

# COMMENTS

## WHAT IS FAIR USE?

LEON R. YANKWICH\*

For a long time I have had the conviction that writers in the fields of ideas—political, social, scientific and other—have been cowed into the belief that a reasonable use of copyrighted materials of others in the same field is not safe without permission from the owners of the copyright, and that, in this manner, reasonable access to such materials, in the interest of progress of ideas, is being discouraged and impediments are placed in the path of the scholar and writer in these fields. The condition has been aided by the policy adopted by publishers of inserting, after the copyright notice, statements in substance as follows: "All rights in this book are reserved. No part of the book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews. For information address Smudgefree Printers, Inc., 1075 Oak Mill Lane, Copenhagen, Wisconsin." In compliance with such notices, many recent books dealing with political and social problems contain, *literally*, pages of credits identifying quoted paragraphs.

### I. THE NATURE OF COPYRIGHT PROTECTION

The source of copyright legislation in the United States is the constitutional provision which authorizes the Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."<sup>1</sup> This enables the Congress to pass legislation to protect the writer after publication of his work. And the courts have interpreted the constitutional grant, so far as the nature of work is concerned, very broadly, by holding recently that a statuette was copyrightable.<sup>2</sup> The protection of the work after it is published is additional to the proprietary right of the author in his manuscript recognized at common law,<sup>3</sup> which is specifically retained by the copyright law.<sup>4</sup>

Statutory copyright in the United States was based on the first English

\* Chief U.S. District Judge, Southern District of California.

<sup>1</sup> U.S. Const. Art. 1, § 8.

<sup>2</sup> *Mazer v. Stein*, 347 U.S. 201 (1954).

<sup>3</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346-49 (1908).

<sup>4</sup> 61 Stat. 652 (1947), 17 U.S.C.A. § 2 (1952).

statute adopted in 1710,<sup>5</sup> which specifically recognized the exclusive right to copy and publish works. Students of English history in this field point to the fact that the theory behind English copyright law had its origin in the rights granted to patentees under royal grants and to lawfully licensed printers in copies entered in the records of the Stationers Company.<sup>6</sup>

Before the adoption of the American Constitution in 1787, several of the original states, including Massachusetts, New Hampshire and New York, had local copyright acts.<sup>7</sup> After the Constitution was adopted, Congress enacted the first copyright act in 1790, which set the pattern followed since, by giving protection to authors for a limited period, fourteen years, and the right of renewal for fourteen more years. The period has since been increased to twenty-eight years with a renewal or extension of the copyright by the proprietor thereof in certain instances, and by the heirs of the author in other instances for a like period of twenty-eight years.

## II. WHAT COPYRIGHT IMPLIES

Essentially, copyright confers the right of printing or multiplying copies of an original work of art or literature and of publishing and selling it to the exclusion of others.<sup>8</sup> It is, in effect, as the Court of Appeals for the Second Circuit has had occasion to say, a monopoly "to prevent others from reproducing the copyrighted work."<sup>9</sup> However, unlike the monopoly conferred by a patent, it is not absolute. The patent monopoly grants the absolute and exclusive right to use the patented article. Copyright, on the contrary, is subject to the right of all persons into whose possession the work comes to make "fair use" of it.<sup>10</sup> The principle has been restated repeatedly.<sup>11</sup>

<sup>5</sup> 8 Anne, c. 19 (1710). See Copinger and James, *The Law of Copyright* 1-21 (8th ed., 1948).

<sup>6</sup> Siebert, *Freedom of the Press in England 1476-1776*, at 74 (1952).

<sup>7</sup> *Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co.*, 59 F. 2d 70, 72 (C.A. 1st, 1932).

<sup>8</sup> *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 19 (C.A. 2d, 1906); *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83, 94-95 (C.A. 2d, 1922); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290, 291 (1907). The most recent revision of the American Copyright Act [61 Stat. 652 (1947), 17 U.S.C.A. (1952)], while recognizing this feature of copyright [*ibid.*, at § 1(a)], has spelled out specifically many other rights as implicit in copyright, such as translation [*ibid.*, at § 1(b)], reading in public [*ibid.*, at § 1(c)], presentation of a dramatic work [*ibid.*, at § 1(d)], and performance of a musical composition [*ibid.*, at § 1(e)]. This codification puts an end to some doubts which existed as to certain of these matters. However, for the purpose of the present discussion, the definition which is embodied in § 1(a) is sufficient.

<sup>9</sup> *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86, 88 (C.A. 2d, 1940).

<sup>10</sup> 18 C.J.S., *Copyright and Literary Property* § 92 (1939).

<sup>11</sup> The enunciated principle has been applied to a great variety of publications: *West Pub. Co. v. Edward Thompson Co.*, 169 Fed. 833, 861 (E.D. N.Y., 1909); *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833 (C.A. 2d, 1910) (citations and syllabi in law books); *Dun v. International Mercantile Agency*, 127 Fed. 173 (S.D. N.Y., 1903) (names of persons and businesses in credit-rating book); *Sampson & Murdock Co. v. Seaver-Radford Co.*,

The difficulties of defining strictly what constitutes "fair use" were stated by Mr. Justice Story, sitting on circuit:

So, in cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases, the identity of the two works in substance, and the question of piracy often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.<sup>12</sup>

These difficulties led to the formulation of the principle that whether there has been "fair use" or not is a pragmatic question to be determined by the court, taking into consideration the particular circumstances of each case.<sup>13</sup> Certain general criteria are given by the Court of Appeals for the District of Columbia: "the value of the part appropriated; its relative value to each of the works in controversy; the purpose it serves in each; how far the copied matter will tend to supersede the original or interfere with its sale; and other considerations."<sup>14</sup>

### III. IDEAS, SYSTEMS AND COMPENDIA

In considering the matter, we treat briefly the borrowing of abridgments or digests, of methods or systems,<sup>15</sup> and of general ideas.<sup>16</sup> Since 1909 the

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140 Fed. 539 (C.A. 1st, 1905) (city directory). This case has an excellent statement of the general principle which has been quoted often. *Ibid.*, at 540-42. *Carr v. National Capital Press*, 71 F. 2d 220 (App. D.C., 1934) (cards portraying historical character); *Leon v. Pac. Tel. & Tel. Co.*, 91 F. 2d 484 (C.A. 9th, 1937) (telephone directory); *Amsterdam v. Triangle Publications*, 189 F. 2d 104 (C.A. 3d, 1951) (maps). And consult *Amdur, Copyright Law and Practice* 754-82 (1936); 2 *Ladas, The International Protection of Literary Property* 805-6 (1938); *Miller, Fair Use*, 2 *So. Calif. L. Rev.* 249 (1942); *Lindley, Plagiarism and Originality* 10-11 (1952); *Howell, The Copyright Law* 125-217 (1952); *Spring, Rights and Risks* 176-88 (1952). For additional cases see note 15 *infra*.

<sup>12</sup> *Folsom v. Marsh*, 2 Fed. Cas. 342, 343-44, No. 4901 (1841).

<sup>13</sup> 18 C.J.S., *Copyright and Literary Property* § 94 (1939).

<sup>14</sup> *Carr v. National Capital Press*, 71 F. 2d 220 (App. D.C., 1934).

<sup>15</sup> See *Baker v. Selden*, 101 U.S. 99 (1879), which, while holding that a bookkeeping system could be copyrighted, ruled that such copyright did not prevent use of the system by others. And see *Taylor Instrument Companies v. Fawley-Brost Co.*, 139 F. 2d 98 (C.A. 7th, 1943) (denying copyrightability to a chart used in connection with recording thermometer); *Crume v. Pacific Mut. Life Ins. Co.*, 140 F. 2d 182 (C.A. 7th, 1944) (where the court, while conceding copyrightability to a plan for reorganizing insolvent insurance companies, permitted use of plan by others); *Dorsey v. Old Surety Life Ins. Co.*, 98 F. 2d 872 (C.A. 10th, 1938), 119 A.L.R. 1250 (involving originality of forms of contracts of insurance); *Brief English Systems v. Owen*, 48 F. 2d 555, 556 (C.A. 2d, 1931) (shorthand system); *Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S.D. N.Y., 1942) (drawing showing

right to abridge has been governed by statute, which specifically grants the exclusive right to the owner of the copyright to make any other version of it, if it be a literary work.<sup>17</sup> Methods or systems relating to the arts and sciences may be appropriated by others, the only limitation being that the original form in which they were expressed be not imitated too closely or taken over completely. The reason for the rule was given by the Supreme Court:

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.<sup>18</sup>

The danger of denying the application of the doctrine of "fair use" to publications in this category was pointed out in a well-known case:

The words "unfair use," while having a broader meaning with respect to the appropriation of earlier writings by a work covering substantially the same ground, and supplanting the earlier book, than they have in the acquirement of knowledge upon the part of a student of the field treated by the publication, cannot, nevertheless, be arbitrarily made to be equivalent to no use at all, outside of consultation, in verifying the ground covered and the subjects or cases comprised in the earlier work. . . . [W]riters of books would be deprived of the proper growth in knowledge, and from taking advantage of the position to which the earlier writers had carried the science under consideration.<sup>19</sup>

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novel approach to bridge); *Simms v. Stanton*, 75 Fed. 6 (N.D. Calif., 1896) (books on the subject of physiognomy); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S.D. N.Y., 1941) (use of architect's forms); *Stone & McCarrick, Inc. v. Dugan Piano Co.*, 210 Fed. 399 (E.D. La., 1914) (use in advertisement of salesmanship system described in book); *Christianson v. West Pub. Co.*, 149 F. 2d 202 (C.A. 9th, 1945) (map).

<sup>16</sup> Consult *Yankwich, Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 461-71 (1951); *Nimmer, The Law of Ideas*, 27 So. Calif. L. Rev. 119 (1954). See *Nutt v. National Institute for the Imp. of Memory*, 31 F. 2d 336 (C.A. 2d, 1929).

<sup>17</sup> 61 Stat. 652 (1947), 17 U.S.C.A. § 1(b) (1952). This was merely a codification of what had been recognized as the law of England for a long time. Indeed, one of the most interesting of the older cases involved the abridgment of a book on equity jurisprudence written by Mr. Justice Story. *Story v. Holcombe*, 23 Fed. Cas. 171, No. 13497 (1847).

<sup>18</sup> *Baker v. Selden*, 101 U.S. 99, 103 (1879).

<sup>19</sup> *West Pub. Co. v. Edward Thompson Co.*, 169 Fed. 833, 866 (E.D. N.Y., 1909). Consult also cases cited note 11 supra. And see *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922 (C.A. 2d, 1903). One of the earliest cases involving plagiarism of law digests is *Saunders v. Smith*, 3 My. & Cr. 711 (1838). But neither under the guise of borrowing ideas nor under the claim of "fair use" can one take a scene or sequence in a dramatic production (*Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. 2d 354

Denial of proprietorship in ideas, whether copyrighted or not, is not grounded, strictly speaking, upon any theory of "fair use." Rather, it stems from the assumption which has always obtained, whether dealing with copyrighted or uncopyrighted material, that ideas are the common property of mankind and an author acquires only the right to the manner in which he expresses them or the form in which he embodies them. Back of this is the norm that copyrightability is denied when there are public rights in the material sought to be protected.

#### IV. REVIEWS, CRITICISMS AND COMMENTARIES

Of the cases involving actual appropriation of portions of the work of an author using his words without modification, the most common are reviews, criticisms and commentaries.<sup>20</sup> This is conceded even by the publishers, for in the warning notice, of which I spoke at the beginning of this article, the right to quote portions of a book in a review is specifically granted. In truth, the right exists not by virtue of any direct grant on the part of author and publisher, but by virtue of the application of the judicial doctrine of "fair use" as evolved in England and the United States. A succinct statement of the principle is found in a case decided over eighty-five years ago: Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book.

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[C.A. 9th, 1947]), or the entire development of a play (*Sheldon v. Metro-Goldwyn Picture Corp.*, 309 U.S. 390, 397 [1940]). In the *Harold Lloyd* case fifty-seven consecutive comedy scenes or twenty per cent of a feature were appropriated. In the *Sheldon* case the Court concluded that the play had been appropriated in its entirety.

<sup>20</sup> For this reason, we need not discuss in detail imitations or parodies. However, it should be stated that a parody on the singing of a chorus by another actress is fair use. *Bloom & Hamlin v. Nixon*, 125 Fed. 977, 978 (C.C. Pa., 1903); *Remick & Co. v. American Automobile Accessories Co.*, 298 Fed. 628, 632 (S.D. Ohio, 1924); *Green v. Minzensheimer*, 177 Fed. 286 (C.C. N.Y., 1909). However, a parody on an entire song is an infringement. *Green v. Luby*, 177 Fed. 287, 288 (C.C. N.Y., 1909). Even the use of a single musical phrase, if it is outstanding, may be forbidden. See *Boosey v. Empire Music Co.*, 224 Fed. 646 (S.D. N.Y., 1915) ("I hear you calling me"). But cf. *Darrell v. Joe Morris Music Co.*, 113 F. 2d 80 (C.A. 2d, 1940), and the writer's opinion in *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199 (S.D. Calif., 1942), for instances where such imitated phrases were traced to common sources in the public domain. And the publication of copies of the lyrics or of a chorus in a book of songs is an infringement. *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. 2d 282 (C.A. 8th, 1939). A parody does not seem to be considered an infringement in England. See *Glyn v. Weston Feature Film Co.*, [1915] 1 Ch. 261, 268 (1916) (vulgar parody of novel "Three Weeks"); *Carlton v. Mortimer, MacGillivray Copy. Cas.* (1917-1923) 194 (1920) (burlesque of scenes from "Tarzan of the Apes"). Of interest in this connection is an English decision in which a reply song entitled "You Didn't Want To Do It, But You Did" was held not to infringe the copyrighted song entitled "You Made Me Love You (I Didn't Want to Do It)." *Francis, Day and Hunter v. Feldman & Co.*, [1914] 2 Ch. 728, 734. As to the circumstances under which characterization might be protected under the doctrine of unfair competition, see *Chaplin v. Amador*, 93 Calif. App. 358, 362-63, 269 Pac. 544, 546 (1928); *Jones v. Republic Productions, Inc.*, 112 F. 2d 672 (C.A. 9th, 1940); and see *Yankwich*, op. cit. supra note 16, at 465-70.

Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the work reviewed.<sup>21</sup>

It is significant that this case, *following the English cases, does not* place a limit upon the quantity to be used. On the contrary, it says that a quoted amount is permissible if sufficient to enable the reviewer correctly to evaluate the book. Subsequent cases have emphasized this point.<sup>22</sup>

The real test involves consideration of (a) the value of the quoted portion, and (b) its effect in serving as a substitute for the original work. The test has been stated to be whether the review or comment has reproduced so much "as will materially reduce the demand for the original," not by reason of adverse criticism but because the publication so fully discloses the contents of the book.<sup>23</sup> This principle also applies to other writings, not properly reviews, which duplicate the copyrighted work and diminish the demand for it. Thus, the principle of "fair use" was denied application where an infringer copied word lists, with additions, from copyrighted books for the study of the French language by students preparing for examinations:

Although the word lists constitute only a small proportion—less than 15 per cent—of the printed matter included in the present editions of both parties' publications, it is evident that they are of real importance. . . . Both plaintiff's and defendant's books met exactly the same demand on the same market, and defendant's copying was unquestionably to avoid the trouble or expense of an independent work. This is an unfair use.<sup>24</sup>

In another case, the use of only three sentences from a medical book by an advertiser who intended to advance the sale of cigarettes was held to be unfair because of the importance of the material taken.<sup>25</sup> And, although news as such is not the subject of copyright, rights in an interpretive article concerning the hopes of Germany during the First World War were held infringed by an article which expounded the same ideas in paraphrase. To the contention that the portion appropriated was small, the court replied that the transgression was "not to be neutralized on the plea that 'it is such a little one.'"<sup>26</sup>

What precedes indicates that whether we deal with books or other publications, the pattern which determines "fair use" is the same.

<sup>21</sup> *Lawrence v. Dana*, 15 Fed. Cas. 60, No. 8136 (1869).

<sup>22</sup> *Folsom v. Marsh*, 2 Fed. Cas. 342, No. 4901 (1841).

<sup>23</sup> *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S.D. N.Y., 1914).

<sup>24</sup> *College Entrance Book Co. v. Amsco Book Co.*, 119 F. 2d 874, 876 (C.A. 2d, 1941).

<sup>25</sup> *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa., 1938). In this case, the court also held that acknowledgment of the copyrighted source does not relieve the defendants of liability for using for commercial purposes copied scientific material. See *Toksvig v. Bruce Pub. Co.*, 181 F. 2d 664, 666 (C.A. 7th, 1950).

<sup>26</sup> *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 Fed. 797, 799 (C.A. 7th, 1921).

If the amount reproduced is legitimately necessary to review the book, or is a part of a scientific or other exposition of the subject, in which the theories expounded by others must be discussed, the use, *regardless of quantity*, is fair. If, on the other hand, the appropriation of the copyrighted product of another is motivated by the desire to derive commercial benefit, the use, *regardless of quantity*, is unfair.<sup>27</sup> The reason is apparent. The author of a copyrighted book invites reviews, comments and criticism. And if his book deals with any of the sciences, portions of it may be used by others in the same field as a starting point for further development;<sup>28</sup> not so by the advertiser who seeks to capitalize on another's contribution to knowledge.

An interesting case in which the court implied an "invitation" to use a song arose in Wisconsin some years ago. The plaintiff had copyrighted a song dedicated to a professional football team known as "The Green Bay Packers." The song was adopted as the official song of the team. *The Saturday Evening Post*, in a feature about the team, alluded to the song, properly attributing it to the author, and, after stating that "when the band strikes up, the fans still join in the chorus," reproduced the chorus of eight lines. The author sued. In granting a motion to dismiss, the court said:

The article in the "Post" containing the eight lines of the chorus was in no manner competitive with the song itself. No music was set forth and it is very difficult to see how the value of the song could in any manner have been diminished by the article in question. . . . When the plaintiff dedicated the song to the Green Bay Packers, by implication at least he consented to a reasonable use thereof associated with the Packers.<sup>29</sup>

A similar ruling was made when on the death of actress Pearl White, who had appeared in a series of silent motion pictures entitled "The Perils of Pauline," *The New Yorker* published a story, as a part of which it printed the chorus of a song entitled "Poor Pauline" with which the actress' name had been associated.<sup>30</sup>

#### V. OTHER INSTANCES: THE CONTINUITY OF JUDICIAL THOUGHT

It is characteristic of the continuity of judicial thought that the conclusions arrived at in the late cases are a restatement of old principles evolved first by English judges after the enactment of the copyright statute of Anne<sup>31</sup> and afterwards by American judges.

In fact, the criteria evolved in the American cases stem from a statement

<sup>27</sup> *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa., 1938).

<sup>28</sup> The courts imply consent to use in the interest of advancement of science. *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 Fed. 539, 541 (C.A. 1st, 1905). See *Oxford Book Co. v. College Entrance Book Co.*, 98 F. 2d 688, 691 (C.A. 2d, 1938).

<sup>29</sup> *Karell v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E.D. Wis., 1941).

<sup>30</sup> *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S.D. N.Y., 1940).

<sup>31</sup> 8 Anne, c. 19 (1710).

by Mr. Justice Story while sitting on circuit, which summed up the matter in this way:

In short, we must often, in deciding questions of this sort, 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. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy.<sup>32</sup>

In that case the plaintiffs had published and caused to be copyrighted a twelve-volume work on "The Life and Writings of George Washington," consisting chiefly of extracts from his writings. The defendants produced a two-volume work entitled "The Life of Washington." A master found that out of the 866 pages of the material found in the defendants' book, 353 (discarding fractions) had been taken from the plaintiffs' work; 319 of these pages consisted of material such as letters and the like, which had first been published by the plaintiffs. The remaining 34 pages had appeared, with variations, in other works than those of the plaintiffs. But the master found that they were taken from plaintiffs' works. Notwithstanding the fact that most, if not all, the material consisted of the official and private writings of Washington, Mr. Justice Story sustained the findings of the master. After laying down the general principle, he concluded that the appropriation of such a large part of the plaintiffs' work, forming, as it did, the basis of the defendants' book, was a clear invasion of the plaintiffs' property right.

These conclusions found support in the decisions of English judges interpreting the first English copyright statute. Some of these cases may be given in brief review.

In one such case,<sup>33</sup> the plaintiff, as a result of his travels to Sicily and Greece, had published a book entitled "The Antiquities of Magna Graecia," with prints from drawings made by him, which he had copyrighted. The defendant published a book entitled "An Essay on the Doric Order of Architecture," in which he copied several plates and prints of the plaintiff's work. To the contention that the work was an abridgment, the Chancellor, Lord Eldon, said:

There is no Doubt, that a Man cannot under the Pretence of Quotation, publish either the Whole or Part of another's Work; though he may use, what it is in all

<sup>32</sup> *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4901 (1841).

<sup>33</sup> *Wilkins v. Aikin*, 17 Ves. 422 (1810).



Cases difficult to define, fair Quotation. . . . The Question upon the whole is, whether this is a legitimate Use of the Plaintiff's Publication in the fair Exercise of a mental Operation, deserving the Character of an original Work. The Effect, I have no Doubt, is prejudicial.<sup>34</sup>

In another case<sup>35</sup> plaintiff had copyrighted a book on roads. The defendant published a similar work in which the names of places and other data were the same. Indeed, several errors which had crept into the plaintiff's book in the printing found their way into the defendant's. Lord Ellenborough stated the problem which he would submit to a jury in this manner:

That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action. . . . Look thro' the book, and find any part that is a transcript of the other; if there is none such; if the subject of the book is that which is subject to every man's observation; such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when, in the defendant's book there are additional observations, and in some part of the book I find corrections of misprinting . . . while I shall think myself bound to secure every man *in the enjoyment of his copy-right, one must not put manacles upon science.* (Emphasis added.)<sup>36</sup>

After Lord Ellenborough said that he would address these observations to the jury, leaving it to them to determine whether the material was taken with a view of compiling a useful book in which the matter taken was rearranged or "taken colorable merely with a view to steal the copy-right of the plaintiff," counsel for the plaintiff, who was the great Thomas Erskine, *sensing defeat*, consented to a nonsuit.

These were some of the precedents which in early days the American judges, including Story, followed. In turn, later English judges felt that Story had so eloquently transmuted the rulings of these cases into his own precise language<sup>37</sup> that they cited his formulation with approval. A case arose in which the plaintiff had copyrighted statistical returns relating to the importation of coal into London, which he published annually, and the defendant published under the authority of the Lords of the Treasury a work giving the statistics relating to all minerals of the United Kingdom for a period of years, in which he included the returns compiled by the plaintiff for a period of nine years.<sup>38</sup> These constituted one-third of the defendant's work. He indicated the plaintiff's charts as the source, which was, as the opinion says, "prominently acknowledged." In reviewing the law on the subject, Sir

<sup>34</sup> *Ibid.*, at 424; cf. *Roworth v. Wilkes*, 1 Campbell's Rep. 94 (1807).

<sup>35</sup> *Cary v. Kearsley*, 4 Esp. 168 (1802).

<sup>36</sup> *Ibid.*, at 170.

<sup>37</sup> *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901 (1841).

<sup>38</sup> *Scott v. Stanford*, L.R. 3 Eq. 718 (1867).

W. Page Wood, the Vice Chancellor, paid tribute to Story by saying of the passage quoted above: "The general principles guiding the Court in cases of this description could hardly be found better stated than in the . . . words, used by Mr. Justice Story."<sup>39</sup> He then held that the appropriation exceeded the limits of "fair use," because, while the defendant could check his results with plaintiff's tables, he could not simply avail himself of the vital part of plaintiff's work.

## VI. CONDITIONS DETERMINING "FAIR USE"

In the main, the rulings of the American courts have followed the direction which the English judges, who were first in the field, established; even to the reasoning which the English courts applied to abridgments or encyclopedic works.<sup>40</sup>

In sum, the cases discussed in the preceding text and notes, English and American, show uniform application of the principles of "fair use" in the following instances:

- (a) the general borrowing of ideas;<sup>41</sup>
- (b) the imitation of methods or systems;<sup>42</sup>
- (c) abridgments and compendia;<sup>43</sup>
- (d) reviews, commentaries and criticisms;<sup>44</sup>
- (e) synopses or digests;<sup>45</sup>
- (f) scenes or themes or plays;<sup>46</sup>
- (g) satires, parodies or impersonations;<sup>47</sup>
- (h) textbooks and encyclopedias, legal or other;<sup>48</sup>
- (i) the taking of scientific or other ideas as a starting point for development of one's own;<sup>49</sup>

<sup>39</sup> *Ibid.*, at 722.

<sup>40</sup> *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833 (C.A. 2d, 1910).

<sup>41</sup> Authorities cited notes 16 *supra* and 53 *infra*.

<sup>42</sup> Cases cited notes 11 and 15 *supra*.

<sup>43</sup> Authorities cited notes 17-19 *supra*.

<sup>44</sup> Cases cited notes 21 and 22 *supra*. And see *Lawrence v. Dana*, 15 Fed. Cas. 261, No. 8136 (1869); *Hanfstaengl v. Empire Palace Limited*, [1894] 3 Ch. 109, 123.

<sup>45</sup> Cases cited notes 11 and 19 *supra*. And see *G. Ricordi & Co. v. Mason*, 201 Fed. 182 (S.D. N.Y., 1911).

<sup>46</sup> Cases cited note 19 *supra*.

<sup>47</sup> Cases cited note 20 *supra*. See *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S.D. N.Y., 1914).

<sup>48</sup> Cases cited notes 11, 19, and 24 *supra*. See *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F. 2d 82 (C.A. 6th, 1928); *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D. N.Y., 1950).

<sup>49</sup> Cases cited notes 27 and 28 *supra*. And see *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (C.A. 6th, 1943).

- (j) compilations, such as statistical data, road and other maps and the like;<sup>50</sup>
- (k) reproduction of part of the words of a song in an article dealing with personalities;<sup>51</sup>
- (l) reprinting of the substance of news articles or editorials.<sup>52</sup>

In determining whether there is "fair use" of the copyrighted material in any of the cases enumerated, the courts are governed by the exigencies of each situation. Given the diversity of instances, it is inevitable that no rigid rules can be applied to all situations. Nevertheless, certain tests have been evolved to determine whether the taking of copyrighted material does or does not exceed the limits of "fair use." They require consideration of (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication.<sup>53</sup> The first two elements are the subject of quantitative or qualitative analysis. As such, they are capable of measurement. The third element is, to some extent, conjectural. Whether a "substitution" exists is difficult to determine. The assumption, however, is that if the work is a compendium of, or of a substantial portion of, the copyrighted book, persons interested in the topic may well be satisfied with the information they receive through the pirated publication. If that can reasonably be inferred, the conclusion is warranted that substitution has occurred.

On the whole, the tests are pragmatic. They strike a scrupulous balance

<sup>50</sup> Cases cited notes 33, 34, and 40 supra.

<sup>51</sup> Cases cited notes 20, 29, and 30 supra.

<sup>52</sup> *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 Fed. 797 (C.A. 7th, 1921).

<sup>53</sup> See *New York Tribune, Inc. v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D. N.Y., 1941) (copy of editorial and masthead); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (C.A. 6th, 1943) (artist's sketch of mechanical device); *De Acosta v. Brown*, 146 F. 2d 408, 410 (C.A. 2d, 1944) (original treatment of scene from life of historical character); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 360 (C.A. 9th, 1947) (sequence in motion picture); *Markham v. A. E. Borden Co.*, 206 F. 2d 199 (C.A. 1st, 1953) (advertiser's catalog). The English Copyright Act of 1911 (1 and 2 George V, c. 46) has codified the principle of "fair use" under the name of "fair dealing" by excluding from the acts constituting infringement: "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary" [§ 2(1)(i)]. As the English courts interpret this section, the courts must first determine whether there had been substantial taking of material, after which they must determine whether the act constitutes "fair dealing." In *Johnstone v. Bernard Jones Publications*, [1938] 1 Ch. 599, 603, the court interpreted this proviso as affording "an additional protection to the defendants in copyright actions in the case of the acts specified in that proviso." Thus the test of substantiality still remains. See Copinger and James, *The Law of Copyright* 135-36 (8th ed., 1948). A similar provision is contained in the Canadian statute of 1921, R.S.C. (1927) c. 32, § 17(i) (Copyright Act). Canadian courts have followed English precedents both as to "fair use" and "fair dealing." See Fox, *The Canadian Law of Copyright* 348-62, 425-32 (1944). (The text of the Canadian statute is at 625-48.)

Article 10 of the International Convention recognizes the right of "fair use." See 1 Ladas, *International Protection of Literary and Artistic Property* §§ 251-62 (1938).

between the right of the author to the product of his creative intellect and his imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the constitutional mandate<sup>54</sup> in which the American law of copyright originated.

### CONCLUSION

From what precedes, certain conclusions are inescapable. The right of "fair use" is a judicial concept evolved by English and American judges in interpreting modern copyright statutes. While some cases speak of "invitation" to copy, the right does not stem from any *direct* permission from the author. Rather, the courts imply that the contents of certain writings are such as to call for the use of portions of them by others. At all times, reviews and literary criticisms of books in any branch of knowledge have been essential to their success. So the courts take the view that when an author publishes a book, he "invites" critics, reviewers, and men working in the same field to subject the book to analysis and criticism. If in performing this task they need to excerpt passages from the book, they are free to do so. The publisher cannot, either by the type of notice which has been reproduced in the first part of this article, or by others which limit quotations in reviews to 250 or 500 words, delimit the scope of use to be made. What is "fair use" is to be determined by judicial criteria, not by the copyright owner's fiat.

Along the same line, the author of a book dealing with any of the sciences calls upon others in the field to analyze its contents and subject its ideas to criticism. So doing, they are free to give a fair summary of its doctrines, with quotations, as a starting point for the unfoldment of their own ideas. An arbitrary rule, conformance to which would be obligatory in all cases, would ill serve the advance of the arts, ideas, and sciences in which the public has an interest.

Every writer is entitled to full enjoyment and protection of his rights in the product of his mind or creative imagination. Any legitimate use of his material by others should be properly acknowledged. Courts should protect the writer against distortion of his work, even by those who have acquired rights to it, thus recognizing what has come to be known as the "moral right" of authors.<sup>55</sup> But even the recognition of such a right would not sanction a narrow limitation of the right of "fair use" as evolved in over two centuries of Anglo-American jurisprudence.

<sup>54</sup> U.S. Const. Art. 1, § 8.

<sup>55</sup> Roeder, *The Doctrine of Moral Right*, 53 Harv. L. Rev. 554 (1940); Yankwich, *Thoughts of Copyright*, 28 Los Angeles Bar Bull. 117 (1953); Katz, *The Doctrine of Moral Right and American Copyright Law*, Fourth Copyright Law Symposium 79 (1952); D'Argoeuves, *Le Droit Moral de l'Auteur* (1926); Desbois, *La Propriété Littéraire et Artistique* (1953). But see *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S. 2d 575, 578-79 (S.Ct. N.Y. Co., 1948).

Plagiarism has troubled authors since the beginning of time. A well-known English literary critic once made the observation that Homer appears to be the most original author, "probably for no other reason than that we can trace the plagiarism no further."<sup>56</sup> Vergil, who was himself accused by his contemporaries of extensive borrowing from Homer and others, nevertheless complained that others were gathering honors from his poems:

*Hos ego versiculos feci,  
Tulit alter honorem.*<sup>57</sup>

But the earnest scholar and student, be he reviewer, critic or scientist in the same field, should have reasonable access to the work of others, lest we put—in the words of Lord Ellenborough—"manacles upon science."<sup>58</sup> On the whole, the law of "fair use," as evolved by the courts, is a wise synthesis of conflicting rights which, while safeguarding the author, avoids injury to the progress of ideas which would flow from an undue "manacling" of others in the reasonable use of copyrighted materials.

<sup>56</sup> Hazlitt, *Characters of Shakespeare's Plays* 104 (Everyman's ed., 1915). Similarly, Mr. Justice Story, while sitting on circuit, in a leading case, *Emerson v. Davies*, 8 Fed. Cas. 615, 619, No. 4436 (1845), stressed the indebtedness of the writer on any subject to the past, and insisted that copyrightability lay in "the plan, arrangement and combination of his [the author's] materials, and his mode of illustrating his subject, if it be new and original in its substance."

<sup>57</sup> Vergil accepts this as the law of life. For he writes, to quote the whole poem:

Hos ego versiculos feci, tulit alter honorem,  
Sic vos non vobis nidificatis aves  
Sic vos non vobis vellera fertis oves  
Sic vos non vobis mellificatis apes  
Sic vos non vobis fertes aratra boves.

(I wrote these lines, another wears the bays,  
Thus you for others bear your fleece, O Sheep,  
Thus you for others honey make, O Bees,  
Thus you for others drag the plough, O Kine.)

*Vitae Vergilianae* 31 (Brunner ed., 1912).

<sup>58</sup> *Cary v. Kearsley*, 4 Esp. 168, 170 (1802). The continuity of this type of judicial thinking is evidenced by the following quotation from a case decided over one hundred and forty years later, which also contains a good summary of the rules evolved for determining "fair use": "Like rules are applicable to the so-called fair use which may be made of copyrighted material, based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as, otherwise, the progress of science and the useful arts would be unduly obstructed." *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (C.A. 6th, 1943).