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BUT CAN YOU DO THAT?

"FAIR USE" PROTECTS ZAPRUDER FILM COPIES

PUBLISHERS' WEEKLY has already mentioned the recent United States District Court's decision in New York holding that although *Life* magazine owns valid copyrights in the now famous Abraham Zapruder films of the assassination of President Kennedy, the author and publisher of a book on the assassination may reproduce those films without being guilty of copyright infringement (*PW*, October 14, 1968). However, because the implications and ramifications of that decision are far-reaching and significant in terms of adapting traditional copyright law to 20th century realities and necessities, we thought it would be a good idea to explore somewhat more fully the case in question.

The book at issue—"Six Seconds in Dallas" by Josiah Thompson (*Gets*)—contained "sketches" of the film which were exact copies of the original, and which, according to the court, were not only unauthorized but were obtained by means of "night-time activities" which constituted "deliberate appropriation . . . in defiance of the copyright owner." Nevertheless, the court held that this "deliberate appropriation" was not a copyright violation but was protected by the doctrine of "fair use."

After a lengthy statement of the facts of the case, including the circumstances of the Zapruder filming, the purchase of his work by *Life*, the appearance and publication of frames of the film in various issues of the magazine as well as in the Report of the Warren Commission, and the fact that *Life* turned down an offer of all of the defendants' profits from the book in exchange for permission to use the frames, the court dealt first with the question of whether the films were the subject of valid United States copyrights. And the court had little difficulty concluding that they were.

However, among many defenses asserted by the defendants were the contentions that "the pictures are simply records of what took place, without any 'elements' personal to Zapruder, and that 'news' cannot be the subject of copyright."

The court rejected both of those assertions, stating in part: "Defendants are perfectly correct in their contention [that] a news event may not be copyrighted. . . . *Life* claims no copyright in the news element of the event but only in the particular form or record made by Zapruder. . . . The Zapruder pictures have . . . many elements of creativity. Among other things, Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated."

Then, after rejecting the claim that *Life* was seeking an unlawful "oligopoly" of the facts of the tragic assassination, the court concluded: "*Life* has a valid copyright in the Zapruder film."

But having thus concluded, the court promptly proceeded to find that the defendants' unauthorized copies of those copyrighted films did not render the defendants liable for infringement—because of the doctrine of "fair use." As the court put it: "The courts have . . . recognized that copying or other appropriation of a copyrighted work will not entail liability if it is reasonable or 'fair.' The doctrine is entirely equitable and is so flexible as virtually to defy definition."

Nevertheless, the court did observe that in a leading early case, "the test of fair use was primarily the degree of injury to the plaintiff," and that in a recent case one distinguished appellate judge "emphasized the factor of 'public interest in the free dissemination of information.'"

And then the court took notice of the fact that the Copyright Revision Bill, which was passed by the House on April 11, 1967, but was not passed by the Senate, contains a specific provision pertaining to "fair use," and the court quite clearly gave that provision much careful and serious consideration in reaching its decision. The court quoted the Revision Bill in full on this point, the relevant part of which reads: "In determining whether the use made of a work in any par-

ticular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." And the court observed: "The difficult job is to apply the relevant criteria."

In this situation, the court found that "in determining the issue of fair use, the balance seems to be in favor of defendants. . . . There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. The book is not bought because it contained the Zapruder pictures; the book is bought because of the theory of Thompson and its explanation, supported by Zapruder pictures."

There seems little, if any, injury to plaintiff, the copyright owner. There is no competition between plaintiff and defendants. Plaintiff does not sell the Zapruder pictures as such and no market for the copyrighted work appears to be affected. Defendants do not publish a magazine. It seems more reasonable to speculate that the book would, if anything, enhance the value of the copyright work; it is difficult to see any decrease in its value."

Admittedly, the question posed by this case was a difficult one in terms of traditional notions of "fair use" of copyrighted works, since it was conceded that the defendants' sketches of the Zapruder frames were exact copies of the most significant shots, made without the permission of the copyright owner. In so holding, the court was no doubt influenced by the fact that our modern means of communication require adaptation and adjustment of our traditional notions of "fair use" to keep up with the times—all of which makes the doctrine harder to define than ever, if that's possible. The problem of the present case bears some resemblance to that presented in a case decided some years ago involving an unauthorized use of the late Martin Luther King's "I Have

event, in that case—and others—the courts have acknowledged that it is not an infringement to reproduce such a work as news—but not otherwise, as in books, which would constitute a more permanent “record.” In the Zapruder case we are presently discussing, the court went still further, since the use in question was in the more permanent form of a book, but then the court did make clear that the use was secondary to the dominant theme of the book and illustrative of it. In any event, the case again underscores the great difficulty inherent in trying to define “fair use” with any precision—a difficulty which led the copyright law revisers not to try.

In view of the length of time it is unfortunately taking to get any copyright revision bill passed, it seems safe to say that each new judicial development makes clear that whatever the final version of the new law (if any) with respect to “fair use,” new situations will continually arise calling for decision on a case-to-case basis, with each such case likely to have industry-wide or multi-industry-wide effect (as with the United States Supreme Court’s decision on CATV, see *PW*, July 1, 1968). And if this is “judicial legislation,” we should make the most of it, since as a method of defining the undefinable, it seems to work at least as well as any other yet devised. [*Time Inc. v. Bernard Geis Associates*, et al., U. S. District Court, So. District of N. Y., Docket No. 67 Civ. 36, Sept. 24, 1968.]

“MALICE” TEST NOT APPLIED TO MAGAZINE DISTRIBUTOR

NOW that the “rule of law” has been fairly well established that a “public figure” as well as a “public official” will have to prove “actual malice”—i.e., knowledge of falsity or reckless disregard of truth or falsity—before he can recover for a libel about him (see, e.g., *PW*, Sept. 2, 1968), the courts are more and more finding themselves confronted by the even more difficult question of what makes a person a “public figure” for the purposes of the new rule. Obviously, such persons as General Edwin Walker (USA, Ret.) or football coach Wally Butts or Nobel Prize-winning Linus Pauling—all of whom have had the new rule applied against them in recent years—seem to qualify, but what about persons who are much less in the public eye, and what—and this is the really hard one—about persons who are *only* in the public eye because some newspaper or radio or TV station decided to put them there?

It was this last question which was

decided by a United States District Court sitting in Philadelphia. And the court’s answer to the question reflects, at least as far as it was concerned, an attempt to effect a significant slowdown in the development of our libel laws in this general area.

The plaintiff in the case was a magazine distributor who was called a “smut distributor” during a radio station’s news account of police activities and judicial proceedings pertaining to allegedly obscene publications. The plaintiff denied the radio station’s characterization of him, and after being refused the opportunity to defend himself over its facilities, he proceeded to institute suit for libel.

The defendant radio station, predictably, argued that the plaintiff—as a “public figure”—would have to prove actual malice, but the court emphatically disagreed.

The court stated: “Application of the constitutional privilege in the law of libel requires a delicate balancing of the freedoms of speech and press on the one hand, and the right of the individual to be free from injury to his reputation by defamation on the other. . . . In restricting the ambit of recovery in libel actions brought by public officials and ‘public figures’ the Supreme Court has recognized that in light of the values served by the freedoms of speech and the press, certain persons are entitled to more protection than others from injuries to reputation. Underlying the recent decisions of the court is the notion that by their activities and their status, prominent persons have assumed to some extent the risk of injury due to negligently reported falsehoods and because of their access to the media of mass communication are able to protect themselves from such injuries more adequately than others. . . .”

Then, addressing itself to the particular plaintiff in the case, the court continued: “We may concede that the suppression of crime is a matter in which the public has a justified and important interest. . . . However, we must also conclude that the libelee’s access to means of public rebuttal of public libel is an important, if not essential factor in determining the application of the constitutional standard. Speech cannot rebut speech nor propaganda answer propaganda where millions of listeners are available to one side, and the other side finds the telephone hung up when he attempts to protest. . . . To insist upon the application of a constitutional standard under circumstances such as these would mean that a person, even though not a public figure, who is accused of crime, however negligently and however falsely,

would be denied access to the courts. We think the philosophy underlying the Supreme Court’s opinion precludes such a drastic result.”

Finally, the court observed that the plaintiff was “in no sense a public man” and that “he was of so little importance that when he approached the defendant seeking a hearing to prove to those in charge that his magazines were neither obscene, nor smut, nor ‘girlie-books,’ he was summarily cut off and ignored. . . . [The plaintiff] was isolated from public view until others had thrust him into it and when the news media finished with him he was in a very real sense defenseless save to the extent that the libel law of Pennsylvania afforded him protection.”

And for all of those reasons the court unequivocally ruled that “because of his public anonymity, which precluded meaningful access to the news media as a means of protecting his reputation, even though he was tangentially involved in a public issue, plaintiff is protected by Pennsylvania libel laws without First Amendment strictures.”

We hope that this case—or one like it—will find its way to the United States Supreme Court. Obviously, the question presented—i.e., when does an otherwise private person become a public figure for purposes of the new constitutional rules for libel—is an extremely perplexing one, with ramifications not only with respect to libel but also to so-called “rights of privacy.”

In this connection, it does seem to us that a strong argument can be made—as this court did in the context of this case—that only if a “public figure” is indeed in a position to “answer back” does a rule precluding him from recovering for libel make sense. The Supreme Court in the *New York Times* case paved the way for an interpretation of our libel laws which permits of more robust and uninhibited debate. It may now be expected that the courts, like the one in Philadelphia, will also seek to ensure that that debate will not also be one-sided. Significantly, in the case in question, the defendant radio station was not only the disseminator of the allegedly defamatory statement but was its originator as well. Especially in such cases, if the medium refuses to permit the person “attacked” to respond—in effect leaving him defenseless and making the debate one-sided indeed—then it seems clear that new rules and formulas for libel suits like the present one will have to be devised.

[*Rosenbloom v. Metromedia, Inc.*, U. S. District Court, Eastern District of Pa., 37 U. S. Law Week, page 2145, August 22, 1968.]