When Copyright Law and the Freedom of the Press Collide: Does the First Amendment Deserve an Independent Analysis?

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INTRODUCTION

An inherent tension exists in the U.S. Constitution between copyright protection and the freedom of the press. Article I, Section 8 authorizes the former and the First Amendment guarantees the latter. When the right of a free press to disseminate information confronts a copyright owner's exclusive right to exercise monopoly control over the dissemination of a protected work, courts face difficult choices.

However, rather than apply an independent First Amendment analysis in this context, courts generally hold that First Amendment concerns are subsumed within existing copyright concepts. Those concepts include: (1) whether a particular work is a copyrightable expression of an idea, rather than the idea itself (which is not copyrightable); and (2) if so, whether the unauthorized use is nevertheless justified under the doctrine of fair use.

Furthermore, to the extent courts address the issue of the freedom of the press at all, they generally consider only the First Amendment under the Federal Constitution. Virtually none of them takes into account press protections under state laws, such as California's Constitution, which afford greater protection than the First Amendment.

The issues grow more complex when the analysis concerns photography and whether an image conveys both an idea and its expression.[1] Do Abraham Zapruder's 8-millimeter home movie pictures depicting the assassination of President John F. Kennedy constitute information, expression or both? Could a member of Congress invoke copyright law to prevent journalists from disseminating inadvertently tweeted embarrassing photographs? Could modern copyright law be invoked to censor publication of images such as those depicting the My Lai massacre or the abuse of detainees at Abu Ghraib? May a popular recording artist who maintains a public image to fans as a young, single pop singer seek damages in a copyright infringement action against a magazine that publishes photographs exposing her secret wedding? The Ninth Circuit's recent split decision in *Monge v. Maya Magazines, Inc.*[2] demonstrates the difficulty of navigating the shoals of copyright law and the freedom of the press in the context of news photography as well as the lack of a requirement that First Amendment concerns be fully vetted.

This article addresses the tension that lies at the intersection of copyright law and the freedom of the press, as illustrated by the *Monge* case. It first discusses the facts of *Monge* and then addresses the constitutional underpinnings giving rise to the tension. Next, it addresses where First Amendment concerns are supposed to be resolved in copyright cases, in the context of both the idea-expression dichotomy and fair use. Finally, it suggests the public interest might be better served if First Amendment analysis were required to play a more prominent role when copyright infringement allegations involve news reporting about public figures.[3]

MONGE V. MAYA MAGAZINES, INC.

In January 2007, pop singer and model Noelia Lorenzo Monge secretly married her manager, Jorge Reynoso. Approximately six photographs were taken using the couple's camera, three at the wedding and three later that evening. The couple never released the photographs and kept their wedding secret for the next two years, motivated at least in part to maintain Monge's marketable image as a young, single pop singer.

In the summer of 2008, Oscar Viqueira, a paparazzo[4] who occasionally worked as the couple's driver and bodyguard, discovered a memory chip in the ashtray after Reynoso borrowed his car. The chip contained more than four hundred photographs and videos, including the six wedding-related photos. In February 2009, Viqueira sold all of the files on the chip to *TVNotas*, a celebrity gossip magazine.[5] The magazine promptly published the six photographs to expose the couple's secret wedding.[6]

When Monge and Reynoso learned of the publication, they registered five of the six photographs with the U.S. Copyright Office and filed a lawsuit against the magazine and its publisher (the

"Magazine"). The district court granted the Magazine's motion for summary judgment, finding its use of the photographs constituted fair use under 17 U.S.C. § 107 and barred the plaintiffs' copyright infringement claims. The only issue raised on appeal was whether the district court properly applied the fair use standards.[7]

The Ninth Circuit reversed, in a split decision. While the majority acknowledged the "porous nature of the [fair use] factors,"[8] it concluded that all four factors tipped in the couple's favor and militated against a finding of fair use as to any of the photographs.[9] The dissent, however, found none of the fair use factors tipped in favor of the couple for the three photographs of the wedding itself.[10] One photograph was not registered and could not be the basis for a copyright infringement claim.[11] As for the remaining two post-wedding photographs, the dissent explained they may have been unnecessary to a story intended to expose the secret wedding and would have remanded the case to the trial court to resolve issues of fact.

Neither opinion discussed the First Amendment.[12]

The two opinions demonstrate how malleable the fair use standards can be and why judges have frequently described the doctrine as the "most troublesome in the whole law of copyright."[13] They also bring into sharp focus the tensions between copyright law and the freedom of the press, and raise the prospect of whether the First Amendment deserves independent analysis when the press is confronted with copyright infringement claims in the context of news reporting.

CONSTITUTIONAL ISSUES

Copyright and Free Press Provisions of the Federal Constitution

Article I, § 8, clause 8 of the U.S. Constitution provides: "[t]he Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[14] The First Amendment also provides that, "Congress shall make no law…abridging the freedom of speech, or of the press…."[15]

Shortly before the adoption of the 1976 Act, questions were raised about tensions between copyright law and the freedoms of speech and of the press.[16] According to the Supreme Court, those concerns were addressed by the enactment of the Copyright Act, which includes "built-in First Amendment accommodations,"[17] namely the idea-expression dichotomy (17 U.S.C. § 102) and the fair use doctrine (17 U.S.C. § 107).

However, judicial copyright analysis in news reporting cases generally has not employed traditional First Amendment analysis even to inquire, for example, whether a particular restriction on the press is content-based or content-neutral or whether it should be subject to strict or intermediate levels of scrutiny.[18] Notably, cases addressing the free press/copyright tensions generally do so under the Federal Constitution only. Potentially broader state constitutional protections, such as the press protection afforded under California's Constitution,[19] traditionally have not been included in the analysis.

California's Constitution Affords Greater Protection than the First Amendment

The California Constitution affords broader press protection than the First Amendment.[20] Article I, § 2(a) of California's Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[21] This guarantee is "more definitive and inclusive than the First Amendment" and the California Supreme Court has "consistently viewed with great solicitude the right to uninhibited comment on public issues."[22] For over a century the California Supreme Court has held that "[t]he wording of this section is terse and vigorous, and its meaning so plain that construction is not needed."[23]

While the Supremacy Clause of the U.S. Constitution[24] precludes states from protecting types of intellectual property that are already covered by the federal copyright laws,[25] the same cannot be said for the California Constitution's free speech and press provisions, which the U.S. Supreme Court has never held to be preempted. Indeed, Federal courts have repeatedly recognized their validity.[26]

Given that the balance between copyright law and the freedom of the press was struck based on the consideration of the lesser protections afforded under the Federal Constitution, the expanded rights afforded to those protected by California's Constitution[27] arguably could affect the balance. Litigants in copyright cases advocating for an expanded interpretation of the freedom of the press may wish to consider raising state constitutional grounds in support of the arguments.

THE IDEA-EXPRESSION DICHOTOMY

Section 102 of the Copyright Act sets forth the subject matter of copyright, which protects only the expression of ideas, not ideas themselves. Courts have explained that, because facts are not protected, copyright protection does not hinder the free flow of information. That is, there is an unfettered right to report on facts notwithstanding copyright protection for expression. This concept is generally referred to as the "idea-expression dichotomy."[28]

In the context of print journalism, the U.S. Supreme Court has described the "dual character" of news reporting and the greater need to distinguish the "substance of the information" from the "particular form or collocation of words in which the writer has communicated it," explaining that copyright protection is afforded only for the particular expression, not the information contained therein.[29] This principle also applies to news photography.

Copyrightability of Photographs Generally

Copyright law has long protected photography[30] and the threshold for copyrightability of photographs is low.[31] The Copyright Office itself encourages the registration of even point-and-shoot photographs[32] and the Ninth Circuit has recognized their registration may constitute *prima facie* evidence of the validity of the copyright in such works, pursuant to 17 U.S.C. § 410(c).[33]

In *Ets-Hokin v. Skyy Spirits, Inc.*, the Ninth Circuit held that photographs of vodka bottles were copyrightable because they met the copyright law's minimal creativity threshold.[34] Citing the Supreme Court case *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,[35] the court explained the "vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be" and that "even the slightest artistic touch will meet the originality test for a photograph."[36] Moreover, in assessing the "creative spark" of a photograph, the court explained: "no photograph, however simple, can be unaffected by the personal influence of the author."[37]

Particular Issues Concerning News Photographs

In *Los Angeles News Service v. Tullo*, the Ninth Circuit explained that copyright protection also extends to news photography.[38] *Tullo* involved a news service that recorded newsworthy events on videotape and licensed unedited raw footage to television stations and networks. A video "news clipping" service that monitored television news programs recorded and sold copies of certain news service works, including raw footage of scenes surrounding a plane crash and a train wreck. When the news service sued, the clipping service asserted that copyright did not protect the raw footage.

The Ninth Circuit disagreed, holding the raw videotapes were sufficiently original to merit copyright protection. The raw videotapes met the minimal threshold for copyrightability because their preparation required intellectual and creative input, including selections of camera lenses, angles and exposures, choices as to the heights and directions from which to shoot, what portions of the events to film and for how long, as well as initial decisions about the newsworthiness of the events and how best to tell the stories.[39] There had been no showing that other depictions or reports of the events were unavailable. The tapes also had been shown on local television programs immediately after the events so the public had not been deprived of any information vital to an understanding of the events.[40]

However, the court noted a concern first expressed by Professor Nimmer, that in some circumstances the idea-expression dichotomy may not adequately protect First Amendment interests, citing as examples the photographs of the My Lai massacre during the Vietnam War and the Zapruder film of the assassination of President John Kennedy. In such circumstances a particular expression also may constitute the idea itself. The court explained the concern of furthering the interest of public access and that copyright protection should be more limited where only a particular expression is meaningful while the "idea" of a work may contribute almost nothing to the democratic dialogue. Words describing the "idea" of the My Lai massacre could not replace the insights the public gained from the particular expression of the photographs themselves. The expression was essential to the public's understanding of what occurred at My Lai and it would be intolerable to permit a copyright owner to censor such photographs.[41]

Similarly, with respect to the assassination of President Kennedy, the Zapruder film provided authoritative answers to questions no other source could supply with equal credibility, particularly in light of the distorted and conflicting descriptions of what happened in Dallas. It was not the idea alone but its specific expression—the images themselves—that informed the public.[42] In such circumstances, the First Amendment's goals of furthering an informed dialogue about public issues could be thwarted by the use of copyright law to prevent dissemination of these works. The Abu Ghraib prison photographs depicting the systematic abuse of Iraqi detainees by American soldiers[43] or, as the *Monge* dissent pointed out, the inadvertently tweeted anatomical photographs of former Representative Anthony Weiner, may be additional examples.[44]

The *Tullo* court also noted a counter argument: denying copyright protection to news pictures could damage the news photography business, thereby defeating the First Amendment's ultimate goal of facilitating greater public access to information. It referenced a compromise proposal offered by Professor Nimmer for news photographs in which idea and expression are inseparable: unless such works appear in the newspapers, magazines or television news programs servicing a given area within a month of their making, they should be made subject to a compulsory licensing scheme.[45] While this proposal has not gained traction in the courts, the tension still exists.

THE DOCTRINE OF FAIR USE

As noted above, the fair use doctrine also is said to address First Amendment concerns. To the extent it does, however, it frames the issue as just one among a potpourri of other factors,[46] minimizing the freedom of the press and relegating the issue to be addressed without requiring application of First Amendment jurisprudence. Moreover, fair use is already decried as an overly flexible standard-free doctrine that defies definition and provides courts with so much discretion that, in reality, it is little more than a "billowing white goo."[47]

The following addresses the basic structure of fair use analysis and illustrates, through the example of *Monge*, that if courts are not required to squarely address the implicit First Amendment concerns that arise in news reporting copyright cases, the freedom of the press can be ignored entirely.

Fair use is a judicially created doctrine with its roots in English law.[48] In the seminal American fair use case of *Folsom v. Marsh*,[49] Justice Story described the difficulty of applying fair use standards, which he equated to "metaphysics of the law."[50] Traditionally, fair use has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[51] In enacting 17 U.S.C. § 107, Congress adopted the doctrine as an affirmative defense that permits an alleged infringer to justify the use of a protected work.

Under the Copyright Act, to constitute infringement in the first place, an accused use must violate one of the bundle of rights conferred on the copyright owner. Section 106 of the Copyright Act defines those rights, which are expressly made "subject to" the fair use provisions of section 107[52] (among other sections). With respect to the freedom of the press, section 107 requires that courts consider the public's right to know. The statute's preamble provides that one inquiry relevant to fair use is whether the use is made for purposes of "news reporting." However, fair use is not automatically triggered just because a particular use occurs in the context of news reporting and "newsworthiness" alone is not an independent justification for unauthorized copying of a work prior to publication.[53]

Although section 107 lists four factors to consider, they are nonexclusive and courts must determine whether particular uses are fair on a case-by-case basis, employing the factors as an "equitable rule of reason."[54] In *Monge*, the Ninth Circuit explained that courts "consider each of the four factors and put them in the judicial blender to find the appropriate balance."[55]

Section 107 provides, in pertinent part:

> Notwithstanding the provisions of sections 106…, the fair use of a copyrighted work, including such use by reproduction in copies…or by any other means specified by that section, for purposes such as…news reporting…, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Factor 1: The Purpose and Character of the Use

The Supreme Court has identified section 107's reference to "news reporting" as one factor to consider in evaluating whether a use is fair under the circumstances.[56] The central issue is whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, in a manner that alters the existing work with new expression. It asks "whether and to what extent the new work is 'transformative.'"[57] Although a "transformative use" is not required, copyright law's goal of promoting science and the arts is generally furthered by the creation of transformative works: the more transformative the new work, the less significant the other factors will be.[58]

In the Ninth Circuit, several cases have addressed fair use in news reporting with respect to video footage taken during the 1992 riots in Los Angeles following the verdict in the Rodney King beating case. In *L.A. News Serv. v. Reuters Television Intern., Ltd.*[59] and *L.A. News Serv. v. KCAL-TV Channel 9*,[60] Los Angeles News Service brought suit against Reuters for selling its footage to other news reporting organizations, and against a television station that re-broadcast its footage. Both cases found the uses did not add anything new (other than one defendant adding audio voiceover) and therefore were not transformative. On the other hand, in *L.A. News Serv. v. CBS Broadcasting, Inc.*,[61] the court held a program's arrangement of similar footage in a video montage edited for dramatic effect could be sufficiently transformative.

Another relevant issue is whether a particular use is for commercial or nonprofit purposes. Commercial use tends to weigh against a finding of fair use.[62] In *Harper & Row*, for example, the Supreme Court found fair use did not protect a magazine's unauthorized use of excerpts of President Gerald Ford's forthcoming memoir.[63] The effort to "scoop" a competitor's forthcoming publication of an unpublished work was not fair use.[64]

In *Monge*, both the majority and dissent addressed whether the photographs were "newsworthy" and agreed that the purpose of the Magazine's use of the photographs was news reporting, but they disagreed as to whether the use was sufficiently transformative or added anything new.[65] While the dissent expressed strong concerns about the implicit free press issues involved, again, neither opinion explicitly addressed the First Amendment specifically or employed a traditional First Amendment analysis; neither opinion attempted to determine whether the copyright provisions as applied in the circumstances were content-based or content-neutral; and neither opinion sought to identify, let alone apply, an appropriate level of scrutiny.

Factor 2: The Nature of the Copyrighted Work

The second factor calls for recognition that some works are closer to the core of intended copyright protection than others.

Facts and information, on the other hand, are part of the "public domain available to every person." Given copyright law and the First Amendment's interests in facilitating the dissemination of information, works of a factual nature are given more leeway in the analysis.[66]

One critical element is whether the original work is unpublished, in which case fair use traditionally is employed more narrowly, as the author has a right to control the first public appearance of the expression. In *Harper & Row*, the court held that President Ford's right of first publication and the unpublished nature of the forthcoming work were also important issues.[67]

In *Monge*, the majority highlighted that the photographs were unpublished, which was critical to its conclusion that the Magazine's use of the photographs usurped the couple's right to one day publish the photographs themselves (they had a history of selling photographs to the Magazine) and concluded this factor tipped against a finding of fair use. The majority and the dissent disagreed about how much weight should be given to this point or whether *Harper & Row* was controlling. The dissent asserted that *Harper & Row* concerned a magazine's effort to "scoop" the forthcoming publication of President Ford's book whereas, in *Monge*, the Magazine published newsworthy photographs exposing the marriage the couple had kept secret in order to profit from young fans. The photographs had not been published in two years since they were taken and there was no indication their publication was being considered.[68] In *Harper & Row*, moreover, President Ford had not previously concealed or controverted the facts included in the article.[69]

Again, the court did not discuss the First Amendment.

Factor 3: The Amount and Substantiality of the Portion Used

Section 107's third factor considers the "amount and substantiality" of the portion used in relation to the whole. This inquiry relates to the first factor, as the extent of permissible copying varies with the purpose and character of its use. For example, reproducing an entire work may be justified in certain circumstances, such as home videotaping of television programs or including substantial quotations of a work in a book review or news account of a speech.[70] As noted above, fair use favors publication of factual works, although copying the most expressive elements at the heart of a work may exceed that which is necessary to disseminate the facts.[71] The *Monge* court discussed these issues conceptually but did not mention the First Amendment.

Factor 4: The Effect on the Copyrighted Work's Potential Market or Value

The fourth factor concerns whether an unauthorized use materially impairs marketability. If the accused work adversely affects the value of any of the copyright holder's rights, the use is not fair.[72] The purpose of copyright is to create incentives for creative effort; copying even for noncommercial purposes can impair the copyright holder's ability to obtain the rewards that Congress intended.[73] Moreover, every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the copyright owner.[74]

In *Monge*, the majority and dissent disagreed about whether this standard could take into account the couple's right to change their minds and license their wedding day photographs for publication in the future.[75] But the court did not perform a First Amendment analysis.

As both the majority opinion and dissent in *Monge* demonstrate, notwithstanding that First Amendment concerns are said to be incorporated within the fair use analysis, application of a traditional fair use analysis does not require courts to discuss the First Amendment at all (let alone address potentially applicable state constitutional protections concerning the freedom of the press).

AN ALTERNATIVE APPROACH

When copyright law and the freedom of the press intersect, courts must reconcile competing constitutional interests, hopefully in a manner that furthers the mutual goals of keeping the public informed and fostering a robust marketplace of ideas. In *Monge*, neither the majority nor the dissent mentioned the First Amendment and the majority did not refer to the freedom of the press at all. Presumably this is because, in copyright cases involving news reporting, the issue is only one among a myriad of flexible factors to consider rather than as a stand-alone issue requiring consideration in its own right.

But courts minimize the guarantee of the freedom of the press when they do not address this fundamental right head-on and instead fold it into an admittedly troublesome, already cumbersome, case-by-case analysis of copyright sub-issues. Copyright was never intended to supplant the First Amendment and the two principles share the common concern of ensuring the uninhibited free flow of ideas and information.[76]

Some may believe that uncovering a celebrity couple's secret wedding may not equate to revealing the facts of My Lai, the Kennedy assassination, or prisoner abuse at Abu Ghraib. However, courts should confront the freedom of the press directly and explicitly when the outcome of any case may chill the press from exposing truths about public figures. Given the significance of the values underpinning copyright law and the freedom of the press, analysis of the freedom of the press should not be relegated to the back room in a manner that risks its misapplication or a misunderstanding of its importance by the courts, the litigants, or the public it seeks to inform. ◀◀

The views expressed in this article are personal to the author and do not necessarily reflect the views of the author's firm, the State Bar of

California, or any colleagues, organization, or client.

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Endnotes

1. In 1970, Professor Nimmer asked whether copyright protection and the liberty of speech and press were compatible. *See* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 U.C.L.A. L. Rev. 1180 (1970). Since then, much has been written about the subject and the *Nimmer on Copyright* treatise itself now includes an entire chapter on the issue. *See generally* 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, ch. 19E (2007 ed.) ("*Nimmer on Copyright*"); *see also* text accompanying note 29, *infra*.
2. *Monge v. Maya Magazines, Inc.*, ___ F.3d ___, 2012 WL 32900014 (9th Cir. 2012).
3. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (applying First Amendment in civil lawsuit between private parties).
4. "Paparazzo," the singular of "paparazzi," is defined as a "freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs." Merriam-Webster's College Dictionary at 896 (11th ed. 2003). The term originated with the news reporter character "Walter Paparazzo," in the Federico Fellini film *La Dolce Vita*. *See id.*; Bondanella, The Films of Federico Fellini at 68 (Cambridge University Press 2002).
5. *Monge*, *supra* note 2 at 1–2.
6. *Id.* at 8.
7. *Id.* at 3.
8. *Id.* at 4. The majority further explained that its analysis "is neither a mechanistic exercise nor a gestalt undertaking, but a considered legal judgment. Following [17 U.S.C. § 107], we consider each of the four factors and put them in the judicial blender to find the appropriate balance. In doing so, we are not without guidance. Precedent from both the Supreme Court and our court gives us a solid foundation to make this judgment. Although we delineate the factors individually, we recognize that our task is to consider these non-exclusive factors as a total package in assessing fair use." *Id.* at 16.
9. *Id.* at 15.
10. *Id.* at 20–24 (Smith, J., dissenting).
11. 17 U.S.C. § 411.
12. Although the *Monge* dissent discusses the importance of a free press, neither the dissent nor the majority referred to the First Amendment or employed a traditional First Amendment analysis. However, the Ninth Circuit previously has explained that, "[c]opyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves. [T]he idea-expression dichotomy…serves to accommodate the competing interests of copyright and the first amendment. The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression. * * * First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine…." Los Angeles News Service v. Tullo, 973 F.2d 791, 795–96 (9th Cir. 1992) (internal citations and punctuation omitted).
13. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); *Monge*, *supra* note 2 at 3; *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980).
14. U.S. Const., art. I, § 8, cl. 8.
15. U.S. Const., amend. I.
16. *See* note 1, *supra*.
17. *See Golan v. Holder*, 132 S.Ct. 873, 876 (2012) (discussing the "idea-expression dichotomy" and the "fair use" defense as the traditional contours of copyright protection that serve as "built-in First Amendment accommodations"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985); *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003), *overruled on other grounds in Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir.2011).
18. *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994); *see also* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 Wash. & Lee L. Rev. 831 (2010).
19. Press protection under other states' constitutions is beyond the scope of this article.
20. *Wilson v. Superior Court*, 13 Cal.3d 652, 658 (1975); *see also Kasky v. Nike, Inc.*, 27 Cal.4th 939, 958-959 (2002); *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 908 (1979), *aff'd sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).
21. Cal. Const. art. I, § 2(a).
22. *See* cases cited at note 20, *supra*.
23. *Hurvitz v. Hoefflin*, 84 Cal.App.4th 1232, 1241 (2000) (*citing Dailey v. Superior Court*, 112 Cal. 94, 98 (1896)).
24. U.S. Const., art. VI, cl. 2.
25. *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986) (*citing* Compco *Corp. v. Day-Bright Lighting, Inc.*, 376 U.S. 234 (1964) and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964)).
26. *See, e.g., PruneYard Shopping Center v. Robins*, *supra* note 20 at 80, n. 2; *N.L.R.B. v. Calkins*, 187 F.3d 1080, 1089-1090 (9th Cir. 1999). However, this discussion is not intended to suggest preemption issues could not be raised. *See, e.g.,* 17 U.S.C. 301 (copyright preemption statute); *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137–38 (9th Cir. 2006) (discussing preemption standards).
27. Whether the foreign press litigants in *Monge*—a Florida corporation and a Florida limited liability corporation—could have invoked California constitutional protection is beyond the scope of this article.
28. 17 U.S.C. § 102. The Ninth Circuit has explained that the limited jurisprudence on "the impact, if any, of the first amendment on copyright…stems not from neglect but from the fact that the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment." *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,

562 F.2d 1157, 1170 (9th Cir. 1977). The Supreme Court also has reiterated that "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" *Harper & Row, supra* note 17 at 556–57 (citing and quoting with approval lower court's opinion, *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d.195, 203 (2d Cir. 1983)).

29. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).
30. Congress first extended copyright protection to photographs in 1870; in 1884, the U.S. Supreme Court acknowledged its authority do so. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *see also Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 141 (S.D.N.Y. 1968).
31. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (with respect to photographs, "the degree of originality required for copyrightability is minimal").
32. U.S. Copyright Office, Frequently Asked Questions publication, *What Does Copyright Protect?* (Revised June 4, 2012), available at http://www.copyright.gov/help/faq/faq-protect.html (last visited October 9, 2012).
33. *Monge*, *supra* note 2 at 2, n. 2.
34. *Ets-Hokin*, *supra* note 31.
35. 499 U.S. 340 (1991).
36. *Ets-Hokin*, *supra* note 31 at 1076.
37. *Id.* at 1076–1077 (quoting Judge Learned Hand) (internal punctuation omitted).
38. *Tullo*, *supra* note 12 at 792–795
39. *Id.* at 792, 794.
40. *Id.* at 796.
41. *Id.* at 795–796 (citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (1992 ed.) §1.10[C][2], at 1-81 – 1-85)); *see also* note 1, *supra*.
42. *Id.* at 795–796; *Time Inc. v. Bernard Geis Associates*, *supra* note 30, at p. 146.
43. *Annals of National Security: Torture at Abu Ghraib*, The New Yorker, May 10, 2004, p. 43 ("[t]he photographs tell it all").
44. *Monge*, *supra* note 2 at 20 (Smith, J., dissenting).
45. *Tullo*, *supra* note 12 at 796.
46. *See* note 8, *supra*.
47. *See Monge*, *supra* note 2 at 4 and authorities cited therein.
48. *Harper & Row, supra* note 17 at 549.
49. *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).
50. *Id.* at 344–345.
51. *Harper & Row, supra* note 17 at 549 (quoting Horace g. Ball, Law of Copyright and Literary Property 260 (1944) (internal punctuation omitted)).
52. 17 U.S.C. § 107.
53. *Harper & Row, supra* note 17 at 557.
54. *Id.* at 549; H. Rep. No. 94-1476, pp. 65–66, U.S. Code Cong. & Admin. News 1976, p. 5680; S. Report 94-473, pp. 65–66 (1975); *see also Sony, supra* note 13 at 447–448, n. 31; *Harper & Row, supra* note 17 at 588.
55. *See* note 8, *supra*.
56. *Harper & Row, supra* note 17 at 561.
57. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
58. *Id.* at 579 (citations omitted).
59. 149 F.3d 987 (9th Cir. 1998).
60. 108 F.3d 1119 (9th Cir. 1997).
61. 305 F.3d 924 (9th Cir. 2002), *as amended*, 313 F.3d 1093 (9th Cir. 2002).
62. *Harper & Row, supra* note 17 at 562.
63. *Id.* at 564.
64. *Id.* at 562–563.
65. The majority also distinguished *Núñez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000), which held a newspaper's publication of salacious photographs of a beauty pageant winner was justified under fair use, explaining that in *Núñez* the photographs themselves were the story (whether posing semi-nude befitted "Miss Universe Puerto Rico"), while in *Monge* they were only evidence of the controversy (the clandestine wedding). *Monge, supra* note 2 at 8.
66. *Campbell, supra* note 57 at 586; *Feist, supra* note 35 at 348; *Harper & Row, supra* note 17 at 563; *Stewart v. Abend*, 495 U.S. 207, 237 (1990).
67. *Harper & Row, supra* note 17 at 564.
68. Both the majority and dissent included lengthy discussions as to the copyrightability of news photographs, which may be misplaced. While the factual character and news value of the photographs was relevant to evaluation of the works, consideration of whether they were copyrightable was a threshold issue that the plaintiff has the burden of establishing at the outset, and not an element of the affirmative defense.
69. *Monge, supra* note 2 at 20 (Smith, J., dissenting).
70. *Campbell, supra* note 57 at 586–87 (citing *Sony, supra* note 13 at 449–450; *Harper & Row, supra* note 17 at 564).
71. *Harper & Row, supra* note 17 at 563.
72. *Id.* at 566–568 (internal citations omitted).
73. *Sony, supra* note 13 at 450.
74. *Id.* at 451.
75. *Monge, supra* note 2 at 14 (citing Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1119 (9th Cir. 2000)); *id.* at 23 (Smith, J., dissenting) (citing *Worldwide Church* at 1119, n.2).
76. *See* note 12, *supra*.