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RECENT DEVELOPMENT

Problems in Giving Obscenity Copyright Protection: Did *Jartech* and *Mitchell Brothers* Go Too Far?*

I. INTRODUCTION

For more than 200 years courts and commentators have debated the issue of whether the law should confer copyright protection on indecent or immoral—"obscene"—works.¹ Until recently the law in this area was well-settled: obscene works were not copyrightable.² In *Miller v. California*,³ however, the Supreme Court complicated the analysis of the copyright-obscenity issue by defining obscenity in terms of contemporary community standards. Though Congress intended copyright law to be uniform and national in scope,⁴ *Miller* requires a court to determine obscenity at the local level. Thus, a work found obscene in only one part of the country would lose federal copyright protection. This result frustrates the policy of uniformity underlying the copyright statute.

Attempting to solve this dilemma, the United States Court of Appeals for the Fifth Circuit in *Mitchell Brothers Film Group v. Cinema Adult Theater*⁵ abandoned the common-law rule that obscenity is not copyrightable. Last year the United States Court of Appeals for the Ninth Circuit in *Jartech, Inc. v. Clancy*⁶ followed *Mitchell Brothers* and held that copyright holders of obscene material have a valid cause of action for infringement.

This Recent Development traces in part II the emergence of the

* A later version of this article was submitted in the Nathan Burkan Memorial Copyright Competition at the Vanderbilt University School of Law. The competition is sponsored by the American Society of Composers, Authors, and Publishers (ASCAP).

1. See *Burnett v. Chetwood*, [1816-1817] 2 Mer. Ch. 441 (1720), in which plaintiff brought an action for injunctive relief to stop translation of a book from Latin into English. The equity court granted relief even though the Latin work contained indecent material.

2. See *infra* part III.

3. 413 U.S. 15 (1973).

4. See *infra* part IV(C), (D) and accompanying text.

5. 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

6. 666 F.2d 403 (9th Cir.), *cert. denied*, 103 S. Ct. 59, *cert. denied*, 103 S. Ct. 179 (1982).

rule that obscenity is not copyrightable. Part III then examines the courts' reasoning in *Mitchell Brothers* and *Jartech* and analyzes the impact of these cases on copyright law. Part IV finds that although these courts properly vindicate free expression, they fail to recognize adequately the national policy against obscenity and the inconsistency of affording federal copyright protection to materials that violate federal obscenity laws. Thus, this Recent Development argues that the strong national policy against obscenity, as manifested in federal antiobscenity statutes,⁷ requires courts in some cases to deny copyright protection to obscene works that violate a national obscenity standard, even though that standard may not coincide with a local community standard. A federal court could substitute for the community standard a balancing of various national interests such as the following: (1) whether the degree of obscenity requires denial of copyright on public policy grounds; (2) whether organized crime is present in the works' creation, sale, or distribution; (3) whether the works depict sexual exploitation of children; and (4) whether the marketability of the work relies heavily on national distribution. This list, though not exhaustive, represents concerns of the federal government that *Jartech* and *Mitchell Brothers* overlook when they give full copyright protection to works that inherently violate federal anti-obscenity policy.

II. COPYRIGHT AND OBSCENITY: A LEGAL BACKGROUND

A. *The Copyrightability of "Obscene" Works*

The United States Constitution gives Congress the 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."⁸ From this constitutional delegation of power, Congress has enacted a body of law to protect all "original works of authorship" from exploitation without the permission of the work's creator.⁹ Although the Constitution and the exten-

7. See *infra* note 67.

8. U.S. CONST. art. I, § 8, cl. 8.

9. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1976 & Supp. V 1981)). Although superseded by the 1976 Act, the Copyright Act of 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. §§ 1-216 (1909)) (repealed 1976) may have some relevance to works created before 1978.

Since 1790 Congress has amended the copyright laws from time to time to reflect the changes in media; its latest statement is the Copyright Act of 1976. See generally *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 854-55 (5th Cir. 1979) (historical discussion of copyright law), *cert. denied*, 445 U.S. 917 (1980).

sive copyright legislation do not expressly preclude immoral or "obscene" works from copyright protection, the courts, through various legal constructs, historically have deemed such works uncopyrightable.¹⁰

The English courts of the eighteenth and nineteenth centuries created this obscenity exception to copyright largely because of their belief that a judge should be the conservator of the public morality. In *Stockdale v. Onwhyn*,¹¹ for example, an English court of law refused to award damages to a publisher who claimed that a subsequent publisher pirated the *Memoirs of Harriette Wilson*, an account of the exploits of a notorious courtesan. The court held that publication of the book violated English obscenity laws because it contained "highly indecent" materials.¹² The *Stockdale* court observed that English equity courts frequently refuse to grant injunctive relief to stop piracy of morally objectionable works.¹³ These courts base denial of injunctive relief on the doctrine of "unclean hands," which prevents a plaintiff tainted by the illegality of publishing an obscene work from enjoying the benefits of the court's equity authority.¹⁴

10. See, e.g., *Khan v. Leo Feist, Inc.*, 165 F.2d 188 (2d Cir. 1947) (song was copyrightable because its lyrics were not lewd or immoral); *Barnes v. Miner*, 122 F. 480 (C.C.S.D. N.Y. 1903) (immoral works are not works that "promote the progress of science and the useful arts" as specified in Constitution); *Broder v. Zeno Mauvais Music Co.*, 88 F. 74 (C.C.N.D. Cal. 1898) (song was uncopyrightable because it contained "vulgar" and "obscene" lyrics); *Richardson v. Miller*, 20 F. Cas. 722 (C.C. Mass. 1877) (No. 11,791) (dictum that inherently immoral works cannot be copyrighted); *Martinetti v. Maguire*, 16 F. Cas. 920 (C.C. Cal. 1867) (No. 9,173) (neither party entitled to copyright protection; works held to be "grossly indecent and calculated to corrupt the morals of the people"); *Bullard v. Esper*, 72 F. Supp. 548 (N.D. Tex. 1947) (copyright protection denied to both parties because copyright was not intended to protect illegality or immorality); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942) (obscenity/copyright problem discussed in dictum); *Simonton v. Gordon*, 12 F.2d 116 (S.D.N.Y. 1925) (obscene materials are uncopyrightable but the book in question was not obscene); *Hoffman v. Le Traunik*, 209 F. 375 (N.D.N.Y. 1913) (a work must be free from immorality to be copyrightable); *Dane v. M. & H. Co.*, 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963) (strip tease did not promote progress of science and useful arts); *Shook v. Daly*, 49 How. Pr. 366 (N.Y. Sup. Ct. 1875) (court refused injunctive relief for alleged piracy of an "immoral" play).

11. 108 Eng. Rep. 65 (K.B. 1826).

12. *Id.* at 66.

13. *Id.* at 65; see Chafee, *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 1065 (1949).

14. The Fifth Circuit in *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), discussed the unclean hands doctrine because the trial court had adopted the English rule to allow defendant to use an obscenity defense in a copyright dispute. On appeal the Fifth Circuit reversed and noted that unclean hands "has seldom been relied upon by courts that have denied copyright to obscene or immoral works." *Id.* at 861.

Another English theory for denying copyright protection to obscene or immoral works was the so-called "property theory." The property theory posited that a person cannot have a property right in something that the law would prohibit him from publishing. See Phillips, *Copy-*

In the late nineteenth century a federal court in *Martinetti v. Maguire*¹⁵ first applied the *Stockdale* rule in the United States. In *Martinetti* the court denied injunctive relief to both parties in a dispute over the copyright to a play. Plaintiff claimed that defendant's play, the "Black Crook," copied his work, the "Black Rook." Although the court held that both works were uncopyrightable because they lacked originality, it suggested that the women's provocative dress in the "Black Crook" influenced its ruling.¹⁶ The court noted that the "principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress"¹⁷ Although the *Martinetti* judge denied that he was acting as a conservator of public morality by denying copyright, he concluded that "it is the duty of all courts to uphold public virtue, and [to] discourage and repel whatever tends to impair it."¹⁸ Furthermore, he stated that the spectacle "panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."¹⁹

The *Martinetti* court technically held that the dramatic content of the two plays was so immoral that the works did not promote the progress of science or useful arts and, hence, did not fall under the ambit of the constitutional copyright clause.²⁰ Other courts followed *Martinetti* and used statutory or constitutional interpretation to justify their refusals to allow a copyright; the true motive behind these holdings, however, was a sense of moral outrage.²¹ In 1875, for exam-

right in Obscene Works: Some British and American Problems, 6 ANGLO-AM. L. REV. 138, 142-44 (1977). Courts at law used the property theory while the equity courts used the unclean hands theory. *Id.*

15. 16 F. Cas. 920 (C.C. Cal. 1867) (No. 9,173).

16. *Id.* at 922.

17. *Id.*

18. *Id.*

19. *Id.*

20. The courts' use of a constitutional interpretation to exclude obscenity from copyright protection offers a stronger basis for the exception than the property or unclean hands theories. See *supra* note 14 and accompanying text. According to Professor Nimmer, however, the constitutional language that copyright should "promote the progress of science and the useful arts" is not a requirement but a preamble stating the intention of copyright protection. 1 M. NIMMER, ON COPYRIGHT § 1.03[A] (1982).

21. For example, the court in *Barnes v. Miner*, 122 F. 480 (C.C.S.D.N.Y. 1903), held that a play called *X-Rays of Society* was not copyrightable because it did not promote the progress of science or the useful arts. The play's scantily clad actresses probably influenced the court's strict interpretation of the constitutional language. See *id.* at 489. The actual denial of copyright protection, however, stemmed from the play's lack of dramatic value rather than its obscenity. *Id.* at 489-90; see Levenson, *Copyright and Obscenity: Towards a National Standard?*, 7 PERF. ARTS REV. 495, 501 (1977).

ple, a New York court stated, "The rights of the author are secondary to the right of the public, to be protected from what is subversive of good morals."²²

In 1909 Congress rewrote the copyright law and expanded its coverage from specific types of writing "intended to be perfected as works of the fine arts"²³ to "all the writings of an author."²⁴ Notwithstanding this change,²⁵ the courts confronting obscenity-copyright problems in the early 1900's maintained that promotion of science and the useful arts did not encompass protection of immoral works.²⁶ Rather than act as moral referees, however, the courts began to require not mere moral objectionability but a finding of criminal obscenity before they would deny copyright protection. For example, in *Simonton v. Gordon*²⁷ a federal court held that a play, *White Cargo*, infringed upon the copyright of a novel, *Hell's Playground*, even though the judge found the novel and play to be "unnecessarily coarse and highly sensual."²⁸ Although the court affirmatively cited the rule that obscenity cannot be copyrighted,²⁹ the judge noted that "[w]hatever may be the view of a prudist with respect to *Hell's Playground*, I think that the book, when judged by the standards of current literature, should not be held to be unentitled to copyright

22. *Shook v. Daly*, 49 How. Pr. 366, 368 (N.Y. Sup. Ct. 1875). In *Broder v. Zeno Mauvais Music Co.*, 88 F. 74 (C.C.N.D. Cal. 1898), the court held uncopyrightable the song "Dora Dean" because it contained the lyrics "She's the hottest thing you ever seen." The court found the word "hottest" objectionable because it implied lewd and lustful behavior in women. *Id.* at 79. Although the court found that plaintiff pirated "Dora Dean" from defendant, it determined that since the original contained the objectionable lyrics, the song could not be copyrighted. Thus, the court dismissed plaintiff's claim and defendant's counterclaim. *Id.*

The *Broder* decision may seem ludicrous by today's standards, but as recently as 1978 the Supreme Court maintained that certain "offensive" words dealing with sex may be banned from radio airwaves. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (comedian George Carlin's monologue entitled "Filthy Words" banned). See also 18 U.S.C. § 1464 (1976) (broadcasting "indecent" language prohibited); Comment, *Obscenity and Copyright: An Illustrious Past and Future?*, 22 S. Tex. L.J. 87, 95 n.56 (1981).

23. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909). An earlier version required that the work be "designed or suited for public representation." Act of August 18, 1856, ch. 169, 11 Stat. 138 (repealed 1909).

24. Act of March 4, 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. § 2) (repealed 1976).

25. Some observers have commented that this statutory change displaced *Martinetti*. See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 855 n.4 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980); Comment, *The Obscenity Defense to Copyright Revisited*, 69 Ky. L.J. 161, 164-65 (1981).

26. See *supra* note 20 and accompanying text.

27. 12 F.2d 116 (S.D.N.Y. 1925).

28. *Id.* at 124. Both the book and play portrayed an Englishman's torrid affair with a West African native woman amid the steamy backdrop of the French Congo.

29. *Id.*

protection."³⁰

In *Cain v. Universal Pictures Co.*³¹ the court rejected the obscenity defense in a copyright case concerning the film *When Tomorrow Comes*. In the motion picture the protagonist and a girl engaged in what the court called "indecent and vulgar" acts before a church altar.³² The court, however, did not apply the *Martinetti* rule to invalidate the copyright; rather, the judge applied the definition of obscenity that the United States Post Office used to eliminate pornography from the mails.³³ This test considers the work as a whole and proscribes the work if it has a "direct tendency to corrupt morals."³⁴ The court noted that "mere vulgarity or coarseness of language does not condemn [the work]"³⁵ and found that the film's didactic ending, in which the girl who desecrated the altar was killed, cured the film of any possible immorality.³⁶

Although *Cain* and *Simonton* indicate a growing reluctance to invalidate a copyright for the immoral content of the underlying work, many courts continued to apply the *Martinetti* rule in cases of copyright and obscenity. For example, in *Bullard v. Esper*³⁷ a federal court considering several adult films refused to uphold a copyright for either plaintiff or defendant. The court applied the United States Post Office obscenity test and found that the films would bring "the

30. *Id.* Similarly, in *Khan v. Leo Feist, Inc.*, 70 F. Supp. 450 (S.D.N.Y.), *aff'd*, 165 F.2d 188 (2d Cir. 1947), a federal court upheld the copyright in the song, "Rum and Coca-Cola," even though defendant claimed that the song's lyrics hinted of prostitution. Plaintiff objected to, *inter alia*, the following lyrics:

Since the Yankee come
to Trinidad
They got the young
girls all goin' mad
Young girls say they
treat 'em nice
Make Trinidad
like Paradise.

70 F. Supp. at 451. The court noted that the song's allegedly "lewd" lyrics seemed to describe accurately the natives' life among the American troops in the area and, hence, were not obscene. As with *Simonton*, a showing that questionable content truly reflects a real situation excuses what the court otherwise would deem indecent content. On appeal the Second Circuit noted that although the lyrics were "cheap and vulgar," the likelihood that they would promote lust was remote. 165 F.2d at 192-93.

31. 47 F. Supp. 1013 (S.D. Cal. 1942).

32. *Id.* at 1018.

33. See 18 U.S.C. § 1461 (1976).

34. 47 F. Supp. at 1018. Courts and the Post Office no longer use this definition of obscenity. See *infra* notes 62-65 and accompanying text.

35. 47 F. Supp. at 1018.

36. *Id.*

37. 72 F. Supp. 548 (N.D. Tex. 1947).

blush of shame to the cheek of virtue."³⁸ Citing the *Simonton* reasoning that a depiction of reality, though immoral or salacious, may not invalidate the copyright, the court said that "nothing in either picture . . . commends itself."³⁹

Indeed, as recently as 1963 courts applied a highly restrictive reading of the Constitution's copyright clause to invalidate or disallow copyrights for works of questionable morality.⁴⁰ Although later courts showed a reluctance to act as censors or moral referees in awarding copyright protection, a court's finding that a work was criminally obscene clearly would establish grounds to withhold copyright protection. As the Nation's attitudes toward sex became more liberal, however, a precise definition of criminal obscenity became more elusive. Not until 1973, in *Miller v. California*,⁴¹ did the Supreme Court establish the contemporary definition of obscenity.⁴² The *Miller* Court, however, did not consider the effect of its flexible definition of obscenity on copyright cases; only recently in *Mitchell Brothers* and *Jartech* has its impact on federal copyright law become apparent.⁴³

B. Obscenity

Until the eighteenth century, obscenity actually was not a crime at common law.⁴⁴ In fact, so long as the work did not degrade or

38. *Id.* at 548. The "blush" test had its roots in the English case *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868). The Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957), discarded this test.

39. 72 F. Supp. at 548.

40. For example, in *Dane v. M. & H. Co.*, 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963), a New York court refused to allow a common law copyright to plaintiff's satirical strip-tease dance. Although the court did not express the moral outrage exhibited by earlier courts, it found that the dance was not copyrightable because it failed to promote the progress of science and the useful arts, *id.* at 429. This constitutional interpretation parallels the *Martinetti* reasoning. This case arose in a state court because before January 1, 1978, the states could enforce common law copyright. Since the Copyright Act of 1976 became effective, however, virtually all copyright law emanates from federal statute. See *infra* notes 140-48 and accompanying text.

41. 413 U.S. 15 (1973).

42. The three-part *Miller* test consists of findings that: (1) "the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (2) "the work depicts . . . in a patently offensive way sexual conduct . . . specifically defined by state law"; (3) "the work, taken as a whole lacks serious literary, artistic, political, or scientific value." *Id.* at 24; see *infra* notes 61-65 and accompanying text.

43. See *infra* part III.

44. See *Dominus Rex v. Curl*, 93 Eng. Rep. 849 (1727). The title of the book in question was *Venus in the Cloister, or The Nun in Her Smock* and dealt with lesbianism in a convent. The court found the book's publisher, Edmund Curl, guilty of obscenity, although one of the judges believed that the work was acceptable because the religious elements primarily were anti-Roman Catholic and not anti-Anglican. See F. SCHAUER, *THE LAW OF OBSCENITY* 5-6 (1976)

blaspheme the established religion, the government rarely prosecuted material with explicit sexual content until the nineteenth century.⁴⁵ In 1868, however, the Queen's Bench in *Regina v. Hicklin*⁴⁶ formulated a standard for the prosecution of obscenity as a common-law crime. The *Hicklin* court determined that the standard of obscenity was whether the material adversely affected the most sensitive persons in the community. The *Hicklin* case also held that a court rightly could condemn a work for specific obscene passages, even if the work taken in its entirety was not morally objectionable.⁴⁷ The *Hicklin* standard continued to be the prevailing obscenity test in England well into the twentieth century.⁴⁸

Although courts in the United States followed the *Hicklin* test, American judges often limited its application.⁴⁹ In 1933 *United States v. One Book Called "Ulysses"*⁵⁰ foreshadowed the end of the *Hicklin* test in this country. Judge Woolsey decided to allow the James Joyce masterpiece *Ulysses* to enter the United States because the book's author did not intend his work to appeal to the reader's prurient interests. In addition to applying this new intent standard, the judge held that the court must evaluate the work in its entirety and find the work offensive to the average person in the community, not the locale's most sensitive reader.⁵¹

As *Hicklin* became discredited, the American courts struggled to

(citing discussion of *Curl* in Reynolds, *Our Misplaced Reliance on Early Obscenity Cases*, 61 A.B.A. J. 220, 221 (1975)).

45. See F. SCHAUER, *supra* note 44, at 1-29.

46. 3 L.R.-Q.B. 360 (1868).

47. *Id.* at 371. As one commentator has remarked, the *Hicklin* test made obscene that which affected "the most feeble-minded and susceptible in the community." Comment, *supra* note 22, at 88.

48. In fact, the English courts zealously embraced the role of conservator of public morality. For example, in *Glyn v. Weston Feature Film Co.*, [1916] 1 Ch. 261, the court refused to grant copyright protection to a popular novel that portrayed an extramarital love affair. Judge Younger condemned the work because it tended to "advocat[e] free love and justif[y] adultery where the marriage tie has become merely irksome." *Id.* at 269. One recent commentary on this area of English law noted that *Glyn* is the last substantive English decision on the copyright-obscenity issue. Phillips, *supra* note 14, at 151.

49. See *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14, 571) (government can base obscenity prosecution on portions of work); *Commonwealth v. Holmes*, 17 Mass. 336 (1821) ("Fanny Hill" banned under *Hicklin* test). Reliance on *Hicklin* continued well into this century. See *Bullard v. Esper*, 72 F. Supp. 548 (N.D. Tex. 1947) (Obscenity is that which brings "the blush of shame to the cheek of virtue.").

Concurrently, other courts limited the doctrine's application. See *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (material honestly in the expression of innocent ideas should not be obscene); *supra* note 35 and accompanying text.

50. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

51. 5 F. Supp. at 184-85.

find a workable definition of obscenity. In 1957 the Supreme Court in *Roth v. United States*⁵² initiated a stormy twenty-year evaluation of obscenity definitions. In *Roth* the Court held that obscenity was not protected "speech" under the first and fourteenth amendments.⁵³ The *Roth* test required a prosecutor to show that under contemporary community standards the predominant theme of the material, taken as a whole, appealed to the prurient interests of the average person.⁵⁴

In *Memoirs v. Massachusetts*⁵⁵ the Supreme Court refined the obscenity standard by requiring that courts find three elements before condemning a work as obscene. First, the dominant theme of the material taken in its entirety must appeal to a prurient interest in sex.⁵⁶ Second, the material must be patently offensive to community standards relating to the description or representation of sexual matters. Last, the material must be utterly without redeeming social value.⁵⁷ The "utterly without redeeming social value" segment of the *Memoirs* test was particularly controversial because it required the prosecution to carry the heavy burden of showing that a work lacks even a scintilla of artistic worth.⁵⁸

Supported by only a three-judge plurality, the *Memoirs* standard received criticism from other members of the Court.⁵⁹ The Court floundered for seven years in attempting to define obscenity, but no single standard could win the support of five justices. The Court summarily overturned obscenity convictions when five justices, each

52. 354 U.S. 476 (1957).

53. *Id.* at 485.

54. *Id.* at 490.

55. 383 U.S. 413 (1966).

56. "Prurient interest" refers to "that which shows erotic sexuality in a manner designed to create some form of immediate stimulation." F. SCHAUER, *supra* note 44, at 101-02. In *Miller* the court gave several examples of what might appeal to the prurient interest: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated[, and] (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. at 25. Indeed, without a finding of an appeal to the prurient interest, a court cannot condemn sexually related material as obscene.

57. *Memoirs v. Massachusetts*, 383 U.S. at 418.

58. In *Miller v. California*, 413 U.S. 15 (1973), Chief Justice Burger revealed the controversy generated by the *Memoirs* decision. Burger noted that the *Memoirs* test had "never commanded the adherence of more than three Justices at one time." *Id.* at 25. Justice Harlan, for example, wrote that the "utterly without redeeming social value" test may have no real meaning. *Memoirs v. Massachusetts*, 383 U.S. 413, 459 (1966) (Harlan, J., dissenting). Even Justice Brennan, who devised the *Memoirs* test, abandoned it in his dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 81-82 (Brennan, J., dissenting) ("Even this [*Memoirs*] formulation, however, concealed differences of opinion.")

59. *See supra* authorities cited note 58.

using his own test, determined that the material in question was "obscene."⁶⁰ Finally, in *Miller v. California*⁶¹ the Court evaluated what it called "the somewhat tortured history of . . . obscenity decisions"⁶² and modified the *Memoirs* obscenity test. The Court reaffirmed the *Roth* pronouncement that the first amendment does not protect obscenity and eliminated the third part of the *Memoirs* test, which required proscribed material to be utterly without redeeming social value.⁶³ The Court authorized states to regulate obscene materials with statutes that meet the following constitutional minimum requirements: (1) state law as written or authoritatively construed must specifically define the forbidden conduct; (2) the statute must apply only to works that, taken as a whole, appeal to the prurient sexual interest and that portray sexual conduct in a patently offensive way; and (3) the proscribed material or conduct must lack serious literary, artistic, political, or scientific value.⁶⁴

In addition to redefining obscenity, the Court expressly rejected a national obscenity standard. The five-to-four majority held that "obscenity is to be determined by applying 'contemporary community standards,' not 'national standards.'"⁶⁵ Prior to *Miller* the Court had flirted with a national standard for obscenity. In *Manual Enterprises v. Day*,⁶⁶ for example, Justice Harlan noted that a "national standard of decency" should apply when the government prosecutes obscenity under federal statutes.⁶⁷ In *Jacobellis v. Ohio*⁶⁸ the Court

60. See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967). The Court decided 31 cases in this manner. *Miller v. California*, 413 U.S. at 22 n.3.

61. 413 U.S. 15 (1973). *Miller* concerned a conviction under California's antipornography laws for distributing obscene material through the mail. Decided with *Miller* were *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Twelve 200-Ft. Reels of Film*, 413 U.S. 123 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

62. *Miller v. California*, 413 U.S. at 20.

63. *Id.* at 23-25. Chief Justice Burger, writing for the five-member majority, noted that a majority of the Court had never embraced the "'utterly without redeeming social value'" test. *Id.* at 24-25 (quoting *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1965)) (emphasis in *Memoirs*).

64. *Id.* at 24; see *supra* note 56.

65. 413 U.S. at 37 (citations omitted). For a discussion of a national obscenity standard, see *infra* part IV(C), (D).

66. 370 U.S. 478 (1962).

67. *Id.* at 488. The following federal statutes regulate obscenity: 18 U.S.C. § 1461 (1976)(mailing obscene or crime-inciting matter prohibited); 18 U.S.C. § 1462 (1976) (importation or transportation of obscene matters prohibited); 18 U.S.C. § 1463 (1976)(mailing indecent matter on wrappers or envelopes prohibited); 18 U.S.C. § 1464 (1976)(broadcasting obscene language prohibited); 18 U.S.C. § 1465 (1976)(transportation of obscene matters for sale or distribution prohibited); 18 U.S.C. § 2251 (Supp. III 1979)(use of children under age 16 in production of pornographic materials illegal); 19 U.S.C. § 1305 (1976) (importation of immoral articles

reaffirmed the position that national obscenity standards applied to federal prosecutions. Two companion cases to *Miller*,⁶⁹ however, discounted any application of a national obscenity standard. Then in 1974 the Court conclusively overruled the application of a national obscenity standard in federal prosecutions and held that the *Miller* reliance on contemporary community standards applied to all obscenity cases.⁷⁰

This reliance on contemporary community standards and the rejection of a national standard create problems in applying federal copyright law to obscenity cases because varying local standards now govern the definition of obscenity. Thus, if a work is obscene by local community standards, then a court applying the *Martinetti* rule that obscene works are uncopyrightable must invalidate the work's copyright provided by federal law.⁷¹ In *Mitchell Brothers and Jartech*, however, the Fifth and Ninth Circuits avoided this result by abandoning the *Martinetti* rule and holding that obscenity, though illegal and not protected by the first amendment, is eligible for copyright protection.

prohibited); 39 U.S.C. 3001 (1976) (nonmailable matter); 39 U.S.C. § 3006 (1976)(unlawful matter); 39 U.S.C. § 3007 (1976)(detention of mail for temporary periods); 39 U.S.C. § 3008 (1976)(prohibition of pandering advertisements); 39 U.S.C. § 3010 (1976)(mailing of sexually oriented advertisements regulated); 39 U.S.C. § 3011 (1976) (judicial enforcement). See F. SCHAUER, *supra* note 44, at app. D.

68. 378 U.S. 184 (1964).

69. *United States v. Orito*, 413 U.S. 139, 145 (1973); *United States v. Twelve 200-Ft. Reels of Film*, 413 U.S. 123, 129-30 (1973).

70. *Hamling v. United States*, 418 U.S. 87 (1974). The community standards rationale is reasonable for most obscenity prosecutions, but the rationale diminishes when the government prosecutes under the customs violation statute, 19 U.S.C. § 1305 (1976), in which the port of entry often is unrelated to the relevant community for the *Miller* test. See F. SCHAUER, *supra* note 44, at 131. Similarly, federal copyright law and the community standards doctrine may be incompatible: while copyright law seeks uniformity, community standards vary from area to area. See *infra* notes 126-28 & 142-48 and accompanying text.

71. The supremacy clause provides in relevant part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ." U.S. CONST. art. VI. Prior to the 1976 Copyright Act, the state common law of copyright generally protected unpublished works and federal copyright statutes protected published works. On January 1, 1978, both published and unpublished works became subject to virtually exclusive federal copyright protection. In most cases, therefore, federal copyright law preempts any state efforts to regulate copyright. See generally M. NIMMER, *supra* note 20, § 1.01[B] (1982).

A determination under state law that a work is obscene and, hence, uncopyrightable, arguably conflicts with the national policy of uniformity. The supremacy clause of the Constitution would seem to render unconstitutional a finding that would conflict with federal copyright law. See 2 C. ANTIEAU, *MODERN CONSTITUTIONAL LAW* § 12:143 (1969).

III. RECENT DEVELOPMENT: *Mitchell Brothers* AND *Jartech*

The Fifth Circuit's 1979 decision in *Mitchell Brothers Film Group v. Cinema Adult Theater*⁷² and the Ninth Circuit's opinion three years later in *Jartech, Inc. v. Clancy*⁷³ parted with more than a century of American copyright precedent and expressly held that obscene materials are copyrightable.⁷⁴ These well-reasoned decisions underscore the difficulties courts encounter in applying the *Miller* community standards rule to federal copyright problems.

A. Mitchell Brothers

Mitchell Brothers arose from an action brought by copyright holders against an adult cinema that allegedly showed pirated copies of a copyrighted film.⁷⁵ The trial court held for defendant and relied upon *Martinetti* for the rule that obscene works are not copyrightable.⁷⁶ On appeal the Fifth Circuit reversed and held that section 4 of the Copyright Act of 1909⁷⁷ impliedly allowed the copyrighting of obscene works by conferring protection on "all the writings of an author."⁷⁸ The court examined the various theories that previous courts had used to justify invalidating or denying copyright protection to allegedly immoral works. The *Mitchell Brothers* court discussed and rejected the moral conservator theory of copyright invalidation,⁷⁹ the property interest theory,⁸⁰ and the unclean hands equitable doctrine.⁸¹ The court concluded that the "copyright holders' actions are not inconsistent with any policy of the copyright laws" and, therefore, an action for copyright infringement can exist.⁸² The *Mitchell Brothers* court said that Congress should determine whether to deny copyright protection to obscenity, and the court noted that "Congress has not chosen to refuse copyrights on obscene

72. 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

73. 666 F.2d 403 (9th Cir.), *cert. denied*, 103 S. Ct. 59, *cert. denied*, 103 S. Ct. 179 (1982).

74. *See supra* note 10.

75. For a discussion of the district court opinion, see Leverson, *supra* note 21, at 495-97; Comment, *supra* note 22, at 98-99.

76. No. CA-3-74-645-D (N.D. Tex. Sept. 2, 1976). The court did not publish its opinion in the *Federal Supplement*. *See* Leverson, *supra* note 22, at 495. The district court used the unclean hands doctrine to justify its acceptance of the obscenity defense to copyright infringement. *See supra* note 14 and accompanying text.

77. Copyright Act of 1909, Ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. §§ 1-216 (1970)) (repealed 1976).

78. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d at 858 n.13.

79. *Id.* at 861; *see supra* notes 11-13 and accompanying text.

80. 604 F.2d at 861; *see supra* note 14.

81. 604 F.2d at 861-65; *see supra* note 14.

82. 604 F.2d at 865.

materials, and we should be cautious in overriding the legislative judgment on this issue."⁸³

B. Jartech

In *Jartech, Inc. v. Clancy*⁸⁴ plaintiffs alleged that defendants illegally copied five adult films shown in plaintiffs' theatre.⁸⁵ In an effort to gather evidence to enforce a municipal nuisance ordinance against plaintiffs' cinema, a city investigator entered the theatre, photographed the films, and recorded the soundtracks.⁸⁶ Defendants used this evidence to declare the theatre a nuisance, revoke the business' licenses and permits, and initiate nuisance abatement proceedings.⁸⁷ The jury found that: (1) each of the five films was obscene; (2) defendants were responsible for copying the five movies without permission of the copyright holders; (3) the unauthorized copying and use in the nuisance abatement proceedings was a fair use; and (4) defendants realized no profits from the copyright infringement.⁸⁸ The trial court entered a judgment against plaintiffs for attorney's fees because the copyright infringement suit was vexatious and intended to harass defendants.⁸⁹

On appeal the Ninth Circuit confronted the following issues: (1) whether obscenity is a defense to a copyright infringement action; (2) whether defendants' use of copyrighted material was fair;⁹⁰ and (3) whether the award of attorney's fees was justified. The *Jartech* court

83. *Id.* at 863.

84. 666 F.2d 403 (9th Cir.), *cert. denied*, 103 S. Ct. 59, *cert. denied*, 103 S. Ct. 179 (1982). The same Mitchell brothers who litigated *Mitchell Brothers* were plaintiffs in *Jartech*. 666 F.2d at 403.

85. 666 F.2d at 405. *Jartech, Inc.* was also a defendant in *Mitchell Brothers*. 604 F.2d at 852.

86. 666 F.2d at 405.

87. *Id.*

88. *Id.* Following the jury verdict, defendants counterclaimed that the films be seized as contraband. The court rejected the counterclaim because the verdict mooted it. *Id.*

89. *Id.* Under 17 U.S.C. § 505 (1976), a court may use its discretion to grant attorney fees to the prevailing party. The court noted that the district court in *Mitchell Brothers* had held that obscene works were not copyrightable. *See* 666 F.2d at 407. The Fifth Circuit, of course, reversed the district court on appeal. *See supra* notes 75-83 and accompanying text.

90. The Copyright Act of 1976 codifies the defense of fair use at 17 U.S.C. § 107 (1976). The fair use considerations are:

- (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.

Id.

reversed the trial court on the first and third issues, holding that obscenity is not a defense to a copyright infringement action and that the award of attorney's fees was unwarranted. The court, however, affirmed the district court on the issue of fair use, holding that defendants' infringement of the copyright was excusable because defendants did not copy the films for commercial exploitation.⁹¹ In holding that obscenity is not a defense to copyright infringement actions, the court relied not only upon *Mitchell Brothers*⁹² but also upon *Belcher v. Tarbox*,⁹³ which concerned copyrights of fraudulent materials. In *Belcher* the Ninth Circuit noted that "[t]here is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work."⁹⁴

Jartech is significant because it is the first major obscenity-copyright case under the Copyright Act of 1976.⁹⁵ The court noted that "[p]rior law [1909 Act] referred to 'all writings of an author,' while the current statute employs the similar phrase 'original works of authorship.'"⁹⁶ Discussing the application of an obscenity definition based on community standards to federal copyright law, the court argued that the obscenity defense would fragment copyright enforcement because it would protect materials held not obscene in one community while it would "authoriz[e] pirating" in a community that held the works obscene.⁹⁷

91. 666 F.2d at 407; see *supra* note 90. The Ninth Circuit has added some judicial gloss to the fair use provisions of the Act. In the highly publicized "Betamax" case, *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972-74 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982), the court examined whether the alleged infringers copied the material to use it for its intrinsic purpose. In *Sony* the Ninth Circuit held that copying by home video recorders was for the works' intrinsic purpose—entertainment. In *Jartech*, however, the court found that defendants did not copy the films and record their soundtracks to enjoy the intrinsic benefits of the films, but rather to gather evidence. Sensing that its statutory interpretation may be strained, the *Jartech* court noted that "the statutory standards are not precisely applicable to the facts at bar." 666 F.2d at 407.

92. 666 F.2d at 406. The Ninth Circuit also cited the latest revision of Professor Nimmer's treatise, which endorses the holding in *Mitchell Brothers*. *Id.* Professor Nimmer considers the *Mitchell Brothers* decision to be the prevailing view. See 1 M. NIMMER, *supra* note 20, § 2.17.

93. 486 F.2d 1087 (9th Cir. 1973).

94. *Id.* at 1088. The Fifth Circuit likewise relied upon *Belcher* in *Mitchell Bros.* See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 856 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

95. 17 U.S.C. § 102 (1976). *Mitchell Brothers* was decided under the 1909 Act. See *supra* note 77 and accompanying text.

96. *Jartech, Inc. v. Clancy*, 666 F.2d at 406.

97. *Id.* The court should have explored other solutions to this dilemma instead of simply holding that all obscenity can be copyrighted. See *infra* part IV.

C. Analysis

Both the *Mitchell Brothers* and *Jartech* courts determined that the need for national copyright protection for the films in question outweighed the state and federal public policies against obscenity.⁹⁸ Each case places great emphasis on the absence of language in the 1909 and 1976 Copyright Acts that would preclude copyrights for obscene materials.⁹⁹ Although the courts' position has some merit, a closer analysis of section 102 of the Copyright Act of 1976¹⁰⁰ undermines this statutory interpretation.

According to section 102 of the 1976 Act, "original works of authorship fixed in any tangible medium" may obtain copyright protection.¹⁰¹ The *Jartech* court construes this section to imply that any author who meets the requirements of originality and fixation in a tangible medium may obtain a copyright, even though the content of his work is obscene and, therefore, illegal.¹⁰² The legislative history

98. A recent survey by the Supreme Court stated that 49 states either legislatively or judicially have adopted standards for obscenity regulation. Alaska is the only state currently without an obscenity law. See *New York v. Ferber*, 102 S. Ct. 3348, 3354 n.7; F. SCHAUER, *supra* note 44, § 10.1, at 192-97. Congress enacted 20 obscenity laws between 1942 and 1956, most of which the government still enforces. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 105 (1973) (Brennan, J., dissenting); *supra* note 67.

99. Although the copyright statute is silent on whether it protects obscene works, the Trade-Mark Act of 1946, 15 U.S.C. §§ 1051-1150 (1976) ("Lanham Act"), which protects registered trademarks, precludes registration of any mark consisting of "immoral, deceptive, or scandalous matter." Trade-Mark Act of 1946, § 2(a), 15 U.S.C. § 1052 (a) (1976). See, e.g., *In re Rundorf*, 171 U.S.P.Q. (BNA) 443 (Trademark Trial & App. Bd. 1971), (§ 2(a) of Lanham Act prohibits registration of tradename in question because the tradename would be offensive to the public). But see *In re Thomas Laboratories, Inc.*, 189 U.S.P.Q. (B.N.A.) 50 (Trademark Trial & App. Bd. (1975) (appeals board reversed examiner's denial of trademark registration). These cases may be distinguishable because the *Thomas Laboratories* panel used an obscenity standard rather than the moral objectionability standard that the Lanham Act seems to contemplate and the *Rundorf* panel followed.

The patent statute, 35 U.S.C. §§ 1-293 (1976), has no express provisions proscribing patent protection for obscene or immoral devices. The courts, however, may deny patent protection to devices that courts determine serve unlawful or immoral purposes. See generally, *National Automatic Device Co. v. Lloyd*, 40 F. 89 (N.D. Ill. 1889) (devices used solely for gambling lack utility and are, hence, unpatentable). The courts rapidly are eroding this rule, and in many cases the United States Patent & Trademark Office will allow patents for inventions that are useful solely in gambling. See *Ex parte Murphy*, 200 U.S.P.Q. 801 (BNA) (Patent & Trademark App. Bd. 1977).

Some commentators read these patent and trademark law provisions—which are reasonably analogous to copyright law—to support the view that Congress implicitly intended to protect obscene works under the copyright law. See Comment, *supra* note 25, at 170-73. Other writers on the subject argue that the trademark and patent law prohibitions on obscenity indicate the need for a similar prohibition in the copyright regime. See Levenson, *supra* note 21, 518-21.

100. The corresponding portion of the 1909 Act is 17 U.S.C. § 4 (1970).

101. 17 U.S.C. § 102(a) (1976).

102. See *Jartech, Inc. v. Clancy*, 666 F.2d at 406.

for section 102 shows that Congress purposely left undefined the phrase "original works of authorship" and intended to incorporate without change the common law accumulated under the 1909 Act. The House Judiciary Committee further stated: "This standard does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them."¹⁰³ The *Mitchell Brothers* court makes the same argument about the language in Section 4 of the 1909 Act, which confers copyright protection on "all writings of an author."¹⁰⁴

Arguably, both courts' statutory interpretation confuses a denial of copyright for "bad" art with a denial of copyright for obscene works—material not protected by the first amendment.¹⁰⁵ In *Bleistein v. Donaldson Lithographing Co.*¹⁰⁶ the Supreme Court held that circus posters could be copyrighted even though they were "low art." Writing for the Court, Justice Holmes commented that judges should not act as art critics, conferring copyright protection only on those works that they deem to be "art." Justice Holmes said "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁰⁷ Courts and juries, however, must formulate definitions of obscenity to enforce local, state, and federal antiobscenity statutes. Clearly, the first amendment and copyright law protect "bad art." Obscenity, however, is one of the narrow exceptions to free expression that legislatures may regulate. The *Jartech* and *Mitchell Brothers* courts confuse bad art with obscenity, which legislatures deem far more pernicious. When Congress did not include aesthetic merit as a requirement of the copyright standard, it did not imply that courts should extend copyright protection to obscene works.¹⁰⁸ Indeed, Congress failed to include a prohibition on obscenity protection in the 1976 Act partly because

103. H.R. REP. No. 1476, 94th Cong., 2d Sess. 51, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5664.

104. 604 F.2d 852, 854-55 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

105. See *Roth v. United States*, 354 U.S. 476 (1957); *supra* notes 52-54 and accompanying text.

106. 188 U.S. 239 (1903).

107. *Id.* at 251. The court in *Mitchell Brothers* places too much emphasis on this passage in supporting its obscenity-copyright position. See 604 F.2d at 855-56.

108. The last part of the *Miller* obscenity text—whether a work has serious artistic merit—poses a problem in a copyright analysis because *Bleistein* stated that a work need not have serious artistic merit to be copyrightable. Thus, even though obscenity inherently lacks serious artistic merit, a court could declare a work copyrightable notwithstanding its obscenity under *Miller*. 188 U.S.C. at 251-52. This argument, however, fails to consider that such a work per se violates public policy.

the prevailing common-law rule was that obscenity was not copyrightable. Moreover, Congress' position on obscenity is clear: it is illegal.¹⁰⁹

Mitchell Brothers and *Jartech* essentially make the copyright clause broader than the first amendment. These cases require the government under copyright law to protect obscene material and to grant its author a legal monopoly on its use even though the government under the first amendment may condemn the material and subject its author to criminal liability. Most commentators agree that the first amendment attempts both to foster artistic creativity and to ensure political and social development in a free marketplace of ideas.¹¹⁰ The copyright clause specifically seeks to provide authors an economic incentive to encourage their creativity in "[s]cience and useful [a]rts."¹¹¹ Indeed, the first amendment and the copyright clause are mutually supportive, even though at times copyright law may limit the unbridled application of the first amendment.¹¹² From a standpoint of public policy, courts upset the mutual support between copyright law and free speech when they afford material excluded from first amendment protection the economic protection of copyright.

Although *Mitchell Brothers* and *Jartech* discuss similar copyright issues, each case arises under very different circumstances. In *Mitchell Brothers* plaintiffs sued a cinema for showing a pirated copy of their film. Defendant then raised the affirmative defense that plaintiffs cannot have a copyright in the film because it is obscene and that plaintiffs, therefore, have no grounds for a copyright infringement action. *Jartech*, however, concerns plaintiffs' offensive use of a copyright infringement action to counter defendants' efforts to enforce an antipornography ordinance.¹¹³ Defendants eventually

109. See *supra* note 67.

110. See, e.g., Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 286 (1979); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

111. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

112. Copyright limits free expression because it gives the creator of an original work a monopoly on the dissemination of that work. Denicola, *supra* note 110; Nimmer, *supra* note 110; Comment, *The First Amendment Exception to Copyright: A Proposed Text*, 1977 WIS. L. REV. 1158, 1177-78.

113. The obscenity issue can arise in copyright law in at least two other manners: (1) The Register of Copyrights denies protection based on obscenity, and (2) a court refuses to award a copyright to either party in a copyright dispute. For a discussion of the first possibility, see Schneider, *Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity*, 51 CHI-KENT L. REV. 691 (1975). Many of the old English and American copyright-obscenity cases reflect the second possibility. See *supra* note 10.

raised the obscenity defense.

Jartech, which recognizes a cause of action for copyright infringement of obscene works, arguably implies that local authorities risk civil liability whenever they confiscate or copy alleged pornography. Of course, the court held against plaintiffs because defendants' unauthorized photography of the films for evidentiary purposes was a fair use.¹¹⁴ Although the statute does not expressly allow copying of a copyrighted work in gathering evidence for an action to enforce a municipal ordinance, the Ninth Circuit held that defendants' copying of the films met the four requirements specified in the statute for a finding of fair use.¹¹⁵ If other circuits reject the *Jartech* court's liberal reading of the fair use provision or if the Supreme Court overrules it, copyright law significantly would hamper local governments' efforts to enforce antiobscenity laws. Even if the Ninth Circuit's fair use theory stands, cities must undergo expensive copyright litigation and endure protracted appeals to achieve a finding of fair use.¹¹⁶

Jartech and *Mitchell Brothers* consider only briefly the argument that the courts frustrate national and local policies against pornography by allowing a copyright for obscenity. The court in *Mitchell Brothers* declared that "the need for an additional check on obscenity is not apparent."¹¹⁷ Although impossible to quantify precisely, the pornography business continues to grow substantially.¹¹⁸ Recent reports indicate that organized crime controls much of the

114. See *supra* note 90 and accompanying text. Under § 107 of the 1976 Act, copying for the purposes of "criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1976).

115. See *supra* note 90 and accompanying text.

116. See *supra* note 90.

117. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d at 862.

118. Little objective authority exists on exactly how large or profitable the pornography industry is. One source refers to "the gradual emergence of a whole new industry consisting of the manufacturers, wholesalers, retailers, and peddlers of pornography who together conduct a \$500,000,000 business annually." R. KYLE-KEITH, *THE HIGH PRICE OF PORNOGRAPHY* 41 (1961) (no authority cited for this estimate). On the other hand, the 1970 *Report of the Commission on Obscenity and Pornography* found that an estimation that the industry grossed between \$500 million and \$2.5 billion per year was an exaggeration. The Commission countered with its own study that divided the industry into numerous categories and subcategories. The report concluded that the "under-the-counter" or "hardcore" pornographic market generated retail sales between \$5 million and \$10 million per year. *THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY* 7-23 (1970).

The advent of the "sexual revolution" in the early 1970's and the subsequent popularity of arguably obscene films such as *Deep Throat* and *Behind the Green Door*, which was held to be obscene in *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), indicate that the Commission's findings probably are out of date.

pornography industry and reaps large profits from it.¹¹⁹ At the same time the pornography business has begun profitable ventures in the burgeoning videocassette and pay television markets. To claim that additional measures are not necessary to effect the nation's antiobscenity policy is simply not correct. In fact, denial of copyrights for obscene works could discourage those persons who seek to use a copyright's economic benefit to make substantial sums of money in the pornography business. Indeed, prosecutors recommend that the best attack on organized crime is to dismantle its economic base.¹²⁰ Denial of copyright protection for obscene works would help to weaken this base.¹²¹

Thus, courts must explore other alternatives to the holdings of *Mitchell Brothers'* and *Jartech* that obscenity is copyrightable. The copyright-obscenity problem is more complex than a choice between the two positions that (1) obscenity cannot be copyrighted; and (2) obscenity is copyrightable. Part IV investigates ways in which the courts more effectively may balance the public policy against obscenity and the public policy for uniform copyright protection.

IV. COPYRIGHT PROTECTION FOR OBSCENE WORKS: ALTERNATIVES AND A PROPOSAL

Because the granting of federal copyright protection to obscene works conflicts with the nation's policy against obscenity, the courts should explore all options to ensure realization of the goals of both copyright law and antiobscenity public policy. This part examines five options courts may consider in determining the copyrightability of obscenity. Each of these options assumes application of the *Miller v. California* rule, which uses contemporary community standards to define obscenity.¹²² These options are: (1) adhering to the *Martinetti* rule that obscenity, as determined by local standards, is a basis for

119. The Task Force on Organized Crime found that organized crime was very active in the pornography business, which the task force described as "an extremely profitable and expansive operation." NATIONAL ADVISORY COMM. ON CRIM. JUST. STANDARDS & GOALS, TASK FORCE ON ORGANIZED CRIME, ORGANIZED CRIME 12 (1976) [hereinafter cited as ORGANIZED CRIME].

120. *Id.* at 7-8. ("Organized crime has economic gain as its primary goal . . .").

121. A denial of copyright may encourage piracy. Those who pirate obscene works, however, must face state and federal obscenity laws that impose stricter penalties than statutes for criminal copyright infringement. For example, the maximum penalty for a first offense of mailing obscene materials is five years imprisonment and a \$5,000 fine. 18 U.S.C. § 1461 (1976). The maximum penalty for a first offense of criminal copyright infringement is one year in prison and a \$10,000 fine (\$25,000 fine for infringement of sound recording or motion picture). 17 U.S.C. § 506(a) (1976).

122. See *supra* notes 61-71 and accompanying text.

denying copyright protection; (2) abandoning the *Martinetti* rule and acknowledging copyrights of obscene works, even though they may violate state and federal law; (3) using a national obscenity standard for all federal obscenity cases, including copyright adjudication; (4) using a national obscenity standard, or federal common law, to resolve copyright cases,¹²³ and (5) using a balancing test after a local finding of obscenity to determine whether the national policy for copyright protection outweighs the national policy against obscenity.

A. *Obscenity is Not Copyrightable*

Jartech and *Mitchell Brothers* rejected the first option, which would require adhering to *Martinetti* and denying obscenity copyright protection. This option would maximize enforcement of the state and federal policies against obscenity. The great weakness of this option, as the *Jartech* court noted,¹²⁴ is the fragmentation of federal copyright law that results from local standards defining obscenity. In *Miller v. California*¹²⁵ Chief Justice Burger wrote, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."¹²⁶ Copyright law, however, envisions uniform application throughout the country. If a work is obscene and hence uncopyrightable in Mississippi, must a federal court in New York consider the Mississippi finding in a copyright infringement action?¹²⁷ If the Mississippi finding is not applicable in a New York proceeding and the New York community standard determines anew the question of obscenity, then the copyright law would be different in Mississippi and New York and thus fragment Congress' intended uniformity.¹²⁸ Therefore, *Jartech* and *Mitchell Brothers* correctly abandoned the *Martinetti* standard.

123. Under § 301(a) of the Copyright Act of 1976; all legal and equitable rights conferred by the federal statute "are governed exclusively by this title." 17 U.S.C. § 301(a) (1976). Works created before 1978, the effective date of the statute, may fall under portions of the 1909 Act.

124. *Jartech, Inc. v. Clancy*, 666 F.2d at 406.

125. 413 U.S. 15 (1973); see *supra* notes 61-71 and accompanying text.

126. *Id.* at 32.

127. If local standards affect copyright infringement suits, defendants would seek adjudications in the states with the most conservative standards of obscenity to win copyright suits in more liberal jurisdictions.

128. See *Jartech, Inc. v. Clancy*, 666 F.2d at 406.

B. *Obscenity is Always Copyrightable*

To replace the *Martinetti* rule, *Jartech* and *Mitchell Brothers* adopt the second option: obscene works may receive copyright protection. The weakness of the Ninth and Fifth Circuits' statutory interpretation of the copyright acts is discussed above.¹²⁹ The advantage of this position is that it preserves the national policy for uniform copyright protection and avoids potentially difficult determinations of obscenity. Giving an obscene work federal copyright protection, however, implies that an author freely can distribute his creation and reap financial rewards for the life of the copyright. Arguably, states that find the author's work obscene may (1) violate the commerce clause if they confiscate or otherwise prevent the sale of the work or its passage through the jurisdiction,¹³⁰ and (2) violate the supremacy clause because the state's finding of obscenity effectively supersedes the author's federal protection under copyright law.¹³¹ A balancing of the national policy against obscenity with the national uniformity of copyright protection could remedy these problems; *Jartech* and *Mitchell Brothers* ignore such a balancing.¹³²

C. *National Obscenity Standard for Federal Obscenity Cases*

Because a substantial body of federal law concerns obscenity, some courts have argued that a national obscenity standard should apply in federal cases.¹³³ A determination of the validity of an obscene work's copyright requires enforcement of federal law and hence an action in which a court would apply a national obscenity standard. A national standard would allow a court to evaluate the national public policy for copyright and the national public policy against obscenity. A court, therefore, could determine whether the degree of obscenity outweighs any arguments for federal protection. Under this interpretation, states could regulate obscenity within their borders, but copyright cases would not rely upon their determinations of

129. See *supra*, part III(C).

130. The commerce clause provides in relevant part that: "Congress shall have Power to regulate Commerce . . . among the several States. U.S. CONST. art. I, § 8, cl. 3. The commerce clause issue arose in *Miller* and the Court summarily dismissed it based on a state's police power within its borders. See *Miller*, 413 U.S. at 32 n.13. If the obscene materials merely pass through the state and are not to be sold within the state, a constitutional violation might exist if the barrier to commerce is unreasonable. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

131. See *supra* note 71 and accompanying text.

132. See *supra* part III(C).

133. See *supra* note 67.

obscenity.¹³⁴

The Supreme Court, however, implicitly has rejected a national obscenity standard for federal copyright cases. In *Hamling v. United States*¹³⁵ the Court held that *Miller* and its companion cases discarded a national standard for federal obscenity prosecutions.¹³⁶ In *Hamling* the trial court had instructed the jury to use a national standard for obscenity in reaching its verdict. The Supreme Court refused to apply *Miller* retrospectively and held that the instruction did not materially affect the jury's deliberation.¹³⁷ Although the Court affirmed the contemporary community standards approach to obscenity, it noted that the Constitution does not mandate such a definition.¹³⁸ Nonetheless, the overwhelming weight of *Hamling* rejects the use of a federal obscenity standard.¹³⁹

D. National Obscenity Standard in Copyright Cases

Two of the dominant characteristics of American copyright law are its national scope and its emphasis on uniformity. As Professor Nimmer has noted: "Absent such comprehensive protection it seems clear that, . . . the subject matter of copyright would have been fatally crippled."¹⁴⁰ Indeed, in enacting the 1976 Act Congress considered the need for a uniform, national policy on copyright protection.¹⁴¹ With few exceptions, the 1976 Act preempts state copyright law.¹⁴² Conversely, both the states and the federal government regulate obscenity.¹⁴³ The Supreme Court's community standards definition of obscenity, which the Court has adopted for state and federal

134. See *infra* part IV(E).

135. 418 U.S. 87 (1974).

136. *Id.* at 104-105.

137. Consider this explanation of the community standards approach: "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinity from which he comes for making the required determination . . ." *Id.* at 104.

138. *Id.* at 105. The Court indicated that a community standard did not proscribe obscenity in any certain geographic area "as a matter of constitutional law." *Id.*

139. The *Hamling* decision, however, applied only to federal obscenity prosecutions. Thus, the use of a national obscenity standard may still be a viable option in civil copyright cases.

140. 1 M. NIMMER, *supra* note 20, § 1.01[A], 1-5.

141. According to the House Report, the 1976 Legislation sought to increase the uniformity of national copyright protection. "Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent." H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 129, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5745; see M. NIMMER, *supra* note 20, § 1.01[A].

142. See *supra* note 9 and accompanying text.

143. See *supra* notes 67 & 98 and accompanying text.

prosecutions,¹⁴⁴ is reasonable when state and local governments have enforcement powers equal to the federal government's powers. The community standards approach, however, is inappropriate when it influences an area of law that Congress has preempted.¹⁴⁵ Even though the Supreme Court requires the application of community standards to federal obscenity cases, this holding arguably should not apply to copyright cases, which courts now decide entirely under federal law.

Like admiralty, copyright is within the exclusive federal jurisdiction and any local standards that conflict with the national policy of uniformity for copyright should not apply. A court's decision regarding copyrights for obscene works should be a matter of federal common law,¹⁴⁶ and its determination of whether a work at issue in a copyright case is obscene should reflect the national policy against obscenity.¹⁴⁷ Indeed, the states still could assert control within their borders over materials they deem obscene by enforcing their anti-pornography and nuisance laws.¹⁴⁸

E. A Balancing Test

This Recent Development proposes the use of a national standard to determine the copyrightability of obscene works.¹⁴⁹ A court could analyze obscenity with a national standard in the following two ways: (1) ignore a state's determination of obscenity and make its own determination of obscenity under the *Miller* test¹⁵⁰ by using a national standard in place of contemporary community standards for the purposes of deciding whether it should allow copyright; or (2) consider the state obscenity standard but only preclude copyright when the work violates national obscenity policy to the extent that it weighs against the national copyright policy. Using either method—a de novo obscenity determination or a national obscenity-copyright policy balancing—a court should identify and evaluate the several national policies regarding obscenity that could override the national policy for copyright. Although the federal government and the states share many of the same policies against obscenity, this Recent Devel-

144. See *Hamling v. United States*, 418 U.S. 87 (1974); *Miller v. California*, 413 U.S. 15 (1973).

145. See *supra* note 71 and accompanying text.

146. One case to suggest this argument in the area of conflict of laws is *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). See also *Leverson*, *supra* note 21, for discussion of a national obscenity and copyright standard before *Mitchell Brothers* and *Jartech*.

147. See *supra* note 67; *infra* part IV(E).

148. See *supra* note 98 and accompanying text.

149. See *supra* part IV(D).

150. See *supra* notes 61-64 and accompanying text.

opment discusses four considerations of national policy that may make denial or invalidation of a copyright appropriate.

1. Degree of Obscenity

Once a court determines that a work is "obscene," the work loses first amendment protection and is subject to regulation under state and federal law.¹⁵¹ A work found obscene under the *Miller* standard nevertheless could gain copyright protection¹⁵² because the *Miller* test and the copyright statute are inconsistent. The third part of the *Miller* test requires a finding that the work lacks "serious literary, artistic, political, or scientific value."¹⁵³ The Copyright Act of 1976, however, protects all "original works of authorship fixed in any tangible medium of expression"¹⁵⁴ and does not require serious artistic value as a prerequisite.¹⁵⁵ Thus, despite a finding of a lack of serious literary or artistic value, an obscene work technically may receive copyright protection. This analysis, however, ignores the national policy against obscenity.

Although courts frequently have tried to distinguish "hardcore" pornography from legitimate artistic treatments of sex,¹⁵⁶ they have devoted little discussion to degrees of obscenity.¹⁵⁷ Justice Harlan, however, has suggested that degrees of obscenity differentiate the state and federal interests in regulating obscenity.¹⁵⁸ Justice Harlan

151. *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

152. The *Mitchell Brothers* court makes a similar argument. See 604 F.2d at 859 n.15.

153. *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added).

154. 17 U.S.C. § 102(a) (1976).

155. Moreover, the Supreme Court in *Bleistein v. Donaldson Lithograph Co.*, 188 U.S. 239 (1903), cogently stated that it would not evaluate the artistic or literary value of a work in the copyright determination. The *Miller* Court, however, appeared willing to establish a standard that would require a court to determine whether a work had "serious" literary or artistic merit. 413 U.S. at 24.

156. *Miller v. California*, 413 U.S. 15, 27 (1973); *Roth v. United States*, 354 U.S. 476, 496-98 (1957).

157. Courts undoubtedly have avoided classifying obscenity because the task is so formidable: if obscenity is difficult to define, then degrees of obscenity are even more difficult to characterize. Indeed, one of the main problems with denying copyright protection to works displaying a "high degree" of obscenity is that a precise categorization of obscenity into various degrees is not immediately apparent.

158. Justice Harlan argued that the states have a much stronger interest in regulating obscenity than the federal government. Although one state bans a book, other states may deem that same work acceptable. If the federal government holds a work obscene, however, it bans the work nationally. Justice Harlan advocated a higher standard for defining "obscenity" in federal cases—limiting prosecutions to "hardcore" pornography—to guard against "the very real danger of a deadening uniformity which can result from nation-wide federal censorship." *Roth v. United States*, 354, U.S. 476, 506 (Harlan, J., concurring in *Alberts v. California* and dissenting in *Roth*) (1957) (discussion of Justice Harlan's state-federal obscenity theory at 496-

argued that the federal government can regulate only "hardcore" pornography while the states have authority to define obscenity more broadly.¹⁵⁹ Although a majority of the Court never accepted Justice Harlan's approach, his separation of state and federal regulatory interests by the degree of obscenity is helpful in a copyright analysis. Congress or the federal courts could define a particular zone of obscenity in which the national interest in obscenity regulation would require a denial of copyright protection.¹⁶⁰

The primary weakness in this element of the analysis is the difficulty courts would face in determining the degrees of obscenity. Other than Justice Harlan's categorization of "hardcore" pornography, the courts, with one notable exception,¹⁶¹ have been reluctant to measure obscenity in degrees. Nonetheless as courts use the *Miller* test more often, judges, especially at the federal level, may find that public policy requires characterization of obscenity in degrees.

2. Presence of Organized Crime

The courts should closely scrutinize obscene materials that originate from sources that are associated with organized crime and that use copyright protection to ensure lucrative national distribution.¹⁶² Although the association with organized crime may be difficult to

508).

159. *Id.* at 500-07. Justice Harlan said that the federal interest in obscenity regulation is "attenuated." *Id.* at 504-05. This Recent Development argues that a distinct set of "national" concerns may exist that makes denial of federal copyright protection appropriate. Neither Justice Harlan nor the Supreme Court ever confronted the copyright-obscenity issue.

The federal government has not become the intrusive censor that Justice Harlan feared. In fact, the Supreme Court occasionally has acted as an obscenity referee to make sure the states—not the federal government—respect national first amendment rights. *See Jenkins v. Georgia*, 418 U.S. 153 (1974) (unanimous Court overturned Georgia obscenity conviction for showing the critically acclaimed film *Carnal Knowledge*).

160. If one assumes that the government should regulate obscenity because obscenity may drive people to antisocial sexual conduct, as Chief Justice Burger noted in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-59 (1973), certain types of obscenity that graphically depict sex and violence incite the reader-viewer to violent criminal conduct. The national interest in regulating these works would be strong. Admittedly, however, some studies show that the purported link between crime and obscenity is tenuous at best. *See THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY* 26-32 (1970).

161. In *New York v. Ferber*, 102 S. Ct. 3348, *on remand sub nom. People v. Ferber*, 57 N.Y.2d 256, 441 N.E.2d 1100, 455 N.Y.S.2d 582 (1982), the Court recognized child pornography as a special category of unprotected expression. *See infra* notes 165-70 and accompanying text. The Court held that states could restrict the distribution of child pornography through criminal statutes, even though the material was not obscene under *Miller*.

162. One recent report referred to organized crime's financial success in pornography and noted that the profitable business is national in scope. *See ORGANIZED CRIME, supra* note 119, at 12.

prove, the courts should be sensitive to the characteristics of a criminal syndicate¹⁶³ and should deny copyright protection to materials emanating from such a syndicate. In one recent federal racketeering prosecution, the government indicted members of a pornography operation that was linked to organized crime for their involvement in a Racketeer Influenced and Corrupt Organizations (RICO) "enterprise."¹⁶⁴ Awarding the financial protection of a copyright to organized criminal activity furthers the lucrative national distribution of pornography and frustrates at least in part the extensive efforts of federal law enforcement agencies to dismantle the economic base of organized crime.

3. Sexual Exploitation of Children

Pornography, often considered a "victimless crime," becomes a more serious public policy concern when it depicts the sexual performances of children. Recently in *New York v. Ferber*¹⁶⁵ a unanimous Supreme Court upheld a New York child pornography statute¹⁶⁶ and noted that the sexual exploitation of children is a problem of national concern.¹⁶⁷ Additionally, the Court stressed that concerted national law enforcement must remove the economic incentives for the production and distribution of child pornography.¹⁶⁸ Thus, as a matter of public policy, courts should deny copyright protection to obscene works that use children in a sexually exploitative

163. *Id.* at 7-8. "Organized crime is a type of conspiratorial crime, sometimes involving the hierarchical coordination of a number of persons in the planning and execution of illegal acts, or in the pursuit of a legitimate objective by unlawful means." *Id.* at 7.

164. *See United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979). In this prosecution under Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981), the government attacked the pornography ring because it was an "association in fact" operating in a pattern of racketeering activity. *Id.* § 1961(4). Federal obscenity crimes, however, are not RICO predicate offenses, although a pornography operation could facilitate a racketeering enterprise.

165. 102 S. Ct. 3348, *on remand sub nom. People v. Ferber*, 57 N.Y.2d 256, 441 N.E.2d 1100, 455 N.Y.S.2d 582 (1982).

166. The New York statute provided in pertinent part: "A person is guilty of the use of a child in a sexual performance if knowing the character and consent thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance . . ." N.Y. PENAL LAW § 263.05 (McKinney 1980). The law also prohibits "promoting" a sexual performance by a child in "any play, motion picture, photograph or dance." *Id.* §§ 263.15, 263.00(4). The *Ferber* Court noted that 20 states, including New York, had similar child pornography statutes. 102 S. Ct. at 3351 n.2.

167. 102 S. Ct. at 3355-56.

168. *Id.* at 3357. "The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation." *Id.*

manner.¹⁶⁹ Copyright invalidation may be only a minor obstruction to the production and distribution of this kind of pornography, but the removal of copyright protection directly affects the marketability of the work and would be a part of the national enforcement effort the Supreme Court envisioned in *Ferber*.¹⁷⁰

4. Marketability of the Work

The rapid technological progress in the communications industry has enabled authors to distribute their work not only in conventional forms such as books, magazines, and films, but also by such modern methods as cable and microwave television, satellite broadcasting, and videocassettes. These marketing options also are available to pornographers. Both Congress and the courts must realize, therefore, that "obscene" works will enjoy a wider, more profitable distribution in the coming decade.¹⁷¹ For example, the copyright tribunal for cable broadcasting¹⁷² and the possible creation of a similar tribunal

169. The *Ferber* Court held that states may regulate child pornography even though it is not "obscene" under the *Miller* test. The Court held that the overwhelming compelling interest in prosecuting the promoters of child pornography removes the issue from traditional obscenity analysis. *Id.* at 3356. This Recent Development advocates that a court find a work "obscene" before it considers a denial of copyright protection.

170. *Id.* at 3354-58. See also Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981) (discussion of widespread sexual exploitation of children).

171. Because the content of cable television, microwave, and satellite broadcasting is not subject to the same scrutiny that the Federal Communications Commission gives to television broadcasters, these new communication systems enjoy greater freedom in transmitting sexually explicit programming. Whether these new forms of broadcasting will create a viable market for obscenity is uncertain, but the sale of pornographic video cassettes appears to provide a lucrative new source of revenue for the pornography industry. Arguably, since the new media systems transmit programming directly into the private home, the state interest in regulating obscenity is reduced. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of obscene material in the home is protected by constitutional right of privacy).

Some states, however, have attempted to regulate the content of sexual material on cable television by enacting criminal statutes. For example, the Utah legislature enacted a statute that imposed criminal penalties upon any person, including a cable television franchise, who "knowingly distribute[s] by wire or cable any *pornographic or indecent* material to its subscribers." UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981) (emphasis added). A federal court in Utah held that the statute was unconstitutionally broad because it proscribed nonobscene materials protected by the first amendment. *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D.C. Utah 1982). The court noted that the statute's definition of "indecent" included nudity and partial nudity, which the Supreme Court has said is not necessarily obscene. *Id.* at 1113.

172. Cable operators must pay royalties to the creators of copyrighted program material that they use. First, cable operators must obtain a copyright license and periodically pay royalty fees into a central fund. Second, the Copyright Royalty Tribunal distributes these fees among the claimants. 17 U.S.C. §§ 801-810 (1976). The tribunal distributed \$15 million for 1978, the first year of distribution; 75% of this money went to program syndicates and movie producers. See *National Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 8 MED. L. REP.

for home video recording¹⁷³ could make the distribution of obscene films even more profitable. Therefore, a decision to award copyright protection to obscene works could result in a direct financial benefit to the copyright holder and thus provide an incentive for the production of more obscene works. Sound public policy requires the denial of such financial rewards to those works that by definition are illegal and violative of national policy.¹⁷⁴

V. CONCLUSION

Using the community standards test for obscenity to invalidate a federal copyright creates a conflict between two policies that normally are mutually supportive. *Jartech* and *Mitchell Brothers* recognized this problem, but they go too far in granting eligibility for copyright protection to *all* obscene works. The incongruous result is that the government confers lucrative copyright protection to the same business that it tries to eliminate through antiobscenity laws. The Supreme Court's community standards definition of obscenity is not a constitutional standard, and no decision of the Court has prohibited the use of a national standard in copyright cases. In determining whether an "obscene" work should have copyright protection, a court should balance the national policies supporting copyright with the national policies against obscenity. *Jartech* and *Mitchell Brothers* justly abandoned the archaic *Martinetti* rule and departed from 200 years of copyright and obscenity jurisprudence. Now the courts and Congress should refine this new approach.

KURT L. SCHMALZ

(BNA) 1432, 1434 (D.C. Cir. 1982).

173. The Supreme Court has granted certiorari to *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982), and conceivably could require a copyright tribunal similar to the cable tribunal for the home video recording industry. The Ninth Circuit in *Sony* declared that home video recording violates the federal copyright laws and that the fair use provisions of the Copyright Act do not excuse the infringement. *Id.* at 972-74.

174. This Recent Development does not argue that the in-home use of obscene materials is against national public policy. Perhaps the federal interest in regulating private use of obscene materials is so attenuated that a court should not deny copyright protection. This Recent Development proposes judicial balancing between national anti-obscenity policies and the national copyright law. The *Jartech* and *Mitchell Brothers* opinions disregarded the need for balancing or the existence of a national interest in regulating obscenity.