publication."[31] The Berne Convention does not recognize such a general right,[32] though it has lately considered doing so.[33]

Where we have strayed from the international consensus is in how to consider this right of first publication in the fair use balance. The courts have treated this right as "inherently different,"[34] from other statutory rights. The result is that, for unpublished works, "the balance of equities in evaluating . . . a claim of fair use inevitably shifts."[35]

On the other hand, the Berne Convention puts no such heavy thumb on the equitable scale. The Convention's basic right of reproduction[36] is directly limited by a fair use

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31 Nation, 471 U.S. at 552.

32 See S. Ricketson, § 8.48, at 409. The Convention does provide for a right of circulation in certain limited circumstances. See Berne Convention, art. 14(1) (right of distribution of cinematographic adaptations and reproductions), art. 14ter (optional provision conferring right to interest in sale of work subsequent to first transfer of the work by the author), art. 16 (right of seizure of infringing copies); see also S. Ricketson, § 8.42, at 403.

33 See S. Ricketson, §§ 8.47-8.48, at 407-09.

34 Nation, 471 U.S. at 553.

35 Id.

36 See Berne Convention, art. 9(1). The exclusive right of reproduction is considered the central right. See S.

Footnote continued on next page.

analysis without regard to whether the work is published or unpublished.[37] Further, when the Convention most recently considered enacting an explicit right of first publication, it did so in the context of that basic right of reproduction.[38] Even if our law were exactly the same as the Berne Convention in this respect, the Convention would grant no special status to unpublished works; an unadulterated fair use analysis would still apply. The bottom line is that the wall our law has built between published and unpublished works is neither recognized nor endorsed by the Berne Convention. This proposed legislation would tear down that wall and harmonize our law with the Berne Convention.

Much has been made in statements before this Committee[39] of a single phrase embedded in the broader Berne fair use scheme. That phrase is "lawfully made available to

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Ricketson, § 8.6, at 369 (characterizing art. 9(1) as "the general right," and the other rights, including the enumerated limited distribution rights, as "its derivatives"); Guide, § 9.1, at 54 (characterizing the right in art. 9(1) as "the very essence of copyright").

37 See S. Ricketson, §§ 9.16-9.17, at 488-89.

38 See id., §§ 8.47-8.48, at 407-09.

39 See, e.g., Ginsburg Letter 4.

the public," and it describes the works from which quotations can fairly be made.[40] From this phrase, all sorts of restrictions have been read into the Berne Convention's fair use provisions and laid before this Committee. You have been told that for any use to be deemed fair, a work must have been "publicly disclosed";[41] that it must have been "intended for the public in general";[42] that "affirmative dissemination" of the work is required, for "mere[] accessib[ility]" is not enough;[43] and that an "authorial intent to disclose" the work is required.[44] Finally, you have been told that the whole enterprise in which you are engaged today "flout[s] our Berne obligations."[45]

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40 Berne Convention, art. 10(1).

41 Ginsburg Letter 5.

42 Id. (quoting Guide, § 10.3, at 58). Professor Ginsburg cites the Guide as "authoritative"; the Guide itself states that it "is not intended to be an authentic interpretation of the provisions of the Convention since such an interpretation is not within the competence of the International Bureau of WIPO." Guide at 4 (preface of Arpad Bosch, Director General, WIPO).

43 Ginsburg Letter 5.

44 Id.

45 Id.

I offer four brief responses to this parade of interpretive horribles. First, the results of such an interpretation of the Berne Convention would be radical. If this interpretation were correct, it would require a total bar on any fair use of unpublished works -- however brief, however significant, however insignificant. This extraordinarily draconian solution goes even farther than -- and in fact, is at odds with -- the Nation, Salinger and New Era cases.

Second, not a word in the detailed and prolonged consideration by Congress of the Berne Convention even relates to this topic. It would, as Kenneth M. Vittor's testimony to you for the Magazine Publishers of America points out, "be surprising, indeed, if United States adherence to the Berne Convention resulted -- without any debate regarding this important issue -- in [such an] elimination or restriction of magazine publishers' and journalists' rights . . . ."[46]

Third, the language about "lawful availability" makes no mention of publication. "Published works" are defined in the Berne Convention as "works published with the consent of their authors."[47] Moreover, the legislative history of the

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46 Statement of Kenneth M. Vittor 19-20.

47 Berne Convention, art. 3(3) (emphasis added).

"lawful availability" phrase makes clear that it relates to "every means by which the work is lawfully made accessible to the public."[48] Those opposed to this amendment would have you believe that notions of consent and authorial intent and affirmative dissemination -- notions bound up in the concept of publication -- are allowed to sneak in through the back door and restrict Berne's fair use analysis. That is not the case.

Finally, it is unpersuasive to maintain that this amendment is improper because "our Berne membership underlies . . . our continued exploration of legislation affording greater protections to creators."[49] To the extent this suggests that it would be inconsistent with our Berne Convention obligations ever to limit to even the slightest degree the rights of those who claim infringement, it is simply insupportable. When the United States implemented the Berne Convention, for example, it explicitly did not incorporate the so-called "moral rights" doctrine into our law.[50] The proper way to

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48 Records of the Intellectual Property Conference of Stockholm, June 11 - July 14, 1967, Vol. I, 107 (Doc. S/1) (emphasis added); see also S. Ricketson, § 7.22, at 339, § 9.22, at 491.

49 Ginsburg Letter 4.

50 See S. Rep. No. 352, 100th Cong., 2d Sess. 10, reprinted in 1988 U.S. Code Cong. & Admin. News 3706, 3715. See also Statement of Kenneth M. Vittor 17-19.

confer rights on artists is through carefully crafted legislation, not by an interpretation of the Berne Convention which reads it as a one-way ratchet barring any Congressional amendment to our copyright law on the ground that the revision might adversely affect creators. Artists' interests after this amendment will be fully protected by an equitable analysis, just as they are protected by the Berne Convention's equitable analysis.

The Berne Convention applies fair use analysis without any threshold reference to the publication status of a work. Our copyright law makes such a threshold reference. This amendment would render our law more not less compatible with the Berne Convention.

COMMENTARY

TOWARD A FAIR USE STANDARD

BY

Pierre N. Leval

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COMMENTARIES

TOWARD A FAIR USE STANDARD

*Pierre N. Leval**

Random distribution has dealt me a generous share of copyright suits involving claims of fair use. The court of appeals' disagreement with two of my decisions[1] provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values. Is this because no rational defining values exist, or is it rather that judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework? This commentary suggests that a cogent set of governing principles exists and is soundly rooted in the objectives of the copyright law.

Not long after the creation of the copyright by the Statute of Anne of 1709,[2] courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as "fair abridgment," later "fair use," would not infringe the author's rights.[3] In the United States, the doctrine was received and eventually incorporated into the Copyright Act of 1976, which provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."[4]

What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. In *Folsom v. Marsh*,[5] in 1841, Justice Story articulated an often-cited summary of how to approach a question of fair use: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[6] The 1976 Copyright Act largely adopted his summary.[7] These formulations,

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* Judge, United States District Court for the Southern District of New York.

[1] *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

[2] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[3] *See, e.g.*, Gyles v. Wilcox, 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130). *See generally* W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6–17 (1985).

[4] 17 U.S.C. § 107 (1982).

[5] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[6] *Id.* at 348.

[7] The statute states:

however, furnish little guidance on how to recognize fair use. The statute, for example, directs us to examine the "purpose and character" of the secondary use as well as "the nature of the copyrighted work." Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the "purpose and character" of the secondary use. It gives no clues at all regarding the significance of "the nature of" the copyrighted work. Although it instructs us to be concerned with the quantity and importance of the materials taken and with the effect of the use on the potential for copyright profits, it provides no guidance for distinguishing between acceptable and excessive levels. Finally, although leaving open the possibility that other factors may bear on the question, the statute identifies none.[8]

Curiously, judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void. Uttering confident conclusions as to whether the particular taking was or was not a fair use, courts have treated the definition of the doctrine as assumed common ground.

The assumption of common ground is mistaken. Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals[9] and divided

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982).

[8] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

[9] Five of the recent leading cases were reversed at every stage of review. In Rosemont Enterprises, Inc. v. Random House, Inc., 256 F. Supp. 55 (S.D.N.Y.), *rev'd*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) — the Howard Hughes case — the Second Circuit reversed a district court injunction. In Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984), the court of appeals reversed the district court's finding for the defendant, and was in turn reversed by the Supreme Court. In Harper & Row, Publishers, Inc. v. Nation Enterprises, 557 F. Supp. 1067 (S.D.N.Y.), *modified*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985), the district court's damage award was reversed by the court of appeals, which in turn was reversed by the Supreme Court. In Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987), and in New Era Publications International v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), my findings of fair use were rejected on appeal.

courts[10] are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

Confusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes. After recent opinions of the Second Circuit casting serious doubt on any meaningful applicability of fair use to quotation from previously unpublished letters,[11] publishers are understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of such sources.

The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

I. The Goals of Copyright

The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.

> [C]opyright is intended to increase and not to impede the harvest of knowledge. . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.
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> . . . [The Constitution's grant of copyright power to Congress] "is a means by which an important public purpose may be achieved. It

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[10] In its first two encounters with fair use, the Supreme Court split 4–4 and thus failed to resolve anything. *See* Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958). The Court decided *Sony* by a 5–4 majority, *see Sony*, 464 U.S. 417, and *Nation* by a 6–3 majority, *see Nation*, 471 U.S. 539. In *New Era*, the Second Circuit voted 7–5 to deny en banc review to alter the panel's dicta on fair use. Four judges joined in a concurring opinion, *see New Era*, 884 F.2d at 660 (Miner, J., concurring), and four in a dissenting opinion, *see id.* at 662 (Newman, J., dissenting).

[11] *See New Era*, 873 F.2d 576; *Salinger*, 811 F.2d 90.

is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ." "The monopoly created by copyright thus rewards the individual author in order to benefit the public."[12]

The fundamental historic sources amply support the Supreme Court's explanation of the copyright objectives. The copyright clause of the Constitution, for example, evinces the same premises: "The Congress shall have Power . . . : To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] Several aspects of the text confirm its utilitarian purpose.[14] First is its express statement of purpose: "To promote the Progress of Science and useful Arts . . . ." By lumping together authors and inventors, writings and discoveries, the text suggests the rough equivalence of those two activities. In the framers' view, authors possessed no better claim than inventors. The clause also clearly implies that the "exclusive right" of authors and inventors "to their respective Writings and Discoveries" exists only by virtue of statutory enactment.[15] Finally, that the right may be conferred only "for limited times" confirms that it was not seen as an absolute or moral right, inherent in natural law. The time limit considered appropriate in those days was relatively brief — a once-renewable fourteen-year term.[16]

A similar utilitarian message is found in the original British copyright statute, the *Statute of Anne of 1709*.[17] Its caption declares that

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[12] *Nation*, 471 U.S. at 545–46 (citation omitted) (quoting *Sony*, 464 U.S. at 429; and *id.* at 477 (Blackmun, J., dissenting)). In numerous prior decisions, the Supreme Court has explained copyright in similar terms. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[13] U.S. CONST. art. I, § 8, cl. 8.

[14] In *The Federalist* No. 43, Madison observes: "The utility of [the power conferred by the patent and copyright clause] will scarcely be questioned. . . . The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST No. 43, at 286 (J. Madison) (C. Beard ed. 1959).

[15] "That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it." Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

[16] Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124. *See* LATHAM'S THE COPYRIGHT LAW 6 (W. Patry 6th ed. 1986). The original copyright term was but a tiny fraction of the duration of protection under the new 1976 Act — extending 50 years after death — which, in the case of youthful letters of an octogenarian, could easily exceed 100 years. *See* 17 U.S.C. § 302(a) (1982).

[17] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

this is "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors . . . during the Times therein mentioned."[18] The preamble declares the statute's purpose to be "for the Encouragement of Learned Men to compose and write useful Books."[19] Elaborating the justification, the preamble exhibits a prevalent concern for the financial entitlements of authorship by noting that the practice of pirated publication without the author's consent "too often [causes] the Ruin of [Authors] and their Families."[20]

The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.

If copyright protection is necessary to achieve this goal, then why allow fair use? Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.

First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers.[21] Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.

Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process. Three judicially created copyright doctrines have addressed this problem: first, the rule that the copyright does not protect *ideas*, but only the manner of expression;[22] second, the rule that *facts* are not within the copyright protection, notwithstanding the labor expended by the original author in uncovering

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[18] *Id.* The duration was the once-renewable fourteen-year term later adopted for the United States in the 1790 enactment. *See supra* text accompanying note 16.

[19] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[20] *Id.*

[21] *See* Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945). "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book . . . ." *Id.*

[22] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985); New York Times Co. v. United States, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.); 17 U.S.C. § 102(b) (1982).

them;[23] and finally, the fair use doctrine, which protects secondary creativity as a legitimate concern of the copyright.

II. The Nature and Contours of Fair Use

The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. As Lord Ellenborough explained in an early dictum, "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science."[24] Thus, the introductory language of our statute explains that fair use may be made for generally educational or illuminating purposes "such as criticism, comment, news reporting, teaching . . . scholarship, or research."[25]

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law.

A. The Statutory Factors

Following Story's articulation, the statute lists four pertinent "factors to be considered" "in determining whether the use made of a work in any particular case is a fair use."[26] They are, in summary, the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work.[27] Each factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether,

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[23] *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

[24] Cary v. Kearsley, 170 Eng. Rep. 679, 681, 4 Esp. 168, 170 (1803).

[25] 17 U.S.C. § 107 (1982).

[26] *Id.*

[27] *See id.*

and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.

1. Factor One — The Purpose and Character of the Secondary Use. — Factor One's direction that we "consider[] . . . the purpose and character of the use"[28] raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.[29] A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original.[30] If, on the other hand, the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[31]

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. A biographer or critic of a writer may contend that unlimited quotation enriches the portrait or justifies the criticism. The creator of a derivative work based on the original creation of another may claim ab-

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[28] *See id.* § 107(1).

[29] *See* Cary v. Kearsley, 170 Eng. Rep. 679, 681–82, 4 Esp. 168, 170–71 (1802). In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), the dissenters approved this approach, *see id.* at 480 (Blackmun, J., dissenting), but the majority of the Supreme Court rejected it, *see* 464 U.S. at 448–51.

[30] *See* Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

[31] *But cf.* Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1768–69 (1988) (using the term "transformative" in a somewhat different sense).

solute entitlement because of the transformation. Nonetheless, extensive takings may impinge on creative incentives. And the secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner.

The importance of a transformative use was stressed in the early decisions, which often related to abridgements. For example, *Gyles v. Wilcox*[32] in 1740 stated:

> Where books are colourably shortened only, they are undoubtedly infringement within the meaning of the [Statute of Anne] . . . .
>
> But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because . . . the invention, learning, and judgment of the [secondary] author is shewn in them . . . .[33]

In the United States in 1841, Justice Story wrote in *Folsom*:

> [N]o one can doubt that a reviewer may fairly cite [quote] largely from the original work, if . . . [its design be] . . . criticism. On the other hand, it is as clear, that if he thus [quotes] the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, [infringement will be found].[34]

Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. This detailed inquiry is particularly important in instances of a biographical or historical work that quotes numerous passages from letters, diaries, or published writings of the subject of the study. Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede. For example, in the recent cases of biographies of Igor Stravinsky[35] and J.D. Salinger,[36] although each biography overall served a useful, educational, and instructive purpose that tended to favor the defendant, some quotations from the writings of Stravinsky and Salinger were not justified *by* a strong transformative secondary objective. The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification.

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[32] 26 Eng. Rep. 489, 2 Atk. 141 (1740) (No. 130).

[33] *Id.* at 490, 2 Atk. at 143.

[34] 9 F. Cas. at 344–45.

[35] *See* Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987).

[36] *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

I confess to some error in Salinger's case. Although the majority of the biographer's takings were of unprotected facts or ideas and some displayed transformative value in sketching the character portrait, other takings of highly expressive material exhibited minimal creative, transformative justification. My finding of fair use was based primarily on the overall instructive character of the biography. I failed to recognize that the nontransformative takings provided a weak basis for claiming the benefits of the doctrine and that, unless attention were focused on the individual passages, a favorable appraisal of the constructive purpose of the overall work could conceal unjustified takings of protected expression. The converse can also be true: a low estimation of the overall merit of the secondary work can lead to a finding for the copyright owner in spite of a well-justified, transformative use of the particular quotation that should justify a favorable finding under the first factor.

Although repentantly agreeing with Judge Newman's finding of infringement in at least some of the challenged passages, I respectfully disagree with his reasoning, which I contend failed to recognize the need for quotation as a tool of accurate historical method. His opinion suggested a far-reaching rule — that unpublished matter is off-limits to the secondary user, regardless of justification. "[Unpublished] works normally enjoy complete protection against copying any protected expression."[37]

The Second Circuit's *New Era* opinion carried this suggestion further.[38] In *New Era*, unlike *Salinger*, various persuasive justifications were proffered as to why quotation was necessary to accomplish the biographer's objective. For example, the biographer sought to support a portrait of his subject as a liar by showing he had lied; as a bigot by showing he had made bigoted pronouncements; as pompous and self-important by quoting self-important statements. The biographer similarly used quotations to show cruelty, paranoia, aggressiveness, scheming.[39] These are points which often cannot be fairly

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[37] *Salinger*, 811 F.2d at 97.

[38] *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989).

[39] *See* New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1508–19 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989). The district court opinion found approximately twenty categories of justifications under the first factor. Personal qualities of the subject that the biographer sought to demonstrate through quotations included dishonesty, boastfulness, pomposity, pretension, paranoia, snobbery, bigotry, dislike of Asians and of the Orient, cruelty, disloyalty, aggressiveness, vicious scheming tactics, cynicism, and mental derangement. Other uses included the exposition of a false mythology built up around the personage of L. Ron Hubbard, of his self-image as revealed in early diaries, and of his teenage writing style. Some passages were quoted to ensure an accurate rendition of an idea.

Early drafts of this Commentary included samples of these quotations to illustrate the point here argued about fair use justifications under the first factor. I believed that such quotation in a law review article to further the discussion of a disputed point of law would be a fair use.

demonstrated without quotation. The Second Circuit's majority opinion rejected the pertinence of even considering the necessity of quotation of unpublished matter to communicate such assessments. Citing *Salinger*, it reasserted that "[unpublished] works normally enjoy complete protection."[40]

I believe the *Salinger/New Era* position accords insufficient recognition to the value of accurate quotation as a necessary tool of the historian or journalist. The biographer who quotes his subject is characterized as a parasite or free rider. If he copies "more than minimal amounts . . . he deserves to be enjoined."[41] Nor does this restriction "interfere . . . with the process of . . . history," the *Salinger* opinion insists, because "[t]he *facts* may be reported"[42] without risk of infringement. Can it be seriously disputed that history, biography, and journalism benefit from accurate quotation of source documents, in preference to a rewriting of the facts, always subject to the risk that the historian alters the "facts" in rewriting them?[43]

As to ideas, the analysis is similar. If the secondary writer has legitimate justification to report the original author's idea, whether for criticism or as a part of a portrait of the subject, she is surely permitted to set it forth accurately. Can ideas be correctly reported, discussed, or challenged if the commentator is obliged to express the idea in her own different words? The subject will, of course, reply, "That's not what I said." Such a requirement would sacrifice clarity, much as a requirement that judges, in passing on the applicability of a statute or contract, describe its provisions in their own words rather than quoting it directly.

Reconsideration of the standards declared by the court of appeals in *Salinger* and *New Era* suggests that no such tolerance exists. I have accordingly deleted the illustrative quotations. Interested readers are referred to the district court opinion, which sets forth numerous examples.

[40] *New Era*, 873 F.2d at 583.

[41] *Salinger*, 811 F.2d at 96; *see also New Era*, 873 F.2d at 584.

[42] *Salinger*, 811 F.2d at 100 (emphasis added).

[43] Sometimes, in the permitted exercise of reporting the facts that are set forth in a letter, a historical writer will inevitably use similar (or identical) language, especially if the original conveyed the fact by simple direct assertion. Consider a biographer whose information about her subject comes largely from letters. One such letter reported to an old college friend, "In July I married Lynn Jones, from San Francisco. We have rented a house on the beach in Malibu and spend most of our free time sunbathing." The biographer, seeking to report these facts writes, "We learn from X's letter to a college friend that in July 1952 he married a San Franciscan named Lynn Jones, that they rented a house on the beach in Malibu and spent most of their free time sunbathing." (This example parallels many instances raised by *Salinger*.) Is this infringement? Notwithstanding virtually identical language, I contend it is not. Where the secondary writer's purpose is to report the facts revealed in the original, and not to appropriate the personal expressive style of the original, she is surely not required — as the Second Circuit's *Salinger* opinion seems to suggest, *see Salinger*, 811 F.2d at 96–97 — to seek refuge in altered language merely to avoid using the same words as the original. Where a simple direct statement of the facts calls for use of the original language, the need to report the fact justifies such use.

Is it not clear, furthermore, as Chief Judge Oakes' separate opinion in *New Era* recognized,[44] that at times the subject's very words are the facts calling for comment? If a newspaper wishes to report that last year a political candidate wrote a personal letter demeaning a race or religion, or proclaiming ideals directly contrary to those now stated in his campaign speeches, how can it fairly do this without quotation from the letter? If a biographer wished to show that her subject was cruel, jealous, vain, or crazy, can we seriously contend she should be limited to giving the reader those adjectives, while withholding the words that support the conclusion? How then may the reader judge whether to accept the biographer's characterization?

The problem was amusingly illustrated in the fall-out of *Salinger*. After the decision, the biographer rewrote his book, this time without quotations. Resorting to adjectives, he described certain of Salinger's youthful letters as "self-promoting . . . boastful"[45] and "buzzing with self-admiration."[46] A reviewer, who had access to the letters, disagreed and proclaimed that the letters were in fact "exuberant, self-deprecating and charged with hope."[47] Where does that leave the reader? What should the reader believe? Does this battle of adjectives serve knowledge and the progress of the arts better than allowing readers to judge for themselves by reading revelatory extracts?

The Second Circuit appears divided over these propositions. After the split vote of the original *New Era* panel, rehearing en banc was narrowly defeated by a vote of 7–5.[48] Judge Newman, joined by three colleagues, argued that rehearing en banc was warranted "to avoid misunderstanding on the part of authors and publishers . . . — misunderstanding that risks deterring them from entirely lawful writings in the fields of scholarly research, biography, and journalism."[49] His opinion recognized that "even as to unpublished writings, the doctrine of fair use permits some modest copying of an author's expression . . . where . . . necessary fairly and accurately to report a fact set forth in the author's writings."[50] In this discussion, Judge Newman retreated substantially from his position expressed in *Salinger* of normally complete protection.[51]

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[44] *See New Era*, 873 F.2d at 592 (Oakes, C.J., concurring).

[45] I. HAMILTON, IN SEARCH OF J.D. SALINGER 53 (1988).

[46] *Id.* at 56.

[47] Richler, *Rises at Dawn, Writes, Then Retires*, N.Y. Times, June 5, 1988, (Book Review) § 7, at 7.

[48] *See* New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting).

[49] *Id.*

[50] *Id.*

[51] In an illuminating article to be published in the next edition of the *Journal of the Copyright Society*, *see* Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 1 (1990), Judge Newman substantially clarifies the issue. He now

Quoting is not necessarily stealing. Quotation can be vital to the fulfillment of the public-enriching goals of copyright law. The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations. If a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors.[52] Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense.[53] The strength of that justification must be weighed against the remaining factors, which focus on the incentives and entitlements of the copyright owner.

2. Factor Two — The Nature of the Copyrighted Work. — The nature of the copyrighted work is a factor that has been only superficially discussed and little understood. Like the third and fourth factors, it concerns itself with protecting the incentives of authorship. It implies that certain types of copyrighted material are more amenable to fair use than others.

Copyright protection is available to very disparate categories of writings. If it be of original authorship, *i.e.*, not copied from someone else, and recorded in a fixed medium, it is protected by the copyright.[54] Thus, the great American novel, a report prepared as a duty of employment, a shopping list, or a loanshark's note on a debtor's

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espouses the propriety of such quotation in limited quantity when necessary to demonstrate facts. After my changes of position and his, the gulf between us in *Salinger* has significantly narrowed. *See infra* note 119 and accompanying text.

[52] Nonetheless, every trivial taking of copyrighted material that fails to demonstrate a compelling justification is not necessarily an infringement. Because copyright is a pragmatic doctrine concerned ultimately with public benefit, under the de minimis rule negligible takings will not support a cause of action. The justifications of the de minimis exemption, however, are quite different from those sanctioning *fair* use. They should not be confused. *See, e.g.*, Funkhouser v. Loew's, Inc., 206 F.2d 185 (8th Cir. 1953), *cert. denied*, 348 U.S. 843 (1954); Suid v. Newsweek Magazine, 503 F. Supp. 146, 148 (D.D.C. 1980); McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296, 1303 (E.D. Mo. 1980); Greenbie v. Noble, 151 F. Supp. 45, 70 (S.D.N.Y. 1957); Robach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155 (S.D.N.Y. 1978).

[53] The interpretation of the first factor is complicated by the mention in the statute of a distinction based on "whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1982). One should not exaggerate the importance of this distinction. It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses. Nor can it mean that books produced by a commercial publisher are excluded from eligibility for fair use. A historian is not barred from making fair use merely because she will receive royalty compensation. This clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.

[54] *See* 17 U.S.C. § 102(a) (1982).

door saying "Pay me by Friday or I'll break your goddamn arms" are all protected by the copyright.[55]

In the early history of copyright, British courts debated whether letters written for private communication should receive any protection at all from the Statute of Anne.[56] The question was soon satisfactorily settled in favor of protection, and I do not seek to reopen it. I do not argue that writings prepared for private motives should be denied copyright protection. In the unlikely event of the publication of the Collected Shopping Lists (or Extortion Notes) of a Renowned Personage, of course only the author should enjoy the author's rights. When it comes to making fair use, however, there is a meaningful difference between writings conceived as artistic or instructive creation, made in contemplation of publication, and documents written for a private purpose, as a message or memo, never intended for publication. One is at the heart of the purpose of copyright — the stimulation of creative endeavor for the public edification. The others are, at best, incidental beneficiaries. Thus, the second factor should favor the original creator more heavily in the case of a work (including superseded drafts) created for publication, than in the case of a document written for reasons having nothing to do with the objectives of copyright law.

The statutory articulation of this factor derives from Justice Story's mention in *Folsom* of the "value of the materials used."[57] Justice Story's word choice is more communicative than our statute's "nature of," as it suggests that some protected matter is more "valued" under copyright law than others. This should not be seen as an invitation to judges to pass on literary quality, but rather to consider whether the protected writing is of the creative or instructive type that the copyright laws value and seek to foster.

The *Nation*, *Salinger*, and *New Era* opinions discussed the second factor solely in terms of whether the copyrighted work was published or unpublished. The *Nation* opinion observed that the unpublished status of a copyrighted work is a critical element of its nature and a

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[55] The latter examples of writing are not ordinarily considered "work," the term used in Factor Two.

[56] Although Pope v. Curl, 26 Eng. Rep. 608, 2 Atk. 342 (1741), answered in the affirmative soon after the passage of the Statute of Anne, Perceval v. Phipps, 35 Eng. Rep. 225, 2 Ves. & Bea. 19 (1813), suggested the contrary:

> [T]hough the Form of familiar Letters might not prevent their approaching the Character of a literary Work, every private Letter, upon any Subject, to any Person, is not to be described as a literary Work, to be protected upon the Principle of Copyright. The ordinary Use of Correspondence by Letters is to carry on the Intercourse of Life between Persons at a Distance from each other, in the Prosecution of Commercial, or other, Business; which it would be very extraordinary to describe as a literary Work, in which the Writers have a Copyright.

Id. at 229, 2 Ves. & Bea. at 28.

[57] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

"factor tending to negate the defense of fair use";[58] "the scope of fair use is narrower with respect to unpublished works."[59]

The Second Circuit in *Salinger* and *New Era* extended this principle. As interpreted in *Salinger*,[60] the Supreme Court's discussion "conveys the idea that [unpublished] works normally enjoy complete protection against copying any protected expression."[60] However extreme this formulation may be, the word "normally" suggests that in the unusual instance fair use may be made of unpublished matter. *New Era*, however, rejected fair use even when necessary for accurate presentation of a fact; the court thus created an apparently insurmountable obstacle to the fair use of unpublished matter. Under the *Salinger/New Era* view, the unpublished nature of a quoted document trumps all other considerations.

The Supreme Court and the Second Circuit justify these positions by the original author's interest in controlling the circumstances of the first public revelation of his work[61] and his right, if he so chooses, not to publish at all.[62] These are indeed legitimate concerns of copyright law. An author who prefers not to publish a work, or wishes to make aesthetic choices about its first public revelation, will generally have the legal right to enforce these wishes.[63] Due recognition of these rights, however, in no way implies an absolute power to bar all quotation, regardless of how persuasive the justification.

A ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life — the "widow censor." A historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors for fifty years after the subject's death. When writers ask permission, the answer will be, "Show me what you write. Then we'll talk about permission." If the manuscript does not exude pure admiration, permission will be denied.[64]

The second factor should not turn solely, nor even primarily, on the published/unpublished dichotomy. At issue is the advancement of the utilitarian goal of copyright — to stimulate authorship for the

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[58] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

[59] *Id.* at 551.

[60] Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

[61] *See Nation*, 471 U.S. at 552–55.

[62] *See id.* at 559.

[63] *See id.* at 552; 17 U.S.C. § 106(3) (1982).

[64] Counsel to a major publisher advised me that the majority of nonfiction books in publication today present legal problems that did not exist prior to the *Salinger* opinion. Telephone conversation with Harriette Dorsen, counsel of Bantam-Doubleday-Dell Publishing (Dec. 1989); *see also* Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80 (discussing the hesitancy of publishers to publish books quoting from unpublished sources).

public edification. Inquiry into the "nature" or "value" of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements. Notwithstanding that nearly all writings may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public.[65] The law was not designed to encourage shoppers to make written shopping lists, executives to keep orderly appointment calendars, or lovers to write love letters. Certainly it was not to encourage the writing of extortion notes. To conclude that documents created for purposes outside the concerns of copyright law should receive more vigorous protection than the writings that copyright law was conceived to protect is bizarre and contradictory. To suggest that simply because a written document is unpublished, fair use of that document is forbidden, or even disfavored, has no logical support in the framework of copyright law.

I do not argue that a writer of private documents has no legal entitlement to privacy.[66] He may well have such an entitlement. The law of privacy, however, and not the law of copyright supplies such protection. Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination.[67]

I do not dispute that publication can be important in assessing the second factor. Publication for public edification is, after all, a central concern of copyright. Thus, a work intended for publication is a favored protectee of the copyright.[68] A secondary use that imperils

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[65] *See supra* pp. 1108–10.

[66] *See infra* pp. 1129–30.

[67] Professor Weinreb argues it is "counterintuitive" that matter intended to be kept private should be more subject to exposure than what was created for others to see. *See* Weinreb, *Fair's Fair*, 103 HARV. L. REV. 1137, 1145–46 (1990). Indeed, it is. For this reason, one who wishes to keep private matters secret possesses various legal remedies, including civil and criminal actions for trespass and conversion, as well as an action to enforce the right of privacy.

My observations here in no way suggest that courts should deprive a person seeking privacy of legal remedies designed to protect privacy. My concern is solely with the understanding of the copyright law — a body of law conceived to encourage publication for the public edification. Construing its rules as more solicitous of an intention to conceal than to publish contravenes its purposes. *See infra* pp. 1129–30.

[68] It was an anomaly of the original drafting that the liberal terms of the Statute of Anne provided no pre-publication protection. It measured the limited period of protection as fourteen years running not from the time of authorship but from the date of publication. This problematic drafting formulation no doubt resulted from the fact that the antecedents of the Statute of Anne

the eventual publication of a creation en route undermines the copyright objective. I therefore agree with the Supreme Court, on the particular facts of the *Nation* case, that the nature of the copyrighted work strongly favored its protection — but not merely because it was unpublished. In that case, the *Nation*, a weekly magazine of news and comment, published purloined extracts from the memoirs of former President Gerald Ford, shortly prior to the scheduled appearance of the first authorized serialization in *Time Magazine*.[69] *Time* then cancelled its plan to print the memoir and withheld payment of the balance of the license fee.[70] The Supreme Court rejected the *Nation*'s claim that the newsworthiness of the President's memoir justified a finding of fair use.[71]

The critical element was that President Ford's memoir was written for publication, and was on its way to publication at the time of the *Nation*'s gun-jumping scoop. The Supreme Court emphasized that the *Nation*'s scoop unreasonably diminished the rewards of authorship.[72] The Court noted further that if the practice were tolerated on the grounds of newsworthiness, it would discourage public figures from writing and publishing valuable memoirs.[73] Read in context rather than excerpting isolated phrases, the *Nation* decision communicates a concern for protection of unpublished works *that were created for publication*, or *on their way to publication*, and not for unpublished matter created for private ends and held in secrecy.

It is not always easy to draw the distinction between works created for publication and notations or communications intended as private. A diary, memoir, or letter can be both — private in the first instance, but written in contemplation of possible eventual publication. In a sense, professional authors are writing either directly or indirectly for publication in their private memos and letters, as well as in their manuscripts. In private letters and notebooks, they practice the writ-

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were acts that conferred monopoly *printing* franchises upon printers under royal license. *See* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3–9 (1967); LATMAN'S THE COPYRIGHT LAW, *supra* note 16, at 2–4.

Construing the statute in accordance with its literal terms would have left authors unprotected at the time of their greatest exposure to piracy — the time before the act of publication made public the author's entitlement to protection. Thus, an author who showed an unpublished manuscript to a friend, critic, or prospective publisher would have had no protection had the latter pirated the work and published it without authorization. The British courts, however, cured the problem by construing the Statute to confer protection prior to publication. *See* Pope v. Curl, 26 Eng. Rep. 608, 2 Atk. 342 (1741).

[69] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543 (1985).

[70] *See id.*

[71] *See id.* at 569.

[72] *See id.* at 554–55.

[73] *See id.* at 557.

er's craft, trying out ideas, images, metaphors, cadences, which may eventually be incorporated into published work.[74]

The attempt to distinguish, for purposes of the second fair use factor, between work created for publication and other written matter should recognize that the copyright objectives include a reasonable solicitude for the ability of the author to practice the craft in the privacy of the laboratory. A critique of an author's writing based solely on rough drafts that the author had superseded might well be an unreasonable intrusion.[75]

On the other hand, notwithstanding the highly protected status of a draft, the privacy of the laboratory should yield in some situations. Assume the following hypothetical cases:

> (1) An author's first novel is greeted with critical acclaim for its elegant style and masterful command of the language. A skeptical critic undertakes to show that the author is a literary fraud, the creation of a talented and unscrupulous editor. In support, the critic quotes brief excerpts from the author's very different original manuscript, revealing a grammatical ignorance and stylistic awkwardness she contends could not conceivably have come from the same pen as the elegant published version. The author sues to enjoin publication of the review.
>
> (2) Author *A* publicly accuses Author *B* of plagiarism; *A* claims that *B*'s recently published book steals a metaphor from a letter *A* wrote to *B*. *B* denies the charge and asserts that his first draft, written before he received *A*'s letter, included the same language. The critic quotes from *B*'s first draft, disproving *B*'s defense by showing that the metaphor was not yet present.

Both examples seem convincing cases of fair use, in which the critic's productive and transformative justification would take precedence over the author's interest in maintaining the privacy of the unpublished draft.[76]

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[74] A recent *New Yorker* cartoon by David Jacobson imagines James Joyce's to-do list posted on his refrigerator. It reads:

TO DO:
1. Call Bank.
2. Dry Cleaner.
3. Forge in the smithy of my soul the uncreated conscience of my race.
4. Call Mom.

NEW YORKER, Sept. 25, 1989, at 100.

[75] Professor Fisher suggests a per se rule barring fair use of material that the original author considered unfinished, on the grounds of injury to the creative process resulting from premature divulgence and absence of benefit. His discussion assumes, however, that the original author's work was created, and is destined, for publication. His reasoning does not apply to a biographer's quotation of an unfinished and abandoned love letter, an extortion demand, or a shopping list. *See* Fisher, *supra* note 31, at 1780.

[76] I therefore question the validity of Chief Judge Oakes' interpretation of *Salinger* in his

In summary, several principles emerge from considering the second factor in light of the copyright objectives: this factor concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage. Thus, a text, including drafts, created for publication, or on its way to publication, presents a far stronger case for protection against fair use than matter written exclusively for private purposes. The more the copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding. The fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication.[77] If, on the other hand, the writing is on its way to publication, and premature secondary use would interfere significantly with the author's incentives, its as yet unpublished status may argue powerfully against fair use. Finally, this factor is but one of four — it is not a sufficient basis for ruling out fair use. There is no logical basis for making it determinative, as was effectively done in *Salinger* and *New Era*. Although the second factor implies a characterization of the protected work on a scale of copyright-protected values, no category of copyrighted material is either immune from use or completely without protection. Wholesale appropriation of the expressive language of a letter, without a transformative justification, should not qualify as fair use, even though the writer of the letter had never considered publication. On the other hand, if a sufficient justification exists, and the quotations do not cause significant injury to the author's entitlements, courts may allow even quotations from an unpublished draft of a novel.

3. Factor Three — Amount and Substantiality. — The third statutory factor instructs us to assess "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[78] In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use.

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opinion in *New Era*: "quotation used merely to demonstrate writing style may not qualify for the fair use defense." New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 592 (2d Cir. 1989) (Oakes, C.J., concurring).

[77] William Patry has expressed readiness, based on these arguments, to amend his previous positions as outlined in THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, cited above in note 3.

> [He] confesses to mechanically reciting the adage "there is no fair use of unpublished works," thereby failing to adequately take into account the different types of unpublished works and uses thereof . . . [as well as to] mechanically reciting that "harm is presumed when a prima facie case of infringement has been made out" thereby inviting . . . confusion between substantive law and remedy . . . .

Editor's Note, 36 J. COPYRIGHT SOC'Y, note 3 (Apr. 1989).

[78] 17 U.S.C. § 107(3) (1982).

This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market).

As to the first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification. A solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.

In its relation to the market impact factor, the *qualitative* aspect of the third test — "substantiality" — may be more important than the quantitative. In the case of President Ford's memoir, a taking of no more than 400 words constituting "'the heart of the book'"[79] caused cancellation of the first serialization contract — a serious impairment to the market for the book. As to the relationship of *quantity* to the market, presumptively, of course, the more taken the greater the likely impact on the copyright holder's market, and the more the factor favors the copyright holder. Too mechanical a rule, however, can be dangerously misleading. One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential. Consider, for example, a lengthy critical study analyzing the structure, symbolism and meaning, literary antecedents and influences of a single sonnet. Fragments dispersed throughout the work of criticism may well quote every word of the poem. Such quotation will not displace the market for the poem itself. If there is strong justification and no adverse market impact, even so extensive a taking could be a fair use.

Too rigid a notion of permissible quantity, furthermore, can seriously distort the inquiry for very short memos or communications. If a communication is sufficiently brief, any quotation will necessarily take most or all of it. Consider, for example, the extortion note discussed above.[80] A journalist or historian may have good reason to quote it in full, either for historical accuracy, to show the character of the writer, or to suggest its effect on the recipient. The copyright holder, in seeking to enjoin publication, will argue that the journalist has taken not only the heart but the whole of the protected work. There are three responses, which relate to the first, second, and fourth factors. First, there may be a powerful justification for quotation of the entirety of a short note. Second, because the note was written for private motives and not for publication, quotation will not diminish

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[79] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

[80] *See supra* text accompanying note 55

the inducement to authors to create works for the public benefit. Finally, because the note is most unlikely to be marketed as a work of its author, there is no effect on its market. Courts must then evaluate the significance of the amount and substantiality factor in relation to the copyright objectives; they must consider the justification for the secondary use and the realistic risk of injury to the entitlements of authorship.

4. Factor Four — Effect on the Market. — The fourth factor addresses "the effect of the use upon the potential market for the copyrighted work."[81] In the *Nation*, the Supreme Court designated this "the single most important element of fair use."[82] The Court's recognition of the importance of this factor underlines, once again, that the copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious. The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor.[83]

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in *Nation*, this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified.[84] Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

How much market impairment must there be to turn the fourth factor against the secondary user? By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.[85] Therefore, if an insubstantial loss of revenue

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[81] 17 U.S.C. § 107(4) (1982).

[82] *Nation*, 471 U.S. at 566.

[83] This reasoning assumes that the author created the copyrighted matter with the hope of generating rewards. It has no bearing on materials written for personal reasons, independent of the hope of commanding a market.

[84] An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the first factor, it should be considered an infringement, regardless of the absence of market impairment.

Because the fourth factor focuses on the "*potential* market, *see Nation*, 471 U.S. at 568 (emphasis in original), perhaps such a case should be considered an impairment, despite the bonanza. The taking of the tune for the movie forecloses its eligibility for use in another film.

[85] It does not necessarily follow that the fair use doctrine diminishes the revenues of copyright

turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user.[86] And if we then gave serious deference to the proposition that it is "undoubtedly the single most important element of fair use,"[87] fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial.[88] When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.

Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute,[89] or, in Story's words "supersede[s] the use of the original."[90] Only to that extent are the purposes of copyright implicated.

B. Are There Additional Factors?

1. False Factors. — The language of the Act suggests that there may be additional unnamed factors bearing on the question of fair use.[91] The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright. They may have bearing on the appropriate remedy, or on the availability of

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holders. If a royalty obligation attached to every secondary use, many would simply forgo use of the primary material in favor of free substitutes.

[86] *Cf.* Fisher, *supra* note 31, at 1671–72.

[87] *Nation*, 471 U.S. at 566.

[88] Although the *Salinger* opinion acknowledged that the biography "would not displace the market for the letters," it counted this factor in the plaintiff's favor because "some impairment of the market seem[ed] likely." Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). This potential impairment, furthermore, resulted not from the copying of Salinger's words but from the readers' mistaken belief, based on the biographer's use of phrases such as "he wrote," "said Salinger," and "Salinger declares," that they had read Salinger's words. *See id.* The *New Era* opinion also awarded this factor to the plaintiff on a speculative assessment of slight market impairment. *See New Era*, 873 F.2d at 585. I believe the criterion requires a more substantial injury. *See* Fisher, *supra* note 31, at 1671–72.

[89] *See Salinger*, 650 F. Supp. at 425.

[90] Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

[91] The statute states that "the factors to be considered shall include" the four factors. *See* 17 U.S.C. § 107 (1982). "The terms 'including' and 'such as' are illustrative and not limitative." *Id.* § 101.

another cause of action to vindicate a wrong, but not on the fair use defense.

(a) Good Faith. — In all areas of law, judges are tempted to rely on findings of good or bad faith to justify a decision. Such reasoning permits us to avoid rewarding morally questionable conduct. It augments our discretionary power. It provides us with an escape from confronting questions that are difficult to understand. The temptation has been particularly strong in dealing with the difficult issue of fair use.[92] This practice is, however, misguided. It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.

Copyright seeks to maximize the creation and publication of socially useful material. Copyright is not a privilege reserved for the well-behaved. Copyright protection is not withheld from authors who lie, cheat, or steal to obtain their information. If they have stolen information, they may be prosecuted or sued civilly, but this has no bearing on the applicability of the copyright. Copyright is not a reward for goodness but a protection for the profits of activity that is useful to the public education.

The same considerations govern fair use. The inquiry should focus not on the morality of the secondary user, but on whether her *creation* claiming the benefits of the doctrine is of the type that should receive those benefits. This decision is governed by the factors reviewed above — with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.

A secondary user, like an original author, may be liable to criminal prosecution, or to suit in tort, if she has stolen information or has committed fraud. Furthermore, if she has infringed upon a copyright, morally reprehensible conduct may influence the remedy, including the availability of both an injunction and additional damages for willfulness.[93]

This false morality factor derives from two misunderstandings of early precedent. The first results from the use of words like "piracy" and the Latin phrase "*animus furandi*" in early decisions. In rejecting the defense of fair use, courts sometimes characterized the offending secondary work as having been written *animo furandi* (with intention of stealing). Although this characterization seemed to imply that fair

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[92] *See* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); W. PATRY, *supra* note 3, at 1110.

[93] *See* 17 U.S.C. § 504(c)(2) (1982) (providing for additional damages if a willful infringement is found).

use requires honest intentions, the courts reasoned in the opposite direction. The decisions did not explore the mental state of the secondary user to determine whether fair use was shown. They examined the secondary text to determine whether it made a productive transformative use or merely restated the original. If they found no productive use justifying the taking, judges adorned the conclusion of infringement with words like piracy or *animus furandi*.[94] The morality of the secondary user's conduct played no role in the decision. The irrelevance of the morality of the secondary user's conduct was underlined in decisions like *Folsom v. Marsh*.[95] There Justice Story emphasized not only the good faith and "meritorious labors" of the defendants, but also the usefulness of their work. Finding no "bona fide abridgement"[96] (what I have described as a transformative use), Justice Story nonetheless concluded with "regret" that good faith could not save the secondary work from being "deemed in law a piracy."[97]

A second misleading assumption is that fair use is a creature of equity.[98] From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically this notion is incorrect. Litigation under the Statute of Anne began in the law courts.[99] Although plaintiffs who sought injunctions could sue, and did, in the courts of equity,[100] which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.

The temptation to determine fair use by reference to morality also can lead to examination of the conduct and intentions of the plaintiff

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[94] *See, e.g.*, Cary v. Kearsley, 170 Eng. Rep. 679, 4 Esp. 168 (1802); Jarrold v. Houlston, 69 Eng. Rep. 1294, 1298, 3 K. & J. 708, 716–17 (1857); *see also* Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir. 1983) ("[F]air use presupposes that the defendant has acted fairly and in good faith . . . ."); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 62 (2d Cir. 1980) (noting the relevance of conduct to fair use).

[95] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[96] *Id.* at 349.

[97] *Id.* at 345; *see also* Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962) (stating that a lack of intent to infringe does not entitle a defendant to the protections of the fair use doctrine); Reed v. Holliday, 19 F. 325, 327 (C.C.W.D. Pa. 1884) ("Intention . . . is . . . of no moment if infringement otherwise appears."); Scott v. Stanford, 3 L.R.-Eq. 718, 723 (1867) (holding that the honest intentions of a defendant are immaterial if the resulting work infringes plaintiff's copyright).

[98] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason"); *see also* S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975) ("[S]ince the doctrine is an equitable rule of reason, no . . . applicable definition is possible . . . ."); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976).

[99] *See* W. PATRY, *supra* note 3, at 3–5.

[100] *See, e.g.*, Dodsley v. Kinnersley, 27 Eng. Rep. 170 (1761) (seeking an injunction to prevent further publication of a novel abstract).

copyright holder in bringing the suit. The secondary user may contend that the copyright holder is disingenuously invoking copyright remedies as a device to suppress criticism or protect secrecy.[101] Such considerations are also false leads.

Like a proprietor of land or an owner of contract rights, the copyright owner may sue to protect what he owns, regardless of his motivation. His rights, however, extend only to the limits of the copyright. As fair use is not an infringement, he has no power over it. Whether the secondary use is within the protection of the doctrine depends on factors pertinent to the objectives of the copyright law and not on the morality or motives of either the secondary user or the copyright-owning plaintiff.

(b) Artistic Integrity. — There are many who deplore our law's failure to protect artistic integrity. French law enforces the concept of the *droit moral d'artiste*, which covers among other things a right of paternity (the right to be acknowledged as author of the work), the right to preserve a work from mutilation or change, the right to withdraw or modify a work already made public, and the right to determine whether or not a work shall be published.[102]

Those who would adopt similar rules in United States law seek a place for them in the copyright law, which is understandable in view of the absence of other niches. I do not oppose our adoption of such rights for artists. I do, however, oppose converting our copyright law, by a wave of a judicial magic wand, into an American *droit moral*. To do so would generate much unintended mischief. Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the *droit moral*.

As the copyright privilege belongs not only to Ernest Hemingway but to anyone who has drafted an interoffice memo or dunning letter or designed a computer program, it would be preposterous to permit all of them to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. If we wish to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of

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[101] *See, e.g.*, Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring), *cert. denied*, 385 U.S. 1009 (1967); New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

[102] *See* DaSilva, *Droit Moral and the Auteur Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 3–4 (1980). *See generally* Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y 269 (1989).

art.[103] Those difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.

(c) Privacy. — The occasional attempt to read protection of privacy into the copyright is also mistaken.[104] This trend derives primarily from an aberrational British case of the mid-nineteenth century in which there had been no replication of copyrighted material.

Queen Victoria and Prince Albert had made etchings which were exhibited privately to friends. The defendant Strange, a publisher, obtained copies surreptitiously. Strange wrote descriptions of the etchings and sought to publish his descriptions. Prince Albert brought suit to enjoin this intolerable intrusion. The Lord Chancellor, expressing concern for the privacy of the royal family and disapproval of the surreptitious manner by which the defendant had obtained copies of the etchings, affirmed the grant of an injunction.[105]

Prince Albert's case is noteworthy as the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren.[106] But it should not be considered a meaningful precedent for our copyright law. The decision reflects circumstances that distinguish British law from ours — particularly the absence from British law of two of our doctrines. First, although British society placed a higher value on privacy than we do, English law did not have a right of privacy.[107] In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication.[108] Second,

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[103] *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (to be codified in scattered sections of 17 U.S.C.).

[104] *See, e.g.*, Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459 (1988).

[105] *See* Prince Albert v. Strange, 41 Eng. Rep. 1171, 1171–72, 1178–79, 1180, 2 Mac. & G. 25, 25–27, 40, 44–45, 48 (1849), aff'g 64 Eng. Rep. 293, 2 DeG. & Sm. 652 (1849).

[106] *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[107] *See generally* REPORT OF THE COMMITTEE ON PRIVACY, Command Papers 5, No. 5012, at 5–12, 202–07 (1972) (recommending against the creation of a statutory general right of privacy).

[108] The RESTATEMENT (SECOND) OF TORTS § 652A (1977) formulates a cause of action for invasion of privacy, which may arise from unwarranted publication of private facts. Numerous states recognize such a privacy action. Relief is typically available if the publicized matter would be highly offensive to a reasonable person and if no strong public interest exists in the disclosure of the facts. *See, e.g.*, Reed v. Real Detective Publishing Co., 63 Ariz. 294, 304–05, 162 P.2d 133, 138 (1945); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128, 448 A.2d 1317, 1329 (1982); Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 919 (Fla. 1976) (Sundberg, J., dissenting) (discussing the absence of an invasion of privacy action when publishing matters of legitimate public interest), *cert. denied*, 431 U.S. 930 (1977); Midwest Glass Co. v. Stamford Dev Co., 34 Ill. App. 3d 130, 133, 339 N.E.2d 274, 277 (1975); Beaumont v. Brown, 401 Mich. 80, 96, 257 N.W.2d 522, 527 (1977) (discussing invasion of privacy based on public disclosure of embarrassing private facts); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (Miss. 1976) (holding that plaintiff alleged facts sufficient to establish an invasion of

British law did not include a strong commitment to the protection of free speech.[109] American law, in contrast, maintains a powerful constitutional policy that sharply disfavors muzzling speech.

Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests. First, it will destroy the delicate balance of interests achieved under our privacy law. For example, the judgment that, in the public interest, the privacy right should terminate at death would be overcome by the additional fifty years tacked onto copyright protection. Such a change would destroy the policy judgment developed under privacy law denying its benefits to persons who have successfully sought public attention. In addition, as a result of the preemption provisions of the federal copyright statute,[110] construing the copyright law to encompass privacy might nullify state privacy laws.

Moreover, the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect the privacy interest involved.[111] Because the copyright generally cannot be enforced without a *public* filing in the Library of Congress, the very act required to preserve privacy would ensure its violation. Finally, incorporating privacy concerns into copyright would burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal. Privacy and concealment are antithetical to the utilitarian goals of copyright.

C. Injunction

One of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily

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privacy claim); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo. 1983); Commonwealth v. Hayes, 489 Pa. 419, 432–33, 414 A.2d 318, 324–25, *cert. denied*, 449 U.S. 992 (1980); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex. 1976) (discussing Prosser's categorization of an invasion of privacy action into four distinct torts), *cert. denied*, 430 U.S. 931 (1977); *see also* RESTATEMENT (SECOND) OF TORTS § 652E (1977) (discussing "false light" invasion of privacy). Some commentators have argued for change in the doctrine. *See, e.g.*, Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (arguing for a shift in focus away from the amount of publicity given to private information).

[109] *Cf.* E. BARENDT, FREEDOM OF SPEECH 304–07 (1985) (arguing that British law does not protect freedom of speech as fully as American or German law and recommending the adoption of a "free speech clause" for Britain); Lee, *Bicentennial Book, Tercentennial Spycatcher: Do the British Need a Bill of Rights?*, 49 U. PITT. L. REV. 777, 811–15 (1988) (discussing the Spycatcher incident as having provoked the adoption of a bill of rights to protect free speech more adequately).

[110] *See* 17 U.S.C. § 301 (1982).

[111] *See id.* § 102(b); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

implicates the grant of an injunction. Many commentators have disparaged the overly automatic tendency of courts to grant injunctive relief.[112] The copyright statute and its predecessors express no preference for injunctive relief. The 1976 Act states only that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[113] Moreover, the tendency toward the automatic injunction can harm the interests of plaintiff copyright owners, as well as the interests of the public and the secondary user. Courts may instinctively shy away from a justified finding of infringement if they perceive an unjustified injunction as the inevitable consequence.[114]

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[112] Benjamin Kaplan chided courts for "sometimes forgetting] that an injunction does not go of course; the interest in dissemination of a work may justify a confinement of the remedy to a money recovery." B. KAPLAN, *supra* note 68, at 73. Professor Nimmer, noting judicial authority requiring an injunction, cautions that "where great public injury would be worked by an injunction, the courts might follow cases in other areas of property law, and award damages or a continuing royalty instead of an injunction in such special circumstances." 3 M. NIMMER, THE COPYRIGHT LAW § 14.06[B], at 14-56 (1989). The remedial standard suggested by the *Restatement (Second) of Torts* would allow courts to award a plaintiff damages when countervailing interests, including free speech, disfavor an injunction. *See* RESTATEMENT (SECOND) OF TORTS § 951 comment a (1979); *id.* § 942 comment e; *see also* Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC'Y 1, 3, 12 (1987) (urging that first amendment values should be viewed as a basis for making copyright law more responsive to the shared values of the nation); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1030 (1970) (arguing that one way to accommodate copyright property with the public interest in access is to prefer an award of damages to an injunctive remedy); Wishingrad, *First Amendment "Fair Use,"* N.Y.L.J., May 22, 1989, at 2, cols. 3–5 (arguing that courts should select other remedies to avoid infringing the first amendment).

[113] 17 U.S.C. § 502(a) (1982).

[114] An example of such confusion, I confess, may be my own opinion in *Salinger*. With hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification.

I believe Professor Weinreb's analysis could similarly deprive copyright owners of their lawful entitlements. Professor Weinreb argues that fair use should not be understood as a part of copyright law, designed exclusively to help achieve its objectives, but as a limitation on copyright based also on other social policies including fairness. It is incorrect, he argues, to restrict fair uses to those that make creative use of the copyrighted material. In some cases, concerns for the public interest will demand that the secondary user's presentation be exempt from the copyright owner's rights, notwithstanding unproductive copying. As an example he cites the finding of fair use involving an unauthorized publication of a copy of a spectator's film of President Kennedy's assassination. *See* Weinreb, *supra* note 67, at 1143 (citing Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968)).

Let us explore Professor Weinreb's example. Assume as our plaintiff a gifted news photographer who, through a combination of diligence, preparedness, rapidity, imagination, instinct, skill, sense of composition, and other undefinable artistic gifts, manages again and again to take captivating photographs of cataclysmic or historic occurrences. According to Professor Weinreb's analysis, the more successful he is in the practice of his creative art, the less copyright protection he has. When there is a sufficiently great public interest in seeing his documentary recordings, he loses his right to receive compensation for them. In the public interest, the newspapers,

Legal rhetoric has dulled thought on the injunction remedy. It is a venerable maxim that irreparable injury is "presumed" in a case of copyright infringement.[115] Injunction thus follows as a matter of course upon a finding of infringement. In the vast majority of cases, this remedy is justified because most infringements are simple piracy. Successful fabric designs, fashion accessories, toys, and videos instantly spawn parasitic industries selling cheap copies. These infringers incur no development cost, no advertising expense, and little risk. They free-ride on the copyright owner's publicity, undercut the market, and deprive the copyright owner of the rewards of his creation. Allowing this practice to flourish destroys the incentive to create and thus deprives the public of the benefits copyright was designed to secure. It is easy to justify enjoining such activity. In fact, the presumption of irreparable harm is probably unnecessary. It merely simplifies and reduces the cost of proving what could be shown without a presumption.

Such cases are worlds apart from many of those raising reasonable contentions of fair use. Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work. And the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found.

In such cases, should we indulge a presumption of irreparable harm and grant injunctions as a matter of course? According to the *Salinger* opinion, "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined . . . ."[116] Judge Miner's majority opinion in *New Era* extended this

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news magazines, and television networks may simply take and republish his photographs without payment. That is fair use.

I think Professor Weinreb's example proves the contrary of his point. He confuses the author's copyright with the questions of remedy. It makes no sense that an "author," whose art and livelihood are to make news photographs that the public will desperately need to see, loses his right to compensation for his labors because he succeeds in his endeavors. On the other hand, the public interest disfavors an injunction barring the dissemination of such a work. The conflict is not difficult to reconcile. The taking of the author's photographs for public display is not fair use; the copyright holder may sue for compensation for the unauthorized republication of his work. The public interest may nevertheless override the right he otherwise would have had to bar distribution. He will be denied an injunction, but will recover damages. Both the copyright law and the public interest will thus be vindicated.

[115] *See* LATMAN'S THE COPYRIGHT LAW, *supra* note 16, at 278 & n.105.

[116] Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

proposition, expressly rejecting the idea that the public interest in publication of an informative biography could outweigh the copyright owner's preference for an injunction.[117] Upon application for rehearing en banc, Judge Newman, author of the *Salinger* opinion but not a part of the *New Era* panel, writing in favor of rehearing of *New Era*, retracted *Salinger*'s seminal assertion. Judge Newman explained that his phrase "deserves to be enjoined" had meant nothing more than "deserves to be found liable for infringement."[118] He pointed out that in *Salinger* there had been no dispute over the appropriateness of injunctive relief. Because at the time of the lawsuit the book was in prepublication copy, the infringing passages could be easily excised or altered without destroying the book. Thus there was no good reason to deny the injunction. Judge Newman's *New Era* opinion goes on to argue convincingly that the public interest is always relevant to the decision whether to grant an injunction.[119]

The customary bias in favor of the injunctive remedy in conventional cases of copyright infringement has no proper application to the type of case here discussed. When a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits.[120] The court should grant or deny the injunction *for reasons*, and not simply as a mechanical reflex to a finding of infringement. Plaintiffs should be required to demonstrate irreparable harm and inadequacy of compensation in damages.[121] As Chief Judge Oakes noted in his separate opinion in *New Era*, "Enjoining publication of a book is not

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[117] *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989).

[118] New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 663 n.1 (2d Cir. 1989) (Newman, J., dissenting) (advocating rehearing en banc).

[119] *See id.* at 664. In his new article, Judge Newman emphasizes the importance of the public interest in determining the availability of an injunction. *See* Newman, *supra* note 51.

[120] *See supra* note 77.

[121] The appropriate measure of damages will raise questions because of the vagueness of the statutory standard. 17 U.S.C. § 504(b) grants the copyright owner his "actual damages suffered . . . and any profits of the infringer that are attributable to the infringement." *Id.* He is permitted, however, to elect instead "statutory damages" of $500 to $20,000 per work infringed. If the infringement was "committed willfully," this statutory award may be increased to $100,000. It may be reduced to $200 if infringers in certain narrow categories believed on reasonable grounds that fair use had been made. *See* 17 U.S.C.A. § 504(c) (West Supp. 1989). A court has wide discretion in setting the award.

It is altogether proper for courts to distinguish in fixing damages between bad faith appropriation and a good faith miscalculation of the permissible scope of fair use. Unquestionably in some circumstances damages should be set to punish and deter. In other instances, no punitive content would be appropriate; fairness would rather suggest reasonable compensation for the use of literary property — a kind of compulsory license.

Where a court has found infringement but denied an injunction, a defendant may limit the risk of catastrophic liability for further distribution of the infringing work by counterclaiming for a declaratory judgment fixing the measure of damages.

to be done lightly. . . . [T]he grant or denial of an injunction remains an open question, to be determined by carefully balancing the appropriate factors."[122]

As with other issues arising in connection with a fair use defense, analysis of this issue should reflect the underlying goals of the copyright law to stimulate the creation and publication of edifying matter. In considering whether the plaintiff would suffer irreparable harm, the court should focus on harm to the plaintiff's interest *as copyright owner*. A public figure may suffer irreparable injury to his reputation if publication of extracts from his private papers reveals him to be dishonest, cruel, or greedy. An individual suffers irreparable harm by the revelation of facts he would prefer to keep secret. But those are not the types of harms against which the copyright law protects; despite irreparability, they should not justify an injunction based on copyright infringement. Only injuries to the interest in authorship are the copyright's legitimate concern.

Critics of these views express concern that obstacles to injunctive relief may undermine the incentives of authorship for which copyright law was created. If the grant or denial of injunction is informed by the concerns of copyright law, such a worry will prove groundless. If the infringement is of a type likely to diminish creative incentives, the court should favor an injunction. In a case like *the Nation*, where the infringement deprives the author of significant monetary and nonmonetary rewards of authorship, and where, as the Supreme Court found, such infringement diminishes the incentive to public figures to write valuable memoirs, an injunction would be justified. If, on the other hand, the original document had been created for purely private purposes and not as a work of authorship for the public benefit, denial of an injunction would not adversely affect creative incentives. For reasons similar to those discussed under the second factor, courts should more readily grant an injunction where the original is a work of authorship created with a view to publication (or is on its way to publication) than in the case of private communicative documents created for reasons that are not the concerns of copyright law.[123]

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[122] *New Era*, 873 F.2d at 596 (Oakes, C.J., concurring).

[123] Furthermore, although the change of approach to remedy suggested here may sound substantial, I believe based on my experience adjudicating copyright cases in federal court that it would have no significant statistical effect on the grant of injunctions. Of the 150–200 copyright cases that have come before me (by random distribution) in 11 years on the bench, the vast majority involved unmistakable copying without claim of fair use and resulted in injunctions; additional cases presented disputes over performance of the terms of licensing agreements; a few involved overambitious claims, where the similarity was attributable to coincidence or to the fact that both the plaintiff and defendant were copying the same conventional model; in some, the similarity related to unprotected elements such as facts, styles, or ideas. None of those cases are affected by the suggested approach to injunctions. Fewer than ten have invol fair use. Half of these were in the area of advertising,

In my argument against automatically granting injunctive relief, I have deliberately refrained from invoking the support of the first amendment's opposition to prior restraints. I have excluded such arguments not because they are irrelevant but because they are unnecessary and risk importing confusion. Although copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment. "[T]he Framers intended copyright . . . to be the engine of free expression."[124] It "is intended to increase and not to impede the harvest of knowledge";[125] "[t]o promote the Progress of Science and the useful Arts";[126] to encourage "Learned [writers] to compose and write useful Books."[127] It was never intended to serve the goals of secrecy and concealment. Thus, the copyright law on its own terms, and not merely in deference to the first amendment, demands caution in awarding oppressive injunctions.

III. CONCLUSION

A question to consider in conclusion is whether imprecision — the absence of a clear standard — in the fair use doctrine is a strength or a weakness. The case that it is a weakness is easy to make. Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct. The contrary argument is more abstract. Perhaps the abundance of disagreement reflects the difficulty of the problem. As Justice Story wrote in 1841, it is not easy "to lay down any general principles applicable to all cases."[128] A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. We should not adopt a bright-line standard unless it were a good one — and we do not have a good one.

We can nonetheless gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright — and by resisting the impulse to import extraneous policies. Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law.

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fair use was rejected and an injunction appropriately granted. Only in three or four cases, or approximately two percent, could differing views conceivably have affected the standard. I can think of only one where my grant or denial of an injunction would turn on whether the traditional or the suggested approach were followed. If my experience is representative, this approach to the injunction remedy would not undermine the incentives that the copyright seeks to foster.

[124] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[125] *Id.* at 545.

[126] U.S. CONST. art. I, § 8, cl. 8.

[127] Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[128] Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly. But it depends equally on the recognition that the monopoly must have limits. Those limits include the public dedication of facts (notwithstanding the author's efforts in uncovering them); the public dedication of ideas (notwithstanding the author's creation); and the public dedication of the right to make fair use of material covered by the copyright.

APPENDIX 4.—LETTER FROM PENNY A. HAZELTON, PRESIDENT, AMERICAN ASSOCIATION OF LAW LIBRARIES (WITH ATTACHMENT), TO HON. WILLIAM J. HUGHES, JUNE 6, 1991

PRESIDENT
PENNY A. HAZELTON
(208) 543-4089
VICE PRESIDENT/
PRESIDENT-ELECT
CAROLYN P. AHEARN
(202) 663-8500
PAST PRESIDENT
RICHARD A. DANNER
(919) 684-2847
SECRETARY
PAUL FU
(614) 466-2044
TREASURER
CLAIRE ENGEL
(404) 572-6397

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American Association of Law Libraries

53 WEST JACKSON BOULEVARD, SUITE 940 • CHICAGO, ILLINOIS 60604 • (312) 939-4764 • TELEFAX (312) 431-1097

JUN 14 1991

June 6, 1991

The Honorable William J. Hughes, Chair
Subcommittee on Intellectual Property and Judicial Administration
House Judiciary Committee
United States House of Representatives
Cannon Building, Room 341
Washington, DC 20515

Dear Mr. Hughes:

H.R. 2372 was introduced on May 16, 1991. Bills have been introduced on fair use of unpublished materials in past Congresses. The American Association of Law Libraries has followed such legislation closely in the past and has expressed its opinions on prior bills through testimony. A copy of our prior testimony is attached. We believe that our opinions and reasons are as applicable to the current bill as they were to similar bills referenced in our attachment. We are very supportive of the legislation, and we urge the Committee to act favorably on H.R. 2372.

Sincerely,

Penny A. Hazelton

Penny A. Hazelton
President, American Association
of Law Libraries

Enclosure
cc: Sally Wiant
Sally Holterhoff
Kathleen Vanden Heuvel
Robert Oakley

WRITTEN STATEMENT ON BEHALF OF THE

AMERICAN ASSOCIATION OF LAW LIBRARIES

Before the SUBCOMMITTEE ON PATENTS, COPYRIGHTS, & TRADEMARKS OF THE

SENATE COMMITTEE ON THE JUDICIARY

and the

Subcommittee on Courts, Intellectual Property

and the Administration of Justice of the

House Committee of the Judiciary

on

H.R. 4263 and S. 2370

101st Congress, 2nd Session

Wednesday, July 11, 1990

INTRODUCTION

The American Association of Law Libraries (AALL) is a national organization of more than 4,700 professionals who are committed to developing and increasing the usefulness of law libraries and the cultivation of the science of law librarianship. In the Association's legislative policy adopted in 1990, the Association states its belief "that an equitable balance between the rights of users of information and the rights of copyright holders is essential to the free flow of information. The Association urges that all proposed revisions, guidelines, procedures, or interpretations relating to the Copyright Law maintain this balance by interposing a minimum of obstacles to the free and open distribution of ideas in all media and formats." AALL is interested in H.R. 4263 and S.2370 because many of our libraries, particularly those in the academic sector, are repositories for unpublished works, including manuscripts, letters, and other papers. The purpose of these bills is to apply fair use equally to published and unpublished works. Like published materials, the value of these materials in our libraries would decline if researchers did not have the right to copy from these works in situations covered by section 107 of the Copyright Law.

HISTORICAL FAIR USE

The main thrust of Article 1, Section 8, is to advance public welfare by encouraging the expression and dissemination of creative ideas.

Subject to certain exceptions, copyright legislation gives exclusive rights to the copyright owner. The quoting of reasonable excerpts has long been considered fair use, a judicially created exception to the exclusive rights held by a copyright owner. The rationale for the doctrine and the criteria for its application are discernable from case law. These judicial decisions determine the balance between the public's right of access and the creator's right to benefit from his or her creation.

The 1909 Act was silent on the question of fair use. Until the 1976 Act, there had been no statutory provision dealing with the issue. Under the 1909 Act, unpublished works were protected under the common law of the individual states and authors had property rights in their works. Until general publication of the work, the author had the exclusive right to copy or to authorize copying. Upon publication, copyright protection continued only if the work contained a notice of copyright and was registered with the United States Copyright Office. Reproduction of limited sections of published materials under copyright was subject to the fair use doctrine and other statutory and common law exceptions to the author's exclusive right to copy.

All this has changed with the enactment of the 1976 Act. Now copyright protection is attached the minute the independent work is fixed in any tangible medium of expression. Both published and unpublished works are protected once expressed in a tangible form. Unpublished works created before January 1, 1978 are now protected from unauthorized use until 50 years after the death of the author or at least until December 31, 2002. Congress made a conscious decision to include unpublished works in the 1976 Act. Congress also made a conscious decision to include two important exceptions in the 1976 Act to insure the public's right of access to the wide variety of works now covered by the copyright law: fair use and reproduction by libraries and archives. The fair use exception of the 1976 Act incorporates the judicially created doctrine of fair use - the quotation or paraphrase without the specific permission of limited sections of the document for purposes such as teaching, news reporting, and research.

RECENT COURT DECISIONS ON FAIR USE

Several recent decisions including Harper & Row, Inc. v. Nation Enters., Salinger v. Random House, Inc., and New Era Publications Int'l. v. Henry Holt & Co. have emphasized the unpublished nature of the work in their analysis of the fair use

doctrine. In 1985, in Harper & Row, the Supreme Court focused attention on the unpublished nature of the copied work by ruling that The Nation had exceeded fair use when it printed excerpts from a purloined copy of as yet unpublished memoirs of Gerald Ford. Even though the 1976 Act eliminates the distinction between published and unpublished works and does not mention publication as one of the factors to be considered under section 107, the Court insisted that a work's published status is one criterion to consider in determining whether use is fair and that use of unpublished works is fair only in extraordinary cases. Four members of the court agreed that there could be virtually no unauthorized use of unpublished materials "even if the work is a matter of . . . high public concern." The court's interpretation narrows the scope of fair use for all unpublished works.

The Second Circuit in Salinger and New Era Publications limited the "fair use" exception as applied to a biographer's use of unpublished materials, holding that the fair use doctrine was virtually inapplicable to unpublished materials. The Salinger decision appears to all but eliminate the fair use exemption even for research purposes where the copied work is unpublished. Salinger arose from a biographer's use of unpublished letters housed in several research libraries. Relying on Harper & Row, the Second Circuit found that the biographer's use of unpublished letters was not a fair use even though the biography clearly fit within several of the fair use purposes specifically mentioned by § 107 and only slightly more than 200 words were directly quoted from the letters. In its discussion of the effect of the unpublished nature of the work on the application of the fair use doctrine, the Salinger opinion makes two statements that place significant limitations on the public's right to access to scholarly research. First, the court states "Salinger's letters are unpublished, and they have not lost that attribute by placement in libraries where access has been explicitly made subject to the observance of at least the protection of the copyright law." 811 F.2d at 97. While it is true that deposit of an unpublished work in a research library does not reduce the amount of copyright protection for a work, the placement of this statement in the opinion seems to imply major restrictions on the use of unpublished works in libraries while § 108 clearly contemplates the copying of unpublished works housed in libraries for purposes of scholarly research. Second, the court's statement that "we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression," 811 F.2d at 97, seems to prohibit all fair use copying from unpublished works. Taken together these two statements imply major restrictions on the use of unpublished works in research libraries that we believe are contrary to the intent of Congress, the public benefit spirit of the Copyright clause of the Constitution, and the best interests of the public. The language in Salinger which prohibits close paraphrasing as equivalent to copying places even more severe restrictions on the use of unpublished works for research purposes.

The Second Circuit reiterated its extremely narrow interpretation of the application of the fair use doctrine to unpublished works in New Era Publications Int'l v. Henry Holt & Co., another biography case in which the court recognized the legitimate purpose of the use.

The Supreme Court's refusal to review either Salinger or New Era now makes it virtually impossible for scholars to practice their craft without running a high risk of having an injunction prevent publication of their works. Authors also are faced with a possibility of monetary damages. These very narrow interpretations of the fair use doctrine stifle the incentive to produce new creative works that the Copyright Law was designed to insure.

Following these decisions, writers and scholars turned to Congress to seek legislative action to correct the chilling affect of these decisions on the creation of new works. As a result of these appeals, H.R. 4263 and S. 2370 have been introduced. Most recently in New Era Publications Int'l v. Carol Publishing Group, the Second Circuit has reaffirmed its interpretation that the unpublished nature of a work precludes most uses that would be fair if the work had been published making the passage of one of these bills even more important.

EFFECT ON LIBRARIES

These decisions place severe limits on the value of important portions of the collections of many research libraries. Since all works created before January 1, 1978 that had not been previously published were granted copyright protection by the 1976 Act until at least the year 2003, and copyright in works created after January 1, 1978 exists until at least the year 2028, all unpublished works now in library collections are covered by copyright. Libraries must presume that every work donated is copyrighted unless it was produced by the federal government. Furthermore, a library cannot presume that the person donating the works to the library owns the copyright in the works nor can a library presume that all rights are transferred even when a donor is the copyright holder. In many cases it may be impossible to track down the heirs of long dead unpublished authors to obtain the release of literary rights. The administrative burdens may prevent some libraries from accepting donations of unpublished materials that contain valuable research material.

If the narrow interpretations in the recent cases concerning unpublished works are allowed to stand, society will lose the benefit of much valuable research. Many of today's scholars would be dead before they could publish their own research which may require the use of quotations or close paraphrasing of unpublished works. Even if the scholars could publish their own research

before they died, the delay caused by the inability to quote or paraphrase previously unpublished works could make much of their research out-of-date before it could be communicated to the public.

There is some danger of libraries being exposed to liability for contributory infringement if scholarly use of unpublished material is not considered to be a fair use under the same circumstances as scholarly use of published works.

Those who favor the recent decisions on unpublished works may argue that the prohibition against quotation or close paraphrasing does not reduce the research value of unpublished material because researchers still have the right to use facts from unpublished materials. In the field of law, as in the fields of history, biography, and journalism, accuracy and interpretation of precise wording is critical. In these and other instances, it is important to recognize that accurate recording and analysis justifies the use of direct quotation even where the source may be an unpublished work.

Conclusion

The apparent conflict between recent decisions narrowly interpreting the application of the fair use doctrine to unpublished works and the legislative history of the 1976 Act which clearly indicates Congress' intention to apply the Copyright Law to unpublished works has created confusion and is likely to chill the use of unpublished materials for research purposes. In light of the importance of such materials to research, the American Association of Law Libraries supports an amendment to the Copyright Law to clarify that the fair use doctrine should be applied to published and unpublished works in the same manner. Clarification will benefit legal researchers as well as historians, biographers, journalists and other researchers by permitting the maximum use of unpublished materials. For these reasons, AALL supports H.R. 4263 and S. 2370.

APPENDIX 5.—LETTER FROM SHIRA PERLMUTTER, ASSISTANT PROFESSOR, COLUMBUS SCHOOL OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA, TO HON. WILLIAM J. HUGHES, NOVEMBER 27, 1991



THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington, D.C. 20064
(202) 319-5140

November 27, 1991

Chairman William J. Hughes
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
House of Representatives
Washington, D.C.

Re: H.R. 2372

Dear Chairman Hughes:

I am writing to supplement the testimony I gave at the June 6, 1991 hearing on H.R. 2372, in light of a recent important development.

At the hearing, I testified that the proposed amendment to the fair use provision of the Copyright Act, Title II of the bill, was neither necessary nor desirable. On Thursday, November 21, the Second Circuit issued a decision affirming one of the district court decisions that I cited as a basis for my opinion, Wright v. Warner Books, Inc., 748 F. Supp. 105 (S.D.N.Y. 1990). The Second Circuit's decision should put to rest any remaining concerns as to that Circuit's law on the issue of fair use of unpublished materials, and remove any need for legislation.

In Wright, a panel of the Second Circuit held that a biographer's use of material from her subject's unpublished letters and journals constituted fair use as a matter of law. Wright v. Warner Books, Inc., No. 90-9054, slip op. (2d Cir. Nov. 21, 1991). Despite resolving the second fair use factor (the nature of the copyrighted work) against the biographer based on the unpublished status of the letters and journal, the court found that the other statutory fair use factors weighed in her favor and entitled her to summary judgment.

In reaching this result, the court explicitly stated that neither Salinger nor any other case had established a per se rule barring fair use of unpublished works, and cautioned that fair use requires a "totality inquiry," based on the weighing of all of the statutory factors. Slip op. at 19-20. The opinion thus accomplishes precisely what the proposed amendment is designed to

accomplish: clarifying that fair use may be made of unpublished works, and that courts must consider all of the relevant factors in making the fair use determination for unpublished works as well as published. As the Second Circuit has now corrected the problem it created through unfortunate dicta in its own decisions, there is no longer any need for Congress to clarify the issue.

Those advocating the amendment may nevertheless continue to press for legislation, pointing to the Second Circuit's strong statements in Wright of the importance to the fair use balance of the unpublished status of the plaintiff's work. The court characterized unpublished works as "the favorite sons of factor two," indicating that the second fair use factor would almost always be resolved against the defendant when the work is unpublished. Slip op. at 12-13. This treatment of the published/unpublished distinction, however, derives from equally strong statements in the Supreme Court's decision in Harper & Row, a decision that the bill is not intended to overturn. And any qualms engendered by these statements in Wright should be allayed by the bottom line: a finding of fair use.

Even apart from the "unpublished" issue, Wright is a pro-publisher decision in a number of respects. The opinion is quite favorable to nonfiction authors and publishers in its treatment of the other fair use factors. In particular:

1) The court held that the first fair use factor should be resolved in the defendant's favor without further inquiry if the defendant's work qualifies as one of the illustrative types of uses listed in the first sentence of section 107, such as criticism, scholarship and research. Slip op. at 10. The Court classified the defendant's biography as falling within these categories, and made several positive statements about the social value of biography. Id. at 10 and 20. This is a groundbreaking aspect of the decision, indicating that the for-profit nature of a biography or history will not weigh against a fair use claim.

2) The court rejected the argument that use of plaintiff's material after denial of a request for permission constituted bad faith weighing against fair use. Slip op. at 10-11.

3) The court drew a distinction between the use of expression to illustrate factual points, enhance the biographer's analysis, or establish her credibility, as opposed to its use to enliven the text and rely on the subject's words to "make the book worth reading." It also applied a demanding standard to the question of qualitative similarity. Slip op. at 15-16; 20.

4) The court reaffirmed that the fourth factor is the most important, indicating that a biography or history that, like the defendant's, does not reproduce so much of its subject's unpublished writings as to serve as a substitute in the market is likely to be held a fair use. Slip op. at 17-18; 20.

Indeed, one is hard pressed to imagine a more reassuring opinion from the publisher's perspective. We now know that it is possible to make fair use of unpublished material; that even "enlivening" uses that are reasonable in amount and do not interfere with the potential market for that material are permissible; and that the first factor of the fair use analysis will virtually automatically be resolved in favor of a biographer or historian. While only a small amount of expression was used in Wright,[1] it appears that a more extensive taking could pass muster in a future case; the resolution of the issue on summary judgment leaves room for a finding of fair use of greater amounts on a full factual record.

The only greater assistance that the court of appeals could provide, consistent with Harper & Row, would be the conclusive weight of an en banc opinion. But the panel's decision has the full force of law; almost all appellate cases are decided by panels, as were the original sources of the problem, Salinger and New Era themselves. The law of the Second Circuit is now Harper & Row as interpreted by Salinger and New Era, as glossed by Wright. No lower court or future appellate panel has the power to disregard Wright's teachings, which can only be reversed by the Second Circuit sitting en banc--a result that is highly unlikely, given the announced views of a majority of its sitting judges.[2]

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[1] The Court of Appeals' tally of the amount taken was considerably higher than that of the district court, which had analyzed some of the same material as unprotectible facts. See slip op. at 8-9.

[2] Eight Second Circuit judges (Judges Newman, Oakes, Kearse and Winter in New Era II; Judges Meskill, McLaughlin and Van Graafeiland in Wright; and Judge Walker in his opinion sitting as the district judge in Wright) have now expressed their unwillingness to apply literally the extreme dicta in Salinger and New Era. Judges Altimari and Mahoney have also indicated that the unpublished status of a work does not constitute a bar to a finding of fair use. See Association of American Medical Colleges v. Cuomo, 928 F.2d 519, 523-26 (2d Cir. 1991) (held: fair use defense presented issues of fact despite unpublished status of plaintiff's work, given non-commercial, non-competing nature of use).

After Wright, it is difficult to see what purpose the proposed amendment would serve. If the amendment is adopted, courts will still be required under Harper & Row to treat the unpublished status of a work as a "key factor" weighing against a finding of fair use, and will still need to engage in a balancing of factors, with the outcome of any particular fair use claim remaining unpredictable.

I therefore respectfully reiterate my recommendation that the proposed legislation not be adopted.

Respectfully submitted,

Shira Perlmutter

Shira Perlmutter
Assistant Professor

APPENDIX 6.—ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1989

ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1989

The National Film Preservation Act of 1988 (P.L. 100-446) established in the Library of Congress a National Film Registry for the purpose of registering and preserving films that are culturally, historically, or aesthetically significant.

The Act also provided for a National Film Preservation Board to be chosen by the Librarian of Congress from a list of nominations submitted by a number of national associations and institutions. The Board reviews nominations for films selected for the National Film Registry and consults with the Librarian of Congress with respect to their inclusion in the Registry.

The activities of the Library of Congress and the Board carried out under the provisions of the Act for fiscal 1989 are summarized below.

The films selected for inclusion in the National Film Registry for 1989 are:

(1) The Best Years of Our Lives (1946)
(2) Casablanca (1942)
(3) Citizen Kane (1941)
(4) The Crowd (1928)
(5) Dr. Strangelove (or, How I Learned to Stop Worrying and Love the Bomb) (1964)
(6) The General (1927)
(7) Gone with the Wind (1939)
(8) The Grapes of Wrath (1940)
(9) High Noon (1952)
(10) Intolerance (1916)
(11) The Learning Tree (1969)
(12) The Maltese Falcon (1941)
(13) Mr. Smith Goes to Washington (1939)
(14) Modern Times (1936)
(15) Nanook of the North (1922)
(16) On the Waterfront (1954)
(17) The Searchers (1956)
(18) Singin' in the Rain (1952)
(19) Snow White and the Seven Dwarfs (1937)
(20) Some Like It Hot (1959)
(21) Star Wars (1977)
(22) Sunrise (1927)
(23) Sunset Boulevard (1950)
(24) Vertigo (1958)
(25) The Wizard of Oz (1939)

As announced at a press conference held at the Library of Congress on September 19, this list of twenty-five films is not a list of the best twenty-five American films. Rather it suggests to the American public the broad range of great American filmmaking. The release of this list will help to promote film as an art form and will generate public interest in the preservation of film. (See press release Appendix A.)

The films were selected after a long and exhaustive process which began with the nomination by the public of almost 1,000 film titles. The National Film Preservation Board met twice to discuss the film selections, once in January to recommend to the Librarian of Congress criteria for the selection of films and once in July to recommend the first twenty-five film titles. On September 26, 1989 the Board met to discuss the labeling requirements.

Appointments to the National Film Preservation Board were made in accordance with section 8 of the Act (see Appendix B).

Summaries of the meetings of the National Film Preservation Board follow.

Meeting of the National Film Preservation Board
January 23, 1989

The first public meeting of the National Film Preservation Board was held on January 23, 1989 in the Library of Congress and was chaired by Fay Kanin representing the Academy of Motion Picture Arts and Sciences. The Librarian of Congress instructed the Board, prior to their own meeting, that the law required the Board and the Librarian to accomplish jointly four tasks in the first year:

(1) establish criteria for the selection of films into the National Film Registry; (2) establish procedures to engage the general public in the selection process; (3) select twenty-five films for inclusion into the National Film Registry; and (4) issue film labeling guidelines for the films selected for inclusion in the Registry. It was agreed that the Board would take up these items in this order and that at the January meeting the Board would complete only items one and two.

1) In its first agenda item, the Board stated a preference for very broad guidelines:

(a) A "film" is defined as a "feature-length, theatrical motion picture after its first theatrical release." The Board agreed that both "feature-length" and "theatrical release" were to be read very broadly, so as not to exclude certain films. In the case of "feature-length", for example, it was agreed that the term has a different meaning when looked at in an historical context;

(b) Films selected for the National Film Registry must be "culturally, historically or aesthetically" important. The Board recommended that these terms be construed broadly;

(c) Films should not be considered for inclusion in the Film Registry if no element of the film exists, but no film would be denied inclusion in the Registry because it had already been preserved. The Board said that while it wants to be active in film preservation activities, it would not want to exclude films because they were already preserved; and

(d) No film is eligible for inclusion in the Film Registry until 10 years after its first theatrical release.

After a discussion of whether only "American" films would be eligible for inclusion in the Registry, the Board concluded that any film would be included under the Act so long it had a "theatrical release," and met the criteria set out in the Congressional findings listed in section 1 of the Act. It was agreed to decide on a case-by-case basis whether a film selected for inclusion in the Registry would promote those ends.

2) The Board agreed to invite broad solicitation from the public in order to educate the public about the Board's purposes and engage broad interest in its activities. Therefore, the Board agreed to:

(a) Publish notices of meetings of the National Film Preservation Board in the Federal Register;

(b) Establish a mailing address within the Library of Congress for the public to use to make recommendations to the Film Board;

(c) Prepare materials for Congressional offices to mail out to their own constituents who wish to make recommendations to the Film Board;

(d) Have the Library of Congress send to other libraries, notices, which would be posted, asking the public to participate in nominating films;

(e) Have similar notices mailed to all movie theaters to be posted in theater lobbies; and

(f) Ask Board members to submit the names of other organizations, guilds, unions, and associations which would also be sent notices; and contact film critics and historians for similar participation.

The Board agreed to a schedule for the year setting April 21 as the final date for nominations of films from all sources, including each Board member. Board members agreed to nominate as many as 50 films each (a potential Board list of 650 films), and then to narrow the list by mail ballot to 50 total films by mid-June in preparation for the July meeting.

The Board opened the meeting up to questions from the general public.

Following the January 23 Board meeting, and after further consultation with the Board and Library of Congress staff, the Librarian of Congress issued criteria for the selection of films and proposed guidelines for incorporating the broadest possible public participation in the selection process. These guidelines were printed in the Federal Register on February 13, 1989 soliciting public comment in accordance with the Administrative Procedures Act (Appendix C). They will be promulgated as final guidelines when the labeling guidelines are completed later this year.

Meeting of the National Film Preservation Board
July 19, 1989

After reducing the list of films by mail balloting, the Board met for the second time in Los Angeles on July 19, 1989, to discuss its process for recommending its twenty-five films. At the Board's request, the Librarian of Congress attended this meeting so that he might benefit from their discussion of films in order to facilitate the selection process.

The Board received 962 film titles for nomination from the general public and by mail balloting. They reduced their "working list" for the July meeting to 57 titles. Chairwoman Kanin reminded Board members, however, that any film was eligible for inclusion, whether it was on anyone's list, if it met the qualification requirements.

The Board discussed whether certain genres of film, such as animated features, documentaries, and avant garde/independent films, should be automatically selected for inclusion in the list of twenty-five. It was decided that a "quota" system would not be advisable because there were too many other genre categories, such as westerns, comedy, musicals, film noir etc., that also deserved attention. Rather, the Board agreed to "seriously consider" only two categories -- animated features and documentaries -- but set no absolute quota for films in each of these categories.

After several hours in a public meeting, the Board went into executive session to discuss the list of twenty-five film titles.

The Board discussed the pros and cons of all 57 titles on their "working list" and added some titles to that list during the discussion. The Board agreed that each member would send his/her final nominations by mail balloting to the Librarian of Congress. They also agreed that Board members were not precluded in this mail ballot from naming film titles which were not discussed.

Each Board member submitted to the Library a list of 30 films, numbered 1 to 30 with the number one film valued at 30 points, number 2 at 29 points, and so on. The Board's nominations were tabulated into a single list of 25 films for consideration by the Librarian of Congress. It was the unanimous opinion of the Board that this list should not be made public.

Mindful of the Board's discussion and its list of films, the Librarian consulted with staff of the Library's Motion Picture, Broadcasting and Recorded Sound Division in order to make his final selections. On September 19, 1989 the Librarian of Congress released a list of twenty-five films to the American public.

Meeting of the National Film Preservation Board
September 26, 1989

The Board met for the third and final time this fiscal year at the Library of Congress, to discuss the labeling guidelines found in section 3 of the Act, "so that film owners and distributors are able to determine whether a version of a film registered on the National Film Registry which is in their possession has been materially altered." Robert Rosen representing the University of California, Los Angeles, chaired the meeting.

The Board's agenda for this meeting included a discussion of specific practices in the industry. The Board's duty in this regard is simply to interpret Congressional intent on the labeling requirements in order to help film owners and distributors. The Board agreed by a 9-3 vote (with one member absent from the vote) on a motion recommending that the Librarian's labeling guidelines require labeling of films in all cases except where a film is edited for "standards and practices" (nudity, language or violence) or for the insertion of commercials or public service announcements. The Board found that given the parameters of the legislation there were irreconcilable differences among the members of the Board on the labeling requirements and the Board's vote was meant to be "advisory" only.

The Board also agreed by acclamation to a motion urging the Librarian to request immediately from Congress an additional $500,000 to $1 million for the archiving and preservation of the twenty-five films selected for the National Film Registry. Although the Library of Congress has 21 of the 25 films in some form, only 2 are of archival quality.

Having the benefit of the Board's discussion at this meeting and after further consultation with the Board, the Librarian will issue final labeling guidelines in accordance with the Administrative Procedures Act to be effective after January 1, 1990.

Nominations for films for inclusion in the National Film Registry for next year's list of twenty-five films are now being solicited. Printed notices soliciting nominations from the public, due April 21, 1990, have been distributed to libraries and movie theaters nationwide.

A seal has been designed by Saul Bass in accordance with section 3(a)(2)(C) of the Act. It will be made available to copyright owners for display on the twenty-five selected films.

Copyright owners of the twenty-five selected films are being contacted to obtain archival quality film for the National Film Board Collection in the Library of Congress.

The Library of Congress, as the repository of the largest film and television collection in the world, and with by far the largest film preservation effort, welcomes the opportunity Congress has given it under the National Film Preservation Act.

APPENDIX 7.—STATEMENT OF JAMES H. BILLINGTON, THE LIBRARIAN OF CONGRESS, SEPTEMBER 19, 1989

Statement of James H. Billington
The Librarian of Congress

September 19, 1989

Good morning. I am pleased to announce today the first installment of 25 films placed in the National Film Registry, located in the Library of Congress. Under the law as passed by Congress, 25 films are to be selected for each of the next three years -- a total of only 75 films. These films were selected after going through the 3 elements of review mandated by the legislation: the general public, the new National Film Preservation Board, and the Librarian of Congress. The general public nominated almost 1,000 film titles by mail. The distinguished members of the National Film Preservation Board then met on July 19 in Los Angeles to discuss a smaller list of films extensively among themselves. After that meeting, each member of the Board sent his or her weighted ballot of top films to the Counsel to the Film Board, who computed them into a base list of 25 films. Then, mindful of this base list as well as the suggested priorities and substantive discussion of the Board, I drew up the final list of 25 films in consultation with my own staff in the Motion Picture, Broadcasting and Recorded Sound Division. In other words, this has been a long, exhaustive process.

Make no mistake, this list of 25 films is <u>not</u> a list of the best 25 American films. Film critics and scholars could not agree on such a list, and the Library of Congress would not embark on any such futile exercise. This is not Academy Awards night.

This list of 25 films should suggest to the American public the breadth of great American filmmaking. Congress stated that the purpose of the Registry is to select films that are "culturally, historically, or aesthetically significant." The films named today are important to America's culture and history. It is impossible to encompass all the dimensions of great filmmaking in a list of 25 films or even in a list of 200. Because of our limited authority under the law, we are merely scratching the surface.

In future years, I will want to talk to the Film Board about considering for the list an even broader range of films to increase public awareness of the scope and diversity of American filmmaking, notably documentaries and ethnic films. We will again actively solicit the public's participation in nominating the next installment of 25 films. Indeed, you can now mail nominations to the National Film Registry in the Library of Congress for next year's list.

In accordance with Congress' wishes, I had two goals in mind in selecting the 25 national treasures announced today. First, the selection of these films should help to promote film as an art form. Second, the selection of these films should generate public interest in the preservation of film. Our great cultural heritage in film must be preserved, and we hope today to make this clear to the American people.

Let's look at the problem. Half of all of the films made before 1950 and 80 percent of the films made before 1930 have been lost forever. The cold, hard fact is that, for all their popularity in America today, films are an endangered species for the America of tomorrow. The Library of Congress film and television collection is the

largest in the world and contains 50 percent of all films held by cinema archives in the United States and is working to protect those films that are most endangered. Our people in the Library of Congress have collected films and conducted preservation activities for over 40 years. Other film archives including the National Archives, the American Film Institute, the George Eastman House, the Museum of Modern Art, UCLA, and the University of Wisconsin Film Center have done important film preservation. Much more needs to be done, and the public's support is crucial.

Congress, in passing the Film Preservation Act last year, launched a limited experiment, 75 films over 3 years. They intended to draw attention to the need for preservation and to move preservation forward by educating the American people on certain practices used in the dissemination of films to the public.

Under the 1988 Film Preservation Act, it is now required that if copies of any of these 25 films are either colorized or materially altered, they must be labeled as such. This law does not end the current practices of colorization or alterations of films. The labeling requirements under the law will not go into effect until I issue labeling guidelines some time later this year or early in 1990. The National Film Preservation Board will meet next week to help me with the labeling requirements.

In essence then, the law is really about preserving and archiving the originals of great and important films. Unless such preservation activities are carried out, many of the films which the public enjoys today will not be available to future generations. Some of

the films on today's list, for example, popular as they are, have never been properly archived.

Some have criticized the role of the government in a film selection process. All archivists would agree that their ideal would be to preserve all films and let the test of time decide which are the films of significance. But archives cannot afford such luxuries. The Library of Congress is the closest thing we have to a universal depository for the American memory. We strive to preserve and archive as much as possible. We welcome this particular selection process as a stimulus to all Americans to preserve what is most important to the national memory.

We expect that, as with any list of films, there will be criticism of some or all of the films selected today. We welcome public debate in the hope that it will stimulate discussion about film as art and the need for more film preservation. These films are a tribute to the American creative spirit. They deserve recognition and preservation, and their selection should draw attention to the hundreds of other films which deserve similar consideration. Next year we will nominate 25 more films, and 25 the year after that. If Congress allows the authority of the Film Preservation Act to continue after 1991, we could continue this process for years to come.

Now, let me read the list.

APPENDIX 8.—FILMS SELECTED FOR THE NATIONAL FILM REGISTRY—1989

9/19

FILMS SELECTED FOR

THE NATIONAL FILM REGISTRY - 1989

1) THE BEST YEARS OF OUR LIVES (1946)

2) CASABLANCA (1942)

3) CITIZEN KANE (1941)

4) THE CROWD (1928)

5) DR. STRANGELOVE (or, HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB) (1964)

6) THE GENERAL (1927)

7) GONE WITH THE WIND (1939)

8) THE GRAPES OF WRATH (1940)

9) HIGH NOON (1952)

10) INTOLERANCE (1916)

11) THE LEARNING TREE (1969)

12) THE MALTESE FALCON (1941)

13) MR. SMITH GOES TO WASHINGTON (1939)

14) MODERN TIMES (1936)

15) NANOOK OF THE NORTH (1922)

16) ON THE WATERFRONT (1954)

17) THE SEARCHERS (1956)

18) SINGIN' IN THE RAIN (1952)

19) SNOW WHITE AND THE SEVEN DWARFS (1937)

20) SOME LIKE IT HOT (1959)

21) STAR WARS (1977)

22) SUNRISE (1927)

23) SUNSET BOULEVARD (1950)

24) VERTIGO (1958)

25) THE WIZARD OF OZ (1939)

APPENDIX 9.—LIST OF NATIONAL FILM PRESERVATION BOARD MEMBERS, SEPTEMBER 1989

NATIONAL FILM PRESERVATION BOARD MEMBERS
September 1989

The Academy of Motion Picture Arts and Sciences
Fay Kanin, member
Walter Mirisch, alternate

The Alliance of Motion Picture and Television Producers
J. Nicholas Counter III, member
Carol A. Lombardini, alternate

The American Film Institute
Gene F. Jankowski, member
George Stevens, Jr., alternate

The Directors Guild of America
Arthur Hiller, member
Sydney Pollack, alternate

The Motion Picture Association of America
Jack Valenti, member
Fritz Attaway, alternate

The National Association of Broadcasters
Edward O. Fritts, member
James C. May, alternate

The National Society of Film Critics
David Kehr, member
Stephen Schiff, alternate

Department of Cinema Studies in the Graduate School of Arts and Sciences, New York University
Charles Milne, member
William K. Everson, alternate

The Screen Actors Guild of America
Roddy McDowall, member
Barry Gordon, alternate

Society of Cinema Studies
John Belton, member
Kristin Thompson, alternate

University Film and Video Association
Ben Levin, member
Betsy A. McLane, alternate

Department of Theater, Film and Television, College of Fine Arts, University of California, Los Angeles
Robert Rosen, member
Howard Suber, alternate

The Writers Guild of America (West and East)
George Kirgo, member
Edward Adler, alternate

APPENDIX 10.—PROPOSED RULES, NATIONAL FILM PRESERVATION BOARD, FED. REG., VOL. 54, NO. 28, FEBRUARY 13, 1989

§§ 1602.14, 1602.21, 1602.40 and 1602.46 (Amended)

6. It is proposed to remove §§ 1602.14(b), 1602.21(b), 1602.40(b), and 1602.46(c) in their entirety.

§ 1602.28 (Amended)

7. It is proposed to amend § 1602.28(a) by removing the words "6 months" and replacing them with the words "one year."

8. It is proposed to add a new Subpart R consisting of § 1602.56 to read as follows:

Subpart R—Investigation of Reporting or Recordkeeping Violations

§ 1602.56 Investigation of reporting or recordkeeping violations.

When it has received an allegation, or has reason to believe, that a person has not complied with the reporting or recordkeeping requirements of this Part or Part 1607 of this chapter, the Commission may conduct an investigation of the alleged failure to comply.

9. It is proposed to add a new Subpart S consisting of § 1602.57, which reads as follows:

Subpart S—Recordkeeping Requirements of Part 1607—Uniform Guidelines on Employee Selection Procedures (1978)

§ 1602.57 Applicability of recordkeeping requirements of Part 1607.

The recordkeeping requirements of §§ 1607.4 and 1607.15 A of this chapter are incorporated into Part 1602 of this chapter.

PART 1627—[AMENDED]

10. The authority citation for 29 CFR Part 1627 continues to read as follows:

Authority: Sec. 7, 81 Stat. 604; 29 U.S.C. 628, sec. 11, 52 Stat. 1060, as amended, 29 U.S.C. 211; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

§§ 1627.3 (Amended)

11. It is proposed to remove § 1627.3(b)(3) in its entirety and redesignate the present § 1627.3(b)(4) as § 1627.3(b)(3).

12. It is proposed to amend new § 1627.3(b)(3) by removing the word "may" and replacing it with the "shall."

§ 1627.4 (Amended)

13. It is proposed to remove § 1627.4(a)(2) in its entirety and redesignate the present § 1627.4(a)(3) as § 1627.4(a)(2).

14. It is proposed to amend new § 1627.4(a)(2) by removing the word "may" and replacing it with the word "shall."

§ 1627.5 (Amended)

15. It is proposed to amend § 1627.5(c) by removing the "may" and replacing it with the word "shall."

[FR Doc. 89-3308 Filed 2-10-89; 8:45 am]

BILLING CODE 6570-06-M

LIBRARY OF CONGRESS

36 CFR Ch. VII

National Film Preservation Board; Proposed Guidelines for Selection of Films and Proposed Procedures for Public Participation in Selection of Films

AGENCY: Library of Congress, National Film Preservation Board.

ACTION: Notice of proposed guidelines.

SUMMARY: This notice of proposed guidelines is issued to inform the public that the Librarian of Congress pursuant to section 3 of Pub. L. 100-446, The National Film Preservation Act of 1988, 2 U.S.C. 178, and pursuant to the rule-making procedures provided in subchapter II of chapter 5 of title 5, United States Code, known as the Administrative Procedures Act, publishes the following proposed guidelines for public comment to:

(A) Establish criteria for guidelines pursuant to which such films may be included in the National Film Registry, except that no film shall be eligible for inclusion in the National Film Registry until 10 years after such film's first theatrical release; and

(B) Establish a procedure whereby the general public may make recommendations to the Board recording the inclusion of films in such National Film Registry.

DATE: Comments should be received on or before March 15, 1989.

ADDRESSES: Copies of written comments on these proposed guidelines should be addressed to:

Dr. James H. Billington, Librarian of Congress, The National Film Registry, The Library of Congress, Washington, DC 20540, Attention: Eric Schwartz, Counsel. Telephone inquiries: (202) 707-8330.

FOR FURTHER INFORMATION CONTACT: Eric Schwartz, Counsel, The National Film Preservation Board, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8330.

Proposed Guidelines: The Librarian of Congress, Dr. James H. Billington, after consultation with the National Film Preservation Board, which met in an open session, on January 23, 1989 in Washington, DC, announces the following are subject to public comment for a period to end on March 15, 1989.

Proposed Guidelines for the Selection of Films for Inclusion into the National Film Registry

(1) All of the films nominated for selection into the National Film Registry should reflect the congressional findings in section 1 of the National Film Preservation Act (Pub. L. 100-446) which reads,

the Congress finds that—

(1) motion pictures are an indigenous American art form that has been emulated throughout the world;

(2) certain motion pictures represent an enduring part of our Nation's historical and cultural heritage; and

(3) it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form, deserving of protection.

In accordance with the intent of Congress, all of the following criteria for guidelines for the selection of films into the National Film Registry are intended to be read broadly, so that as many films as possible will be eligible.

(2) For the purposes of film selection, a "film" is defined as a feature-length, theatrical motion picture at or after its first theatrical release.

(3) Films should be given a priority for selection to the National Film Registry if they are culturally, historically or aesthetically important.

(4) Films should not be considered for inclusion into the National Film Registry if no element or copy of the film exists. While the Librarian intends to promote the goals of film preservation provided for in the Act, no film should be denied inclusion into the National Film Registry because that film has already been preserved.

(5) No film is eligible for inclusion into the National Film Registry until 10 years after such film's first theatrical release.

The Librarian of Congress, Dr. James H. Billington, after consultation with the National Film Preservation Board, which met in an open session, on January 23, 1989 in Washington, DC, announces the following are subject to public comment for a period to end on March 15, 1989.

Proposed Procedures for the Public to Recommend Films for Inclusion into the National Film Registry

(1) All notices of meetings of the National Film Preservation Board will be published in the Federal Register.

(2) A mailing address within the Library of Congress, will be established in order to allow the public to make nominations of films to the Librarian and the National Film Preservation

Board. All nominations should include the film title only, unless additional information is necessary to prevent confusion with similarly named titles.

(3) Materials will be prepared for congressional offices to send information to constituents who wish to make nominations. Materials will also be made available for distribution to libraries, movie theaters, and through the guilds and societies representing actors, directors, screenwriters, producers, and film critics, film preservation organizations and representatives of academic institutions with film study programs, in order to encourage broad participation from the general public. The nominations, when received, will be forwarded to the Librarian of Congress and members of the Board to assist them in making selections of films into the National Film Registry.

(4) The Librarian of Congress will study the possibility in future years of broadcasting notices to the public on television and radio, after further review by the Board and after consulting with the broadcast industry.

(5) All nominations for inclusion of films into the National Film Registry, for 1989, from whatever source, must be submitted in writing, by mail, to the Librarian of Congress *no later than April 21, 1989*. All nominations should be *mailed* to: National Film Registry, Library of Congress, Washington, DC 20540.

Dated: February 7, 1989.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 89-3228 Filed 2-10-89; 8:45 am]

BILLING CODE 1410-09-M

APPENDIX 11.—ANNUAL REPORT OF THE ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990



ANNUAL REPORT OF ACTIVITIES UNDER THE NATIONAL FILM PRESERVATION ACT OF 1988 FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990

In accordance with Public Law 100-446, the National Film Preservation Act of 1988, the Library of Congress submits this second annual report summarizing activities of the Library of Congress and the National Film Preservation Board in carrying out the provisions of the Act.

The Act established in the Library of Congress a National Film Registry for the purpose of registering and preserving films that are culturally, historically, or aesthetically significant.

The Act requires the Librarian of Congress to select, after consultation with the Board, up to twenty-five films a year for the National Film Registry. The Library then must attempt to obtain archival quality copies of each of the nominated films for inclusion in the National Film Board Collection in the Library of Congress. Finally, the Librarian is obligated to issue guidelines prescribing the kinds of "material alterations" that require labeling of the films selected for inclusion in the National Film Registry.

The films selected for inclusion in the National Film Registry for 1990 are:

(1) All About Eve (1950)
(2) All Quiet on the Western Front (1930)
(3) Bringing Up Baby (1938)
(4) Dodsworth (1936)
(5) Duck Soup (1933)
(6) Fantasia (1940)
(7) The Freshman ((1925)
(8) The Godfather (1972)
(9) The Great Train Robbery (1903)
(10) Harlan County, U.S.A. (1976)
(11) How Green Was My Valley (1941)
(12) It's a Wonderful Life (1946)

(202) 707-5215
FAX: (202) 707-0812



[illegible] D.C., 20540, U.S.A.

(13) Killer of Sheep (1977)
(14) Love Me Tonight (1932)
(15) Meshes of the Afternoon (1943)
(16) Ninotchka (1939)
(17) Primary (1960)
(18) Raging Bull (1980)
(19) Rebel Without a Cause (1955)
(20) Red River (1948)
(21) The River (1937)
(22) Sullivan's Travels (1941)
(23) Top Hat (1935)
(24) The Treasure of the Sierra Madre (1948)
(25) A Woman Under the Influence (1974)

Last year the Library and the National Film Preservation Board announced two broad goals--to promote film as an art form and to generate public interest in the preservation of film. These goals were furthered by the nomination of the first twenty-five films in September 1989, which generated an enormous amount of attention in the popular and critical press. Every major newspaper and many of the major networks reported not only on the list of films but on the activities of the Library of Congress and other archives in preserving our national motion picture heritage.

This year's films, like last year's, were selected after a long and exhaustive process. The public nominated 1,465 film titles, a dramatic increase from last year's 962 titles. Nominations were received from 40 states and the District of Columbia. The National Association of Theater Owners (NATO), a trade association representing thousands of theaters nationwide, published a nomination form in its trade publication, and will repeat this in 1991.

In addition, the Librarian asked each Board member to suggest additional film historians and critics whom he could contact for advice about minority and ethnic films, documentaries and animated features that are historically, culturally, or aesthetically significant even though they may not be widely known. Nearly thirty critics respondad with approximately 300 additional nominations.

The National Film Preservation Board met twice to discuss the film selections, once in February in Los Angeles to refine the film selection process, and once in July to recommend their list of twenty-five film titles for 1990.

Three changes were in made in Board membership in

accordance with section 8 of the Act (the current Board membership list is attached). Arthur Hiller replaced Franklin Schaffner who died in July 1989. The members and alternates from two organizations traded places, with Charles Milne becoming the member representing New York University and Bob Rosen the member representing UCLA.

Meeting of the National Film Preservation Board
February 19, 1990

The National Film Preservation Board met at the headquarters of the Writers Guild of America in Los Angeles and was chaired by Fay Kanin, representing the Academy of Motion Picture Arts and Sciences. Eleven of the thirteen organizations represented on the Board attended the meeting as well as the Librarian of Congress.

The Board discussed and adopted a schedule for selecting films for the National Film Registry in 1990. It agreed to use the February 1989 criteria for selecting films. These criteria were published in final form in the Federal Register on August 9, 1990 (see attached).

These criteria allow as many films as possible to be eligible for selection--with broad interpretations of "theatrical release" (any exhibition in a theater including festivals and publicity showings) and "feature length" (the definition varies according to the year in which a particular film was made).

The Board discussed the Library's efforts to obtain "archival quality copies" of the first twenty-five films, and agreed to help the Library obtain the necessary preservation quality copies.

The Board discussed the role of the additional advisors and historians whose names the Librarian had requested each Board member to bring to this meeting. The Librarian agreed to send a letter to the Board's list of historians and experts asking for the names of additional films for inclusion in the National Film Registry, especially minority and ethnic films, documentaries and animated features. The Librarian also agreed to make the response letters available to all the Board members so that they could contact these film historians and advisors individually with follow-up questions, and the Librarian offered to arrange screenings of obscure titles, if possible.

To broaden the public's interest and participation in the Board's activities, the Librarian asked staff to look into the

possibility of getting tear sheet ballots in theaters for the public. The possibility of a film trailer to be shown in theaters was also suggested for further review by the Librarian. [Subsequently, a meeting was held in Washington with representatives from the National Association of Theater Owners (NATO), who prepared ballots for distribution in their theaters.]

It was agreed that the Librarian, in consultation with the Board, would try to achieve a balance in the final selection process, in keeping with Congress' intent that the films selected represent the broadest range of films possible.

Meeting of the National Film Preservation Board
July 20, 1990

The National Film Preservation Board met at the Library of Congress in Washington, D.C. and was again chaired by Fay Kanin. The Librarian attended, as did twelve of the thirteen Board members. Also in attendance, at the Board's request, was a member of the American Society of Cinematographers.

Prior to the meeting, a number of Board members attended screenings of films slated for discussion. The Board was shown the seal of the National Film Registry, designed by Saul Bass. This seal, required by section 3 of the Act, is available for purchase from the Library's Motion Picture, Broadcasting and Recorded Sound Division.

The purpose of this meeting was to advise the Librarian which films to choose for the National Film Registry. To facilitate candor, the Board requested that the meeting be closed. The Board had chosen from the 1,465 film titles nominated by Board Members and alternates, the general public, and the film historian's a "working list" of 50 titles for full discussion.

The Board decided not to establish a quota for certain genres of film, such as animated features, documentaries, avant garde and independent films. They agreed that any film would be eligible, whether or not it was on anyone's list, if it met the qualification requirements set by the Board and the Librarian.

The Board discussed the films on their "working list" title by title. Every film was discussed using the criteria set out by Congress--cultural, historical, or aesthetic significance. After several hours of discussion, the Board decided to take several days to reflect on the lively discussion and make their final recommendations by mail to the Librarian of Congress.

Having benefited from the Board's discussion and their list of films, the Librarian consulted with the staff of the Library's Motion Picture, Broadcasting and Recorded Sound Division and viewed a number of films before making the final selections. On October 18, 1990 the Librarian announced the final list of twenty-five films for 1990 to the American public.

Film Labeling Guidelines

On November 30, 1989, in accordance with the Administrative Procedures Act, the Librarian of Congress published a notice of proposed guidelines for the labeling of the first twenty-five films selected for inclusion in the National Film Registry and the proposed list of those first twenty-five films.

On August 9, 1990, the Librarian of Congress issued the final regulations pursuant to section 3 of the Act. The final guidelines became effective on September 24, 1990, and expire on September 27, 1991. These guidelines will apply to the second and third lists of twenty-five films once those lists are published in the Federal Register. Both the proposed guidelines and the final guidelines as printed in the Federal Register are attached.

The Librarian received eleven public comments regarding the proposed film labeling guidelines. Although some of the comments supported the proposed guidelines overall, each of the comments proposed some modifications to the guidelines as published in the Federal Register.

In addition to the public comments, the Librarian also had the advice of the Board from its meeting on September 26, 1989 (summarized in last year's report to Congress). After reviewing the comments, the recommendations of the Board, and the legislative history, the Librarian issued final guidelines.

These final guidelines are to be used by film owners, distributors, exhibitors and broadcasters to determine whether a version of one of the films selected for inclusion in the National Film Registry, which is in their possession, has been colorized or otherwise materially altered and therefore must carry a label as designated in section 4 of the Act.

In addition to the use of a label, these regulations are to be used for the placement of the seal of the National Film Registry on one of the designated films. That seal can only be used for films that are not colorized or otherwise materially altered. The Librarian encouraged film owners, distributors and

exhibitors to use the seal of the National Film Registry with some discretion because it carries the name of the Library of Congress, and he stated his preference that the seal be used on original theatrical release versions wherever possible.

The Librarian made five major changes to the proposed labeling guidelines of November 30.

First, based on information provided in the comments, he incorporated a standard of 5 percent of running time (per scene or per total running time of the film overall) for time compression or time expansion (lexiconning) into the definition of what is not a material alteration.

Second, to narrow the focus of the labeling requirements in accordance with congressional intent, an exemption was provided from labeling if materials equaling up to 5 percent of running time were removed for any reason. This allows three minutes per hour of running time to be edited out over and above any removal of materials which is necessary for community standards and practices (including nudity, profanity and explicit violence).

Third, in order to clarify the focus of the labeling requirements, practices used for good faith restoration and archiving were clearly articulated to prevent abuse of this exemption, while allowing some practices to continue without labeling, such as color corrections or good faith soundtrack restorations.

Fourth, where alternate materials shot by the original director are inserted for alternate versions, whether for community standards or for other marketing purposes (such as rereleases), the label prescribed by the Act would not serve its intended useful purpose and would not be not required.

Finally, as a result of the comments received, the exclusion for panning and scanning was changed from an objective standard based on aspect ratios to a standard based on the "reasonable" and "customary" uses within the industry.

Preservation Activities of the Library of Congress
The 1989 Film Titles

Under section 3 of the Act, the Librarian is instructed to obtain "by gift" archival quality copies of the original version of each film selected for the Registry. The Library of Congress is the largest film archive in the United States and has been preserving and restoring film for over 40 years. Even so, the

Library did not have archival quality copies of many of the films selected for inclusion in the National Film Registry.

Film preservationists and archivists are concerned with the original "preprint" materials. Only these materials, when correctly restored and maintained, can guarantee that future generations will be able to see these films as their creators intended them to be seen.

The staff of the Library began the process of obtaining archival quality materials for the first twenty-five films by researching the copyright status of each of the films. Some of the films are almost seventy-five years old and copyright ownership has changed hands many times. The staff also researched the quality and location of the best surviving materials available for each film. In some cases, the best available materials existed in many different public and private collections.

The Library contacted copyright owners and other archives to request gifts or assistance in obtaining the best surviving materials for each film. The Library received strong support from trade associations and the motion picture industry. Despite these efforts, the Library still does not have archival quality copies of all twenty-five films. But our difficulties in finding and obtaining copies even of these generally well-known and beloved films illustrates the extent of the film preservation challenge in this country and the important role the National Film Preservation Board can play in preserving this part of our cultural heritage.

APPENDIX 12.—LETTER FROM GEORGE SPIRO DIBIE, PRESIDENT, INTERNATIONAL PHOTOGRAPHERS GUILD, TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 7, 1991

INTERNATIONAL PHOTOGRAPHERS GUILD

OF THE MOTION PICTURE AND TELEVISION INDUSTRIES LOCAL 659 I.A.T.S.E.
7715 SUNSET BLVD. SUITE 300, HOLLYWOOD, CALIFORNIA 90046
(213) 876-0160 FAX (213) 876-6383

REPRESENTING
DIRECTORS OF PHOTOGRAPHY
CINEMATOGRAPHERS
CAMERA OPERATORS
CAMERA ASSISTANTS
STILL PHOTOGRAPHERS
FILM LOADERS
ANIMATION
NEWS PHOTOJOURNALISTS
VIDEO CONTROLLERS

"The Guild of the Finest Film and Video Crews in the World"
CHARTERED 1928

7 June 1991

JUN 10 1991

Honorable William J. Hughes, Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C.20515

Dear Chairman Hughes:

On behalf of the 3,000 member International Photographers Guild I would like to thank you for choosing the Guild as one of two cinematographers' organizations authorized to nominate its members to the National Film Preservation Board.

Our Guild is well qualified for this task because it is the largest organization of its kind in the world. All professional cinematographers are now, or aspire to become, members of our Guild. Indeed, nearly all members of the American Society of Cinematographers (ASC) are also members of the Guild.

The artistic achievements of Guild members are legendary in all fields of cinematography, including feature films. They have won more Oscars, Emmys, Clios and documentary awards than members of any other photographers' organization. Guild members have photographed such classics as CASABLANCA (1942), CLOSE ENCOUNTERS OF THE THIRD KIND (1977), not to mention this year's Academy Award winning DANCES WITH WOLVES. They have also been nominated for or won Emmys for WAR AND REMEMBRANCE, GROWING PAINS, MOONLIGHTING and many more. They are, in short, the world's best.

But the Guild is not a mere honorary organization. On the contrary, we are a trade union that represents our members on a host of fronts, including collective bargaining. Like the Directors Guild of America, Screen Actors Guild, Writers Guild of America, the International Photographers Guild bargains for cinematographers, camera operators, assistants, etc., in negotiations with the Alliance of Motion Picture and Television Producers (AMPTP). Indeed, for more than 60 years the Guild has been fighting to improve the wages and working conditions and to expand the artistic rights of cinematographers and camera crews.

Affiliated with
AFL-CIO
California State Federation of Labor
California State Theatrical Federation
Hawaii State AFL-CIO
Hollywood Film Council
Los Angeles County Federation of Labor
Northwest Oregon Labor Council
Sacramento Central Labor Council
San Francisco Labor Council
Santa Clara Central Labor Council
Southern Nevada Central Labor Council

Based on the above experience, the Guild applauds your efforts to reauthorize the National Film Preservation Act. However, the Guild is concerned that the bill's nomination procedure for the cinematographer's seat is unnecessarily divisive and perhaps counterproductive to the purpose of choosing the most qualified representative. As presently written, the bill would have two organizations, our Guild and the ASC, nominate three candidates each. The Librarian of Congress would then choose the Board member from one of the organizations' choices and the alternate to the Board from the other organization's choices.

Such a procedure has a number of potential and real flaws. First, it would pit the two organizations against each other. By mandating that each organization select three nominees, it would virtually preclude the possibility of their mutually agreeing on one set of nominees. Second, it would encourage the organizations to compete for the Librarian's favor. He, after all, would make the final choices. This, we fear, would lead to a political quagmire that may frustrate the goal of choosing the most qualified candidate. Third, it ignores the fundamental fact that nearly all of the ASC's 175 members are members of the Guild. Why should a bill divide member against member, provoking unnecessary competition? Fourth, because it sets up a false dichotomy, it runs the risk that one of these organizations would always be dissatisfied with the result, i.e., alternate status. This point would ring particularly true in our case because the Guild is more than 15 times larger than the ASC.

In order to avoid these problems, the Guild suggests that the bill be amended to read that the two organizations would "jointly represent" cinematographers on the Board. As such they would be required to agree on three nominees, one of whom the Librarian would select, for Board membership.

The Guild believes the above amendment would prevent needless political division by encouraging the organizations to work together in the best interests of cinematographers and the Board.

We thank you for the confidence you have expressed in our organization and we would like this comment placed into the record of the June 12, 1991 hearing on the Film Preservation Act. We look forward to playing an active role on the Film Preservation Board.

Sincerely,

George Spiro Dibie

George Spiro Dibie, President

GSD/m

APPENDIX 13.—LETTER FROM BARRY W. LYNN, LEGISLATIVE COUNSEL, AND MORTON H. HALPERIN, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

June 11, 1991

Congressman William J. Hughes
Chairman, House Subcommittee on
Intellectual Property and Judicial Administration
341 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Hughes:

The American Civil Liberties Union was pleased to see that you have introduced H.R. 2372, a bill to change the 1988 legislation regarding the National Film Preservation Board. We support the bill which terminates the existing labelling requirement for copyright owners and others who distribute or exhibit "altered" versions of films selected for inclusion in the National Film Registry.

As we indicated in our filing to the Librarian of Congress at the time that regulations were proposed for implementing the Film Registry legislation, it is a form of censorship whenever agents of the United States government are required to make decisions regarding the artistic merits of works which then, as a collateral matter, imposes burdensome disclosure requirements on the dissemination of these works. We believe it is unconstitutional to require a private party to place a "label" with specific government-mandated wording on a product like motion pictures protected by the First Amendment, at least absent a genuinely "compelling" government interest. There was not, however, any record before Congress in 1988 from which to derive the conclusion that distribution or exhibition of any "colorized" or otherwise "materially altered" films was a substantial government concern. A "compelling" government interest is an extremely heavy burden to bear, and we find no basis for believing any labelling requirement would withstand constitutional muster. Moreover, selection of a particular film for inclusion in the National Film Registry certainly never carried with it the inherent need to notify every viewer when an "altered" version was exhibited.

The new legislation merely requires that the Librarian of Congress "provide a seal to indicate that a film has been included in the National Film Registry..." so that the seal "may then be used on copies of such films that are original and

complete versions as they were first published...". Only where a person uses the seal is there any potential civil liability.

Your proposal, of course, eliminates most of the significant problems associated with the current statute and regulations. It would no longer be necessary for exhibitors and distributors to be concerned about whether the product they were handling was "materially altered". The pejorative message of the current labels will undoubtedly limit distribution of films which contain them. Further, it would not be necessary for the Librarian to micromanage the determination of what is and what is not a "material alteration" and what alterations, even if "material", are acceptable because they are "merely" done to comport with customary standards and practices. Such content-based decisions are inappropriate.

We believe that H.R. 2372 is a most welcome move away from the constitutional problems created by the original 1988 legislation, and appreciate your sensitivity to constitutional concern.

Sincerely,

Barry W. Lynn
Legislative Counsel

Morton H. Halperin
Director

BWL/njg

APPENDIX 14.—LETTER FROM MICHAEL R. KLIPPER AND JOHN B. GLICKSMAN, COUNSEL FOR COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

MICHAEL R. KLIPPER
COUNSEL

SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

June 11, 1991

The Honorable William J. Hughes
Chairman
House Judiciary Subcommittee on
Intellectual Property and the
Administration of Justice
207 Cannon House Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Committee for America's Copyright Committee (CACC) respectfully submits the following comments on Title III of H.R. 2372, "The National Film Preservation Act of 1991," and it asks that this statement be made part of the official hearing record on this issue.

CACC is composed of representatives of a variety of America's copyright owners and users. Its members include the creators and producers of computer software and databases, books, newspapers, magazines, sound recordings, motion pictures and other video and film products, and educational testing and training materials, as well as commercial broadcasters. A list of CACC's members is attached for your review.

In early 1989, the members of CACC joined together because of their concern over legislative efforts that threaten the constitutional goal of promoting the production and dissemination of creative works. In particular, our members are troubled about proposals that would impose so-called "moral rights" on copyright-intensive industries in this country. CACC believes that, if enacted, such proposals would adversely affect many of the traditional practices and relationships that are fundamental to the daily operation of these industries.

Since its inception, CACC has been closely monitoring developments under the National Film Preservation Act of 1988, 2 U.S.C. Sec. 178 ("the Act"), including the Librarian's efforts to implement the mandatory labeling provisions and the

current efforts to revise and extend the existing statutory scheme.

Our interest in the film board issue is grounded, in large part, in the fact that the Act has strong "moral rights" underpinnings. Mr. Chairman, you alluded to this very point at the time you introduced H.R. 2372:

> The 1988 legislation was the end product of an unsuccessful effort to secure proprietary rights ["moral rights"] in films for American film directors and screen writers similar to those enjoyed by their counterparts in some European countries.

Indeed, both as a discussion draft, and as first approved by a congressional subcommittee, the Act would have directly amended the Copyright Act, leaving no doubt that the fight over its enactment was about copyright law. See Schwartz, The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process, 36 J. Copyright Soc'y of the U.S.A. 138, 141 (1989). In addition, the main proponents of the Act, the Directors Guild of America ("DGA"), made clear at the outset, and have continued to proclaim, that the 1988 law is but a first step in DGA's quest for a full-blown federal "moral rights" law.

Moreover, at the heart of the Act's labeling provisions[1/] is the concept of "material alteration" -- a concept that is central to the operation of a statutory "moral rights" regime.

1/ Under the Act, if a film is selected for inclusion in the National Film Registry, any version of the film that has been "colorized" or "materially altered" must carry a statutorily prescribed label indicating that it has been so adapted. See 2 U.S.C. § 178c. The Act also specifies the wording of the statutorily prescribed labels for both "colorized" and "materially altered" films. See id. Furthermore, the Act directs the Librarian of Congress to establish general guidelines for use in determining whether a particular version of a film has been "materially altered." See 2 U.S.C. § 178b.

Aside from the "moral rights" issue, CACC is interested in the film board issue because of concerns about the First Amendment implications, and the wisdom, of a regulatory plan that requires representatives of a federally-created entity to make content-based choices about protected First Amendment works, including such determinations as which motion pictures warrant inclusion on a National Film Registry.

Against this background, at this time we would like to share with you some brief comments on Title III of H.R. 2372.

Mr. Chairman, at the outset we would be remiss if we did not express our appreciation to you, Representative Moorhead, and, of course, the Librarian of Congress, Dr. Billington, for crafting a legislative proposal that contains a number of important provisions.

First, Title III focuses on the significant issue of film preservation. As creators and users of copyrighted works, we fully recognize the public interest in the preservation and restoration of creative materials such as motion pictures. For this reason, in the past, CACC has applauded the efforts of the Librarian and Congress aimed at better preserving and restoring motion pictures, and we reaffirm our appreciation for the commitment evinced by the bill's creators to these laudable goals.

Second, because of our aforementioned concerns regarding the mandatory labeling provisions in the Act, the decision to exclude labeling language from Title III is a very welcome one.

Third, we are appreciative of the steps you have taken in drafting H.R. 2372, Mr. Chairman, to ensure that your Subcommittee, with its extensive copyright expertise, is given a full opportunity to review this legislation. Your actions in this regard have precluded a repetition of the situation that occurred in the 100th Congress, when the original film board proposal was added as an amendment to an appropriations measure despite its obvious copyright implications.

Nonetheless, the members of CACC have significant concerns regarding the overall approach found in Title III. In sum, we believe that Title III contains certain troubling provisions that (1) are not essential to achieving the stated

goals of preserving and restoring motion pictures, and (2) put agents of the federal government in the inappropriate position of making aesthetic and qualitative judgments regarding the contents of motion pictures.

Mr. Chairman, as you indicated in your introductory remarks on H.R. 2372, "it [Title III] is limited to matters of film preservation." Title III contains several provisions crucial to achieving that worthy goal. In particular, after completion of a study, required by Section 314 of the bill, on the current state of film preservation in the United States, the Librarian is instructed to "establish a comprehensive national film preservation program for motion pictures, in conjunction with other major film archives." Section 304(a). Obviously, the purpose of this program is to improve preservation and restoration efforts with respect to the greatest possible number of motion pictures.

In light of this goal, we submit that the provisions for the creation of a National Film Registry and the selection of 25 "classic" films per year for the Registry (the maximum number of films that can be placed on the Registry annually), are not essential to further the paramount goal of preservation. Not only are these provisions not essential but, more importantly, they perpetuate one of the key vices under current law: placing the Librarian and the members of the federally-created film board in the position of making qualitative decisions about the relative merits of various motion pictures, thereby injecting the federal government into the aesthetic aspects of the motion picture industry. Enhancing and coordinating film preservation and restoration efforts is an appropriate goal. Mandating that federal agents make such aesthetic judgments is not.

Given the foregoing, we urge that the Subcommittee consider a different approach, one that eschews creating (or, in this case continuing) another federal entity -- the National Film Preservation Board -- and that relies, instead, on the Librarian's existing powers to further the interests of film preservation. The Subcommittee should consider an approach by which the Librarian appoints an informal advisory panel to (1) work with him in devising an overall plan to better coordinate preservation and restoration efforts in the public and private sector, and (2) encourage appropriate parties to voluntarily increase their efforts in this regard. In our view, an approach along these lines is preferable to one that

requires subjective decisionmaking by those vested with power by the federal government. While a modest appropriations may be necessary to enable the Librarian to carry out these functions, such a streamlined approach would not necessitate establishing the type of formal governmental machinery contemplated under Title III of H.R. 2372.

In conclusion, CACC will monitor the progress of this legislation carefully as it works its way through Congress. Given our aforementioned concerns, we strongly urge this Subcommittee to resist efforts (1) to amend the film board legislation to incorporate mandatory film labeling provisions, (2) to push through mandatory labeling legislation separate and apart from the film board extension issue, and (3) for that matter, to enact any proposals that would import "moral rights" into this country.

We hope that these comments prove helpful as your Subcommittee continues its consideration of Title III. We will, of course, be happy to elaborate on these comments if that is the Subcommittee's desire.

Sincerely,

Michael R. Klipper

John B. Glicksman

Counsel for Committee for
America's Copyright Community

cc: Members of House Judiciary Subcommittee on Intellectual Property and the Administration of Justice

Members Of The

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

1991

The American Film Marketing Association

Association of American Publishers

Association of Independent Television Stations, Inc.

Association of National Advertisers

The Dun & Bradstreet Corporation

Harcourt Brace Jovanovich, Inc.

Information Industry Association

International Communications Industries Association

Magazine Publishers of America

McGraw-Hill, Inc.

Meredith Corporation

Motion Picture Association of America

National Association of Broadcasters

Paramount Communications, Inc.

The Reader's Digest Association

Recording Industry Association of America, Inc.

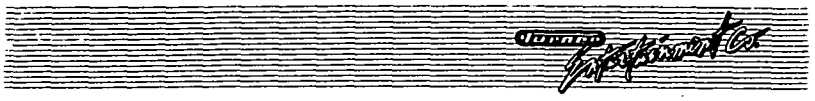
Time Warner, Inc.

Times Mirror Co.

Training Media Association

Turner Broadcasting System, Inc.

APPENDIX 15.—LETTER FROM ROBERT L. MAYER, PRESIDENT AND CHIEF OPERATING OFFICER, TURNER ENTERTAINMENT CO., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 11, 1991



TURNER ENTERTAINMENT CO.
10100 Venice Boulevard, Culver City, CA 90232

ROGER L. MAYER
President and Chief Operating Officer
(213) 558-7301
Fax: (213) 558-7444

June 11, 1991

The Honorable William J. Hughes
Chairman
Intellectual Property & the
Administration of Justice Subcommittee
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Turner Broadcasting System, Inc. respectfully submits the following comments regarding "The National Film Preservation Act of 1991," Title III of H.R. 2372. We request that our statement be made part of the official hearing record.

Turner Broadcasting is fully committed to film preservation. We appreciate the opportunity to provide the Committee an overview of our substantial preservation efforts.

In 1986, Turner Broadcasting purchased the entire Metro-Goldwyn-Mayer "MGM" film library and the pre-1950 Warner library. This and subsequent acquisitions have brought The Turner Entertainment Company's current film library to over 3,300 feature films and over 2,000 short subjects and cartoons. Many of these were produced prior to 1951 when safety film became the standard of the industry. MGM and Turner have spent a combined thirty million dollars on preservation work. Every version of every film, every cartoon, every short subject, every trailer and every other piece of film material in our entire library has been converted, preserved and restored with the exception of approximately 35 films from the RKO library which has been in our possession only a few years. These remaining films are scheduled to be completed by the end of 1991.

MGM began conversion of unstable nitrate negatives to safety film in the early 1960s. A number of rare silent movies were among the first pictures upgraded, including LA BOHEME (1914) and THE GREEN GODDESS (1923). The MGM safety conversion included not only the relatively simple copying of black and white film to safety stock but also the more difficult and expensive modernizing of the printing facilities of 115 feature films photographed in the 3-strip Technicolor process (single strip color negatives have been used since 1953). Additionally, all

short subjects, cartoons (again, from Technicolor), trailers, foreign language titles and all other nitrate film materials were preserved on safety stock.

By the early 1980s, MGM had merged with United Artists "UA" which had previously purchased the entire pre-1950 output of Warner Brothers. About half of the UA feature films had been converted to safety stock, and preservation efforts continued after the merger. Turner then purchased the merged MGM company and completed the unfinished conversion. Two years later, Turner exclusively licensed U.S. rights to the entire output of RKO Radio Pictures (1930-1957). Of the close to 800 features in this group, 270 had not yet been protected by conversion to safety stock. Turner continued the RKO conversion which should be completed this year.

A large film library, like the Turner library, requires a significant financial commitment to preservation. Rising laboratory work costs and film stock prices have increased the conversion cost of a black and white feature film to approximately ten thousand to twenty thousand dollars, varying with the length and condition of the nitrate material. Conversion from 3-strip Technicolor to modern single strip color costs a minimum of sixty thousand dollars.

Even after the conversion of a film library is completed, the maintenance of preserved works is an ongoing process. Preserved films are stored in controlled environments, such as a salt mine, and are checked for signs of deterioration at regularly scheduled intervals. Also, improvements in preservation technology occur. For example, several of the Technicolor pictures in the Turner library which were first converted to single strip negatives in the late 1970s are being redone to achieve higher quality. Foremost in this reconversion is GONE WITH THE WIND, finished in time for its 50th anniversary in 1989 at a cost of about two hundred and fifty thousand dollars. Turner Entertainment anticipates ongoing expenditures of at least one million dollars per year in film preservation and maintenance.

Turner Broadcasting is proud of its leadership role in film preservation. But, we are not alone in our preservation efforts. The entire entertainment industry has recognized the value of film preservation and has instituted preservation programs.

Although we support your interest in film preservation, we urge the Subcommittee to consider whether extension of the National Film Board is necessary or is the best way to encourage preservation. We join the Committee for America's Copyright Community, of which we are members, in suggesting that the Librarian use his existing powers to appoint an advisory

committee to devise a film preservation strategy in cooperation with film copyright owners and other interested parties. Government efforts might be better focused on films of historical or cultural interest which are in the public domain or are, for other reasons, not being preserved rather than on the twenty-five Film Board "best film" designations which are, undoubtedly, already being preserved. We would strongly support adequate appropriations for this more flexible approach which would promote preservation without the governmentally-intrusive features of the current Film Board and of H.R. 2372.

Finally, Mr. Chairman, while we are not convinced that extension of the Film Board in its present form is the best way to advance the Library's role in film preservation, we salute the focus of H.R. 2372 on preservation rather than regulation of film distribution through mandatory labeling. Turner Broadcasting intends to continue its current policy of labeling all colorized films; however, we strongly oppose mandatory labeling requirements or other so-called "moral rights" legislation and urge the Committee not to move down that road on this or other legislation.

Sincerely,

Roger L. Mayer

RLM:ph

APPENDIX 16.—LETTER FROM ALFRED W. DI TOLLA, INTERNATIONAL PRESIDENT, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 25, 1991

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,
SUITE 601, 1515 BROADWAY, NEW YORK, NEW YORK 10036-5741

Affiliated with the AFL-CIO-CLC

Telephone: (212) 730-1770 TWX: 446-062 FAX: (212) 921-7699

ALFRED W. DI TOLLA
International President

JAMES J. RILEY
General Secretary-Treasurer

FRANK A. HOBBS, First Vice President
6918 Creston Ct., Niles, IL 60648
JOHN J. NOLAN, Second Vice President
801 Kearney Place, Paramus, N.J. 07652
JOHN J. RYAN, Third Vice President
2208 Greencastle Rd., Burtonsville, MD. 20866
EDWARD C. POWELL, Fourth Vice President
340 Second St., San Francisco, CA. 94105
MICHAEL W. PROSCIA, Fifth Vice President
406 76th St., No. Bergen, N.J. 07047
ALAN L. CONKLEY, Sixth Vice President
6 Headland Dr., West Hill, Ont. Can. M1C 2T7
RICK LONG, Seventh Vice President
1223 Paseo Grande, San Diego, CA 91773
DANIEL J. KERSHB, Eighth Vice President
80 No. Wacker St., Rm. 722, Chicago, IL 60606
THOMAS C. SHORT, Ninth Vice President
704 Morgan Bldg., 1276 W. 3rd St., Cleveland, OH 44113
RUDY N. NAPOLEONE, Tenth Vice President
1031 Lester Dr., N.E., Albuquerque, N.M. 87112
CARMINE A. PALAZZO, Eleventh Vice President
11369 Ventura Blvd., #202, Studio City, CA. 91604

OFFICE OF THE PRESIDENT

June 25, 1991

Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515

Re: HR 2372

Dear Chairman Hughes:

I am President of the International Alliance of Theatrical Stage Employes, a 60,000 member affiliate of the AFL-CIO, which represents craftspeople in the motion picture and television industries. These crafts include, but are not limited to, cinematographers, film editors, art directors, hair and make artists. I write this letter to express my support of HR 2372, your bill to reauthorize the National Film Preservation Act. In particular, I applaud the bill's addition of cinematographers to the Film Preservation Board which will advise the Librarian of Congress as to which films should be placed on the National Film Registry.

Given the critical role cinematography plays in creating the photographic images that appear on screen, I can think of no craft which is more deserving of this honor. In this light, I would like to strongly support the International Photographers Guild as the nominating organization for the cinematographer's representative on the Board. Put simply, the Guild is the largest, most distinguished photographers' organization in the world.

Its 3,000 plus members have won more Academy Awards and Emmys than members of any other comparable organization. Indeed, the Guild's members include almost all of the American Soci.. of C.. ..atographers' 165 members. However, unlike the self-selecting ASC, the Guild's membership is not limited to cinematographers of theatrical motion pictures. On the contrary, the Guild's broadly based membership excels in all areas of photography, including documentaries, videotaping and news photojournalism. This is impo... because these are some of the very formats suggested by the ... ·ian for nomination to the National Registry.

...e... r, the Guild is a trade union in the finest sense of the ... For more than 60 years it has negotiated collective ...ing agreements for all crafts associated with c... ..tography, including camera operators, assistants, still photographers and news photojournalists. In this sense, the International Photographers Guild has played a role analogous to the DGA, WGA and SAG, all of whom are presently on the National Fil.. Preservation Board. In short, there should be no doubt in anyone's mind as to which cinematographic organization represents its members in all facets of its craft, as well as in collective bargaining.

I strongly urge you to make the International Photographers Guild the organization authorized to nominate cinematographers to the Film Preservation Board.

Sincerely,

Alfred W. DeLa...

INTERNATIONAL PRESIDE...

AWD:sg
cc: Hayden Gregory

APPENDIX 17.—LETTER FROM JOHN M. KERNOCHAN, NASH PROFESSOR EMERITUS OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NY, TO ERIC SCHWARTZ, POLICY PLANNING ADVISER, LIBRARY OF CONGRESS, JULY 2, 1991

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW 435 West 116th Street

July 2, 1991

Eric Schwartz, Esq.
Policy Planning Advisor
Department 17, Library of Congress
Washington, D.C. 20540

Dear Eric:

I found the ALAI Resolution which was sent to the Copyright Office in July 1990. I hope you will be able to get this in the Record of Proceedings for both the Senate and the House. If Bernie Korman cannot supply the CISAC resolution, I am sure it can be obtained by calling CISAC and asking for a faxed copy. The CISAC numbers in Paris are 47205937 or 47202252 and the fax number is 47230266.

With thanks and warm regards,

Sincerely,

Jack

John M. Kernochan
Nash Professor Emeritus
of Law

JMK:ah

APPENDIX 18.—LETTER FROM PROF. ANDRÉ FRANCON, SECRETARY GENERAL, ASSOCIATION LITTERAIRE ET ARTISTIQUE INTERNATIONALE, PARIS, TO RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, JULY 3, 1990

ASSOCIATION LITTÉRAIRE ET ARTISTIQUE
INTERNATIONALE
65, RUE DES MATHURINS PARIS 75008

PARIS, 3th July 1990

Hon. Ralph OMAN
Register of Copyrights for the United States
Library of Congress
Department 17
WASHINGTON, DC 20540 (U.S.A.)

Dear Mr OMAN,

I have the honor to transmit to you, on behalf of ALAI, the resolution adopted unanimously by ALAI's Executive Committee and approved by ALAI's General Assembly at its meeting in Helsinki, Finland on the 30th of May, 1990.

ALAI, as you know, is a multinational organization for the promotion and defense of authors'rights. Besides its headquarters and membership in France, ALAI includes national groups in the following nations : 17 national groups, i.e German, American, English, Austrian, Belgian, Canadian, Danish, Spanish, Finnish, French, Greek, Dutch, Italian, Norwegian, Swedish, Swiss and Israeli.

Insofar as such recording may serve to advance the proposal in question, ALAI wishes to be recorded in support of the CLIPS proposal for autometic renewal of copyright as already approved by you.

With thanks for your attention and assistance and with cordial regards.

Sincerely yours.

For ALAI
Prof.André FRANÇON
Secretary General

APPENDIX 19.—RESOLUTION OF THE ASSOCIATION LITTERAIRE . ARTISTIQUE INTERNATIONAL, PARIS

ASSOCIATION LITTÉRAIRE ET ARTISTIQUE
INTERNATIONALE
55, RUE DES MATHURINS PARIS 75008

RESOLUTION

Considering that ALAI has long favored the Berne Convention's term of life plus fifty or more years for the protection of author's works,

and

considering that ALAI opposes -as does the Berne Convention- the invalidation of copyrights for non-compliance with formalities,

and

considering that under current U.S. Law, as applied to works in their first twenty-eight year term of protection in 1978 copyrights in such works will be invalidated if renewal formalities are not complied with,

and

considering that many important copyrights have been lost through ignorance, inadvertences or error,

Now therefore be it resolved that :

1. - ALAI supports the proposal making automatic the renewal of all copyrights for which renewal is still required under U.S. Law, which proposal has been put forward by the U.S. Committee for Literary Property Studies (CLPS), and endorsed by the U.S. Register of Copyrights and by ALAI-USA and ALAI-Canada.

.../...

2. - This resolution is to be formally communicated as soon as practicable by ALAI to the U.S. Register of Copyrights.

Adopted unanimously at Helsinki, Finland on May 30 1990 by the General Assembly of A.L.A.I.

****

APPENDIX 20.—RESOLUTION OF THE INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS

INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS

BE/91/277

EXECUTIVE BUREAU
(Brussels, 28-30 January 1991)

Report

Present:

Mr J. Corbet, **President**
Mr G. Boytha, **Vice-President**

Messrs E. Bautista, also **President of the European Committee**, L. Capograssi, M.J. Praegard, R. Kreile, J. Matajcek, S. Matsuoka, Ms G. Messinger, Messrs G. Petri, N. Tchatverikov and J.L. Tournier, **Members**

The Secretary General

Apologies:

Mr A. Stampone, **President of the Latin American Committee**

Guest:

Mr R. Abrahams, representing the Chairman of the Asian-Pacific Committee for the discussion on item 9) of the agenda.

*
* *

1) Opening of the meeting and miscellaneous announcements

The President of the Executive Bureau welcomed the members of the Bureau on behalf of SABAM.

With regard to the agenda, the following questions would be discussed under the items indicated below:

- 3bis): "SPA request to serve as a member of the "Latin America" Working Group";

- 10bis): "Possible affiliation of CISAC to the EUROVISION Organization";

- 10ter): "Tedis project";

- 10quater): "Memorandum from a Directorate-General of Studies (Luxembourg, 19 February 1990) on authors' rights vis-à-vis non-profit-making or similar associations".

2) Approval of the Reports of the Florence (24-25 April 1990) and Budapest (9 October 1990) meetings

Documents BE/90/1567 and BE/90/2298 were unanimously approved.

ORGANIZATION AND FUNCTIONING OF CISAC

The Executive Bureau congratulated the Secretary General on his initiative to draw up an annotated agenda, a document which certainly made the Bureau's work easier.

3) Enlargement of the "Satellites/Cable TV" Working Group to include BILD-KUNST, KODA, SUISA and SUISSIMAGE and proposed new name for it

The Bureau was unanimously in favour of enlarging the aforementioned Working Group to include BILD-KUNST, KODA and SUISA.

On the other hand, the Bureau would not take a decision on SUISSIMAGE's application until its next meeting; in the meantime, the President of the Bureau would make further inquiries about the links which might exist between this Society and AGICOA.

Lastly, the Bureau did not think the Working Group's present name should be changed.

3bis) SPA request to serve as a member of the "Latin America" Working Group

The Bureau agreed to this request and indicated that SPA would take part, as of right, in the "Latin America" Working Group's next meeting which was to be held in Mar del Plata on 25th and 26th March 1991.

4) Criteria to be adopted for awarding the CISAC Gold Medal

Rather than defining general criteria, the Bureau considered it appropriate, above all, to define minimum ones which, in any case, ought to be flexible.

The presentation of this Medal should be a promotional act for CISAC and take place, as far as possible, at General Assemblies so that the occasion would be a formal one and would thus constitute a media event.

To ensure that this distinction remained exceptional in character, the Bureau did not think it should be awarded systematically at each Congress. Furthermore, the Medal could be awarded to authors and administrators alike.

5) Participation in meetings of the Administrative Council

For the next Administrative Council meeting, the Secretary General would prepare a draft amendment to Article 10 of the Statutes specifying that duly nominated substitutes could attend meetings only in the absence of the incumbents.

6) Resolution of the Legal and Legislation Committee (Beetsterzwaag, May 1990) on the automatic renewal of copyrights in the United States

This resolution was unanimously adopted and would be formally communicated by the Secretary General to the Register of Copyrights of the United States.

7) Organization of a Seminar on "marketing"

The Bureau thought that it might be detrimental to the Societies to employ the term "marketing" and that the title "Seminar on the licensing and communication activities of the authors' Societies" (perception et communication) would be preferable. The Secretary General would advise the organizers of the Seminar accordingly.

In addition, the Bureau agreed to CISAC bearing half the envisaged simultaneous interpretation costs, i.e. the sum of USD 5,000.

8) Report on the meetings of the Technical Committees (Athens, December 1990)

a) Share-out of cable distribution royalties between the various repertoires (CT/90/2146)

The reservations expressed by several Societies at the aforementioned Technical Committee meetings concerning the results of the "Techniques and criteria for cable distribution" Working Group's research were also shared by several members of the Bureau.

Annex

Automatic renewal of copyrights in United-States of America

Considering that CISAC has long favored the Berne Convention's term of life plus fifty or more years for the protection of author's works,

and

considering that CISAC opposes - as does the Berne Convention - the invalidation of copyrights for non-compliance with formalities,

and

considering that under current U.S. Law, as applied to works in their first twenty-eight year term of protection in 1978, copyrights in such works will be invalidated if renewal formalities are not complied with,

and

considering that many important copyrights have been lost through ignorance, inadvertences or error,

Now therefore be it resolved that:

1. On the unanimous advice of the Legal and Legislation Committee, CISAC supports the proposal making automatic the renewal of all copyrights for which renewal is still required under U.S. law, which proposal was put forward by the U.S. Committee for Literary Property Studies (CLPS), and endorsed by the U.S. Register of Copyrights and by ALAI - USA and ALAI - Canada.

2. This resolution is to be formally communicated as soon as possible by CISAC to the U.S. Register of Copyrights.

N.B. Resolution approved 5/16/90 by the CISAC Legal and Legislation Committee at Beetsterzwaag, Holland.

It still has to be submitted to the Executive Bureau or to the Administrative Council for approval

Approved by the Executive Bureau on January 28, 1991.

APPENDIX 21.—LETTER AND STATEMENT OF BARBARA RINGER, ESQ., FORMER REGISTER OF COPYRIGHTS, JUNE 27, 1991

BARBARA RINGER
ATTORNEY-AT-LAW
560 "N" STREET SOUTHWEST
SUITE N-803
WASHINGTON, D.C. 20024

(202) 488-4331
(703) 997-5607

June 27, 1991

Representative William J. Hughes
Chairman, House Subcommittee on Intellectual
Property and Judicial Administration
Room 206, Cannon House Office Building
Washington, D. C.

Dear Representative Hughes:

On June 20, 1991, Mr. Irwin Karp presented to your Subcommittee a statement favoring enactment of Title II of H.R. 2372, the Copyright Renewal Act of 1991. Mr. Karp is Counsel to the Committee for Literary Property Studies, and as a member of the Committee I fully endorse all of his statements and conclusions. In addition, I should like to present some personal observations concerning this thoroughly justified and badly needed piece of legislation, with the request that they be included in the printed record of the hearing.

Yours sincerely,

Barbara Ringer

Barbara Ringer

STATEMENT OF BARBARA RINGER,
FORMER REGISTER OF COPYRIGHTS, ON
TITLE II OF H.R. 2372, THE BILL FOR
AUTOMATIC RENEWAL OF COPYRIGHT
June 27, 1991

I am a member of the Committee for Literary Property Studies ("CLPS"), and my views on the bill for automatic copyright renewal are fully reflected in the statement submitted to your Subcommittee by Mr. Irwin Karp, the Committee's counsel. In addition, however, I have a personal perspective on the problems addressed by this bill which I hope will prove of value to your members during further consideration of its provisions.

For five years (1951 - 1956) I was the Head of the Renewal and Assignment Section of the Copyright Office's Examining Division, and for some years thereafter, as Assistant Chief and Chief of that Division, I continued to have line authority over the Office's renewal operation. In the late 1950's I prepared an exhaustive study of the copyright law's renewal provisions, which was published in the early 1960's as a monograph in the Office's series of general revision studies. Beginning in 1955 and until my retirement in 1980 I was in close contact with the development, enactment, and implementation of what became the Act of October 19, 1976 for Geneeral Revision of the Copyright Law, and was directly involved in the drafting of the provisions on duration, renewal, and reversion. It should not be surprising that, after forty years of experience with this subject, I should have some strong feelings about it.

As I write this statement I have a mental image of my office in the old Copyright Office on the first floor of what is now the Adams Building of the Library of Congress, and of the constant procession of tragedies that were played out there. Some of these tragedies were revealed in correspondence: renewal applications received too late or inquiries (some from Congressional offices) about what to do now that the first term had expired. Worse were the frantic phone calls; if there was still any time left in the 28th year it was the Office's policy to move heaven and earth to get the renewal registered in time, but for claims received too late the pain we felt in conveying this message was nothing compared to the reaction on the other end of the line.

Worst of all were the personal visits from authors and their heirs whose property had been lost through no fault of their own. I have read the statement of Mrs. Jacqueline Byrd and was deeply moved by her experience, but I can only say that it is in no way untypical. When individual claimants break down in tears at what you have to tell them, it is not something that you can easily forget. Those of us who had to administer this unjust law, including Abraham L. Kaminstein (then Chief of the Examining Division), felt strongly enough to discuss the possibility of notifying claimants of the renewal deadlines applicable to their

works, but we had to conclude that the immensity, complexity, and expense of such an undertaking would make it wholly impracticable.

The reasons for a "too late" rejection varied: often there was simply no knowledge that such a requirement existed, or there was the all-too-common procrastination involved in undertaking to deal with government red tape. A great many authors or their heirs assumed that their original publishers or producers would take care of the matter, but during an era of corporate mergers, mass transfers of copyright ownership, and dazzling changes in the media and their control, compliance with a formality connected with a 28-year old work could easily get lost in the shuffle. Even where the original publisher or other original copyright owner had established a procedure for submitting timely renewal applications on behalf of their authors, there were frequent slip-ups: misfiled tickler cards, changes in personnel, mistakes and negligence of all kinds. As for potential renewal claimants from other countries, their total ignorance of the requirement was matched by their total amazement when it was explained to them.

None of this made sense to those of us who had to deal with renewal registration on a daily basis. Early in the revision program, when we were still talking about a copyright term based on the date of publication, there were some discussions of retaining renewal and providing grace periods, advance notices, or some kind of recourse against unjust forfeitures, but none of the suggestions seemed practicable or adequate. Based on a great deal of dismal experience it was ultimately the Office's conclusion that the renewal system was truly unjust to authors and their families, that any benefits it might have were not to the public but to potential pirates looking for a windfall, that a term of either 28 or 56 years was too short, and that, for the future, the whole renewal apparatus ought to be abandoned.

At the same time, it was considered important to retain the reversionary aspect of renewal. After a long wrangle, what emerged in the General Revision Act of 1976 was essentially a single term based on the life of the author, with a provision allowing the author or the author's family to reclaim copyright ownership after a period of time.

This left the question of what to do with subsisting copyrights still in their first term when the new law came into effect. The legislative history of the 1976 Act will bear me out in saying that this problem received very short shrift. Everyone agreed that the new law could not fairly, or even constitutionally, cut off future interests and expectancies that had been the subject of thousands of assignments, which in turn had been the subject of massive trafficking. The wording of the renewal provision had been interpreted in dozens of cases over more than sixty years, and no one dissented from the argument that, for subsisting copyrights in their first term, it would be dangerous to tinker with the old language, bad as it was.

The House Report strongly criticized the unfairness of the all-or-nothing renewal requirement, and recommended that it be repealed for the future. The same arguments applied to copyrights still in their first term, and it would have been far better if a way could have been sought at that time to ameliorate their situation. In the context of the general revision legislation there were raging arguments over the future length of the copyright term and the conditions for reversion of rights, but no one seemed disposed to focus on what was regarded as a transitional provision. No one, including me, had the imagination to suggest the rather simple solution contained in the bill now before you. There was certainly no understanding, tacit or otherwise, that the rigid renewal requirement had to be retained intact. The possibility of making renewal registration optional was, to the best of my recollection, never raised.

The 1976 statute did away with some copyright formalities and softened others, but retained certain requirements as a condition of securing and maintaining protection. The "transitional" renewal requirement for works in their first term on January 1, 1976 was one more formality, along with various notice, registration, and manufacturing provisions, and attracted no attention until the efforts to bring the United States into the Berne Convention began some ten years later. The Berne implementing legislation was highly controversial; and again there was apparently a disposition among its sponsors not to tinker with what might still be called a "transitional" provision. However, because the Berne implementing legislation finally did away with all formalities going to the life or death of a copyright except renewal registration, it now stands out like a blue carbuncle. Aside from producing human tragedies like those I have seen with my own eyes, it is fundamentally inconsistent with the basic provisions of our copyright law as it exists today.

APPENDIX 22.—LETTER FROM PATRICK J. GRIFFIN, GRIFFIN/JOHNSON AND ASSOCIATES, TO HON. WILLIAM J. HUGHES, CHAIRMAN, TRANSMITTING A STATEMENT OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., JUNE 19, 1991

GRIFFIN/JOHNSON

AND ASSOCIATES

June 19, 1991

The Honorable William Hughes
Chairman, Subcommittee on Intellectual Property,
And Judicial Administration
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Mr. Ed Murphy, President of the National Music Publishers' Association, has asked me to forward to you a statement the Association would like to have entered into the hearing record on H.R. 2372, the Copyright Renewal Act of 1991.

The National Music Publishers' Association strongly supports the adoption of this legislation and appreciates the leadership you have provided in moving this measure through the Subcommittee.

I hope the Association's statement will be made a part of the official hearing record. If this is not possible, I would appreciate it if you would have someone on the Subcommittee staff contact me.

Sincerely,

Patrick J. Griffin

Enclosure

National Music Publishers' Association • Inc.

205 EAST 42 STREET, NEW YORK, N.Y. 10017 • (212) 370-5330 • CABLE ADDRESS: HAFOX
TELEX: 237441 HAFOX UR

H. R. 2372
Statement of the National Music Publishers' Association, Inc.
Before the Subcommittee On Intellectual Property and Judicial Administration
House Judiciary Committee
102nd Congress, First Session
June 20, 1991

Mr. Chairman, the National Music Publishers' Association, Inc. (NMPA) welcomes this opportunity to submit a statement in support of Title II of H.R. 2372, the Copyright Renewal Act of 1991, which is the subject of hearings today. NMPA is extremely grateful to you, Mr. Chairman, and to Mr. Moorhead for taking the lead in introducing this important legislation.

NMPA is the trade association for the American music publishing industry. We represent more than four hundred music publisher members, including virtually all of the most active and influential music copyright owners in the United States. Through their partnerships with composers and songwriters, our music publisher members help to cultivate and market the music which has made this country the most economically and culturally successful music producer in the world.

The Copyright Renewal Act of 1991 will mitigate the unfairly harsh, confiscatory effects on creators and copyright owners of failing to satisfy the copyright renewal technicalities of the 1909 Copyright Act. The proposed legislation provides for automatic renewal of pre-1978 copyrighted works published under the 1909 Act at the end of their first twenty-eight year term of protection. Thus, accidental and sometimes catastrophic forfeitures of copyrights eligible for renewal between 1991 and 2005 will be avoided. Renewal of post-1978 works is not required under the new 1976 Copyright Act.

The American intellectual property community would greatly benefit from elimination of the danger of inadvertent lapsing of pre-1978 works into the public domain due to a technical failure of the creator or copyright owner to properly file for renewal. The well known hit song from the 1950's entitled, "Rockin Robin" is just one example among thousands of copyrighted works unintentionally forfeited by innocent and unsophisticated owners.

In the case of "Rockin Robin," the widow of the songwriter, unaware of the technicalities of the 1909 copyright provisions governing the rights in her only valuable asset, failed to properly renew and was subject to the draconian penalty of divestiture. This tragically unfair result benefits no one.

In actuality, The Copyright Renewal Act of 1991 will help keep works available to the public. The diminished commercial value to merchants of dealing in public domain materials on a necessarily non-exclusive basis often discourages the manufacture and distribution of such works. This often results in the public having *less* access to works after their copyright protection expires. The premature passing of works into the public domain clearly does not represent a windfall gain for the public in any real sense.

Since The Copyright Renewal Act of 1991 also contains significant incentives for copyright owners to continue to formally renewal pre-1978 copyrights with the U.S. Copyright Office, NMPA sees no cogent arguments against its enactment. Copyright Register Ralph Oman supports "fast track" legislative action on this bill, a position which has our firm support.

In conclusion, Mr. Chairman, Congress acted in 1976 to ensure copyright protection to all new works for a minimum of fifty years after the last surviving author's death. In 1988, Congress affirmed the role of our nation as a leader of the world copyright community by enacting the Berne Convention Implementation Act. There is insightful recognition in our country today of the importance to our economy, trade balance, and cultural legacy of strong copyright protections for creative works both at home and throughout the world.

A situation continues to exist, however, whereby certain pre-1978 works accidentally and quite unfairly have their U.S. protection revoked after twenty-eight years--to no one's benefit. NMPA urges that Congress rectify this unfortunate anomaly in the Copyright Law before one more creator or copyright owner loses protection of his or her most valued asset for failure to comply with statutory technicalities established during an era of diminished sensitivity to the importance of intellectual property rights.

Thank you.

APPENDIX 23.—LETTER FROM BERTRAM W. CARP, TURNER BROADCASTING SYSTEM, INC., TO HON. WILLIAM J. HUGHES, CHAIRMAN, JUNE 18, 1991

TURNER BROADCASTING SYSTEM, INC.
WASHINGTON CORPORATE OFFICE
820 First Street, N.E., Washington, D.C. 20002

BERTRAM W. CARP
Vice President
Government Affairs
(202) 898-7880

RECEIVED
JUN 19 1991
Sub on Courts

June 18, 1991

The Honorable William J. Hughes
Chairman
Intellectual Property & Judicial
Administration Subcommittee
House Judiciary Committee
207 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Last week, Turner Broadcasting asked to testify at the June 20, 1991 hearing of the Subcommittee on Intellectual Property and Judicial Administration.

We sought the opportunity to balance testimony presented at the June 6 hearing regarding news monitoring services. Proposals to extend presumptive fair use to news monitoring services have serious implications not only for Turner Broadcasting but for network and local news broadcasters, in general. Also, our ongoing litigation in this area makes Turner Broadcasting particularly concerned about potential Congressional action.

Based on our understanding that you do not favor inclusion of news monitoring provisions in H.R. 2372 because there is not sufficient time to develop a full record, we hereby withdraw our request to testify on June 20. Should the Subcommittee contemplate moving forward with legislation affecting news monitoring services in the future, we would appreciate the chance for ourselves and other interested parties to present our views at that time.

We very much appreciate the attention which you and the Subcommittee staff have given to this matter.

Sincerely,

Bertram W. Carp

BWC/ph

APPENDIX 24.—STATEMENT OF JOSEPH CAYRE, PRESIDENT, GOODTIMES HOME VIDEO CORP., NEW YORK, NY

STATEMENT OF JOSEPH CAYRE ON TITLE II OF HR 2372 SUBMITTED TO SUBCOMMITTEE ON INTELLECTUAL PROPERTY JUDICIAL ADMINISTRATION OF THE HOUSE COMMITTEE ON THE JUDICIARY

I am president of GoodTimes Home Video Corporation of New York, New York. GoodTimes Home Video is now the largest independent distributor of home video cassettes in the United States. Our products appear in most major retail chains, including K-Mart, Wal-Mart, Toys "R" Us and Target Stores.

The success of our company, and the extent of the distribution of our products, is primarily due to one major fact: the retail price of our home video cassettes, usually below $10.00, is affordable for almost everyone. By pursuing this low cost strategy, GoodTimes has allowed millions of American consumers to own, rather than simply rent, home video cassettes.

Much of our product line consists of copyrighted motion pictures licensed from the major studios and other entertainment companies. Currently, GoodTimes is distributing works licensed by RCA/Columbia, MCA (Universal), HBO, Hanna/Barbera and the National Broadcasting Company, among others. GoodTimes is scrupulous in obtaining licenses to use works which are protected by existing copyrights.

Another significant part of our product line consists of works which are not protected by copyright, and which GoodTimes, like anyone else, has the right to reproduce and sell. During the past few years alone, GoodTimes has released to the public for purchase, at low cost, hundreds of public domain motion pictures, documentary compilations, shorts and cartoons which had lain dormant and inaccessible to the public. Examples of these works are the original "Phantom of the Opera" with Lon Chaney, the original, silent "Dr. Jekyll and Mr. Hyde," "Metropolis," and many Charlie Chaplin and Alfred Hitchcock films.

GoodTimes is not alone in this business. Indeed, there are literally hundreds of companies throughout the United States which produce and sell public domain home videos. Competition in this market is vigorous and prices to the consumer are correspondingly low.

One may wonder why, if GoodTimes and others can develop a market in these motion pictures, the copyright owners themselves do not exploit them during the term of copyright. The answer lies in the realities of the motion picture business. Quite simply, its orientation is towards new products, and towards those few older products whose preexisting reputation allows them to be marketed easily. The result is that thousands of works which have been forgotten by motion picture studios, and which are of no interest to them, remain inaccessible to the public.

One example is "This Is the Army", a wonderful 1943 Technicolor musical starring Ronald Reagan and George Murphy. After its initial release by Warner Brothers, the studio never rereleased it or permitted its exploitation in any way. Its copyright was not renewed. After it fell into the public domain, home video companies like ours found it, recognized its historical interest and commercial potential, and distributed it to the public. I am confident that had the automatic renewal provisions been in place, this motion picture would still be inaccessible to the public.

The burden of renewing a copyright on a company like Warner Brothers is minimal. If such a copyright owner has so little interest in a work that it fails to file a simple renewal form, there is no injustice in letting the work become part of the public domain and available to all.

Another example is It's A Wonderful Life, which is cited by the motion picture community as an example of a tragic loss of copyright protection due to failure to renew. I believe that this case illustrates our own point. It's A Wonderful Life had little commercial success at the time of its release, and was of insufficient commercial interest to warrant renewal. Upon expiration of the copyright due to failure to renew, independent home video distributors who recognized its value began its distribution. By having entered the public domain, It's A Wonderful Life has enriched the lives of millions of American citizens who otherwise would have been unlikely to see it.

Injection of forgotten films into the public domain enables collectors and archivists to restore and reassemble motion pictures and television programs which have been literally lost by their copyright owners. For example, GoodTimes has recently released "lost" episodes of Lucille Ball and Red Skelton television programs on which copyrights had not been renewed. These episodes had been in the hands of collectors who, upon expiration of the copyrights, had an economic incentive to restore them. Automatic renewal would have consigned these works to obscurity for another 47 years.

GoodTimes Home Video recognizes and understands the problems of individual authors and composers whose rights are cut off due to an inadvertent failure to renew. We agree with the statements of Representative Hughes and the witnesses at the hearing on June 20, 1991 which reflected concern for the individuals whose widows and heirs are adversely affected by failure to observe the technical requirements for renewal. We do not oppose HR 2372 as it applies to such individual authors.

However, it is our view that these policy considerations simply do not apply in the case of composite works, works copyrighted by a corporate body, or by an employer for whom the work was made for hire. In all of these cases, copyright renewal must be effectuated not by the author, but by the "proprietor" of the work. Invariably these proprietors are corporations or persons whose businesses are oriented to the production and protection of copyrighted works.

We propose that a balance be struck between the legitimate needs of individual authors and composers on the one hand, and the interest of the public in enjoying works which have been long forgotten by corporate copyright owners on the other. Accordingly, we propose an amendment to H.R. 2372 which would require an affirmative renewal of copyright only for works enumerated in proposed amended Section 304(a)(1)(B) (i.e., posthumous works, composite works, works copyrighted by a corporate body otherwise than as assignee or licensee, and works made for hire, hereafter referred to collectively as "Paragraph 1(B) Works.") Automatic renewal for all other works would be left intact.

Different treatment of renewal for Paragraph 1(B) Works is further justified by the fact that the practical need for renewal registrations on these works is greater. It has already been noted by others that there is a public benefit to having renewal registration, namely, making it easier for persons desiring to acquire or obtain a license under a copyright to know whom to ask for these rights. In the case of works created by individual authors, the renewal right belongs to the author or his heirs, making it fairly easy to determine whom to approach. However, the renewal right for Paragraph 1(B) Works belongs to "the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright."

Determining who this is 28 years after publication is no easy task. Copyrights in motion pictures are often transferred and licensed many times during the decades after publication. It is very often the case that the "proprietor" of the copyright 28 years after publication may be far removed from the initial copyright holder, and that the original copyright registrant has no idea as to who presently owns the rights. Without a renewal registration, we don't know who to contact to inquire about the possibility of obtaining a license for home video distribution. The result is that motion pictures that could otherwise be available to the public lie unexploited.

In our view, renewal registration benefits copyright owners. With registration, owners increase their chances of being contacted by those seeking licenses for the work. At the same time, the renewal system releases to the public domain those works which are no longer of commercial interest to the corporate proprietors.

We find a second troubling aspect to Title II of HR 2372 as drafted. It is not clear from the text of the bill that a work will have to have been registered in its first term of copyright protection in order to qualify for an automatic renewal. To permit automatic renewal of a work which was never registered will create an effective term of 75 years from publication, without any requirement of registration. This would create a retroactive effect to the legislation which may not be intended by the drafters. Accordingly, the attached proposed amendment codifies the requirement of a first-term registration as a prerequisite to renewal of all works.

We appreciate the opportunity to be heard on this issue. I hope that the subcommittee will consider our comments and incorporate our proposal into H.R. 2372.

3791/87463
(AB/26)

PROPOSED AMENDMENT TO HR 2372

-- In the proposed amended §304(a)(1)(B), add at the end of that subparagraph "but only if the copyright was registered during the first term."

-- In the proposed amended §304(a)(1)(C), add at the end of that subparagraph "but only if the copyright was registered during the first term."

-- Delete the proposed amendment to 17 U.S.C. §304(a)(2)(A) and substitute the following therefor:

> (2)(A) At the expiration of the original term of copyright in a work specified in paragraph 1(B) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, only if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, by the proprietor of the copyright who is entitled to claim renewal at the time the application is made, and the claim is registered.

-- In the proposed amended §304(a)(3)(A)(ii), delete, in the third line therein, "(A) or."

-- In the proposed amended §304(a)(3)(B), add, at the beginning thereof: "With respect to works specified in paragraph 1(C) of this subsection..."

-- In the proposed amended §304(a)(4)(A), line 2, add the following words after "work": "specified in paragraph 1(C) of this subsection."

(AB/26)

APPENDIX 25.—LETTER FROM JACK GOLODNER, PRESIDENT, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, JUNE 25, 1991

Department for Professional Employees, AFL-CIO
815 16th Street, N.W., Washington, D.C. 20006 Phone 202/638-0320

June 25, 1991

Honorable William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515

Re: HR 2372

Dear Chairman Hughes:

I strongly support the addition of a cinematographer seat to the National Film Preservation Board, as contemplated in H.R. 2372, and endorse the International Photographers Guild for that seat. The Guild, through its parent organization, the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada (IATSE), is an affiliate of this Department which comprises 28 national and international union organizations representing approximately three million professional and highly trained technical workers employed in the arts, sciences and professions. The Department is the largest interdisciplinary organization of such people in the nation.

In our view, the International Photographers Guild is eminently suited to nominate cinematographers to the National Film Preservation Board because of its size--it represents more than 3000 members as opposed to the 165 members of the American Society of Cinematographers (ASC)--and because it is a union, thus accountable by law to its members. Most, though not all, members of the ASC are also Guild members.

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page 2

Should the Guild not be involved in nominating a cinematographer to the Board, it is possible that an ASC member would be nominated to the Board who is not a member of the Guild. Such a result would be a disservice to the major organization of cinematographers in the U.S. as well as to the Board.

Thank you very much for your consideration of this matter.

Sincerely,

Jack Golodner
President

cc: Hayden Gregory

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