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Applying the Fair Use Doctrine on a Moral and Commercial Basis: *Harper & Row, Publishers, Inc. v. Nation Enterprises*

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NOTES AND COMMENTS

APPLYING THE FAIR USE DOCTRINE ON A MORAL AND COMMERCIAL BASIS: *HARPER & ROW, PUBLISHERS, INC. V. NATION ENTERPRISES**

I. INTRODUCTION

Shortly after the end of his term as President of the United States, Gerald Ford entered into a contract with the publishing company of Harper & Row and The Reader's Digest, Inc. for the publication rights to the former President's memoirs, which were still unwritten at that time.[1] For nearly two years Ford worked on the memoirs with the assistance of a senior editor of Reader's Digest Inc.[2] Their work resulted in a "mountain of documents" and over 6,000 pages of transcribed interviews involving Ford and other parties.[3] From this material a manuscript entitled *A Time to Heal: The Autobiography of Gerald R. Ford* was drafted. Just before the completion of the memoirs, Harper & Row and Reader's Digest, Inc. exercised their "first serial rights"[4] by entering into an agreement with *Time* magazine. This agreement provided for *Time* to pay $25,000 for the right to excerpt 7,500 words from Ford's account of his pardon of former President Richard Nixon.[5] Critical terms of the agreement included a $12,500 advance with the remaining $12,500 payable at publication and *Time's* exclusive right to the "first serial rights."[6]

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* This note was awarded first place in the Nathan Burkan Memorial Copyright Competition at the University of Miami School of Law and has been submitted to the national competition.

1. Harper & Row, Pub. v. Nation Enters., 105 S. Ct. 2218, 2221 (1985).

2. Harper & Row, Pub. v. Nation Enters., 557 F. Supp. 1067, 1069 (S.D.N.Y. 1983), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985).

3. *Harper & Row*, 577 F. Supp. at 1069 n.1.

4. *Harper & Row*, 105 S. Ct. at 2222. "First serial rights" are the publishing trade's definition of the exclusive right to license prepublication excerpts. *Id.*

5. *Id.* at 2222.

6. *Id.* In order to protect its exclusivity, *Time* "retained the right to renegotiate the second payment should the material appear prior to its release of the excerpts." *Id.* Accord-

An unauthorized copy of Ford's manuscript was secretly given to Victor Navasky, the editor of *The Nation* magazine, two to three weeks before *Time's* release was scheduled.[7] With the knowledge that his possession was unauthorized and believing that the draft had to be returned quickly, Navasky hurriedly assembled a draft of what he believed was "a real hot news story."[8] The extent of the work done by Navasky was to quote and paraphrase from the memoirs, without any verification of the material and without any editorial commentary.[9] *The Nation's* article, entitled "The Ford Memoirs-Behind the Nixon Pardon," was approximately 2,250 words and sets out former President Ford's recollections of the facts concerning the pardon of Nixon as well as Ford's reminiscences about other national figures.[10] As a direct result of *The Nation's* article appearing before *Time's* planned article, which was to excerpt the same manuscript, *Time* exercised its right to cancel the agreement. Under its agreement with Harper & Row and Reader's Digest, Inc.[11] *Time* refused to pay the balance of $12,500 due on the agreement.[12] Shortly after *The Nation's* article, former President Ford's memoirs, entitled "A Time to Heal," were official published and protected by copyright.[13]

Consequently, Harper & Row and Reader's Digest brought an action in the District Court for the Southern District of New York alleging that *The Nation's* article was a copyright infringement under the Copyright Act of 1976.[14]

Harper & Row and Reader's Digest, Inc. also alleged conversion and tortious interference with contract. The district court found that the Ford memoirs were copyrightable and that *The Nation's* article revealing the memoirs was "not such news, 'hot' or otherwise, as to permit the use of author Ford's copyrighted material"[15] under the "fair use" doctrine.[16] In holding that the memoirs

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ingly, Harper & Row took measures to protect the confidentiality of the transcript. *Id.*

7. *Id.* The identity of the person who took the manuscript as well as the circumstances of the taking of the manuscript were not revealed. *Id.*

8. *Id.*

9. *Harper & Row*, 557 F. Supp. at 1069.

10. *Harper & Row*, 105 S. Ct. at 2221; *Harper & Row*, 557 F. Supp. 1069. *See also Harper & Row*, 105 S. Ct. at 2235-40 (setting out *The Nation's* article).

11. *Harper & Row*, 105 S. Ct. at 2221.

12. *Id.*

13. *Harper & Row*, 557 F. Supp. at 1069-70.

14. 17 U.S.C. § 106 (1982).

15. *Harper & Row*, 557 F. Supp. at 1072.

16. 17 U.S.C. § 107 (1982) codifying the four factors used by the courts in determining "fair use"). *See infra* notes 50, 51 for a discussion of § 107.

were copyrightable, the district court also found that although "recitals of historical facts, . . . the texts of government memoranda prepared by individuals other than Ford, and . . . the quoted conversations of persons other than Ford"[17] were not per se copyrightable, when the totality of the facts, memoranda and other conversations were combined with Ford's recollections, this creative work could be protected by the copyright laws. The district court awarded Harper & Row and Reader's Digest, Inc. damages of $12,500 resulting from *Time's* non-performance of the contract plus any profits shown in a subsequent accounting.[18] The state law claims of conversion and tortious interference were dismissed as being preempted under the Copyright Act.[19]

On appeal, The United States Court of Appeals for the Second Circuit reversed the district court's holding of copyright infringement and affirmed the district court's dismissal of the state law claims of conversion and tortious interference.[20] The basis of the court of appeals' reversal began with its rejection of the district court's coupling of copyrightable expression with uncopyrightable facts into a copyrightable totality.[21] The court of appeals then found that large amounts of the information concerning Nixon's pardon and the use of conversations attributed to other persons were not copyrightable and thus not protected.[22] After the uncopyrighted material was "stripped away," the Second Circuit found that *The Nation's* article contained, at most, 300 copyrighted words.[23] The court of appeals then held that the district court was clearly erroneous in holding that *The Nation's* article was not "fair use" of a news event.[24] In doing so, the court of appeals established an objective standard of what was news rather than the subjective view which it perceived the district court as establishing.[25]

The dissenting opinion for the court of appeals rejected the

17. *Harper & Row*, 557 F. Supp. at 1072.

18. *Id.* at 1073.

19. Harper & Row Pub. v. Nation Enterps. 723 F.2d 195, 199 (2d Cir. 1983).

20. *Id.*

21. *Id.* at 205.

22. *Id.*

23. *Id.* These copyrighted words consisted of verbatim quotes which had not been in any other publication, including "a short segment of Ford's conversations with Henry Kissinger and several other individuals" and primarily "Ford's impressionistic depictions of Nixon, ill with phlebitis after the resignation and pardon, and of Nixon's character." *Id.* at 206.

24. *Id.*

25. *Id.* at 207.

majority's mechanical determination of what constitutes a "totality" in lieu of a case-by-case approach.[26] The dissent found that although the district court was clearly erroneous in holding that *The Nation's* article was not news, the article was still not a "fair use."[27] The dissent concluded that "The Nation . . . used far more of the memoirs than was necessary to write a 'news' article."[28]

The Supreme Court of the United States granted certiorari to decide the issue of whether the "fair use" doctrine, as codified in the Copyright Revision Act of 1976,[29] sanctioned "the unauthorized use of quotations from a public figure's unpublished manuscript."[30] Answering this question in the negative, the Supreme Court *held*, reversed and remanded: A magazine's use of verbatim excerpts from the unpublished manuscript of a public figure was not a fair use. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218 (1985).

II. Copyright Law and the Fair Use Doctrine

A. Constitutional Origin and Early Cases

The protection accorded under the copyright laws originates from article I, section 8, of the United States Constitution: "The 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."[31] The intent of the Framers in providing this protection was to encourage and reward creative individuals for their efforts.

Competing with the constitutional protection for copyright is the first amendment guaranty of free speech: "Congress shall make no law . . . abridging the freedom of speech."[32] The constitutional tension resulting from the sometimes competing protections of copyright and free speech has produced the idea-expression dichotomy. Under this dichotomy, an author's expressions of his ideas are protected by copyright, while the ideas themselves are not.[33] In cases involving the idea-expression dichotomy, the critical issue becomes: what are an author's expressions and what are his ideas.

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26. *Id.* at 214 (Meskill, J., dissenting).
27. *Id.* at 215 (Meskill, J., dissenting).
28. *Id.* at 216 (Meskill, J., dissenting).
29. 17 U.S.C. § 107 (1982).
30. *Harper & Row*, 105 S. Ct. at 2221.
31. U.S. Const. art. I, sec. 8, cls. 1 and 8.
32. U.S. Const. amend. I.
33. 1 M. Nimmer, Nimmer On Copyright 1.10 B.2 at 1-72 (1985).

The question of whether news could be an author's expression was an early test of the idea-expression dichotomy. In an early case, *International News Service v. Associated Press*,[34] one news gathering service alleged that a competing news service was taking its news from bulletin boards and early editions of its members' newspapers. The Supreme Court found that "the news element . . . is not the creation of the writer."[35] The Supreme Court concluded that constitutional protection of "history of the day" was not intended by the framers of the Constitution and was thus not within the protection of the copyright laws existing at that time.[36]
Even if there is an infringement of a work protected by copyright, such infringement might be excused under the "fair use" doctrine.[37]

> The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. The cases emphasize that resolution of a fair use claim "depends on an examination of the facts in each case and cannot be determined by resort to any arbitrary rules or fixed criteria."[38]

Among the earliest examples of this "judge-made rule of reason"[39] was in *Folsom v. Marsh*,[40] which coincidentally involved the papers of another former President, George Washington. In *Folsom*, it was found that the infringers, in writing on the life of President Washington, used verbatim parts from a collection of Washington's letters, which was published by the copyright holders.[41] In doing so, the defendants invaded the plaintiffs' copyright, despite there being no evidence of bad intentions on the part of the infringers.[42] In his decision, Justice Story recognized the doctrine of "fair use."[43]

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34. 248 U.S. 215 (1918).

35. *Id.* at 234. Although *International News Serv.* was decided on grounds other than copyright, it has been cited for the proposition that news by itself is not necessarily protected by copyright since the work did not originate with the author. 1 M. NIMMER, *supra* note 33, at 2.1 E. at 2-166.

36. 248 U.S. 215 at 234.

37. *See generally* 3 M. NIMMER, *supra* note 33, at 13.05.

38. Iowa State Univ. Research Found. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980). (citation omitted).

39. 3 M. NIMMER, *supra* note 33, at 13.05 B.2 at 13-62.

40. 9 F. Cas. 342 (C.D. Mass. 1841) (No. 4,901).

41. *Id.* at 345.

42. *Id.* at 349.

43. *Id.* at 345. Although Justice Story does not use the term "fair use," he was clearly referring to the doctrine when he stated that, "it has been decided that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author." *Id.* (citations

as well as identifying the difficulty in its application: "But, then, what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion."[44]

B. *Copyright Revision Act of 1976*

The current statutory authority for copyright protection is the Copyright Revision Act of 1976 (the Copyright Act).[45] The Copyright Act was enacted as a much heralded codification of the existing law.[46] The subject matter of copyright protection is found in section 102 of the Copyright Act[47] as well as in the codification of the idea-expression dichotomy.[48] Section 106 sets forth the exclusive rights which are vested in copyright owners.[49]

One of the most significant changes Congress made when revising the copyright laws in 1976 was the codification of the "fair use" doctrine in section 107. This "fair use" provision states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section,

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omitted).

44. *Id.*

45. 17 U.S.C. §§ 102, 106, 107 (1982).

46. "The general copyright revision of 1976 represented a towering achievement: the first total recodification and modernization of copyright in sixty-seven years, which culminated more than twenty years of study, debate, and drafting." Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421, 423 (1983).

47. Section 102 provides that, "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 102 (1982).

48. 1. M. NIMMER, *supra* note 33, at 1.10 B.2 at 1-72. The codification of the "idea-expression dichotomy" is found by combining the protection accorded in § 102(a) with the limitation in § 102(b) which provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1982).

49. Section 106 of the Copyright Act provides that:

> Subject to sections 107 through 118, the owner of copyright under the title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending; publicly; and
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> . . . .
>
> (5) in the case of literary . . . works, to display the copyrighted work publicly.

17. U.S.C. § 106 (1982).

> for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[50]

After defining and codifying the "fair use" doctrine, section 107 sets out four factors to be used in determining whether or not a given use is a "fair use:"

> 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 a value of the copyrighted work.[51]

Although the Copyright Act gives some guidance in determining "fair use," its drafters recognized the difficulty of its application encountered by the courts ever since *Folsom v. Marsh*,[52]:

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.[53]

Because of the difficulty in formulating a concrete statutory "fair use" standard, the drafters specifically provided that: "[s]ection 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[54]

C. *Bad Faith and Fair Use*

In order for an individual to utilize the "fair use" doctrine, a commentator suggested and the courts have borne out an element of good faith in its use.[55] The early leading case on the good faith element, *Time Inc. v. Bernard Geis Associates*[56] involved the Za-

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50. 17. U.S.C. § 107 (1982).
51. *Id.*
52. 9 F. Cas. 342 (C.D. Mass. 1841) (No. 4,901).
53. H.R. REP. No. 1476, 94th Cong. 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679.
54. *Id.* at 66, *reprinted in* U.S. CODE CONG. & AD. NEWS at 5680.
55. *See* W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 121-23 (1985).
56. 293 F. Supp. 130 (S.D.N.Y. 1968). This case was prior to the Copyright Revision

pruder film of the assassination of President John F. Kennedy. This film, "an historic document and undoubtedly the most important photographic evidence concerning the fatal shots,"[57] was purchased by *Life* magazine, which printed pieces of the film in several copyrighted issues of its magazine. One of the defendants in the action was the author of an analytical book on the Kennedy assassination which included sketches of frames of the Zapruder film.[58] These sketches were drawn from copies made by the infringing author from some of the Zapruder frames, while the infringer was a consultant with *Life*. Because "Life had refused permission to use the Zapruder frames in the defendant's Book,"[59] the copying was improper and the fact that sketches were used rather than actual copies did not dissuade the court from the position that copying had indeed occurred." The so-called 'sketches' in the Book . . . are in fact copies, as is readily apparent by comparison with the Zapruder frames involved . . . . The 'artist' has simply copied the original in charcoal with no creativity or originality whatever."[60]

In holding that the infringing author's copying of the Zapruder film was a "fair use" the court found that, "[t]here is an initial reluctance to find any fair use by defendants because of the deliberate appropriation in the Book, in defiance of the copyright owner. Fair use presupposes 'good faith and fair dealing.' "[61] With this indicia of bad faith, the court balanced the facts in favor of the defendants:

> On the other hand it was not the nighttime activities of [the defendant author] which enabled defendants to reproduce copies of Zapruder frames in the Book. They could have secured such frames from the National Archives, or they could have used the reproductions in the Warren Report or in the issues of Life itself.[62]

When the court balanced these factors along with the importance of the public's interest in receiving the fullest information on the Kennedy assasination, the court found that the defendants' use was fair.[63]

Act of 1976 and therefore did not apply the § 107 factors.

57. *Id.* at 131.
58. *Id.* at 131-32.
59. *Id.*
60. *Id.* at 139.
61. *Id.* at 146. (citations omitted).
62. *Id.*
63. *Id.* The court also considered several commercial factors, which will be discussed

Public interest will not always overcome bad faith. *Iowa State University Research Foundation v. American Broadcasting Co.*[64] involved a short film on a college wrestler who later became a gold medal winner at the 1972 Olympics. This film was produced by two students and financed by their university's research foundation and the wrestler's family.[65] The university and one of the producers had a written agreement which allowed the producer to negotiate the first television showing, but this was only to be expressly with the university's consent.[66] This agreement was displayed in a legend on the film.[67] The film's producer negotiated with the infringing television network, with whom he was temporarily employed. An agreement, however, was never reached. Despite this lack of agreement, the network made an unauthorized copy and used short portions of the film in three separate broadcasts. The network never paid any compensation and repeatedly denied its use of the film to the university.[68]

In affirming the district court's holding that the copying of the film was a copyright infringement not excused by the "fair use" doctrine, the court of appeals rejected the network's argument as to the importance and public benefit of the film's subject matter. The court of appeals was especially concerned with the network's conduct:

> The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance. Indeed, we do not suppose that appellants would embrace their own defense theory if another litigant sought to apply it to the ABC evening news.[69]

D. Commercial Use and the Sony Case

Under the "fair use" doctrine, prior to the Copyright Revision Act of 1976, the courts had considered the *commercial nature* of

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infra at notes 70-71.

64. 621 F.2d 57 (2d Cir. 1980), *aff'g* 463 F. Supp. 902 (S.D.N.Y. 1978). Although the case was tried after the enactment of the Copyright Revision Act of 1976, the judicial doctrine of "fair use" was applied rather than the section 107 factors because the events which led to the action were prior to the effective date of the Copyright Act. *Id.* at 60 n.5.

65. *Id.* at 58.

66. Iowa State Univ. Research Found. v. American Broadcasting Co. 463 F. Supp. 902 (S.D.N.Y. 1978).

67. *Id.* at 905.

68. 621 F.2d at 59.

69. *Id.* at 61.

the questioned use in deciding "fair use" issue. In *Time Inc. v. Bernard Geis Associates*, the infringing author's lack of commercial incentive was a key factor in the court's finding of a "fair use":

> Moreover, while hope by a defendant for commercial gain is not a significant factor in this Circuit, there is a strong point for defendants in their offer to surrender to Life [the plaintiff] all profits of Associates [one of the defendants] from the Book as royalty payment for a license to use the copyrighted Zapruder frames.[70]

Furthermore, the court found that the copyright holder and infringers did not complete, and "[i]t seems more reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work; it is difficult to see any decrease in its value."[71]

Similarly, the court in *Iowa State University Research Foundation v. American Broadcasting Cos.* looked into the commercial effect of the infringing network's actions on the copyright holder:

> [W]e believe that ABC did foreclose a significant potential market to Iowa—sale of its film for use on television in connection with the Olympics. In fact, because of its exclusive right to televise the games, ABC monopolized that market. When ABC telecast [the copied film] without purchasing the film it usurped an extremely significant market.[72]

Thus, in determining "fair use," the courts have given great importance to the commercial relationship between the copyright holders and the infringers, and as between these parties and their respective commercial markets.

The commercial nature of the use of a copyrighted work is expressly provided for in the Copyright Revision Act of 1976[73] as a factor to be analyzed in determining "fair use." The landmark case of *Sony Corp. v. Universal City Studios*[74] is an example of the Supreme Court's recent approach to commercial practices. *Sony* (the so-called *"Betamax Case"*), was an action brought by the copyright owners of certain television programs against the manufacturers and sellers of home video tape recorders. At issue was whether "the sale of defendants' copying equipment to the general public violate[d] any of the rights conferred upon plaintiffs by the

70. 293 F. Supp. 130, 146 (S.D.N.Y. 1968).
71. *Id.* at 146.
72. *Iowa State Univ. Research Found.*, 621 F.2d at 62.
73. *See* 17 U.S.C. § 107(1) (1982).
74. 464 U.S. 417 (1984).

Copyright Act."[75] The copyright owners did not take any action against any of the video tape recorder owners, but rather brought the action against the defendants, alleging that they, because of their manufacturing and marketing of the recorders, were liable for alleged copyright infringement by recorder owners.[76]

The district court held that, "noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement."[77] The district court further held that the defendants could not be liable for contributory infringement even if the recorder owners were infringing.[78] In doing so, the district court reasoned that if marketers of the video tape recorders could be liable for their customers' infringements, so might the marketers of "other staple articles of commerce" such as cameras, tape recorders, and copying machines.[79]

The court of appeals reversed, holding that home use of the video tape recorder was not a "fair use" because it was not a productive use. The court of appeals also rejected the analogy to staple articles of commerce by distinguishing tape recorders and photocopying from video tape recorders. The distinction was that tape recorders and photocopying machines have substantial benefit while video tape recorders' primary purpose is reproducing copyrighted television programs. The court of appeals held that the defendants were chargeable with the recorder owners' infringing use since that was the most conspicuous or major use.[80]

The decision of the court of appeals was reversed by the Supreme Court. In an opinion by Justice Stevens, the Court first found that, "[t]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed it need merely be capable of substantial noninfringing uses."[81] Justice Stevens then went on to rephrase the issue as whether the video tape recorder was capable of "commercially significant noninfringing uses."[82] The Court found that the video tape recorder was capable of a noncommercial significant use,

75. *Id.* at 420.
76. *Id.*
77. *Id.* at 425.
78. *Id.* at 426.
79. *Id.*
80. *Id.* at 427-28.
81. *Id.* at 442.
82. *Id.*

"time-shifting," which is where a video tape recorder is used to record a program which cannot be viewed at the televised time. Justice Stevens reasoned that because "time-shifting" was a non-commercial significant noninfringing use, it was a fair use.[83] This private, noncommercial use may be either authorized, for example, in sports or educational broadcasting where the producers authorize home taping[84] or unauthorized, such as with the removal of commercial advertisements from programs. The unauthorized "time shifting" would also be a "fair use" because it necessarily involves noncommercial, nonprofit activity[85] and there was no showing of any "meaningful likelihood of future harm" to the copyright holders.[86]

III. Analysis of the Supreme Court Decision

A. The Moral Basis

In *Harper & Row*, the Supreme Court again addressed the "fair use" doctrine in a commercial setting along with the additional element of bad faith. Writing for the majority, Justice O'Connor focused on Navasky's knowledge that his possession of the "purloined manuscript" was unauthorized.[87] Although the court did not specifically state that *The Nation* through its editor acted in bad faith, the court examined *The Nation's* conduct and found a lack of good faith.

> The trial court found that The Nation knowingly exploited a purloined manuscript . . . . Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification. Like its competitor newsweekly, it was free to bid for the right of abstracting excerpts from "A Time to Heal." Fair use "distinguishes between a true scholar and a chiseler who infringes a work for personal profit."[88]

Thus, the Court subjectively examined the infringer's conduct in comparison to its competitors by using the customary practices of that industry. In the publishing industry, the customary commercial practice for excerpting a soon-to-be-released book appears to

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83. *Id.*
84. *Id.* at 446.
85. *Id.* at 449.
86. *Id.* at 451.
87. Harper & Row Publishers v. Nation Enters., 105 S. Ct. 2218, 2221 (1985). Purloined has been defined as "appropriate wrongfully and often under circumstances that involve a breach of trust." Websters Third New International Dictionary 1846 (1976).
88. *Harper & Row*, 105 S. Ct. at 2232.

be through bidding rather than by "appropriating" a "purloined" manuscript. When *The Nation's* lack of adherence to customary standards is combined with the Court's use of terms such as "appropriate" and "purloined," the result is a lack of moral good faith on the part of *The Nation.* This, in the majority's view, is decidedly different than the dissent's view that bad faith means illegal or criminal conduct.[89]

Furthermore, Justice O'Connor rejected *The Nation's* attempt to use the first amendment to justify its conduct:

> [The Nation] advance[s] the substantial public import of the subject matter of the Ford Memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use—the piracy of verbatim quotations for the purpose of "scooping" the authorized first serialization. [The Nation] explain[s] [its] copying of Mr. Ford's expression as essential to reporting the news story it claims the book itself represents . . . . [The Nation] argue[s] that the public's interest in learning the news as fast as possible outweighs the right of the author to control its first publication.[90]

In rejecting this rationale, the Court reasoned that *The Nation's* argument would create a bright line rule that would effectively expand the "fair use" doctrine "to create what amounts to a public figure exception to copyright."[91] Instead, the Court focused on *The Nation's* bad faith and applied the section 107 "fair use" factors to find that *The Nation's* use was not fair.[92]

The Court's handling of *The Nation's* bad faith was consistent with the doctrine previously developed in the lower courts.[93] *Harper & Row*, like *Bernard Geis*, dealt with an important historical event. However, whereas *Bernard Geis* dealt with a new theory of analysis on the assassination of John F. Kennedy, using frames of the copyrighted Zapruder film which had already been published, *Harper & Row* involved an unpublished copyrighted autobiography which was to be excerpted by a magazine competing with *The Nation.* In *Bernard Geis*, if the offending use of the frames was not allowed, the public arguably would not have been exposed

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89. *Harper & Row*, 105 S. Ct. at 2240 (Brennan, White, Marshall, J.J., dissenting).

90. *Id.* at 2228.

91. *Id.* at 2230.

92. *Id.* at 2231-35. For application of the § 107 "fair use" factors, see *infra* notes 104-18.

93. *See* Iowa State Univ. Research Found. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980); Time Inc. v. Bernard Geis Assoc., 293 F. Supp 130 (S.D.N.Y. 1968); W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 121-23 (1985).

to the new theory. But, in *Harper & Row* the only thing that the public gained by *The Nation's* unauthorized use of the manuscript was a preview, using verbatim quotes and paraphrasing of the Ford manuscript, which was to be excerpted soon thereafter. The public gained no new or additional knowledge, because *The Nation's* editor added little, if any, editorial commentary.[94] This distinction, based on public flow of information, goes to the very root of copyright protection: "[T]he Framers intended copyright . . . to be the engine of free expression."[95] In *Bernard Geis*, strict adherence to copyright would have prevented the author's free expression of a new theory of analysis. Copyright was, however, necessary to protect President Ford's free expression of thoughts. Without the protection of copyright, Ford's memoirs would not be marketable and his thoughts would probably never be published.

Comparatively, however, *The Nation's* misconduct was not as injurious as the conduct of the television network's in *Iowa State University Research Foundation.* In *Harper & Row*, there was no deception or denial involving the use of the manuscript, as the network did in the use of the film.[96] Also, rather than one competitor trying to gain a competitive advantage over another by "scooping" the manuscript as was done in *Harper & Row, Iowa State University Research Foundation* involved a large corporate network stealing a film produced by amateur students.[97] Despite these distinctions, *The Nation's* use was not held to be a "fair use." Thus, when there is bad faith present on the part of the user, a balancing test is used within the statutory framework. The determination of bad faith is done subjectively, using the infringer's conduct in comparison with the customary standards of the infringer's industry. The results are that the greater the degree of bad faith, the lesser are the chances of the use being held fair.

B. The Commercial Basis

The Court's decision was also deeply rooted in commercial practices. The most significant of the commercial practices was the right of first publication

> First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies

94. *See supra* note 9 and accompanying text.
95. *Harper & Row*, 105 S. Ct. at 2230.
96. *See supra* note 67 and accompanying text.
97. *See supra* note 64 and accompanying text.

> primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of this manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.[98]

Clearly, *The Nation's* unauthorized use of the unpublished Ford manuscript infringed on the first publication rights which were contracted for by *Time*.

The Nation argued that "the public's interest in learning this news as fast as possible outweighs the right of the author to control its first publication."[99] This contention was rejected by the Court. Instead, the Court chose the "idea/expression dichotomy"[100] and the traditional equities of fair use"[101] as the proper standards by which to judge *The Nation's* use of Harper & Row's copyrighted material.

The Court's rejection of *The Nation's* attempt to characterize the expressions comprising the Ford manuscript as non-copyrightable news was also based on its concern for the way that commercial incentives foster the dissemination of information under copyright. In rejecting *The Nation's* argument the Court held:

> [The Nation's] theory . . . would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book . . .
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> . . . .
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> In our haste to disseminate the news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.[102]

An additional commercial reason used by the Court was the investment of time and capital by Ford and Harper & Row. Justice O'Connor stated "[w]here an author and publisher have invested

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98. *Harper & Row*, 105 S. Ct. at 2227.

99. *Id.* at 2228.

100. *Id.* at 2228-29. For a discussion of the "idea/expression dichotomy" see *supra* note 33.

101. 105 S. Ct. at 2231.

102. *Id.* at 2229-30 (citation omitted).

extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by preempting the right of first publication."[103] The Ford manuscript was the result of two years of extensive work,[104] whereas The Nation's article was one weekend of quoting and paraphrasing by its editor.[105] *The Nation* could have added or improved the article, thus giving it some investment or contribution in the article. In that situation, *The Nation* certainly would have had a greater chance of qualifying as a "fair use." However, *The Nation's* bad faith in its use of the "purloined" manuscript only served to emphasize the magazine's lack of contribution to the article. As a result of the policies underlying the commercial practices, the Court articulated a presumptive test: "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[106]

Perhaps Justice O'Connor's view on the effect of commercial practices is best illustrated by comparing *Harper & Row* with the *Sony* case. In the *Sony* case the Court was willing to expand the "fair use" doctrine in light of changes in technology, i.e. the advent of video tape recorders. In doing so the Court recognized not only commercial uses but also non-commercial uses such as "time-shifting."[107] Thus, the Court not only looks at commercial uses and practices but also at noncommercial uses where significant, as in the *Sony* case. In *Harper & Row*, however, there were no significant noncommercial reasons to permit *The Nation* to use the Ford manuscript. Clearly the purpose of *The Nation's* "scooping" of the

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103. *Id.* at 2229.

104. *See supra* notes 2, 3 and accompanying text.

105. *See supra* note 8 and accompanying text. An interesting contrast between the approaches taken in *Harper & Row* by the district court and the court of appeals is reflected by their respective characterizations of the work on the article by *The Nation's* editor. The district court found that:

> [The editor] spent overnight or perhaps the next twenty-four hour period *quoting and paraphrasing from a number of sections of the memoirs* [the editor] *added no comment of his own.* He did not check the material . . . Part of [the editor's] rush apparently was caused by the fact that he had to get the draft back to his "source" with some speed.

557 F. Supp. at 1069 (emphasis added).

Conversely, the court of appeals characterized the editor's work as follows:

> Believing the book to contain important political news, including heretofore undisclosed facts on the pardon, [the editor] worked *frenetically* throughout a night and part of a weekend to *read the memoirs in their entirety and select materials germane to a news article* before returning the copy to its source.

723 F.2d at 198 (emphasis added).

106. 105 S. Ct. at 2228.

107. For a discussion of "time-shifting" see *supra* note 80 nd accompanying text.

article from *Time* was for an eventual financial award, which certainly is a commercial goal.[108]

C. *Application of the Section 107 Fair Use Factors*

After addressing the relevance of the good faith test and commercial uses, Justice O'Connor summarily applied the section 107 statutory factors[109] to the facts of *Harper & Row* in order to determine whether or not the infringement was a "fair use."

1. *Purpose of the Use*

The Court found that although the purpose was to report news, "The Nation went beyond reporting uncopyrighted information and actively sought to exploit the headline value of its infringement, making a 'news event' out of its unauthorized first publication of a noted figure's copyrighted expression."[110] Under this factor, Justice O'Connor also took *The Nation's* bad faith and its achieved purpose of "supplanting the copyright holder's commercially valuable right of first publication"[111] into account. Clearly, analysis under this first factor did not form a finding of "fair use."

2. *Nature of the Copyrighted Work*

The Court recognized that because *A Time to Heal* was an autobiography, some quotes may have been necessary to adequately convey the facts. However, *The Nation* clearly crossed the threshold when it "excerpted subjective descriptions and portraits of public figures whose power laid in the author's individualized expression."[112] Within this second factor, Justice O'Connor applied the presumptive test favoring the copyright holder of unpublished material.[113] Using this test, the Court found that the use by *The Nation* clearly infringed upon Harper & Row's interest in the confidentiality of the manuscript, and that *The Nation* did not over-

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108. Ironically, *The Nation* only received $418.00 in newsstand sales from the infringing issue. *Harper & Row*, 723 F.2d at 198. The Supreme Court gave no recognition to this nominal revenue.

109. *See supra* note 50 for a discussion of the four factors.

110. 105 S. Ct. at 2231.

111. *Id.* at 2232 (citation omitted).

112. *Id.*

113. For a discussion of the presumptive test, see *Supra* note 100 and accompanying text.

come the presumption of no "fair use" within this second factor.[114]

3. *Amount and Substantiality of the Portion Used*

Under this third factor, the Court combined the district court's subjective finding that *The Nation* took the "heart of the book"[115] with the court of appeals' "stripped away" thirteen percent of verbatim quotes,[116] and found that the qualitative feature of the amount used made the taking something more than meager.[117] In doing so, the Court looked beyond the solely mechanical, quantitative test developed by the court of appeals.

4. *Effect on the Market*

Justice O'Connor viewed this last factor as the "single most important element of fair use."[118] The Court found that there clearly was an effect on the market as a result of the infringement; the effect being *Time's* cancellation of the contract.[119] The Court also took account of the potential market effect if the infringement were to become widespread.[120] Justice O'Connor found that there was a potential market effect: "A fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general."[121]

After the Court applied the four section 107 factors, Justice O'Connor held that *The Nation's* infringement of the approxi-

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114. *Harper and Row*, 105 S. Ct. at 2233.

115. 557 F. Supp. at 1072. This heart was the material on the pardon of Richard Nixon. *Id.* at 1072 n.10.

116. Thirteen percent is calculated by dividing the approximately 300 "stripped away" copyrighted words by the approximately 2,250 words in *The Nation* article. *See Harper & Row*, 723 F.2d at 198, 206.

117. *Harper & Row*, 105 S. Ct. at 2234.

118. *Id.* Justice O'Connor's view is based in part on an economic theory. Justice O'Connor stated:

> Economists who have addressed the issue believe the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero. . . . As the facts here demonstrate, there is a fully functioning market that encourages the creation and dissemination of memoirs of public figures. In the economists' view, permitting "fair use" to displace normal copyright channels disrupts the copyright market without a commensurate public benefit.

Id. at n.9 (citations omitted).

119. *Id. See supra* note 6 for a discussion at the agreement with *Time*.

120. *Harper & Row*, 105 S. Ct. at 2234-35.

121. *Id.* at 2235.

mately 300 words of verbatim quotations was an infringement not excused by the "fair use" doctrine.[122] The issue of the combination of copyrightable elements with uncopyrightable elements was specifically not addressed, because Justice O'Connor felt it was unnecessary in view of *The Nation's* conceded use of 300 verbatim words.[123]

D. The Dissent

In his dissent, Justice Brennan found that *The Nation's* use was fair.[124] Justice Brennan viewed the Court's decision as favoring the copyright owner at the expense of the underlying rationale for copyright protection:

> [T]his zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine.[125]

Justice Brennan also disagreed with the Court on whether or not *The Nation* acted in bad faith:

> The Court's reliance on The Nation's putative bad faith is equally unwarranted. No court has found that The Nation possessed the Ford manuscript illegally or in violation of any common law interest of Harper & Row . . . . Even if the manuscript had been "purloined" by someone, nothing in the record imputes culpability to The Nation. On the basis of the record in

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122. *Id.*

123. *Id.* at 2224-25.

> Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole.
>
> . . . .
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> We need not reach these issues, however, as The Nation has admitted to lifting verbatim quotes of the author's original language totalling between 300 and 400 words and constituting some 13% of The Nation article. In using verbatim excerpts of Mr. Ford's unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right.

Id.

124. *Harper & Row*, 105 S. Ct. at 2240 (Brennan, J., dissenting).

125. *Id.* (Brennan, J., dissenting) (citation omitted).

> this case, the most that can be said is that The Nation made use of the contents of the manuscript knowing the copyright owner would not sanction the use.[126]

However, contrary to Justice Brennan's bright line test of illegal versus legal, the Court's test of bad faith is a subjective one. The Court's subjective approach seems more appropriate since the relevancy of the bad faith is in determining the infringer's intent in its purpose and use of the copyrighted materials.[127]

IV. CONCLUSION

In *Harper & Row*, the Supreme Court justifiably refused to expand the "fair use" doctrine, as it had in the *Sony* case.

The "fair use" exception in the *Sony* case was a result of a new technology together with significant noncommercial uses. The infringement in *Harper & Row* resulted from a magazine's bad faith use of a soon-to-be-released manuscript, which was to be excerpted by a rival magazine. The determination of bad faith is done on a subjective, moral basis, using customary commercial practices as the benchmark. The application of the statutory "fair use" factors is only one of the bases of analysis used by the Court, with other tests such as moral good faith also being employed.

Perhaps the most significant aspect of *Harper & Row* is the Court's concern that if *The Nation's* infringement was allowed as a "fair use," public figures might be discouraged from writing their memoirs. This is because publishers would not be willing to pay as much for the memoirs when the memoirs could be taken and published by a rival who only makes minor changes. Not only would a "fair use" holding adversely affect the commercial publishing industry, it would certainly be contrary to one of the underlying purposes of copyright which is to encourage the creation of literary works.

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126. *Id.* at 2248 (Brennan, J., dissenting) (footnote omitted).

127. *See* 17 U.S.C. § 107(1) (1982). *See supra* note 104 for use of the infringer's bad faith in statutory analysis.

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