to determine the validity of the preliminary injunction. CNN had to prove: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that its own injury outweighed the injury to VMS; and (4) the injunction would not disserve the public interest. *Id.* at 1477-78 (citing *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1990)).

95. 940 F.2d at 1480.

96. *Id.* The requirement is that "no action for infringement of copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a).

97. 940 F.2d at 1480. The court recognized the conflict that could result from overzealous application of § 502 of the 1976 Act, which allows injunctions as remedies. See *supra* note 66. As discussed *supra* in Part II.B.2, by enjoining a person from copying a work not yet in existence, let alone registered, the court would obviate the need for registration in the first place. Hence, the court stood by the axiom that a remedy should

minute segment had been registered. In addition, the segment was not representative of CNN's normal broadcasting; that is, the bulk of CNN's broadcasting was of live news coverage, while the alleged infringement had occurred regarding a non-news "specialty show."⁹⁸

CNN asked for an injunction preventing all recording. The court found this to be the equivalent of claiming a remedy available for (1) unregistered claims of copyright in unpublished works, and (2) putative copyrights in works that are not yet in existence.⁹⁹ The court considered both of these theories direct contradictions to copyright law. The *VMS* decision requires further analysis.

a. The Future Works Issue

The main problem with protecting "putative copyrights which are not yet in existence," as the circuit court saw it, was that it was impossible for a non-existent work to be "fixed." Fixation is integral to copyright law; indeed, no copyright can exist without it.¹⁰⁰ Until there is a copyright, there cannot be a copyright owner. The law restricts actions for infringement of copyright to the owner of the infringed copyright.¹⁰¹ Assuming ownership, no action can be made for recovery until the copyright is registered. The court then recognized that an argument existed for some sort of equitable protection of the author's efforts. It would seem unjust for one person to work diligently in producing a work, and, at the last moment, (or after the fact) to allow a second party to acquire the work with no recompense. However, the circuit court found this theory to be in direct conflict with the recent Supreme Court decision in *Feist*.¹⁰² CNN did not claim to own the news. On the other hand, CNN did claim that newscasts should be protected in

only correct the fault complained of (which was in this case infringement of a single half-hour segment).

98. *VMS*, 940 F.2d at 1480.

99. *Id.*

100. *See* 17 U.S.C. § 102.

101. *VMS*, 940 F.2d at 1481 (citing 17 U.S.C. § 501(b)(1988)).

102. *Id.*

some way because of the effort made to collect and compile the news.¹⁰³ Yet, the *Feist* decision expressly rejected this "sweat of the brow" theory.¹⁰⁴ The Supreme Court emphasized that the telling factor in copyright is originality, not amount of effort exerted.¹⁰⁵ Hence, "[t]he primary objective of copyright is *not* to reward labor of authors, but . . . 'to promote the Progress of Science and the useful Arts.'"¹⁰⁶ Accordingly, the circuit court rejected outright the notion of an "equitable" remedy based on the "sweat of the brow" theory as contradicting the *Feist* ruling.

A second conflict arises from allowing certain copyright holders to protect future works. By restraining people from copying works that have not yet been created, an injunction allows claimants to avoid registration altogether. After all, why register a copyright if future infringers are already enjoined from copying the work? Such injunctions, in effect, grant a copyright monopoly and elevate protection of the author over the common good. Also, an injunction such as CNN sought would have prohibited the copying not only of copyrighted works, but also would have prohibited the copying of those works that should have had no copyright protection. Granting the injunction would have effectively bypassed the constitutional mandate of originality. No test for originality can exist for works that have not yet been created. This sort of "future works injunction" would also grant authors a method of securing copyright protection for material in the public domain.¹⁰⁷

103. *Id.*

104. *Feist*, 111 S. Ct. at 1292-93.

105. *Id.* at 1289.

106. *VMS*, 940 F.2d at 1481 (quoting U.S. CONST. art. I, § 8, cl. 8).

107. *Id.* The circuit court also examined the propriety of granting injunctive relief for the infringement of unregistered copyrights in existing works. The circuit court reminded the parties that a prerequisite to any action in copyright is the registration of the work. While it is true that under the Copyright Act of 1976 a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, he cannot enforce his rights in the courts until he has registered. *Id.* (citing 17 U.S.C. § 411(a)(1988)). The court also reviewed § 411(b), which deals with the special situation presented by works that are transmitted live at the same time they are fixed in a tangible form for the first time. *Id.* at 1482 (citing 17 U.S.C. § 411(b)(1988)).

However, the court came to the conclusion that such rights could only be enforced

The circuit court reviewed CNN's claims, keeping in mind the above considerations. Although CNN asserted that access to copies of its programming could be obtained from its library and other sources, the court noted that CNN was under no statutory obligation to keep such a library or to allow access to such resources.¹⁰⁸ Indeed, a broadcaster is only obligated to "fix" the program at the time of transmission if copyright protection is sought. Even then, the broadcaster is not required to retain the fixed copy for any length of time, unless it is submitted for registration. The broadcaster could erase the tapes immediately. The court found the threat of such abuse to be quite real, with the possibility of a monopolization of information by news broadcasters. It concluded, "[b]y approving a grant of injunctive relief for infringement of unregistered, copyrighted transmission programs, we would allow broadcasters to close the door on public access to their work product."¹⁰⁹

b. The Fair Use Issue

The second issue considered by the Eleventh Circuit was fair use. The court noted that the "fair use" doctrine was incorporated into the 1976 Copyright Act¹¹⁰ in order to counter the nullification of the publication requirement, which had been the traditional guarantor of free access to information.¹¹¹ The court then observed that regardless of how CNN defined its broadcasting, some portion of it would always be open to unlicensed recording. This was because some segments would either fall in the public domain, or become available for anyone to record, through application of the fair use section.¹¹² Because the injunction sought by CNN would

by injunctive relief when the infringer had been given advance notice of potential infringement. The typical use of this section is by broadcasters enforcing their exclusive rights in live sports broadcasting. *Id.*

108. *Id.* at 1483.

109. *Id.* at 1484.

110. See 17 U.S.C. § 107 (1988 & Supp. III 1991).

111. *Id.*

112. *Id.* at 1484-85. Of course, a finding of fair use depends upon the ability of the copier to provide a legitimate motive conforming to the fair use section.

have denied these basic liberties given by the law, the court found that the fair use doctrine ran counter to the broad injunction proposed by CNN.¹¹³

The court reiterated the finding of *Duncan I* that a news broadcast is not a copyrightable whole, but is a compilation of many smaller works.¹¹⁴ Accordingly, a typical television newscast is copyrightable in its entirety only as a compilation, and simply copying a segment is not a violation of that particular copyright. In order to initiate a copyright action, each and every copyrightable segment of a newscast would have to be individually registered.¹¹⁵ The circuit court then reminded the parties of the holding in *Miller v. Universal City Studios, Inc.*,¹¹⁶ which specifically stated that "[t]he originality requirement . . . remains the touchstone of copyright protection today 'It is the very premise of copyright law' The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."¹¹⁷ The circuit court continued, reiterating the findings of *Feist*: "No matter how original the format . . . the facts themselves do not become original through association."¹¹⁸

The court concluded that "[s]imply stated, the copyright in a compilation does not prohibit the copying of pre-existing material that is in the compilation."¹¹⁹ What this means is that a newscast may contain any number of parts which, on their own, cannot be copyrighted for various reasons. While the newscast as a whole

113. *Id.* at 1485.

114. *Id.* See also *Duncan I Appeal*, 744 F.2d at 1493.

115. This means that each separate news item is viewed as a separate story, or a separate motion picture. Thus, if a station wants to copyright an entire newscast, it must file a registration form for each 30-45 second clip. Obviously, this procedure becomes much easier if the entire newscast focuses on a single topic. Hence, a half-hour news special on a single topic, such as Iraqi military strength, may be registered as a single work.

116. 650 F.2d 1365 (5th Cir. 1981).

117. *VMS*, 940 F.2d at 1485 (quoting *Feist*, 111 S. Ct. at 1289) (citing *Miller*, 650 F.2d at 1368).

118. *Id.* at 1486 (quoting *Feist*, 111 S. Ct. at 1289).

119. *Id.*

can be copyrighted, these uncopyrightable portions do not obtain copyright protection simply by being included in a copyrighted compilation.¹²⁰ Hence, the circuit court concluded that the district court had erred in finding that CNN had a substantial likelihood of success on the merits and that the relief afforded served the public interest. The order of injunction was reversed and the case remanded.¹²¹

4. Try and Try Again

The most recent case involving the videotaping of newscasts is *Los Angeles News Service v. Tullo*,¹²² a Ninth Circuit decision that came down in August of 1992. Audio Video Reporting Services ("AVRS") was a monitoring and video newsclipping service,¹²³ performing essentially the same function in Los Angeles as Carol Duncan performed in Atlanta in *Duncan I*. The plaintiff in this case, however, was not a television station but rather, Los Angeles News Service ("LANS"), a freelance video service that sold raw footage of news events to broadcasters.¹²⁴ The crux of the case revolved around news footage of an airplane crash and a train wreck. LANS had filmed these events, registered the copyrights of the tapes, and then sold the tapes to a Los Angeles broadcaster. AVRS taped the newscast containing the film segments, and then sold the videotapes.¹²⁵ LANS sued for copyright infringement.

120. Example: Professor X quotes verbatim a recent Supreme Court decision in his new compendium of humorous legal writing. Just because the quote appears in a copyrighted work does not grant Professor X a copyright in the quote itself. It is still in the public domain, and anyone can use it.

121. *VMS*, 940 F.2d at 1486. The decision was later vacated. *CNN v. Video Monitoring Servs. of Am., Inc.*, 949 F.2d 378 (11th Cir. 1991). The appeal of the preliminary injunction was reheard en banc, on Feb. 11, 1992. However, by this time, the case below had been decided, and the district court granted CNN a permanent injunction against VMS. The Eleventh Circuit, sitting en banc, found that there was no reason to overturn the decision, as the matter before it dealt only with a preliminary injunction, so VMS's appeal of the permanent injunction was (wrongly) denied. *CNN v. Video Monitoring Servs. of Am., Inc.*, 959 F.2d 188 (11th Cir. 1992).

122. 973 F.2d 791 (9th Cir. 1992) [hereinafter *LANS*].

123. *Id.* at 792.

124. *Id.*

125. *Id.*

AVRS relied on the holding in *VMS*¹²⁶ to support its claim that LANS's footage did not possess enough originality to be copyrighted. The Ninth Circuit, however, disagreed and found that almost all photographs and videotapes possess the very low level of originality required by *Feist*.¹²⁷ The circuit court also reprimanded AVRS for relying on a decision that was vacated and thus had no value as precedent.¹²⁸ The circuit court also distinguished the case at hand from *VMS* by recognizing that the issue in *VMS* was the blanket copyright of newscasts and not the copyrightability of raw footage.¹²⁹ The distinction is found in the 1976 Act: "The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work"¹³⁰

LANS is readily distinguishable from the cases cited earlier in this Note, as *LANS* had already obtained copyright registration when it sold the footage to the television station. Also, the remedy that the circuit court imposed was not nearly as draconian as that applied by the district court in *VMS*. The district court awarded half the statutory maximum damages,¹³¹ which amounted to \$10,000 for each infringement.¹³² The decision by the circuit court was aided by *LANS*'s withdrawal of a request for an injunction. For these reasons, this Note will refer only sparingly to the *LANS* case. This Note is concerned not with the copyrightability of specific news segments, but rather, the overly broad injunctive relief of the kind approved by the Eleventh Circuit.

126. 940 F.2d 1471 (11th Cir. 1991).

127. *LANS*, 973 F.2d at 794 n.3. See also *supra* note 93 and accompanying text (discussion of *Feist*).

128. *LANS*, 973 F.2d at 794 n.4.

129. *Id.*

130. 17 U.S.C. § 103(b) (cited in *LANS*, 973 F.2d at 794 n.4).

131. See 17 U.S.C.A. § 504 (Supp. 1992) (Berne Convention provision).

132. *LANS*, 973 F.2d at 792. *LANS* had originally requested a permanent injunction against AVRS but later dropped the request from its pleadings. *Id.* This may have been motivated by profit (the \$20,000 in statutory damages is worth much more than *LANS* would have received for any two tapes of news footage in an open market) or (more likely) the probability that the injunction would have been denied by application of the then-pending *VMS* standard (the *VMS* decision had not yet been vacated when *LANS* brought its suit).

III. VARIOUS VIEWS ON COPYRIGHT

The conflict from which the *VMS* and *Duncan I* cases seem to stem is that caused by the relatively new treatment of the First Amendment. The trend has been to interpret "freedom of speech" as being equivalent to "freedom to hear speech" or, more appropriately, "freedom to access of information."¹³³ The conflict develops when two very strong theories of copyright protection collide. The first theory is the property approach, which holds that the primary goal of copyright law is the protection of property rights.¹³⁴ The second view is the regulatory approach, which holds that the primary goal of copyright is to disseminate information and ideas in an efficient manner, and that the property rights occurring in copyright are secondary in nature and importance.¹³⁵

The conflict arises when one party claims that its First Amendment right to freedom of access to information is impeded by a second party's exercise of copyright. As was seen in the *Duncan* cases, the defendant claims a First Amendment right to copy the newscasts, despite apparent copyright infringement. This argument was rejected by the Eleventh Circuit and later that year by the Supreme Court in *Harper & Row Publishers Inc. v. Nation Enterprises*. Both courts found that First Amendment privileges were included in the fair use doctrine. One cannot have a First Amendment defense separate from a fair use defense, as fair use encompasses any First Amendment argument. Because fair use is a balancing test, it is helpful to observe how each approach is interpreted. This section will cover briefly the history and basic philosophies of both the proprietary and regulatory approaches, and it will show why both these approaches fail when they are applied to news broadcasts.

133. See *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972). See also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 556, 576 (1980).

134. An excellent example of proprietary interpretation of copyright law is that of *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

135. See generally, Patterson, *Free Speech*, *supra* note 23; Zimmerman, *supra* note 15.

A. *The Proprietary View*

Often, copyright is viewed as property. The owner of a copyright has the ability to sell a work, while retaining the rights of its reproduction. These rights are, themselves, subject to sale and resale. Naturally, one would assume that such an item, if it can be sold at will, is a part of one's estate and is therefore property. However, let us step back even further into history to consider why copyright was developed at all.

1. The English Background

The United States' First Amendment right to freedom of expression and the law of copyright arose from the same source in English law.¹³⁶ An example commonly cited is the English Licensing Act of 1662,¹³⁷ made law during the reign of Charles II. The Act was a modification of the earlier Star Chamber Decree of 1637, a censorship act passed by Charles I.¹³⁸ The Licensing Act was an act "for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses."¹³⁹ Basically, the Act made it illegal for anyone to print a book that was not registered with the Company of Stationers. Of course, the Company of Stationers was primarily a tool of censorship: no book would be registered if it did not pass the censors. Requiring all printed materials to be routed through the Company of Stationers also granted the company a monopoly on the printing industry. The Stationers did not have to register a book if they were not contracted to print it.¹⁴⁰

Almost fifty years later, Parliament came to the conclusion that the Company of Stationers had a strangle hold on the English print

136. See, e.g., L. Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966); Zimmerman, *supra* note 15, at 171.

137. 13 & 14 Car. 2 c. 33, *explained in* 6 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 372 (1927).

138. 6 HOLDSWORTH, *supra* note 137, at 368-69, 372.

139. 14 Car. II. c. 33, *reprinted in* 6 HOLDSWORTH, *supra* note 137, at 372.

140. Zimmerman, *supra* note 15, at 174-75.

industry. In 1709, the Statute of Anne was enacted.¹⁴¹ It was basically the same law as the Licensing Act, but it limited the period of copyright registration and allowed anyone to seek copyright. Unlike the Licensing Act, which granted copyright registration in perpetuity, the Statute of Anne limited the term to fourteen years.¹⁴² Also, allowing anyone to copyright material was in direct contrast to the Licensing Act, which required that only the original publisher of material could do so.¹⁴³ By breaking the hold of the Stationers over the printing industry, the Crown also weakened its own influence. The burden of censorship was greatly eased.

2. Copyright as Property in the United States

Later United States court decisions recognized additional authors' rights as creators of their own works, thus reinforcing the proprietary nature of copyright law. Before these cases, authors' rights had received little attention because the works were generally considered to be owned in their entirety by the publisher, not the author.

The U.S. Supreme Court recognized in *Stephens v. Cady*¹⁴⁴ that "[t]he copy-right is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns It is an incorporeal right to print and publish"¹⁴⁵ In this sense, the Supreme Court recognized that every copyrighted work consists of two distinct parts: the actual, tangible work, and the right to reproduce it. The rights do not have to co-exist.

Likewise, in the landmark copyright case of *Wheaton v. Peters*,¹⁴⁶ the Supreme Court held that an author had a definite proprietary interest in his work. More specifically, an author had a common law proprietary right in his work from the time of its creation.

141. 6 HOLDSWORTH, *supra* note 137, at 377.

142. 15 HOLDSWORTH, *supra* note 137, at 37.

143. Zimmerman, *supra* note 15, at 175-76.

144. 55 U.S.(12 How.) 528 (1852) (owner of printing plates sued owner of copyright to allow publishing of map).

145. *Id.* at 530.

146. 33 U.S.(8 Pet.) 591 (1834).

However, once the work was published, the author had to rely solely on federal copyright law.¹⁴⁷

Courts have recognized the proprietary nature of copyright in two of the cases discussed earlier in this Note.¹⁴⁸ In the *Betamax* case, Justice Blackmun's dissent exemplified the typical approach to copyright as property. The Justice opined that home taping of copyrighted works, though not immediately harmful to the television industry, damages the future market for a studio's productions.¹⁴⁹ He rejected the "fair use" approach, discussed later, stating that "[t]here is no indication that the fair use doctrine has any application for purely personal consumption"¹⁵⁰

The *Duncan I Appeal* court also adopted a proprietary view of copyright. By rejecting Ms. Duncan's claims of fair use and First Amendment rights, the court gave the unspoken word that WXIA-TV had property rights in the broadcasts that should be protected from intruders, despite other considerations.

B. The Regulatory Approach

While many think that copyright is a form of property to be bartered and sold, another school of thought believes that property rights are merely the by-product of government regulation. Under the regulation approach, a property interest in copyright is merely an expedient form of regulation. To determine which view is correct, we must look to the basis of United States copyright law, found in the Constitution. The power to give copyright protection lies in Article 1, section 8, clause 8: "The Congress shall have

147. *Id.* at 665. The law was subsequently amended in 1976 to provide for federal protection before and after registration, effectively nullifying all common law causes of action in copyright. 17 U.S.C. § 102 (only requirements for protection are that work is original and fixed).

148. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *supra* note 32 and accompanying text; see also *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984); *supra* note 60 and accompanying text.

149. *Sony*, 464 U.S. at 481-86.

150. *Id.* at 495.

Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁵¹ Quite clearly, from the wording of the clause, protection is not granted to authors because of a moral right in their works, but rather, “[t]o promote the Progress of Science and the useful Arts.” Authors’ rights are secondary to the public’s right to dissemination of information and ideas.

The view of copyright as a regulatory concept is perhaps best advanced by the Supreme Court decisions in the *Betamax* case and *Feist*.¹⁵² In the *Betamax* case, the Supreme Court held that the main purpose of copyright was not to protect an owner’s interest in a work, but rather, to promote public access to information.¹⁵³ The Court determined that home recording of a television program for viewing at a later date furthered public access to information. As Justice Stevens stated for the majority, copyright is a “limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”¹⁵⁴ He also noted that copyright law “has never accorded the copyright owner complete control over all possible uses of his work.”¹⁵⁵ Finally, the Court recognized “the public interest in making television broadcasting more available.”¹⁵⁶ The Court found that the benefits for such “time-shifting” through use of video tape machines greatly outweighed the detrimental effects on the broadcasting companies.¹⁵⁷ Thus, video home systems were declared legal.

In *Feist*, the Supreme Court again upheld the regulatory approach to copyright by rejecting the “sweat of the brow” argument.¹⁵⁸ The plaintiff had claimed that an author of a work had a certain moral right to it, even if it lacked originality, simply be-

151. U.S. CONST. art. I, § 8, cl. 8.

152. *Sony*, 464 U.S. 417; *Feist*, 111 S. Ct. 1282.

153. 464 U.S. at 429.

154. *Id.*

155. *Id.* at 432.

156. *Id.* at 454.

157. *Id.*

158. 111 S. Ct. at 1291.

cause of the time and effort he put into it. This assertion was rejected by the Court, which stated that originality was the touchstone of copyright law, not ownership in a work, regardless of how much labor was expended.¹⁵⁹

Completely differentiating between the two approaches, however, is not entirely proper. In reality, the proprietary theory and the regulatory theory are simply at opposite ends of the copyright spectrum. The two approaches can be differentiated only in their most extreme forms. For example, suppose the court in *VMS* had taken an extreme proprietary approach. The court would probably have found that CNN had absolute control over its own copyrighted programming. Therefore, other unlicensed copying of the broadcasts would be treated as infringement.

At the other end of the spectrum, a court may take an extreme regulatory approach. The court could find that CNN simply performs a necessary public service by broadcasting compiled factual information and that *none* of its work is copyrightable. Because the purpose of copyright is to disseminate information, and news is often the purest form of such dissemination, CNN would be left with no recourse.

C. Balancing Property and Regulation: Fair Use

Reality is usually not so cut-and-dried. Most cases seem to fall somewhere between property and regulation analysis, and the judicial system is required to balance the scales. Usually, an equitable arrangement is reached to accommodate both views. This equitable balancing act has been given the force of law, and it is known as the "fair use doctrine."

In early United States copyright law, the dividing line between proprietary rights and general copyright was the simple act of publication. As discussed previously,¹⁶⁰ an author had absolute property rights until publication of the work. Before publication, the author was able to rely on common law for protection of his inter-

159. *Id.* at 1294-95.

160. See *supra* note 146 and accompanying text.

ests. After publication, only federal copyright law was applicable.¹⁶¹ While works remained in a basic written form, this was a simple and fairly just solution. However, with the advent of new technologies, the distinction between what was and what was not "publication" became nebulous.

Publication is defined in the Copyright Act as:

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.¹⁶²

The clear distinction between a public performance and publication insures against fraudulent infringement claims.¹⁶³

A conflict plainly arose with the advent of live broadcast television. Some televised programs more than fulfilled the originality requirements of copyrights. The programs, however, were being distributed to the public (publication) for free—that is, without sale, transfer of ownership, or by rental, lease, or lending, as required by the Act. This obviously raises the question of copyrightability under the Copyright Act. Changing the definition of publication would create more problems than it would solve. Rather than create a whole new body of legislation for the new medium, Congress chose to rework the copyright law.¹⁶⁴ As a result, the requirement of publication for copyright was dropped. In its place, Congress substituted the ability to copyright all works, published or unpublished.¹⁶⁵ This had the effect of doing away with the body of common law dealing with proprietary interest in a work and replacing

161. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 665 (1834).

162. 17 U.S.C. § 101 (1988 & Supp. III 1991).

163. Example: "Why, I performed that play three years ago in the Berkshires!" "Prove it!" "I can't, I didn't write it down."

164. H.R. REP. NO. 1476, *supra* note 18, at 51, *reprinted in* 1976 U.S.C.C.A.N. at 5664.

165. H.R. REP. NO. 1476, *supra* note 18, at 52, *reprinted in* 1976 U.S.C.C.A.N. at 5665.

it with copyright law. As stated in *VMS*, now authors may rely on federal copyright protection for all their works, published or unpublished.¹⁶⁶ However, before an action may be brought in court, the work must be "fixed in a tangible form" and duly registered with the Office of Copyright.¹⁶⁷

This seemed well and good. However, in solving one very large problem, Congress replaced it with a more insidious one. Congress erased the "bright line" that the publication requirement afforded—the line that determined whose rights were the greater, those of the public or of the author. In its place was left a murky body of equitable law, now fashioned "the fair use doctrine."

Fair use of copyrighted materials has been recognized as a defense to copyright infringement claims since 1841.¹⁶⁸ It grew in power over the years and became an important part of the common law. This doctrine was finally codified as § 107 in the Copyright Act of 1976, consisting of a four part test to determine fair use.¹⁶⁹

The fair use section had a strong judicial background, even before its inclusion into the 1976 Act. Courts had found fair use in activities such as:

quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of

166. *VMS*, 940 F.2d 1471, 1478.

167. *Id.* at 1482.

168. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (in finding that defendant had infringed copyright of George Washington's biography, court first questioned whether such use was justified).

169. *See supra* note 53.

a work located in the scene of an event being reported.¹⁷⁰

However, even with the explicit examples, the fair use doctrine has been, and remains for the most part, an equitable rule, with the basic guidelines enumerated in § 107 of the Copyright Act of 1976. Section 107 was intended simply to state the then-current application of the fair use doctrine, not to change, narrow or enlarge it in any way.¹⁷¹ In effect, Congress gave the courts free reign to define fair use. The law was written to reflect the state of judicial doctrine of 1976 but was expressly created in order not to limit subsequent interpretations.¹⁷² Rather, it was intended to provide basic guidelines to reflect the changing nature of copyright law.¹⁷³

IV. THE NEED FOR A NEW APPROACH

What follows is a series of issues relevant to television newscasts that are not satisfactorily resolved by application of the fair use doctrine, the proprietary view, or the regulatory view. This Note proposes that other factors need to be considered when determining the copyrightability of newscasts, such as proper ownership of a videotaped copy, the availability of copying to the public as a whole, and a consideration of traditional economic policies of the United States. This Note will emphasize the need for a more comprehensive approach to newscast copyright, and will propose an amendment to the relevant legislation.

A. Who Owns the Videotape?

1. Clipping Services Are Agents, Not Producers

In *VMS*, the court summarily rejected the view that *VMS* was

170. H.R. REP NO. 1476, *supra* note 18, at 65, reprinted in 1976 U.S.C.C.A.N. at 5678-79.

171. *Id.* at 66, 1976 U.S.C.C.A.N. at 5680.

172. *Id.*

173. *Id.*

able to rely on the exception to copyright law found in 17 U.S.C. § 109. Section 109 states that the rightful owner of a copy may do anything with it, including renting, lending, or selling it.¹⁷⁴ This section is often used by "news clipping" companies, which clip articles from newspapers and then sell them to clients. The court found that because VMS, unlike a purchaser of a newspaper, did not pay for its copy, it was not technically the owner. This is a mere technicality, one which could easily be ignored.

Since the *Betamax* case, individuals have been given the right to record broadcasts for home use. Anyone is allowed to record, including the clients of VMS. The defendant in *LANS* relied on the *Betamax* case to justify recording of newscasts. The Ninth Circuit drew a clear distinction between recording newscasts for later viewing ("time shifting") and recording newscasts for resale.¹⁷⁵ AVRS wrongly relied on its own ability to record off the air. Instead, it should have placed more emphasis on *its clients'* ability to make the recordings. The argument can be made that news monitoring services are not really selling clips of newscasts but are instead performing a service for their clients. If the clients videotaped the newscasts themselves, for personal use, there would be no infringement. The broadcaster could not be involved in this transaction. It seems that it would serve the public interest if such news clipping companies were treated as agents of their clients and not independent operators.

2. Tapes of News Broadcasts Are in the Public Domain

The argument that video clipping services do not own the taped

174. The relevant section reads as follows: "(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (1988). Section 106(3) states that "[s]ubject to sections 107 through 118, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . ." 17 U.S.C. § 106(3) (1988 & Supp. III 1991).

175. *LANS*, 973 F.2d at 797.

programs, and therefore cannot sell the tapes, is without merit. Recall the example of the newspaper: the contention is not that the clipping service owns the right to a particular article, but rather to the personal copy of a particular article. Section 106 of the Copyright Act prohibits the copying of copyrighted materials, but § 109 allows the sale of legally copied materials. Since videotaping is legal, it follows that the sale of these legally made tapes should also be legal. This view, however, was expressly rejected by the LANS court.¹⁷⁶

Tapes can be made of two types of television transmissions: aerial (transmitted via antenna) and cable. This Note shall first address aerial transmissions, which are free of charge. Take the example of a free news circular appearing in the mailbox. The circular has no subscription price; it is funded entirely by advertisers. Or, similarly, a newspaper appears on the doorstep, even though the occupant has no subscription. It is a free paper, enticing the reader to purchase a subscription. Does this circular or paper remain the property of the publisher? Or is it treated as a gift, becoming the receiver's property? The probability is that this newspaper would become the property of the individual, despite the fact that the individual has paid nothing for it.¹⁷⁷

The subscriber would then have the right to clip articles from this paper and sell them, under § 109 of the Copyright Act.¹⁷⁸ True, the law does not authorize a person to reproduce the copyrighted item, but it does allow the person to sell the item itself. This Note is not concerned with making copies of videotapes. The concern is with what the owner may do with a particular, lawfully made videotape.¹⁷⁹ Why should the provisions of § 109 not apply

176. *Id.*

177. "[It is arguable that] a recipient has no obligations if he receives the goods or services under circumstances reasonably inducing his honest belief that they were intended as a gift and uses them before he learns otherwise." Note, *Unsolicited Merchandise: State and Federal Remedies for a Consumer Problem*, 1970 DUKE L.J. 991, 996. Unordered goods received in the mail may be treated as gifts, and a recipient may do with them as he pleases. Postal Reorganization Act of 1970, 39 U.S.C. § 3009(b) (1988).

178. See *supra* note 174.

179. The *Betamax* Court declined to rule on the legality or illegality of certain recordings, as such a ruling could only result from lawsuits by other individual copyright

to television news? The receiver of the news generally cannot, and does not, pay for it. Does the broadcast, if recorded, remain the property of the station even though it was transmitted for free to thousands of people? Does the federal government own the broadcast? The government owns the airwaves on which the broadcast is transmitted. Do a station's property rights cease to exist when such property is flung towards space?¹⁸⁰ It would seem that a receiver, by such unsolicited reception, becomes, at least for that single tape, the legal owner.

The matter in question is greatly simplified with respect to pay TV operators.¹⁸¹ Unlike aerial broadcasts, one must pay to receive CNN. It is impossible to legally receive it in any other fashion without paying. While CNN is usually considered a basic cable service, at least part of a cable subscription rate will go to fund CNN programming.¹⁸² CNN has recently started to scramble its satellite signal, so those people with satellite dishes must now pay CNN a monthly service charge for a decoder. Doesn't this grant at least some sort of property right in the broadcast for those receiving it? Like a newspaper, CNN programming must be purchased through subscription.

Some may argue that there is a distinct difference between paying for the right to receive news and paying for copy of the

holders. See *Sony*, 464 U.S. at 434. In *LANS*, the circuit court stated that though a viewer may be invited to "time shift" a public broadcast, the viewer is not invited to sell copies of the program. *LANS*, 973 F.2d at 798 n.7. However, the court ignored the singular nature of newscasts and their general inability of repetition. Thus, time shifting becomes more crucial to the viewing of a newscast, and it should then be given wider latitude when determining its legality.

180. It is generally conceded that the government has no property right in broadcasts by way of the frequency-ownership theory. See generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); Nancy Nord, Comment, *Red Lion Broadcasting Co., Inc. v. FCC—Extension of the Fairness Doctrine to Include Right of Access to the Press*, 15 S.D. L. REV. 172 (1970).

181. The *Betamax* Court specifically declined to review the issue of videotaping cable television transmission. See *Sony v. Universal*, 464 U.S. at 458 n.2 (Blackmun, J., dissenting).

182. CNN charges cable systems about 37 cents per subscriber if the cable operator carries no other Turner Broadcasting programming. The rate decreases as more Turner programming is carried by the operator. Melissa Turner, *CNN to Raise Rates Cable Systems Pay*, ATLANTA J. & CONST., July 2, 1991, at C7.

news under § 109. However, such an argument would be based solely on technical definitions of publication and transmission. This kind of argument would hearken back to the early days of copyright enforcement and the creation of highly artificial and arbitrary categories of what is, and what is not, a copy.¹⁸³ It is the view of this Note that if a news service is paid for, be it by cable transmission or by the mails, a property right accrues.

3. Fixation Is Not a Valid Method of Defining Newscast Copyright

Perhaps the requirement of fixation is not a useful method of defining copyrightability for newscasts after all. At the very least, it is incomplete. The correct definition of copyrightable materials of a factual nature is that *copyrightability of material does not depend on how a form may be fixed, but rather, the form by which the material is distributed to the public*. Thus, it is not the act of taping a news broadcast that should be protected, but rather the act of transmitting a news broadcast. The "copy" of copyright in a news broadcast should refer not to copying the fixed form, but rather copying the method by which it reaches the public—a "re-broadcast right." Section 111 of the 1976 Act permits the rebroadcast of certain transmissions, provided, among other restrictions, that the rebroadcaster not change the original transmission.¹⁸⁴ The design of § 111 preserves the market of the original broadcaster, while furthering the Copyright Act's goal of dissemination of information. It is the view of this Note that § 111 of the 1976 Act provides sufficient protection to news broadcasters, and that further copyright protection for news broadcasts in the form of injunctive relief from videotaping is not required.

Arguments in this field seem based on semantics bordering on the metaphysical plane. According to the Supreme Court's interpretation of the First Amendment, all citizens have the civil right to receive information.¹⁸⁵ By definition, a civil right is something

183. See *White-Smith Music Publishing Co.*, 209 U.S. 1.

184. 17 U.S.C. §§ 111(a)(3) & (b)(3) (1988 & Supp. III 1991).

185. See *supra* note 133, and accompanying text.

to which every person is entitled. Rights have little or no substantive value.¹⁸⁶ However, one must pay for certain forms of information (newspapers, cable television news), and therefore a value is assigned to this right. Thus, one person may pay for a newspaper subscription, while another might invest in cable television. The courts, however, for purposes of property, treat the two forms as thoroughly dissimilar. How can the news that certain subscribers receive be altogether different from that which others receive, some falling within the ambit of § 109, while some does not? The argument would have to be that television news is not really news at all, but rather, entertainment, thus falling outside the scope of § 109. It is doubtful that broadcasters will espouse this view. News is news is news. The fact that one form is received aurally as well as visually, while one is received strictly visually, should not make a difference.

B. A Rational Economic Approach

1. Copyright Law Must Reflect Economic Reality

The Chicago school, led by Judge Posner, advocates the view that society is governed by "rational maximizers."¹⁸⁷ These actors will take the route that is the cheapest and most feasible. This view of the law shuns the notion of legal vs. illegal acts; it simply holds that people respond to incentives, some more attractive than others.¹⁸⁸ Thus, all people can be considered amoral in the eyes of the law.¹⁸⁹ What distinguishes criminals from the rest of society is that criminals are more willing to risk the consequences to obtain an economic gain.¹⁹⁰

To deter crimes under this rationale, society must make the price for disobeying the law very high. Following this economic view, if the award of damages is outweighed by legal costs, it is not economically feasible to bring suit. However, this allows peo-

186. See, e.g., *Carey v. Phipps*, 435 U.S. 247 (1978) (interpreting 42 U.S.C. § 1983).

187. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3d ed. 1986).

188. *Id.* at 4.

189. *Id.* at 239.

190. *Id.* at 240.

ple to get away with crimes. The government has two options. One, do away with the law to reflect the economic reality of the situation, or two, increase the penalty for breaking the law to make the law worthwhile to enforce.¹⁹¹ As Judge Posner stated:

the economist may be able to show that the means by which society has attempted to attain [the goal of limiting theft] are inefficient—that society could obtain more prevention, at lower cost, by using different methods. If the more efficient methods did not impair any other values, they would be socially desirable¹⁹²

The Ninth Circuit has followed the second path. Instead of formulating injunctions designed to keep the offender from breaking the law, the penalty imposed on AVRS will probably have the effect of making the monitoring service more cautious, and thus achieving the same end with a minimum of court interference. Another lesson to be learned from *LANS* is that a tangible copyright is more powerful than a more limited compilation copyright. While CNN received what it asked for in *VMS* and *Duncan I Appeal*, the same effect could have been had by applying the more stringent and less complicated approach of the Ninth Circuit in *LANS*.

2. Newscasts Have Little Long-Term Value

Once a news broadcast has been transmitted, the broadcast becomes relatively worthless to the station. In the case of the aerial broadcasters, advertising sales generate most of the profits derived from news reports. Advertising rates are, in turn, governed by market share. Market share is determined by the number of people watching a show at any particular time, relative to total viewers at that time. News is by nature time-limited, and so rebroadcasts are generally of little worth because they draw few viewers. Newscasts compete for market share by presenting their news in an appealing format that will capture a loyal audience.

191. *Id.* at 242-44.

192. *Id.* at 21.

Hence, the primary reason for copyrighting newscasts by broadcasters would seem to be to prevent competing stations from rebroadcasting current news from the station with the best coverage of a particular news item, thus misappropriating a portion of the market share.

Of course, in the real world there are exceptions to this perfect economic view. However, there are also many caveats with these exceptions. A common exception is that some stations rebroadcast the news of others. The caveat is that generally, the two stations are not competing for market share. CNN, for example, often makes news stories available to local broadcasters.¹⁹³ First, the local broadcaster is often not affiliated with a network (hence its need for more comprehensive programming), confining any possible competition to a small geographical area. Second, the local broadcaster is not in competition with CNN. Individuals who do not have cable TV (or a satellite dish with decoder) cannot receive CNN; therefore there is no competition. Conversely, if an individual does have cable TV, CNN assumes that one will watch CNN and get the news "straight from the horse's mouth."¹⁹⁴ Third, CNN sells the right of rebroadcast to the local stations. Ted Turner, owner of CNN, does not have First Amendment freedom of access argument foremost on his mind. (Else he would give everyone free cable TV so everyone could get CNN.) He is in the business for a profit. Giving away resources does not a profit make.

This Note declines to deal with the situation that appeared in *AVRS*. While broadcasters generally have very little by way of a resale market, the markets of *AVRS* and *LANS* had substantial overlap.¹⁹⁵ While opening the market to monitoring services would not substantially impair the business of broadcasters, it could definitely harm the business of footage providers, such as *LANS*. However, the Ninth Circuit did not delve into relevant markets,

193. CNN has a daily news-feed service that supplies stories to 265 television stations. Richard Zoglin, *Inside the World of CNN*, *TIME*, Jan. 6, 1992, at 28.

194. A survey of 215 network affiliate stations revealed that most station managers ranked CNN second only to local broadcast competition as a threat to their local news ratings. Gerald Jaffe & David Bivins, *Affiliate Angst*, *MEDIA WK.*, Sept. 2, 1991, at 16.

195. *LANS*, 973 F.2d at 799.

which was a mistake. It may be the case that all of LANS's revenues were derived from sales to television stations, and the sales by AVRS did not impair LANS's market value at all. The circuit court only hypothesized that *some* AVRS customers might purchase instead from LANS.¹⁹⁶

3. All News Is Public Interest by Nature

As stated before, 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 law should be rewritten to reflect this. In fact, it seems to be the case that newscasts should not be copyrighted at all. Unlike most shows, they are not entertainment, simply the production of fact. While different stations may have different methods of providing news, the basic nature of any newscast is factual. It seems far too complicated, even hypocritical, to allow every newscast to be copyrighted, and yet still require individual segments to be individually copyrighted in order to gain copyright protection. Professor Nimmer has developed the theory that in some cases fact and expression of that fact become so inseparable, and so infused with the public interest, that both are in the public domain and are exempt from copyright. He gives as a possible example the Zapruder film of President Kennedy's assassination.¹⁹⁷ Relatively recently, the Supreme Court has decided several cases determining that the First Amendment guarantees a freedom of access to information.¹⁹⁸ Television and print news is information, albeit in a slightly digested form. By its very nature, if news broadcasts did not arouse public interest, they would be of little use to the broadcaster, or anyone else for that matter. Likewise, news is intertwined with its presentation. A fact should not become copyrightable through its mere association with a copyrightable performance.¹⁹⁹

196. *Id.* (relying on the finding in *Duncan I Appeal*). See *supra* note 60 and accompanying text.

197. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[C][2], at 1-86 (1992).

198. See *supra* note 133.

199. *Feist*, 111 S. Ct. at 1289.

The idea that all news is in the public interest is not new. Senator Orin Hatch has perennially sponsored a bill²⁰⁰ to the Senate that would include newscasts in the fair use exceptions of § 107.²⁰¹ While such an exception would do away with the problem of overly broad injunctions, such as those imposed by the Eleventh Circuit, it would also endanger the rights of independent news gatherers, such as LANS. It could be argued that the fourth test embodied in § 107—that which examines the effect of the use on the market value of the copyrighted work—would protect such services.²⁰² However, such a change in the law would manifestly require ignoring the first test, which determines the “commercial nature of the work.”²⁰³ While the monitoring services may be performing an important function, the commercial nature of their business has always been the catch. To allow profits from fair use is to corrupt one of the purposes of the fair use clause. The “commercial nature” test has traditionally been the strongest of the fair use determinations,²⁰⁴ and to ignore it in favor of the “effect on the market” test is to ignore an entire body of well-thought-out case law. Senator Hatch’s approach also ignores the plight of independent news gathering companies, such as LANS, whose income is not derived from broadcasting and advertising, but rather from the licensing of copyrighted material. The fair use exception he proposes would have the effect of telling the news gatherers that they are performing an essential function, but that they should not expect to be paid, as their product is in the public interest.

4. News Broadcasts Should Not Be Copyrighted

A simple method to deal with the problem is to place news broadcasts outside of copyright law entirely. Instead, each news

200. 139 CONG. REC. S422 (daily ed. Jan. 5, 1993) (statement of Sen. Hatch).

201. S. 23, 103d Cong., 1st Sess. (1993). The bill states “[t]hat section 107 of title 17, United States Code, is amended by inserting ‘or monitoring news reporting programming’ after ‘news reporting.’”

202. 17 U.S.C. § 107 (1988 & Supp. III 1991). See *supra* note 53.

203. *Id.*

204. See generally *Duncan I Appeal*, *supra* part II.B.2; *VMS*, *supra* part II.B.3; *Betamax*, *supra* part II.A.

broadcast, in its entirety, would be issued a "rebroadcast" license, based in the rebroadcasts rights found in 17 U.S.C. § 111, which would give stations copyright over the rebroadcast of the news program for a limited time, but no rights at all over any other uses, such as resale of tapes or sale of synopses of programs.²⁰⁵ Of course, stations may claim that they offer just such tapes for sale, and that allowing others to record the newscasts would be an infringement of rights. However, allowing others to make copies would stimulate the market, having the effect of increasing quality and driving down prices. Additionally, the broadcaster, as the originator of the transmissions, should be able to produce higher quality tapes at lower prices, thus obtaining a lion's share of the market in any case. As it stands now, the broadcasters have the ability to record and sell copies of news broadcasts at a fair price. Since they have not done so, market forces—Adam Smith's "invisible hand"—have created fairly priced competitors.

CONCLUSION

This Note has shown that news broadcasts cannot be adequately evaluated on the copyright spectrum through either proprietary or regulatory forms of analysis. The fair use doctrine, while being the method of analysis mandated by Congress, ignores basic economic sense. The current fair use doctrine, as applied to news broadcasts, is far too narrow in scope, and results in economically driven "law breaking" and economically inefficient "law enforcement." The solution for the problem is to take news broadcasts out of the realm of copyright entirely, creating instead a separate "rebroadcast right" for factual works of a time-limited nature. Such a right would allow the taping of newscasts, but protect the source of broadcasters' incomes, i.e., the advertising revenues from the original broad-

205. Professor Nimmer suggests a similar scheme involving compulsory licensing for news photographs in which the idea and the expression are inseparable. 1 NIMMER § 1.10[C][2], at 1-88. This approach was also suggested as a possible remedy by the defendant in *LANS*. *LANS*, 973 F.2d at 796. However, no court has yet adopted this approach. *Id.* at 796 n.5.

cast. However, it is important to note that while such a right would remove news broadcasts from the realm of copyright, independent news gathering organizations would still have the right to collect and copyright news footage, and these rights could still be individually enforced.

The problem, however, is that the courts alone cannot implement such a rule. The change proposed by this Note requires Congressional action. In the meantime, courts should apply the form of analysis that would most provoke Congress into acting, namely, the economic approach. Other forms of analysis would provide temporarily satisfying solutions but would only give the illusion of a fair and justly operating law. All this time, small economic actors would be crushed underfoot and consumed by big business.

Using an economic analysis, as shown above in this Note, would support the position of the small economic actor while causing the news broadcasters little or no damage. However, such an application by the courts would surely infuriate and outrage the news broadcasters. It is the broadcasters (not the fledgling newsclipping industry) who have power and money enough to influence Congress and effect a change. Congress must revise the Copyright Act to exclude news broadcasts. Broadcasters' rights in their news programs can be protected much more efficiently, and the right to access of information advanced more forcefully, if a simple "re-broadcast right" is substituted for the vague and inadequate copyright law.

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