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# Order in the Court: An Evaluation of Copyrights on Videotaped Coverage of Trial Proceedings\*

Sandra J. Garcia\*\*

## I. INTRODUCTION

A standard gloss in copyright law is that the “news”<sup>1</sup> is not subject to copyright protection, but a copyright may be claimed in the specific form of its expression, *i.e.*, the selection and arrangement of the underlying factual information.<sup>2</sup> For example, the events surrounding the assassination of President John F. Kennedy in Dallas on November 22, 1963 may not be copyrighted because the factual information constituting the news event is in the public domain. In contrast, the particular record of the event, Abraham Zapruder’s film footage capturing the moment President Kennedy was shot, is copyrightable expression.<sup>3</sup> This may be understood as an application of the “originality” requirement in the copyright statute: only those

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<sup>1</sup> News is defined as information about recent or current events. *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *AMERICAN HERITAGE DICTIONARY* 561 (3rd ed. 1994).

<sup>2</sup> Professor Mark F. Grady, Lecture at University of California at Los Angeles, Intellectual Property class (Fall 1994). See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *International News Serv.*, 248 U.S. at 234; *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795-96 (9th Cir. 1992); *Wainright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968). See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* [hereinafter *NIMMER*] § 1.01[B] (1993 ed.).

<sup>3</sup> *Time Inc.*, 293 F. Supp. at 144 (“[Time] Life has a valid copyright in the Zapruder film.”).

works owing their creation to an "author"<sup>4</sup> may be copyrighted.<sup>5</sup> Typically, a news reporter does not create a news event. Instead, a reporter simply relays public matters to the public. Where public events exist independently of the reporter, these events are not the creation of the news reporter, even if that reporter was the first to discover and report that event.<sup>6</sup> For this reason, news events are not the proper subject of a copyright. The form in which the news is relayed, on the other hand, can be copyrighted because the expression in the report is created by the news reporter.

Although this dichotomy between expression, which is copyrightable, and facts, which are not, seems to delineate the legal concepts simply enough, some courts and commentators have still expressed First Amendment concerns about copyrighting "hard"<sup>7</sup> news reports,<sup>8</sup> especially when in the form of "news photography."<sup>9</sup>

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<sup>4</sup> The term "author" includes writers, reporters, photographers, and motion picture camera operators.

<sup>5</sup> NIMMER, *supra* note 2, § 2.11[A] at 2-157-58. See 17 U.S.C. § 102(b). See also *Harper & Row*, 471 U.S. at 556; *International News Serv.*, 248 U.S. at 234; *Wainright Sec.*, 558 F.2d at 95; *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 798 (7th Cir. 1921); *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 297 (7th Cir. 1902); NIMMER, *supra* note 2, § 2.11.

<sup>6</sup> *International News Serv.*, 248 U.S. at 234.

<sup>7</sup> No court has attempted to define what "hard" news photography is other than comparing it to the My Lai photographs and the Zapruder film. See *Los Angeles News Serv.*, 973 F.2d at 795; *Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1100 (2d Cir. 1982); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 (9th Cir. 1977); *Pacific and S. Co., Inc. v. Duncan*, 572 F. Supp. 1186, 1193 (N.D. Ga. 1983), *aff'd*, 744 F.2d 1490 (11th Cir. 1984) (an informational news report featuring a fitness trail considered "soft" news).

<sup>8</sup> See *Los Angeles News Serv.*, 973 F.2d at 796; *Roy Export Co. Estab. of Vaduz*, 672 F.2d at 1100; *Iowa State Univ. Research Found.*, 621 F.2d at 61, n.6; *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1171 (finding that there "may be certain rare instances when First Amendment considerations will operate to limit copyright protection for graphic expressions of newsworthy events"); *Pacific and S. Co.*, 572 F. Supp. at 1192. See also NIMMER, *supra* note 2, § 1.10[C], at 1-90. See generally Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970); Lyman R. Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161 (1975).

<sup>9</sup> "News photography" constitutes not only still photographs but also all products of the photographic and analogous processes, including motion picture film and videotape. NIMMER, *supra* note 2, § 1.10[C], at 1-91.

This concern is based upon Professor Nimmer's theory that in the case of hard news photography, the expression in the photograph merges with the factual subject of the photograph such that the whole work becomes factual in nature and in the public domain.<sup>10</sup> Nimmer cited the exclusive photographs of the My Lai massacre, in which a partially-clothed Vietnamese child, burned by Napalm, is seen in obvious pain, running down a street,<sup>11</sup> as an example:

No amount of words describing the [facts] of the massacre could substitute for the public insight gained through the photographs. The photographic expression, not merely, the [facts], became essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs.<sup>12</sup>

Nimmer has proposed that news photography should not enjoy full copyright protection in order to ensure public access to the factual information supplied by photographic works under the First Amendment.<sup>13</sup> Subject to this proposal would be all photographs in which the "event depicted in the photograph, as distinguished from the fact that the photograph was made, is the subject of news stories appearing in newspapers, magazine[s], or television news programs throughout the country."<sup>14</sup>

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<sup>10</sup> See NIMMER, *supra* note 2, § 1.10[C], at 1-91; Jay Dratler, Jr., *Distilling the Witches's Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 306 (1988).

<sup>11</sup> Note that the author has just described the photograph in enough detail to communicate the facts of the photograph. Although the written description is not as graphic as a photograph, it communicates the basic facts nonetheless. One commentator has suggested that fact-merger doctrine is a myth because photographs can be easily described and communicated to the public. James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263, 288 (1986).

<sup>12</sup> NIMMER, *supra* note 2, § 1.10[C], at 1-91. Nimmer also cited the exclusive photographs of the Zapruder film as another example of a hard news photograph that should not have been copyrighted. This is despite the fact that film was granted a copyright. *Id.*

<sup>13</sup> Nimmer suggests that a compulsory license system should be applied in order to ensure public access to the information conveyed by the news photograph. This approach is analyzed in Part IV.

<sup>14</sup> NIMMER, *supra* note 2, § 1.10[C], at 1-91.

Nimmer's proposal has yet to be adopted by any court in the United States.<sup>15</sup> In fact, all the courts that have addressed Nimmer's theory have found the theory inapplicable to the photographs at issue or distinguished the copyrighted work at issue from hard news photographs like the ones of the My Lai massacre.<sup>16</sup> The purpose of this Article is to assert that the test for determining whether a photograph is eligible for copyright protection is not whether the photograph's subject matter is hard or soft news or whether the photograph is accessible to the public, but rather whether the camera operator has satisfied copyright's statutory requirements, particularly the "originality" requirement.<sup>17</sup>

To illustrate this contention, this Article discusses the videotaped coverage of a recent newsworthy event of great public interest, the O.J. Simpson trial. By analyzing the circumstances in which the O.J. Simpson trial proceedings were recorded, this Article demonstrates that videotaped recordings of trial proceedings are eligible for full copyright protection. In particular, this Article contends that Los Angeles County could copyright videotaped recordings of trial proceedings and license the videotapes to the media. In addition, this Article maintains that concerns about public access to the factual information contained on these newsworthy videotapes would be accommodated under the press's right of access to public trials, the fact/expression dichotomy in copyright law, the copyright fair use standard, and a blanket license mechanism for exhibiting the trial videotapes.

Part II of this Article briefly explores current case law and California court rules to determine whether the press has a constitutional right to broadcast and record trial proceedings. This section finds that because the press does not have the right to record

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<sup>15</sup> Los Angeles News Serv. v. Tullio, 973 F.2d 791, 796 (9th Cir. 1992).

<sup>16</sup> *Id.* (citing Roy Export Co. Estab. of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982); Iowa State Univ. Research Found., Inc. v. McDonald's Corp., 562 F.2d 1157, 1171 (9th Cir. 1977); Pacific and S. Co., Inc. v. Duncan, 572 F. Supp. 1186, 1193 (N.D. Ga. 1983), *aff'd*, 744 F.2d 1490 (11th Cir. 1984).

<sup>17</sup> A work is "original" if it is independently created by the author and does not consist of actual copying of another's work. Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991); L. Batlin & Sons, Inc. v. Snyder, 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976).

trial proceedings, the County may permissibly do so. Part III examines current case law on copyrighting photographic works in general and news photography in particular. This section contends that First Amendment considerations of newsworthiness of photographs and a right of access are not legitimate factors in evaluating copyrights after the landmark case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>18</sup> Part IV of this Article applies the copyright doctrine to the videotaped recordings of the O.J. Simpson trial and concludes that even an amateur courtroom camera operator could satisfy the statutory requirements for a copyright. Part V examines the various fee proposals the County may implement once it obtains a copyright on the videotaped recordings. This section concludes with a recommendation that the County adopt a "blanket-licensing" system which would not only allow unlimited use of the videotaped recordings, but also ensure the public and the press immediate access to the recordings of these newsworthy events.

## II. INSTALLING AUDIOVISUAL EQUIPMENT IN COUNTY COURTROOMS IS CONSTITUTIONALLY PERMISSIBLE

In response to the minute-by-minute media coverage of the O.J. Simpson trial, the Los Angeles County Board of Supervisors initiated a task force to investigate the cost of installing audiovisual equipment<sup>19</sup> in county courtrooms in order to record and copyright high publicity trial proceedings.<sup>20</sup> However, the presence of cameras in state courtrooms is not a new phenomenon. In the last fifty years, cameras have found their way into forty-seven state courts, including the courtrooms in Los Angeles, California, and eight federal courts

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<sup>18</sup> 471 U.S. 539 (1985).

<sup>19</sup> The term "audiovisual" refers to cameras or other recording devices that produce a series of related images, which when shown in succession, impart an impression of motion, together with accompanying sounds, if any. 17 U.S.C. § 101.

<sup>20</sup> Letter from the Hon. Judge Lance A. Ito, Superior Court, Los Angeles County to the Hon. Michael Antonovich, Board of Supervisors, Los Angeles County, (Mar. 13, 1995) [hereinafter Ito Letter] (on file with author).

across the country.<sup>21</sup> For this reason, the issue in this section is not whether cameras may or should be brought into the courtroom, but rather, who has the right to own and operate the cameras in the Los Angeles County courtrooms.

*A. While the Press Has a Constitutional Right to Attend and Report on a Trial, the Press Does Not Have a Constitutional Right to Record or Broadcast the Trial*

To begin with, almost no one questions the press' constitutional right of access to criminal trials.<sup>22</sup> This right was first recognized by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,<sup>23</sup> although the opinion itself was a plurality. In *Richmond Newspapers*, a trial judge excluded members of the public and the press from the courtroom trial of a defendant charged with murder.<sup>24</sup> Seven Justices concluded that the public's and the press' rights of access to criminal trials were embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.<sup>25</sup>

Two years later, the Supreme Court faced a similar set of facts in *Globe Newspaper Co. v. Superior Court*.<sup>26</sup> In that case, a trial court judge excluded members of the public and press from the courtroom during the testimony of a minor victim in a sex-offense trial. The trial court relied upon the prevailing state statute at the time.<sup>27</sup> In review

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<sup>21</sup> Mississippi, South Carolina and South Dakota do not authorize video coverage of judicial proceedings in their state courtrooms. Joseph E. Martineau & Mary B. Schultz, *Cameras in Missouri's Courtrooms: Supreme Court Administrative Rule 16*, 49 J. MO. B. 379 (1993); Jeannine Aversa, *Cameras Enter Fed. Court; Cable There*, MULTICHANNEL NEWS, July 1, 1991, at 14; Jane Greenstein, *Courtroom TV Tests Seen as Boon for Law Networks*, ELECTRONIC MEDIA, Sept. 17, 1990, at 3.

<sup>22</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Gannet Co. v. DePasquale*, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring). See Jeremy Cohen, *Cameras in the Courtroom and Due Process: A Proposal for a Qualitative Difference Test*, 57 WASH. L. REV. 277 (1982).

<sup>23</sup> 448 U.S. at 558-81 (4-3-1 decision).

<sup>24</sup> *Id.* at 560.

<sup>25</sup> *Id.*

<sup>26</sup> 457 U.S. at 598-99.

<sup>27</sup> *Id.*

of the statute, the Supreme Court took this opportunity to explicitly confirm the plurality opinion in *Richmond Newspapers*. In a majority opinion, the Court stated that, although the First Amendment does not expressly provide for a right of access, "the press and general public have a constitutional right of access to criminal trials" to ensure that the "discussion of governmental affairs is an informed one."<sup>28</sup> The Court then struck down the Massachusetts statute.<sup>29</sup> As a result, both print and broadcast journalists now have a constitutionally protected right to attend and report news stories on criminal trial proceedings.

Although this right is of a "constitutional stature," the press' right of access is not absolute.<sup>30</sup> The Supreme Court in *Nixon v. Warner Communications, Inc.*<sup>31</sup> limited the press' right to report on trial proceedings to only what it has observed, and did not give the press the right to electronically copy what it observed.<sup>32</sup> In *Nixon*, representatives of the news media requested access to tapes recordings introduced at the criminal trial of former President Richard Nixon and his advisors for allegedly conspiring to obstruct justice in connection with the Watergate investigation.<sup>33</sup> Refusing the electronic media's request to make copies of the tape recordings, the Court held that although the press had the constitutional right to hear the tapes and report on their subject matter, the press did not have the right to

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<sup>28</sup> *Id.* at 603 (5-1-3 decision). The circumstances under which the press can be denied access to a criminal trial are limited. *Id.* at 606-07. The State must show that the denial of the right of access is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. *Id.* at 607.

<sup>29</sup> *Id.* at 604, 610-11.

<sup>30</sup> *Globe Newspaper Co.*, 457 U.S. at 606. For instance, limitations resembling "time, place, and manner" restrictions may be imposed. *Richmond Newspapers*, 448 U.S. at 581 n.18. In addition, the trial court judge may refuse the press' right to inspect and copy judicial records where the documents may "gratify private spite or promote public scandal, . . . serve as reservoirs of libelous statements for press consumption, . . . [or] harm a litigant's competitive standing" in business. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

<sup>31</sup> 435 U.S. at 610.

<sup>32</sup> *Id.* See also *Chandler v. Florida*, 449 U.S. 560, 569 (1981); *Estes v. Texas*, 381 U.S. 560 (1981).

<sup>33</sup> 435 U.S. at 589.



record or broadcast the actual tapes.<sup>34</sup> Indeed, the Court went so far as to conclude that the press had no constitutional right to record or broadcast live witness testimony, the trial, or any part of the trial.<sup>35</sup> The Court simply stated that “the opportunity of members of the public and the press to attend the trial and report what they have observed” was enough to satisfy both the First Amendment right of access and the Sixth Amendment requirement of a public trial.<sup>36</sup>

Following *Nixon*, California courts have similarly denied the press the right to electronically record and broadcast trial proceedings. In *KFMB-TV Channel 8*, the appellate court noted that the press’ right to attend a preliminary hearing did not extend to the “right of the press to electronically record and broadcast the hearing.”<sup>37</sup> Similarly, in *Marin Independent Journal*, a trial court denied a newspaper photographer’s request to photograph a suspected murderer at his arraignment.<sup>38</sup> The appellate court held that the media does not have a constitutional right to photograph or otherwise electronically record open judicial proceedings.<sup>39</sup>

Since the press has no right, under either the Constitution or existing case law, to access trial proceedings beyond a right to report on what it has observed, the press cannot claim a right to electronically record trial proceedings. Consequently, Los Angeles County would not violate the press’ right of access to trial proceedings if the County recorded trial proceedings in its courtrooms.

#### B. *State Statute Authorizes the County to Install Audiovisual Recording Equipment*

Although there is no state statute granting Los Angeles County the explicit right to record and license the broadcasts of live criminal proceedings, the County does have the right to own and operate cameras in its courtrooms. In particular, California Government Code

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<sup>34</sup> *Id.* at 610.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *KFMB-TV Channel 8 v. Municipal Court*, 221 Cal. App. 3d 1362, 1365 (1990).

<sup>38</sup> *Marin Indep. Journal v. Municipal Court*, 12 Cal. App. 4th 1712, 1718 (1993).

<sup>39</sup> *Id.*

section 68073 provides Los Angeles County with the authority to install electronic equipment in county courtrooms under certain circumstances.<sup>40</sup> The Code provides in pertinent part that, "A board of supervisors . . . shall provide suitable rooms for holding the superior, municipal and justice courts . . . , together with sufficient . . . furnishings, equipment, and other personal property, for . . . the transaction of the business of the courts."<sup>41</sup> In accordance with this section, Los Angeles County must demonstrate that the use of cameras in criminal proceedings is a court transaction before audiovisual recording equipment could be installed in county courtrooms.

A review of existing case law establishes that the use of cameras in the criminal proceedings is a court transaction and, therefore, the business of the court, rather than of the press. The review need look no further than the Supreme Court's finding in *Nixon* that the trial court judge has supervisory power over the extent to which the public and the press may access matters within the courtroom, including records, files, and exhibits, in order to electronically copy them.<sup>42</sup> Justice Powell noted that the degree to which the press may access trial proceedings to electronically record them is a discretionary matter best left to the trial court judge who can decide the issue "in light of the relevant facts and circumstances of the particular case."<sup>43</sup>

Consistent with this principle, California adopted Rule 980 of the California Rules of Court which, specifically controls the use of television, radio, photographic, or any other recording equipment in California courtrooms.<sup>44</sup> Indeed, recent amendments to Rule 980 expressly provide the trial court judge with the exclusive discretion to permit or prohibit the use of cameras in the courtroom: "Media coverage shall be permitted only on written order of the judge as

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<sup>40</sup> CAL. GOV'T CODE, § 68073 (West 1997).

<sup>41</sup> *Id.*

<sup>42</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

<sup>43</sup> *Id.* at 599.

<sup>44</sup> CAL. R. CT. 980. In the event a judge allows cameras into the courtroom, Rule 980 limits the scope of what the camera operator can film. There are prohibitions against filming proceedings in chambers, attorney-client conferences, and images of the jurors, in order to protect the interests of justice, the rights of the parties, the dignity of the court, or to assure the orderly conduct of the proceedings. To safeguard these interests, the judge may, at any time, limit or terminate the use of cameras under the court rules.

provided in this subdivision. The judge in his or her discretion may permit, refuse, limit, or terminate media coverage."<sup>45</sup> Accordingly, the judge is the sole person responsible for granting permission to photograph, record or broadcast court proceedings by the media.

Prior California case law confirms this interpretation of Rule 980 as reflecting a "commitment to the court's inherent right to control access."<sup>46</sup> For instance, the California appellate court noted in *KFMB-TV Channel 8* that Rule 980 makes clear that the threshold determination as to whether electronic media representatives and their equipment should be allowed access is left to the court.<sup>47</sup> Relying upon *KFMB-TV Channel 8*, the California appellate court in *Marin Independent Journal* extended the court's control over access to court control over the press itself. When a newspaper photographer photographed a suspect in violation of Rule 980, the trial court confiscated the photographer's negatives.<sup>48</sup> The appellate court held that the seizure of the film was justified because it "simply enforced Rule 980 by precluding publication of photographs that should never have been taken in the first instance."<sup>49</sup> The court reasoned that "the seizure is little different than a refusal of permission to photograph in the first instance."<sup>50</sup>

Thus, the court has the power to determine when criminal trials may be electronically recorded and the degree to which cameras may access and record the trial proceedings. This intrinsically demonstrates that the use of cameras in the courtroom is a court transaction rather than a press function.

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<sup>45</sup> The California legislature adopted the amendments effective January 1, 1997. *Id.*

<sup>46</sup> *KFMB-TV Channel 8 v. Municipal Court*, 221 Cal. App. 3d 1362, 1366 (1990); *see also* *Marin Indep. Journal v. Municipal Court*, 12 Cal. App. 4th 1712, 1718 (1993).

<sup>47</sup> *KFMB-TV Channel 8*, 221 Cal. App. 3d at 1366.

<sup>48</sup> *Marin Indep. Journal*, 12 Cal. App. 4th at 1716.

<sup>49</sup> *Id.* at 1718. The court also held that the seizure of the film was not a prior restraint because the photograph was taken in violation of the law.

<sup>50</sup> *Id.* at 1719.

### C. *Conclusion*

As the press has neither a constitutional right to bring its cameras into court nor the right to mechanically record trial proceedings, the press' First Amendment rights will not be violated if Los Angeles County installs county-owned audiovisual equipment in its courtrooms and records the proceedings. Indeed, the use of county-owned cameras under the supervision of the trial court judge is consistent with Supreme Court precedent that the judge should have supervisory power over the press' electronic access to trial proceedings. In addition, the use of county-owned court cameras to cover proceedings is specifically exempt from the general court rule prohibiting media coverage of court proceedings.<sup>51</sup> One of the recent amendments to Rule 980 states that, "This rule [980] does not prohibit courts from photographing or videotaping sessions for judicial . . . publications and is not intended to apply to closed-circuit television broadcasts solely within the courthouse or between court facilities if the broadcasts are controlled by the court and court personnel."<sup>52</sup>

So long as the court controls coverage of the trial proceedings and Los Angeles County owns the cameras and employs court personnel to broadcast the proceedings, Los Angeles County is not affected by Rule 980's general ban of media coverage in the courtroom. As such, Los Angeles County should install cameras into its courtrooms in order to implement its proposal to record and copyright trial proceedings.

### III. COPYRIGHT DOCTRINE

The history of copyright law in the United States begins with the Constitution's bestowal upon Congress of the right "to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."<sup>53</sup> The members of the very first Congress, many

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<sup>51</sup> CAL. R. CT. 980(c).

<sup>52</sup> Amendment of Rule 980, effective Jan. 1, 1997.

<sup>53</sup> U.S. CONST. art. I, § 8, cl. 8.

of whom were the framers of the United States Constitution, enacted the Copyright Act of 1790 providing that:

[T]he author or authors of any map, chart, book or books, being a citizen or resident of the United States, shall have the sole right and liberty of printing, reprinting, publishing, and vending the same for the period of fourteen years from the recording of the title thereof in the clerk's office.<sup>54</sup>

Subsequent amendments to the first Copyright Act mirrored the technological progress of the mechanical arts, extending legal protection from writings to photographs to audiovisual works.<sup>55</sup>

#### A. *History of the Cases Establishing Copyright Protection*

The first copyright provision for photography, which appeared in the Copyright Act of 1870, was upheld by the Supreme Court in the landmark case of *Burrow-Giles Lithographic Co. v. Sarony*.<sup>56</sup> In *Burrow-Giles*, the plaintiff Napoleon Sarony, a New York photographer, contracted with Oscar Wilde, a famous British writer, for a photography session.<sup>57</sup> Sarony copyrighted a product of the session, a photograph entitled "Oscar Wilde, No. 18," in accordance with all copyright formalities.<sup>58</sup> The defendant, a large New York lithography<sup>59</sup> company, copied 85,000 prints of "Oscar Wilde, No. 18." without the consent of Sarony.<sup>60</sup>

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<sup>54</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) (citing 1 st. p. 124, § 1).

<sup>55</sup> The amendments were deemed necessary to give full recognition to the scientific discoveries and technological developments that made possible new forms of creative expression. H.R. REP. NO. 94-1476, at 51-57, *reprinted in* 1976 U.S.C.C.A.N. 5658, 5664-70.

<sup>56</sup> 111 U.S. 53 (1884).

<sup>57</sup> 111 U.S. at 54.

<sup>58</sup> *Id.*

<sup>59</sup> Lithography is an ink printing process in which an image rendered on a flat surface retains ink while the non-image areas repel ink. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 762 (1969).

<sup>60</sup> 111 U.S. at 54.

The Supreme Court found *Burrow-Giles* liable for copyright infringement. Holding that the Constitution was broad enough to make a photograph a subject of copyright protection, the Supreme Court implicitly found that a photograph was a "writing" of which the photographer was the author.<sup>61</sup> The Supreme Court required photographs, like writings, to be "original" to receive copyright protection.<sup>62</sup> The defendant argued that no photograph could be original because a camera merely reproduces the object before it.<sup>63</sup> Without deciding whether all photographs possessed the necessary element of originality, the Court found the photograph at issue, which entailed posing Wilde, selecting and arranging his clothes, background scenery, furniture, and the lighting, and evoking the desired expression, to clearly embody such originality.<sup>64</sup>

After *Burrow-Giles*, the question remained open whether an ordinary photograph of a real life object or person in a natural setting, not subject to the immediate control and direction of the photographer, could be sufficiently "original" to merit copyright protection. The case of *Pagano v. Chas. Beseler Co.*<sup>65</sup> tackled this issue for the first time. In *Pagano*, the plaintiff photographer captured a scene on Fifth Avenue in New York that included the public library as a backdrop to pedestrians, traffic policemen, and motorists in the surrounding vicinity. Summarily granting copyright protection to the photograph, the court recognized that "it undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc."<sup>66</sup> The district court, in effect, acknowledged that even though the photographer did not control the external elements, the photographer still controlled the

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<sup>61</sup> *Id.*, at 60; *Time Inc.*, 293 F. Supp. at 141.

<sup>62</sup> See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987); *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Time Inc.*, 293 F. Supp. at 141.

<sup>63</sup> *Burrow-Giles*, 111 U.S. at 59.

<sup>64</sup> *Id.* at 55. See also *Los Angeles News Serv.*, 973 F.2d at 793-94.

<sup>65</sup> 234 F. 963 (S.D.N.Y. 1916).

<sup>66</sup> *Id.* at 964.

internal mechanical features and placement of the camera so as to produce an original work of art. Thus, the photographer's professional touch supplied the necessary element of originality. This decision, however, did not definitively answer the *Burrow-Giles* question outside of the Second Circuit.<sup>67</sup>

Not until the landmark case of *Time Inc. v. Bernard Geis Assocs.* did the audiovisual work by an "amateur" photographer settle the "conventional" photograph question for all circuits.<sup>68</sup> On November 22, 1963, Abraham Zapruder, a dress manufacturer, captured on film the single, most important photographic evidence of the assassination of President Kennedy in Dallas.<sup>69</sup> Zapruder, not knowing what was going to transpire that day, chose to film the presidential motorcade from a concrete pedestal atop a grassy knoll near a highway underpass.<sup>70</sup> Once the procession came into view, Zapruder set the speed control at "run" and started his camera.<sup>71</sup> The product, Zapruder's raw film footage, was found to be a proper subject matter of copyright.<sup>72</sup> Classifying the film as a "photographic picture," the Court extended copyright protection from a still photograph to a "moving picture."<sup>73</sup>

Following the holdings in *Burrow-Giles* and *Pagano* for photographs of both animate and inanimate subjects, the district court in *Time Inc.* noted that Zapruder's technical decisions to use color film and a telephoto lens,<sup>74</sup> as well as picking the right camera angle, supported a finding of creativity. However, the main importance was

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<sup>67</sup> *Pagano* is cited in only five other cases, all of which are in the Second Circuit. *Altman v. New Haven Union Co.*, 254 F. 113 (D. Conn. 1918); *American Code Co. v. Bensinger*, 282 F. 829 (2d Cir. 1922); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968); *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1987).

<sup>68</sup> *Time Inc.* 293 F. Supp. at 131.

<sup>69</sup> *Id.* at 133.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 141.

<sup>73</sup> The Supreme Court first recognized motion pictures as a proper subject of copyright in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) (holding that a series of photographs of a copyrighted story constituted a single picture).

<sup>74</sup> A telephoto lens produces a large image of a distant object. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1323 (1969).

the court's ruling that Zapruder's judgment to film the presidential motorcade from the specific place he was standing, at a particular angle, and at that moment in time, demonstrated the necessary level of creativity needed to satisfy the originality requirement. As a result, the Zapruder film now stands for the proposition that a conventional photographic work can merit copyright protection by virtue of the fact that the photographer uses editorial discretion in choosing what kind of camera to use, turning it on, and finding the location from which to film.

Then, with the advent of the "zoom" lens, which allows the camera operator to rapidly change the size of the subject image as well as the focal length between the camera and the subject while simultaneously recording images, Congress first recognized the artistry in producing "raw" film footage.<sup>75</sup> Congress noted that the camera operator's selective process in choosing the right "electronic images sent to the public and in which order" supplied the requisite level of creativity necessary for a copyright.<sup>76</sup> Relying on legislative history, the court in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*<sup>77</sup> held that the live telecast of a baseball game was a copyrightable work.<sup>78</sup> The court emphasized that camera operators must make many editorial decisions concerning "camera angles, types of shots, the use of instant replays and split screens, and shot selection" during the broadcast of a live baseball game.<sup>79</sup> The court in *National Football League v. McBee & Bruno's, Inc.* followed *Baltimore Orioles'* holding that the live telecast of a professional football game, without the inserted commercials, commentary, or station breaks, constituted a copyrightable work of authorship.<sup>80</sup> In

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<sup>75</sup> "Raw" videotapes are filmed recordings that are not interrupted by any commercials or commentary inserted or edited into the program. *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 732 (8th Cir. 1986) (agreeing that the live telecast of the game constituted a work of authorship).

<sup>76</sup> *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986) (citing H.R. REP. NO. 94-1476, reprinted in 1976 U.S.C.C.A.N. 5659, 5665).

<sup>77</sup> 805 F.2d 663 (7th Cir. 1986).

<sup>78</sup> *Id.* at 669.

<sup>79</sup> *Id.* at 668 (citing H.R. Rep. No. 94-1476, at 52, reprinted in 1976 U.S.C.C.A.N. 5659, 5665).

<sup>80</sup> *National Football League*, 792 F.2d at 732.



both cases, the camera operators satisfied copyright's originality requirement by their manipulation of their cameras, the zoom lens, and shot selection.<sup>81</sup>

Thus, creativity was found to be demonstrated not only by the camera operator's direction and control of the subject of the picture, as in *Burrow-Giles*,<sup>82</sup> but also by the operator's direction and control the camera, as in *Pagano*,<sup>83</sup> *Time Inc.*,<sup>84</sup> *Baltimore Orioles*<sup>85</sup> and *National Football League*.<sup>86</sup>

### B. *News Photography as Works of Art*

Nowadays, the prevailing rule in copyright law is that, absent slavish copying, any photographic work<sup>87</sup> affected by the personal influence of the photographer is a proper subject of a copyright.<sup>88</sup> News photography, in particular, has consistently been found to be deserving of a copyright.<sup>89</sup> For instance, a film recording of

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<sup>81</sup> Professor Nimmer reports that "merely by virtue of the photographer's personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken," a "photograph may claim the necessary originality to support a copyright." *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992) (citing NIMMER, *supra* note 2, § 208[E][1], at 2-126.3).

<sup>82</sup> 111 U.S. 53 (1884).

<sup>83</sup> 234 F. 963 (S.D.N.Y. 1916).

<sup>84</sup> 293 F. Supp. 130 (S.D.N.Y. 1968).

<sup>85</sup> 805 F.2d 663 (7th Cir. 1986).

<sup>86</sup> 792 F.2d 726 (8th Cir. 1986).

<sup>87</sup> The term "photographic work" refers to both still photography and motion pictures. The term "photographic" is broad enough to cover both types of photography.

<sup>88</sup> Judge Learned Hand in *Jewelers' Circular Publishing Co. v. Keystone Publishing Inc.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff'd* 281 F. 83 (2d Cir. 1922), presumed that all photographs are copyrightable "because no photograph, however simple, can be unaffected by the personal influence of the author." However, Professor Nimmer has identified two situations in which a photograph might not contain the necessary originality for a copyright: (1) A photographer who purposely chooses live subject matter, camera angle and lighting to reproduce a prior photograph or (2) One who mechanically copies a prior photographic work. NIMMER, *supra* note 2, § 2.08[E][1], at 2-126.3. See *Gross v. Segilman*, 212 F. 930 (2d Cir. 1914); *Simon v. Birraporetti's Restaurants, Inc.*, 720 F. Supp. 85 (S.D. Tex. 1989).

<sup>89</sup> *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980); *Pacific and S. Co., Inc. v. Duncan*, 572 F. Supp. 1186, 1192 (N.D. Ga. 1983), *aff'd*, 744 F.2d 1490 (11th Cir. 1984); *Georgia Television Co. v. TV News Clips of Atlanta, Inc.*, 718 F. Supp.

President Kennedy's assassination, a short film biography of a champion wrestler and a broadcast news feature of a local fitness trail were all granted copyright protection.<sup>90</sup>

In addition, in *Los Angeles News Service v. Tullo*, two raw videotape recordings of the sites of a plane crash and train wreck were awarded copyright protection.<sup>91</sup> The raw videotape recordings were not interrupted by any commercials or news commentary inserted or edited into the program. A professional camera operator videotaped the crash sites for her business which licensed the videotapes to interested news media and the public for their use of all of or segments of the unedited footage in their news programs. Finding that the preparation of the two videotapes required intellectual and creative input, the court noted that the camera operator decided whether the events were newsworthy and then figured out how to relate the news events by selecting certain camera lenses, angles and exposures in order to effectively film the sites.<sup>92</sup> Indeed, the court found it particularly significant that "the camera operator described herself as 'an artist,'" using the camera like "a paintbrush . . . to tell a story."<sup>93</sup>

### C. *Shifting of Copyright Protection for News Photography*

Although the above instances demonstrate that news photography has regularly been granted a copyright, the level of protection afforded to these copyrighted news photographs has been far from consistent. To determine whether an unauthorized use of a copyrighted news photograph was fair, some courts have focused either on the newsworthiness of the events depicted in the photograph or the photograph itself to determine this issue, rather than the statutory

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939 (N.D. Ga. 1989); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968).

<sup>90</sup> *Iowa State Univ. Research Found.*, 621 F.2d at 57; *Pacific and S. Co.*, 572 F. Supp. at 1192; *Los Angeles News Serv.*, 973 F.2d at 791.

<sup>91</sup> *Los Angeles News Serv.*, 973 F.2d at 796.

<sup>92</sup> *Id.* at 792.

<sup>93</sup> *Id.* at 794.

elements of fair use.<sup>94</sup> This odd turn is the result of the merger doctrine advanced by Professor Nimmer that news photographs should not deserve full copyright protection where the factual information in a hard news photograph is inseparable from the photographic expression.<sup>95</sup> Influenced by Professor Nimmer's theory, courts have been reluctant to grant full copyright protection to hard news photographs in fear that the copyright holder would restrict vital information from the public. Although no court has adopted Professor Nimmer's theory, courts have interjected the newsworthiness and right of access factors into their copyright analysis to address his concerns.

### 1. Newsworthiness Is Not a Legitimate Factor After *Harper & Row*

The level of newsworthiness of a photograph first became an issue in *Time Inc.*<sup>96</sup> In *Time Inc.*, author Josiah Thompson used the Zapruder film to make sketch copies of portions of the Zapruder film for his book analyzing the evidence and circumstances surrounding the Kennedy assassination. In determining whether the unauthorized use was fair, the court noted that, "[t]here is a public interest in having the fullest information available" on newsworthy events such as the Kennedy assassination.<sup>97</sup>

After *Time Inc.*, courts began focusing on the message of the photograph: whether it depicted a hard or soft news event. Implicit in this distinction is that the expression in a hard news photograph is more essential to relaying the factual information in the photograph than would be in a photograph of a soft news event. The court in

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<sup>94</sup> The four statutory factors are the following: purpose and character of the use, amount and substantiality of the portion used in relation to the copyrighted work as a whole, nature of the copyrighted work, and effect of the use upon the potential market. 17 U.S.C. § 107.

<sup>95</sup> NIMMER, *supra*, note 2.

<sup>96</sup> 293 F. Supp. 130 (S.D.N.Y. 1968).

<sup>97</sup> The court ultimately decided that, although Time had a valid copyright on the Zapruder film, the use of sketches was fair because there was "little, if any," economic injury to Time. Since Thompson did not use the actual Zapruder stills, Thompson did not usurp the market for the Zapruder film. The court also concluded that the market could include both the Zapruder film and the Thompson sketches because Thompson's book did not compete with Time's magazine business. *Id.* at 146.

*Iowa State University Research Foundation, Inc. v. ABC* adopted this theory distinguishing a film biography of a champion wrestler from the limited and unique category of hard news photographs.<sup>98</sup> The film biography chronicled the wrestler's training and wrestling matches in preparation for the 1972 Olympic Games.<sup>99</sup> The biography also included short comments from the wrestler, his family, coaches and teammates.<sup>100</sup> News producers for ABC television copied portions of the film biography and used them during their Olympic broadcasts. The court found that ABC infringed the film biography's copyright because ABC did not need to "bodily appropriate" the expression in order to "enlighten its audience."<sup>101</sup> Although the court protected the newsworthy film biography, the court also opened the door in the Second Circuit to Professor Nimmer's theory that in rare situations unauthorized users could appropriate and copy newsworthy photographs in order to "enlighten its audience."

Subsequently, the Eleventh Circuit in *Pacific and Southern Co., Inc. v. Duncan* addressed Professor Nimmer's theory, but refused to apply it to a broadcast news feature on a fitness trail because the feature was not hard news.<sup>102</sup> Instead, the court found the feature to be one of "soft news" and not of broad public interest that would justify imposing an exception to the copyright standard.<sup>103</sup> The Second Circuit entertained Nimmer's theory again in *Roy Export Co. Estab. of Vaduz v. CBS* before finding it inapplicable to the facts before it.<sup>104</sup> In *Roy Export*, the defendant Columbia Broadcasting System used the plaintiff's copyrighted feature film starring Charlie Chaplin in its biography of Charlie Chaplin after his death without the plaintiff's consent. The studio tried to excuse its unauthorized use of the Chaplin clip as a First Amendment right to report newsworthy

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<sup>98</sup> *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980).

<sup>99</sup> *Id.* at 58.

<sup>100</sup> *Id.* at 59.

<sup>101</sup> *Id.* at 61.

<sup>102</sup> *Pacific and S. Co., Inc. v. Duncan*, 572 F. Supp. 1186, 1193 (1983), *aff'd*, 744 F.2d 1490, 1498 (1984).

<sup>103</sup> *Id.*

<sup>104</sup> *Roy Export Co. Estab. of Vaduz v. CBS, Inc.*, 672 F.2d 1095, 1099, 1100 (2nd Cir. 1982).

events. Rejecting this defense, the court held that CBS's biographical news report did not support "invention or application of even a limited exception" to the copyright laws because the showing of Chaplin's film was not essential to reporting on Chaplin's death.<sup>105</sup> *Roy Export* left open the possibility, however, that "someday, on some facts" the court would be so inclined to recognize a narrow exception for unauthorized uses of hard news photographs.<sup>106</sup>

Not until *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>107</sup> did the distinction between hard and soft news become suspect. In *Harper & Row*, a copyright infringement action arose out of *The Nation Magazine's* unauthorized publication of verbatim quotes from former President Gerald Ford's memoirs. Ford was Harper & Row's client. In that case, *Time Magazine* had a pre-publication license from Harper & Row to publish a book review of Ford's upcoming memoirs. However, when *The Nation* illicitly obtained Ford's unpublished manuscript from an unauthorized source, *The Nation* scooped *Time Magazine* to be the first one to review Ford's memoir. In particular, *The Nation* was the first to report Ford's account of his pardon of former President Richard M. Nixon. In the review, *The Nation* used verbatim quotes of at least 300 to 400 words of Ford's copyrighted expression. Relying upon the reasoning of Professor Nimmer's theory, *The Nation* argued that the newsworthiness of the Ford account justified copying copyrighted material.<sup>108</sup> In its defense, *The Nation* asked the Supreme Court to create a public figure exception to copyright that would allow the media to freely use copyrighted works by and about public figures.<sup>109</sup> The Court rejected this proposal as it could see no cause for creating a newsworthiness exception to existing copyright law.<sup>110</sup> The Supreme Court held that the fact that the expression in Ford's

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 471 U.S. 539 (1985).

<sup>108</sup> *Id.* at 556.

<sup>109</sup> *Id.* at 555, 557.

<sup>110</sup> *Id.* at 557.

memoirs may itself be newsworthy is not an independent justification for an unauthorized copying of the author's expression.<sup>111</sup>

Although the Supreme Court did not specifically address the issue of news photography, the Court did rely on *Iowa State* and *Roy Export*, news photography cases, to establish its broad holding. Citing *Iowa State*, the Court pointed out that it could not ignore a copyright just because a work contained material of possible public importance.<sup>112</sup> The Court reasoned that ignoring a valid copyright would effectively destroy an author's incentive to create and disseminate works of public interest because copyright infringers would merely dub their use a "news report" to escape liability for an unauthorized use.<sup>113</sup> For that reason, the Court concluded that to "accord lesser rights in those works that are of greatest importance to the public," would be "fundamentally at odds with the scheme of copyright."<sup>114</sup>

After *Harper & Row*, the Ninth Circuit in *Los Angeles News Service v. Tullo* refused to adopt a bright line rule that would prohibit copyrighting photographic works of newsworthy events.<sup>115</sup> In *Los Angeles News Service*, Audio Video Reporting Services, a news clipping service,<sup>116</sup> recorded local news broadcasts that included the videotaped segments of the crash sites and then marketed their videotapes to the public. Audio Video Reporting Services argued that Los Angeles News Service's proprietary interest in the videotapes should yield to the public's interest, "even if the videotapes were found to be original enough to merit copyright protection," solely because the videotapes were newsworthy. In rejecting Audio Video Reporting Service's contention, the court relied on Nimmer's own statement in his treatise that "denying copyright protection to news pictures might defeat the ultimate First Amendment goal of greater

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 559.

<sup>115</sup> *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1995).

<sup>116</sup> A news clipping service records live television broadcasts and sells the tapes to the public.

public access to information by inhibiting or destroying the business of news photography.”<sup>117</sup>

In effect, *Los Angeles News Service* resolved the issue, which was specifically unaddressed in *Harper & Row*, in the copyright proprietor’s favor—that hard news photographs deserve full copyright protection. Analogous to *Harper & Row*, the holding in *Los Angeles News Service* is that according lesser rights to hard news photographs solely because they are newsworthy would be fundamentally at odds with the copyright scheme. As both the Supreme Court and the Ninth Circuit basically repudiate Nimmer’s proposal calling for a two-tiered level of copyright protection for newsworthy works, courts should no longer apply a newsworthiness exception to the unauthorized use of hard news photographs.

## 2. Right of Access Not a Legitimate Factor After *Harper & Row*

After *Time Inc.*, courts also shifted their focus from the message to the messenger. In particular, courts began asking whether the copyright owner was making the copyrighted work available to the public. For instance, in *Pacific and Southern Co.*, the court noted that the television station made its copyrighted broadcasts available to the public and did not “absolutely refuse to allow the public to view recordings or scripts of its broadcasts.”<sup>118</sup> Similarly, in *Los Angeles News Service*, the court found it significant that the camera operator made her videotapes available to the public. Indeed, the court pointed out that because the “tapes were shown on local television programs immediately after the events and thus were freely available to the public . . . , the problem perceived by Professor Nimmer was not present.”<sup>119</sup> In addition, the court found it particularly noteworthy that Audio Video Reporting Services failed to show that other depictions and reports of the crash sites “were unavailable or omitted information vital to the public understanding of the events.”<sup>120</sup> The

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<sup>117</sup> *Los Angeles News Serv.*, 973 F.2d at 796.

<sup>118</sup> *Pacific and S. Co., Inc. v. Duncan*, 572 F. Supp. 1186, (N.D. Ga. 1983), *aff’d*, 744 F.2d 1490, 1498 (11th Cir. 1984).

<sup>119</sup> *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 796 (9th Cir. 1995).

<sup>120</sup> *Id.* at 795-96.

holding of *Los Angeles News Service* appears to imply that if the copyright proprietor did not make his copyrighted work available to the public or if other news reports were unavailable or omitted vital public information, unauthorized users would have a right to use the copyrighted work without the copyright owner's consent in order to inform the public.

However, no court has ever mandated that a copyright holder must provide wholesale access to the copyrighted work itself based on the public's right to know.<sup>121</sup> In fact, the Supreme Court in *Harper & Row* rejected *The Nation's* argument that the "public's interest in learning news as fast as possible outweighs the right of the author to control its first publication."<sup>122</sup> In *Harper & Row*, the Court found that *The Nation* infringed Ford's copyright in his unpublished memoirs when *The Nation* scooped *Time Magazine* by publishing the memoir before *Time* did. Although the Court hinged its decision on the copyright owner's right to first publication, the Court also implicated the First Amendment. The Court admonished the lower courts, stating that the issue in the copyright infringement case is "whether a claim of news reporting is a valid fair use defense," not whether the information in the copyrighted work "was actually new to the public."<sup>123</sup> Accordingly, *Harper & Row* determined that the fact that a copyrighted work may contain facts not known to or available to the public is not an independent justification for appropriating copyrighted work. In effect, the Court in *Harper & Row* prohibited what the Ninth Circuit implied in *Los Angeles News Service*. Unauthorized users would not have a right of access to newsworthy copyrighted works to inform the public of new information without the copyright owner's consent. Consequently, the press does not have a right of access to a copyrighted newsworthy work solely because other works are unavailable to the public or do not include vital public information.

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<sup>121</sup> Even the compulsory license scheme for non-dramatic musical works does not grant the right to duplicate or reproduce the sound recordings of another. The compulsory license scheme only allows the making and distributing of records upon payment of a royalty to the copyright proprietor. 17 U.S.C. § 115.

<sup>122</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

<sup>123</sup> *Harper & Row*, 471 U.S. at 561.



### 3. Fair Use Standard and Fact/Expression Dichotomy Are Only Legitimate Factors After *Harper & Row*

Indeed, the Supreme Court thoroughly established in *Harper & Row* that there is no right of access to copyrighted works beyond the fair use and fact/expression doctrines.<sup>124</sup> Rejecting *The Nation's* position that the First Amendment required a right of access to matters of high public concern, the Court in *Harper & Row* noted that a First Amendment exception to copyright was not necessary because the fact/expression dichotomy “strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”<sup>125</sup> Under the fact/expression doctrine, authors have the exclusive property rights to the original expression in their copyrighted works, such as the exclusive right to reproduce, distribute, perform and display the copyrighted work.<sup>126</sup> However, no copyright owner can claim a monopoly on the facts. As a result, subsequent authors could freely pluck the facts from an author’s original copyrighted work without being subject to liability for copyright infringement.

The Court in *Harper & Row* also found that copyright law already incorporated a right of access based on the First Amendment in view of the “latitude for scholarship and comment traditionally afforded by fair use.”<sup>127</sup> This doctrine allows certain unauthorized uses of a copyrighted work, including original expression, without the consent of the author, in order to promote the creation and dissemination of supplementary works. As the fair use doctrine effectively denies an author “absolute dominion over his work” and allows others a limited right to use these works without the author’s prior consent, the Court found that the First Amendment did not warrant imposing a right of access above and beyond the traditional fair use equities.<sup>128</sup> The standards to judge whether a use was fair would continue to be the

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 555 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2nd Cir. 1983)).

<sup>126</sup> 17 U.S.C. § 106.

<sup>127</sup> *Harper & Row*, 471 U.S. at 560.

<sup>128</sup> *Id.*

statutory factors of purpose and character of use, the nature of the copyrighted work, the substantiality of the portion used in relation the copyrighted work as a whole, and the effect on the potential market for or value of the copyrighted work.<sup>129</sup> As the Court concluded that copyright serves First Amendment interests by allowing an unlimited right to use newsworthy facts in subsequent works, and the fair use doctrine allows the limited use of copyrighted expression in order to create supplemental works, a right of access based on the public's right to know is not necessary. To allow such a broad grant of access would not only be inconsistent with current Supreme Court precedent, but also duplicative of existing allowances under the fact/expression dichotomy and the fair use doctrine.

#### 4. Conclusion

As the Supreme Court settled the issues of newsworthiness and rights of access to copyrighted works in *Harper & Row*, lower courts should no longer apply these factors in their analyses of hard news photographs. Instead, courts should apply only the statutory elements of copyright, such as subject matter, fixation in a tangible medium, and originality, to determine copyright eligibility and the fair use standard to evaluate copyright infringement cases.

#### IV. EVALUATION: RECORDINGS OF TRIAL COURT PROCEEDINGS ELIGIBLE FOR COPYRIGHT PROTECTION

Once Los Angeles County installs the cameras in the courtroom and begins videotaping the trial proceedings, the County must take the following steps to register the videotape recordings with the Copyright Office: Besides placing a copyright notice on each videotape recording, the videotape must be within the subject matter of copyright, it must be fixed in a tangible medium, and it must be original.<sup>130</sup> The question of whether a raw videotape merits a

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<sup>129</sup> 17 U.S.C. § 107.

<sup>130</sup> 17 U.S.C. § 101.

copyright is one of law and fact.<sup>131</sup> As Los Angeles County has not yet recorded any trial proceedings itself, the following evaluation is based on the videotaping practices in the O.J. Simpson criminal trial.

*A. Raw Videotapes Are Audiovisual Works Which Come Within the Subject Matter of the Copyright Act*

Section 102 of the Copyright Act lists seven categories for which an author may seek copyright protection, of which audiovisual works is one of those listed. Section 101 of the Copyright Act defines "audiovisual works" as those works consisting of a series of related images and accompanying sounds, if any, such as films or tapes.<sup>132</sup> Los Angeles County currently intends to record live trial proceedings on videotape, the most commonly used device for recording visual images and associated sound recordings in the broadcast media, and copyright the videotape as an audiovisual work.<sup>133</sup> As videotapes are by definition audiovisual works under section 101,<sup>134</sup> Los Angeles County could properly copyright its recordings of live trial proceedings.<sup>135</sup>

*B. Fixation of Raw Videotapes of Live Trial Proceedings Done Simultaneously With Live Broadcast*

Under the Copyright Act, Los Angeles County needs to "fix" the trial proceedings in a tangible medium of expression, such as a videotape copy.<sup>136</sup> The statutory element of fixation under section 101 of the Copyright Act expressly provides that a "work consisting of sounds, images, or both, that is being transmitted [live] is fixed . . . if a fixation, [meaning a copy], of the work is being made

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<sup>131</sup> Los Angeles News Serv. v. Tullo, 973 F.2d 791, 793 (9th Cir. 1995).

<sup>132</sup> 17 U.S.C. § 101.

<sup>133</sup> Ito Letter, *supra* note 20.

<sup>134</sup> 17 U.S.C. § 102(a)(6).

<sup>135</sup> See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 669 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987).

<sup>136</sup> 17 U.S.C. § 101.

simultaneously with its transmission.”<sup>137</sup> Since trial proceedings potentially may be covered “live” as well as recorded for later broadcast,<sup>138</sup> the County needs only to make a videotape copy of the trial proceedings while they are simultaneously being broadcast.<sup>139</sup> If the trial proceedings are being taped for later broadcast, then the videotape itself is the copy and is thereby fixed under the Copyright Act as well.<sup>140</sup> In either instance, the County can easily satisfy the statutory element of fixation.

### C. *Los Angeles County Can Satisfy The “Originality” Requirement*

As stated before, “originality,” as defined by current copyright law, means works independently created by an author that do not consist of actual copying.<sup>141</sup> Under this liberal standard of copyright, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* held that the author need only display some “minimal level of creativity.”<sup>142</sup> Although the standard of originality is low, those works that are so “mechanical or routine as to require no creativity whatsoever” are not copyrightable.<sup>143</sup> Therefore, to satisfy the originality requirement, Los Angeles County must demonstrate that the videotaped recordings of the trial proceedings derive their origins from a county employee and that the recordings possess a minimal amount of creativity.<sup>144</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> Live coverage of the O.J. Simpson criminal trial was seen on Court Television, Cable News Network and the E! Channel.

<sup>139</sup> See *Baltimore Orioles*, 805 F.2d at 668.

<sup>140</sup> *Id.*

<sup>141</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2nd Cir.), *cert. denied*, 429 U.S. 857 (1976).

<sup>142</sup> *Feist Publications*, 499 U.S. at 358.

<sup>143</sup> *Id.* at 362.

<sup>144</sup> *Id.*

## 1. Los Angeles County Can Be Considered an "Author"

As Los Angeles County is a fictitious entity, the County cannot actually record any trials and be the "author" of the tape.<sup>145</sup> Rather, the County must hire someone to record the trial proceedings. Under current proposals, Los Angeles County presently plans to have a county employee, rather than a Court Television designatee,<sup>146</sup> be the courtroom camera operator.<sup>147</sup> The County then can be considered the "author" of the work by virtue of the "work made for hire" doctrine, even though the camera operator is the one who actually produces the recorded videotape.<sup>148</sup> This doctrine provides that an employer, for whom the work is prepared, is considered the author of a work where the employee prepares the work within the scope of the employment.<sup>149</sup> Considering that the County proposal to videotape trial proceedings is long-term,<sup>150</sup> a court could easily find that the camera operator's production of the videotape is within the scope of employment. For instance, the camera equipment will be

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<sup>145</sup> An "author" is the party who actually creates the work, translating the idea of how the work should be expressed into a fixed, tangible form. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

<sup>146</sup> Court TV owned and operated the camera in the O.J. Simpson criminal trial.

<sup>147</sup> It is unknown at this time whether the employee will be a current or specially-hired camera operator. Nonetheless, the proposal entails that a county camera operator be used to record the trials. Memorandum, County Counsel for Los Angeles County, Frederick R. Bennett, Assistant County Counsel, to De Witt. W. Clinton, General Counsel (Feb. 27, 1995) [hereinafter Memorandum] (referring to Government Code § 25330 et seq. that provides that the county may provide optional or enhanced services for a fee where employees produce this service). Since there are many camera operators working in Los Angeles, it should be relatively easy for the County to hire one.

<sup>148</sup> See *Community for Creative Non-Violence*, 490 U.S. at 737.

<sup>149</sup> The following are factors to be considered in a determination of whether the work is made within the scope of employment:

[T]he skill required, source of equipment, location of work, duration of relationship between parties, hiring party's right to assign additional projects to hired party, extent of hired party's discretion over when and how long to work, method of payment, hired party's role in hiring and paying assistants, regular business of hiring party, provision of employee benefits, and tax treatment of hired party.

*Id.*

<sup>150</sup> Memorandum, *supra* note 147 at 69.

owned by the County and all work will be performed only in Los Angeles County courtrooms. In addition, the County will most likely pay the operator a set salary and provide the operator with city and state benefits.<sup>151</sup> As a result, the County, as employer of the camera operator, can become the author of the raw videotapes of the trial proceedings.

## 2. Raw Videotapes of Trial Proceedings Need Only Show Modest Amount of Creativity

Given that *Time Inc.* set the standard for creativity at an amateur's level, a County camera operator should be able to meet this threshold. For instance, like Zapruder, the courtroom camera operator could choose the subject of the film and the angles by which to videotape.<sup>152</sup> However, unlike Zapruder, the Los Angeles county and its camera operators are limited by space and court rules.<sup>153</sup> First of all, Los Angeles County does not have the right to choose which trials it would like to record. On the contrary, camera coverage is conditioned upon the trial court permitting the use of cameras in the courtroom per Rule 980 of the California Rules of Court.<sup>154</sup> In the event that the trial judge allows camera coverage, the judge can still prohibit camera coverage at any point in the trial. In addition, the camera operator is prohibited from recording attorney-client conferences, sidebars and proceedings in the judge's chambers.<sup>155</sup> The judge also has the discretion to prohibit coverage of certain types of evidence, such as graphic photos.

Second, unlike most situations where a camera operator can freely move about the area, only one electronically-operated camera is

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<sup>151</sup> *Id.*

<sup>152</sup> Scott Schulman, the supervising media representative at the Los Angeles County Superior Court Building, wants to replace the Court Television camera with a KNBC camera that is more sensitive to low light. Susan Karlin, *Totally Wired: The Man Behind O.J. TV Frenzy*, ELECTRONIC MEDIA, Oct. 24, 1994, at 3.

<sup>153</sup> See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that multiple cameras in a courtroom are a factor in depriving defendant due process because of prejudicial publicity); *Estes v. State of Texas*, 381 U.S. 532, (1965).

<sup>154</sup> See *supra* discussion in Part II.

<sup>155</sup> *Sheppard*, 384 U.S. at 344.

allowed in the courtroom. The camera must be positioned right above the jury box.<sup>156</sup> This placement produces less likelihood of capturing the jurors on camera, which would be in violation of current court rules.<sup>157</sup> At the same time, the camera operator's creative license is effectively reduced when the camera operator is not free to move around the courtroom or record everything that transpires during the proceedings.

The operator may, nevertheless, manipulate the mechanisms of the camera itself, such as adjusting the lenses or pivoting the camera from left to right on the wall mount by remote control. The camera operator may also exercise such editorial judgment as selecting whom to record, whether to zoom in or out on a person or persons, for how long, and when to switch to another scene.<sup>158</sup> For instance, the operator may choose from a number of vantage points in the courtroom, such as an angled view of the judge's bench, witness stand, public seating section, and the prosecution and defense tables. Indeed, during a one-hour period of the Simpson trial, the camera operator changed vantage points approximately seventeen times, mostly alternating between shots of the witness, the examining attorney, and shots of both of them in the scene together at the same time.<sup>159</sup> The operator then zoomed in and out on each subject approximately two times. The camera operator also scanned away from the examining attorney and witness approximately eight times. In addition, exhibits that were displayed on the video monitors in the courtroom were inserted into the coverage approximately twelve times. Because these techniques demonstrate a level of creativity

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<sup>156</sup> For the O.J. Simpson trial, the media camera was operated by remote control by the camera operator who was positioned in the back of the courtroom. The live video feed was then routed, through fiber-optic lines running from the courtroom, to the media room on the twelfth floor of the Los Angeles Superior Court building, through a 75-foot underground tunnel to a make-shift media village across the street from the court building. This village was called "Camp O.J." by several members of the press. Karlin, *supra* note 152.

<sup>157</sup> Judge Lance Ito considered banning live coverage of the O.J. Simpson trial when the camera operator captured a juror on tape. Susan Karlin, *The Simpson Trial: TV Fights to Keep its Courtroom Cameras*, ELECTRONIC MEDIA, Oct. 10, 1994, at 1.

<sup>158</sup> Karlin, *supra* note 152. The operator is stationed in the back of the courtroom throughout the proceeding.

<sup>159</sup> Five hours of live coverage were analyzed to make this approximation. (CNN, May 10-12, 1995).

somewhere above Zapruder's technique of just letting the film roll and below the actions of the camera operators in *Baltimore Orioles* (which probably had two or more cameras), the recorded videotapes of trial proceedings will most likely be found to be creative. Thus, Los Angeles County has a strong possibility of satisfying the originality requirement for a copyright.

### 3. Conclusion

In sum, past practices in the videotaped coverage of the O.J. Simpson criminal trial and existing case law strongly suggest that the recorded video coverage of a live trial proceeding can indeed receive copyright protection. Nonetheless, to ensure such protection, the camera operator should actively film the trial proceedings, focusing in on different parts of the courtroom, switching camera angles, and zooming in and out on people and exhibits. In addition, a director or editor should facilitate these shot selections by guiding the camera operator, alternating between cameras, if more than one, and choosing which scenes to include in the final version. In no circumstance, however, should the camera merely be turned "on," letting it mechanically record what is occurring before it, like a stationary surveillance camera.

#### *D. Rebuttal of Possible Counter-Arguments*

This section analyzes possible arguments against copyrighting videotape recordings of trial proceedings. Specifically, critics of the County proposal will argue that (1) cameras merely record trial proceedings; (2) the County is trying to obtain a monopoly on the facts of the trial proceeding; and (3) the First Amendment requires an exception. The following sections rebut these assertions.

##### 1. Cameras Do Not Merely Record Trial Proceedings

A critic of the County proposal may argue that the videotape recording is a mere record of the public proceedings and, therefore, should be in the public domain. The critics may even cite the case of



*Lipman v. Commonwealth of Massachusetts* for the proposition that a court reporter can not claim a copyright in court records.<sup>160</sup> However, the issue in that case is clearly distinguishable from the one at hand. In *Lipman*, the court did not deny a copyright to the transcripts on the ground that they were in the public domain. Rather, the determinative fact was that because a court transcript is merely an accurate statement of the testimony of others, without any expressive elements provided by the court reporter, the reporter could not satisfy the originality requirement.

In contrast, a camera operator can claim the required level of originality in producing a videotaped recording. Although the substance of the videotaped recording is an accurate record of the trial proceedings, the form in which the trial is videotaped has original elements. As stated above, a camera operator imposes editorial judgment in selecting whom to film and for how long and also demonstrates creativity in selecting camera angles, distance, and editing, in order to portray an event most effectively. In this type of situation, courts have consistently found that camera operators easily satisfy the originality requirement. Indeed, several courts have outright rejected the argument that cameras merely record what is set before them.<sup>161</sup>

## 2. County Only Trying to Copyright the Videotape of the Trial Proceeding

Critics of the County proposal may claim that the County is trying to copyright the actual trial proceedings, thereby creating a monopoly on the factual events of the trial. However, the County claims no copyright in the trial proceedings. The County fully acknowledges that members of the public and the press have a constitutional right to

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<sup>160</sup> 311 F. Supp. 593 (D. Mass. 1970). However, on appeal, the *Lipman* court found that the court reporter had a "legitimate claim of entitlement," growing out of local custom and usage, to sell copies of the transcripts to the parties in the litigation. *Lipman v. Commonwealth of Mass.*, 475 F.2d 565 (1st Cir. 1973).

<sup>161</sup> *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 792; *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 141-43 (S.D.N.Y. 1968); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

attend and report on trial proceedings.<sup>162</sup> Indeed, the press can “freely set forth in speech, in books, in pictures, in music, and in every other form of expression,” the factual events that transpire during a trial proceeding.<sup>163</sup> All that the County claims is a copyright in the particular form of expression in its videotaped recordings of the trial proceedings.<sup>164</sup>

### 3. Copyright Law Already Ensures First Amendment Access to Information

A First Amendment exception to the copyright law is not necessary because copyright laws already assure access to the factual information underlying expressive works under the fact/expression dichotomy and fair use doctrine.<sup>165</sup> First, copyright protection extends only to the particular form in which factual information is expressed, and not to the factual information itself.<sup>166</sup> For instance, in *Time Inc.*, the district court found that while Zapruder’s film of President Kennedy’s assassination was copyrightable, the events surrounding the assassination were not copyrightable. For this reason, the public was free to report on the event itself. In a like manner, even if Los Angeles County copyrights its videotaped coverage of trial proceedings, the media would still have an unfettered right to sit in on the trial and report the facts of the trial to the public in its respective fora of expression. For instance, the media can freely report on the

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<sup>162</sup> See textual discussion in Section II.A., *supra*.

<sup>163</sup> *Time Inc.*, 293 F. Supp. at 143-44.

<sup>164</sup> *Id.* The court in *Time Inc.* went on to say that if having a copyright in the only film footage of a newsworthy and factual event is “oligopoly,” then “it is specifically conferred by the Copyright Act and for any relief must be addressed to . . . Congress . . . and not to the Court.” This Article agrees.

<sup>165</sup> See *Los Angeles News Serv.*, 973 F.2d at 795. See also James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263 (1987); Lionel Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971).

<sup>166</sup> See *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *Los Angeles News Serv.*, 973 F.2d at 795-96; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Wainright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977); *Time Inc.*, 293 F. Supp. at 130. See generally NIMMER, *supra* note 2, § 1.01[B].

testimony of trial participants, the arguments of attorneys and all other occurrences in the trial proceedings in newspapers and on broadcast news. The public will still be assured access to the facts of the trial because the media, both print and broadcast, is free to report the facts. The only restriction on the media is that it would not have an unfettered right to use expressive elements in the copyrighted videotapes without the County's consent.

Second, in the event that the media copies the videotapes for an authorized use, the media may rely on the "fair use" doctrine in copyright law as its defense. Subject to certain conditions, the fair use doctrine cedes access to an author's expression, without the author's consent, for the purpose of promoting more free expression, such as news reporting.<sup>167</sup> For example, in *Time Inc.*, the defendant book author's use of Zapruder's copyrighted film to produce charcoal sketches of the event was a fair use. First Amendment considerations were relevant in determining that the use was reasonable because the purpose of the author's use was to broaden public interest in his theory on why and how President Kennedy was assassinated. The court found it significant that the author did not mechanically copy the film and place the still shots in his own book. Instead, the defendant extracted the facts from Zapruder's film and reproduced them in his own work.<sup>168</sup> This, the court found, expanded the market of information on the Kennedy assassination and facilitated the "public interest in having the fullest information available."<sup>169</sup> Similarly, a courtroom sketch artist may freely distribute renditions of the trial participants and the proceedings without violating Los Angeles County's copyright on the videotape. These courtroom sketches would add to the market of information on the trial proceedings. In addition, if still photography is allowed in court, the news photographers could freely publish their own photographs in the newspapers or include them in broadcast news programs, adding to the market for public interest works.

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<sup>167</sup> The four factors to consider for fair use are: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the taking in relation to the whole, and effect on market value. 17 U.S.C. § 107.

<sup>168</sup> *Time Inc.*, 293 F. Supp. at 146.

<sup>169</sup> *Id.*, at 146.

Thus, the fact/expression dichotomy and the fair use doctrine, together, can adequately protect First Amendment interests in assuring both access to factual informational contained in photographic works and access to independent works of the media. In addition, all this can be done without the need to create a specific First Amendment exception for news photography.

## V. OPTIONS

As stated above, cameras are present in courtrooms across the country filming criminal trials. In California, present court rules limit the number of television cameras to only one.<sup>170</sup> In the O.J. Simpson trial, Court Television owned and operated the one camera filming the trial proceedings.<sup>171</sup> As a consequence, court rules dictate that where more than one media agency requests permission to videotape a criminal proceeding, then all media agencies must share the videotape.<sup>172</sup> This arrangement is commonly referred to as a "pooling agreement." Implicit in the pooling agreement is that all recordings of the criminal proceedings may be freely used by all members of the pool because the film belongs to all. In effect, the present system allows the media to have unrestricted use of all the videotaped recordings.

However, if the County were to install its own audiovisual equipment, the recorded videotape no longer belongs to the pool, but rather to the County. Once the recordings are copyrighted, the County has several options in exploiting this property right. The County may consider adopting (1) a user-fee approach; or (2) a blanket license approach. This section also considers Nimmer's suggestion to implement a compulsory license approach.

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<sup>170</sup> CAL. R. CT. 980(e)(7)(i).

<sup>171</sup> Steve Brennan & Jonathan Davies, *O.J. Trial Cover Charge for Broadcasters OK'd*, HOLLYWOOD REPORTER, Mar. 1, 1995, at 1.

<sup>172</sup> CAL. R. CT. 980(e)(8).

## A. *Nimmer Compulsory License Proposal*

### 1. The Approach

In his treatise, Nimmer suggested that news photography be subjected to a compulsory license system.<sup>173</sup> Under this approach, a news photographer would be obligated to license his photographs to anyone seeking access to the work if the news photograph “has not appeared in any newspaper, magazine, or television news program servicing a given area” within one month of its making. Under the system, the copyright owner of the photograph would only be able to charge a reasonable royalty, as determined by a court of law.<sup>174</sup> The effect of this system would be to create an incentive on copyright holders of news photography to immediately release their works to the public and the press.<sup>175</sup>

### 2. Evaluation

Nimmer’s scheme to “accord lesser rights in those works that are of the greatest importance to the public”<sup>176</sup> is fundamentally at odds with the goals of copyright: to reward authors with a property right in their original works of expression and to reward society with the creation and dissemination of new ideas and information.<sup>177</sup> A compulsory license for photographs would deny photographers the right to market their works based solely on a loose definition of “newsworthiness.” This not only endangers the copyright incentive to produce news photographs, but also delves into the murky waters of what constitutes the “news.”

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<sup>173</sup> This system is patterned after the compulsory license mechanism for translations provided in article V(2) of the Universal Copyright Convention. NIMMER, *supra* note 2, § 1.10[C] at 1-91.

<sup>174</sup> *Id.*

<sup>175</sup> Nimmer thought it “intolerable that a copyright owner’s prerogative may cut off entirely from public access a photograph which by hypothesis is one of which the public should be aware.” NIMMER, *supra* note 2, § 1.10[C], at 1-92.

<sup>176</sup> *Id.*

<sup>177</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Indeed, even Nimmer recognized that if news photographers could no longer be compensated for their works based on marketplace conditions, the industry of free-lance photographers, who constantly and randomly take photographs of newsworthy and non-newsworthy events, could be unduly penalized under the system.<sup>178</sup> In fact, a compulsory licensing scheme could be the death nail of the industry because the primary income free lance photographers receive is from licenses to major news programs.<sup>179</sup> If a compulsory licensing scheme were imposed on these free-lance photographers or the County, allowing the media a free right of access to the photographers' products, free-lance photographers and the County would no longer have an incentive to photograph newsworthy events. This would not only reduce a viable source of income for the free-lance photographers, but also reduce the number of photographs available to the public.

In addition, the compulsory licensing scheme fails to take into consideration the residual value of stock photographs, photographs that are stored in archives listing the persons and events photographed.<sup>180</sup> Most free-lance journalists save their photographs for years in these archives in case the photograph becomes newsworthy later in time. News publications have a tremendous need and demand for these photographs.<sup>181</sup> In the O.J. Simpson civil trial, O.J. Simpson was photographed wearing a pair of Bruno Magli shoes.<sup>182</sup> At the time of the photograph, Simpson's shoes were not newsworthy. Now, however, the photograph is newsworthy because the murderer of Nicole Brown Simpson and Ronald Goldman was believed to be

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<sup>178</sup> NIMMER, *supra* note 2, § 1.10[C] at 1-91.

<sup>179</sup> Major news networks are the primary consumers of free-lance photography because over the years news organizations have downsized and eliminated both domestic and foreign offices. As a result, news organizations no longer have their own photographers photograph newsworthy events around and outside the county. Instead, they rely on free-lance photographers to supply these photographs. Don E. Tomlinson & Christopher R. Harris, *Free-lance Photojournalism in a Digital World: Copyright, Lanham Act and Droit Moral Considerations Plus a Sui Generis Solution*, 45 FED. COMM. L.J. 1, 2 (1992).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> The author would like to thank Adam Baker, Chief Articles Editor of the Entertainment Law Review, for supplying this example.

wearing the same Bruno Magli shoes. This example illustrates a misconception of newsworthiness that Nimmer failed to address. Not all events are so graphically newsworthy at the time they are captured on camera that they will be in banner headlines. Some events, persons or objects, like the illustration above, become newsworthy because of some later newsworthy events. Even so, the compulsory license system would strip free-lance photographers of their right to license their photos under existing market conditions to hundreds, if not thousands, of news organizations that can afford to pay a competitive market price, even though the photographer has no control over what becomes the latest "newsworthy" event.

In conclusion, the compulsory licensing system is counter-productive to the goals of copyright law. Rather than rewarding the "author" of the work, the compulsory license system penalizes photographers for situations completely outside their control. This system also reverses the incentive copyright was meant to afford by diminishing the photographer's property right while, at the same time, increasing the media's access to their work at a large discount. This is particularly offensive when, in all actuality, most media organizations can afford to pay for a competitive license. Just as the compulsory license system would be detrimental to the free-lance photojournalist, this system would be equally detrimental to the County, the copyright owner of the courtroom videotapes. As such, the County should not adopt this approach.

## B. *County User-Fee Proposal*

### 1. The Approach

Present County proposals call for charging a "user-fee" for the use of county cameras and copyrighted film footage of trial proceedings.<sup>183</sup> Designed to defray the cost of county services, this special type of fee is imposed only on the users of that service.<sup>184</sup>

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<sup>183</sup> Memorandum, *supra*, note 147.

<sup>184</sup> See *In re Lorber Indus. of California, Inc. v. Lorber Indus. of California, Inc.*, 675 F.2d 1062, 1067 (1982).

For example, bus passengers, the users of county-operated bus companies, pay the county a fee for the use of the bus and the services of the driver. Under this type of arrangement, the user pays a fee directly proportional to the amount of service used. Los Angeles County could charge a fee based on the cost of operating county-owned cameras and the number of times videotaped courtroom proceedings are broadcast.

## 2. Evaluation

Although the County's proposal to charge interested news media a users-fee is an equitable approach, this approach is not economically efficient because not all users will use the County's videotapes in the same manner. Referring back to the Simpson trial, a practical look at the marketplace reveals that there is a potential for hundreds of users and hundreds of videotaped recordings. For instance, virtually every television news program across the country followed the trial and used the videotaped recordings of the trial regularly (mostly because news organizations have free use of the videotapes through the pool).<sup>185</sup> In addition, considering that criminal trials may last anywhere from days to weeks to years, the County could end up possessing hundreds of videotapes on one trial alone that users may want to possess.

Under these conditions, arranging individual fees for the use of individual videotape recordings by potentially hundreds of users would

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<sup>185</sup> Although use of the videotapes is free, the Radio and Television News Association insists that it has paid "hundreds of thousands of dollars" in costs associated with covering the trial and estimate that the cost will be over \$1.25 million dollars by the trial's end. However, much of these costs relate to normal overhead in covering a story. For instance, although the Association has paid \$130,000 for the press room on the thirteenth floor of the Los Angeles Superior Court building, most of the expense was for the media equipment that the media wanted and needed. The room itself is provided free of charge by the County, which has a long-standing policy not to charge the media for space in the courthouse. Other costs borne by the media are directly related to its use of County services, such as increased security and additional space for the ad-hoc village across the courthouse that houses several portable trailers, scaffolds, and satellite dishes. Susan Karlin, *Media Balk at Paying Court Fees*, ELECTRONIC MEDIA, Apr. 3, 1995, at 56; Karlin, *supra* note 152; Ito Letter, *supra* note 20.



be economically prohibitive for both the County and the users.<sup>186</sup> For instance, the County would have to spend additional resources developing customized fee schedules for each individual user, which could take days to produce. The users would have to spend their resources itemizing when, where and how they would use the videotaped recordings. Plus, the costs in arranging this transaction would be increased when the County and the user do not agree on the fees and they seek to negotiate on the issue. The effect of these transaction costs multiplied by the hundreds would put an undue strain on the County.

In addition, videotape use, unlike other county products like water, gas, electricity and bus rides, cannot be measured simply by hooking up a meter to the product. Once the user has possession of the videotape, the County has no way of monitoring whether the user uses the tape according to the agreed upon fee arrangement. Furthermore, because the vast majority of users operate all across the nation, not just within Los Angeles County, the County would have a difficult task monitoring such illicit videotape use. Thus, the County would have to spend additional resources policing videotape use which could also be economically prohibitive.

### C. *Blanket License Fee Recommendation*

#### 1. The Approach

As fees based upon individual use would cause difficult and expensive problems, the County should implement a "blanket" licensing approach. A blanket license gives the licensee an unlimited, non-exclusive right to use any videotaped recording of trial proceedings. The licensee also obtains the right to use the recordings copyrighted by the County, as often as the licensee chooses for a stated term.<sup>187</sup> Furthermore, the licensee has immediate access to

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<sup>186</sup> *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 (1979).

<sup>187</sup> *Id.* at 20.

the recordings in the event the trial proceedings are recorded on a live basis.<sup>188</sup>

Thus, the license fee would not be based on the amount or purpose of the use, but rather on the value of the service as a package deal. Under the County Provisions statute, the County has the discretion to charge users a fee based on the value of the services, rather than on the cost to produce such services, as suggested in the user-fee approach.<sup>189</sup> In contrast, under the blanket license fee approach, the value of the fee would be based upon the total benefits received by the licensee and the County.

## 2. Evaluation

Under the blanket licensing approach, the County and the licensee benefit by not having to develop and implement a fee schedule for each individual user and for each individual use, thereby reducing transaction costs from arranging hundreds of separate user-fee contracts to the purchase of only a few blanket licenses.<sup>190</sup> In addition, County costs would be reduced since the County would not have to spend its resources policing its copyrights. At the same time, licensees would be indemnified from any copyright infringement actions.

Taken together, the blanket license is much more valuable than a user-fee agreement because negotiation costs are reduced, the licensees have immediate access to videotaped recordings of trial proceedings, the licensee is no longer limited to scheduled pre-approved uses (as under the user-fee agreement), and the licensee can broadcast the videotaped recordings without worrying that the use is an infringement of the copyright.

In conclusion, the County should implement a blanket licensing system rather than a fee based on usage because the blanket licensing system would be more economically efficient for both the County and the user. Moreover, this arrangement would not significantly affect

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<sup>188</sup> *Id.*

<sup>189</sup> CAL. GOV'T CODE § 25336. *See also* 1992 Cal. Stat. § 787 (Deering/West), enacting CAL. GOV'T CODE §§ 25330-25339.

<sup>190</sup> *Id.* at 21-22.

current practices in the press' coverage of trial proceedings. As under the pooling system, the licensees would still have unlimited use and unrestricted access to the videotaped recordings; the only real difference would be that the users of this service will now have to pay for it.

Furthermore, this approach would systematically promote the ultimate goals of copyright: counties would have the incentive to produce works that are of the utmost public importance and the public and the press would be assured immediate access to the factual information in the trial proceedings.

## VI. CONCLUSION

Both the First Amendment and copyright law recognize two important interests in our society: the dissemination of factual information to the public and rewarding the producer of this information with a property right in the form of its expression. Allowing Los Angeles County to install audiovisual equipment in county courtrooms in order to record and copyright videotaped trial proceedings would serve these two interests. First, the installation of cameras in the courtroom would in no way impede the press' right to attend and report on trials. Rather, providing videotaped recordings to the press and the public is an additional source of information on trial proceedings that would supplement trial transcripts. Second, copyright law secures the press' right of access to factual information under both the fact/expression dichotomy and the fair use standard. Third, the implementation of a blanket license system would allow licensees unlimited and immediate use of the videotaped recordings of the trial proceedings. At the same time, a copyright on the videotapes of trial proceedings would reward the County for its efforts to open courtroom doors, through its cameras, to the press and public. In conclusion, the Los Angeles County should install audiovisual equipment in its courtrooms and copyright the videotaped proceedings in order to license their use.