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# Two Approaches to the Fair Use Doctrine: A Look at the *Harper & Row, Publishers, Inc. v. Nation Enterprises* Decisions

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# TWO APPROACHES TO THE FAIR USE DOCTRINE: A LOOK AT THE HARPER & ROW, PUBLISHERS, INC. V. NATION ENTERPRISES, DECISIONS

On February 28, 1977, former President Gerald Ford granted Harper & Row, Publishers, Inc. (Harper & Row) and Reader's Digest Association, Inc. (Reader's Digest) exclusive rights to publish in book form his yet unwritten memoirs.[1] The book was to include information on the pardon of Richard M. Nixon, Ford's childhood, his political career, and his perception of several political figures. In March of 1979, Victor Navasky, editor of *The Nation*, came into possession of a copy of the unpublished memoirs.[2] Upon receipt of the draft, Mr. Navasky diligently and expediently read the entire manuscript before returning it to its source and selected material for a news article. Mr. Navasky's article entitled, "The Ford Memoirs, Behind the Pardon," appeared in the April 7, 1979 issue of *The Nation*. The article divulged pertinent topics of the Ford memoirs, focusing on the decision to pardon Richard Nixon.[3]

Harper & Row claimed that the publication of Mr. Navasky's article by Nation Enterprises[4] and the Nation Associates, Inc. constituted copyright infringement[5] under the Copyright Act of 1976 (the Act).[6] *The Nation* asserted that Harper & Row's pendent

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1. According to an agreement between *Time* magazine and Harper & Row, *Time* was to pay Harper & Row $25,000 for the serial rights to the memoirs, $12,500 on signing and $12,500 when *Time* published selected excerpts. As a result of *The Nation's* article, *Time* never published any excerpts, nor did it pay the second $12,500.

2. *The Nation* is a magazine devoted in large part to political commentary and news. Mr. Navasky testified that he neither solicited nor paid for the delivery of the manuscript and that upon its receipt, he had not been aware of *Time's* pre-publication rights.

3. The article's introduction announced the expected publication dates of Ford's book, A TIME TO HEAL. The introduction was followed by nineteen paragraphs regarding the decision to pardon Nixon. In total, the article was approximately 2,500 words in length. The manuscript, in comparison was nearly 200,000 words covering 665 typed pages.

4. Nation Enterprises is the publisher of *The Nation*.

5. Harper & Row also alleged conversion and tortious interference with their contract.

6. 17 U.S.C. § 101 et seq. (1976). Section 106 provides exclusive rights to the owner of a copyright under this title to do and authorize any of the following:

> (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 or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

state law claims of conversion and tortious interference with contract were preempted by the Act and moved to have these counts dismissed. The District Court for the Southern District of New York granted *The Nation's* motion to dismiss Harper & Row's state claims because they asserted violations of rights equivalent to rights already protected under the Act.[7] The district court dismissed the state claims because they failed to fulfill the requirements of the two-pronged test established by the Act. The two-pronged test requires that first, the nature of the work of authorship in which rights are claimed must come within the subject matter of copyright as defined in sections 102 and 103 of the Act.[8] Second, that the rights granted by state law must not be equivalent to any of the exclusive rights within the general scope of copyright, as specified by section 106 of the Act.[9]

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(5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1976).

7. Harper & Row, Publishers, Inc. v. Nation Enter., 501 F. Supp. 848 (S.D.N.Y. 1980).

8. Section 102 provides:

(a) Copyright 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, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

(b) In 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 (1982).

9. Section 106 provides:

Subject to Sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic

On the merits, the district court in 1983[10] held that *The Nation* failed to justify its use of the material under the fair use doctrine as now codified in section 107 of the Act.[11] The district court based its decision on the grounds that the revelations of the Ford memoirs were not *hot* news as to permit the use of the author Ford's copyrighted material. The district court upheld Harper & Row's argument that although historical facts and memoranda are not *per se copyrightable*, the historical facts together with Ford's personal insight made the work as a whole copyrightable.[12]

On appeal, the United States Court of Appeals for the Second Circuit, *held*, affirmed in part and reversed in part. Harper & Row had failed to fulfill the two-prong test needed to sustain their state claims of conversion and tortious interference with contract. The Second Circuit, however, reversed the lower court's finding of copyright infringement. Despite the fact that the author's chosen language was taken by virtue of short segments of verbatim quotation, such use was considered permissible under the doctrine of fair use. The *paraphrasing of disparate facts*, if held to be an infringement of copyright, would clash with the legislative history which establishes that such information is not to be protected.[13] Finally, much of the material used in *The Nation's* article was held to be un-

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works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1977).

10. Harper & Row, Publishers, Inc. v. Nation Enter., 557 F. Supp. 1067 (S.D.N.Y. 1983).

11. Section 107 provides that:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

(2) the nature of a 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.

17 U.S.C. § 107 (1982).

12. Harper & Row, 557 F. Supp. at 1072.

The court reasoned that the facts and memoranda were of interest to *The Nation* only to the extent that *The Nation* could set forth Ford's views about them. Further, the court believed that *The Nation* had no interest in presenting these historical facts and memoranda in isolation. *Id.*

13. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 56 (1976).

copyrightable because a great deal of information concerning the pardon decision was presented by President Ford to a Congressional subcommittee and subsequently printed in a government document; it was therefore uncopyrightable.[14] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983).

The extremes of the two *Harper & Row* decisions regarding the scope of what material is copyrightable in a non-fiction work and what constitutes fair use in news reporting reflects the conflicting approaches to the fair use doctrine among the circuit courts throughout the United States. With *Harper & Row* pending before the Supreme Court, the time has come to lay to rest the discrepancies surrounding the above issues.

Fair use is a judicially created doctrine which has been codified in section 107 of the 1976 Copyright Act.[15] The doctrine permits some reasonable use of another's work under circumstances that make it excusable and proper. Some reasonable uses designated in section 107 of the Act include criticism, comments, news reporting, teaching, scholarship, and research. The policy behind the doctrine is to serve the fundamental constitutional purpose of encouraging contributions to recorded knowledge by granting subsequent authors of non-fiction works a relatively free hand to build upon the work of their predecessors.

## I. Material Protectable Under the Copyright Laws In a Work of Non-Fiction.

Section 102(b) of the Act 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."[16] From this section, and from the House Reports, it appears that Congress recognizes the distinction between facts and ideas, which are not copyrightable, and expressions which are.[17]

In presenting their argument Harper & Row rejected *The Nation's* concept that expression must be limited "to its barest ele-

14. *Pardon of Richard M. Nixon, and Related Matters: Hearing Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 2d Sess. at 90-151 (1974). *See* 17 U.S.C. § 105 (1982).

15. The doctrine first appeared in Folsum v. Marsh, 9 F. Cas. 342 (D. Mass. 1841).

16. 17 U.S.C. § 102(b) (1977). *See supra* note 8.

17. *See* S. Rep. No. 983, 93d Cong. 2d Sess. 107-108 (1974), H.R. Rep. No. 1476, 94th Cong. 2d Sess. 55-57 (1976).

ment—the ordering and choice of the words themselves."[18] Underlying Harper & Row's argument is the fact that the Second Circuit, in supporting *The Nation's* argument, excluded from its consideration important elements of an author's expression—the author's selection and arrangement of material, his analysis and interpretation of events, his structuring of material and marshalling of facts, and his emphasis on particular developments.

Harper & Row found support for its argument in traditional copyright holdings. A leading case is *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,[19] where the defendant published abstracts of plaintiff's financial research reports. The defendant in *Wainwright*, like *The Nation*, relied upon news reporting as its principle fair use defense. In upholding a finding of copyright infringement and denying the fair use defense, the court, in a unanimous decision, distinguished between *news events* which may not be copyrighted and the *form of expression* which constitutes a fair use:

> What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshalls facts, his choice of words, and the emphasis he gives to particular developments. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the 'particular expression through similarities of treatment details, scenes, events and characterization.'[20]

This definition of expression has been followed in other circuits. As early as 1921, the Seventh Circuit in *Chicago Record-Herald Co. v. Tribune Ass'n*,[21] held that where "the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship" the article is clearly brought within the protection of the Copyright Law.[22] The Seventh Circuit reiterated this holding in *Eisenschiml v. Fawcett Publications, Inc.*,[23] where the court defined copyrighted expression in a historical work to include "[t]he association, arrangement and combination of ideas and thought and their form of expression. . . ."[24]

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18. Harper & Row, 723 F.2d at 204.
19. 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 404 U.S. 1014 (1978).
20. *Id.* at 96.
21. 275 F. 797 (7th Cir. 1921).
22. *Id.* at 799.
23. 246 F.2d 598 (7th Cir. 1957).
24. *Id.* at 603.

The Fifth and Ninth Circuits have also held that the selection and arrangements of facts are, as part of the author's expression, protected by copyright. In *Miller v. Universal City Studios, Inc.*,[25] involving alleged copying from a work of non-fiction concerning a highly publicized kidnapping, the Fifth Circuit upheld instructions to the jury that "the form of expression of the facts and their arrangement and selection are copyrightable."[26] In *United States v. Hamilton*,[27] the Ninth Circuit accorded protection to the mapmaker's "selection, arrangement, and presentation of terrain features."[28]

Harper & Row asserted that the facts used, although per se uncopyrightable, coupled with the author's expression are deserving of protection under the Act. The unauthorized copying of works consisting primarily of factual material has been held to be an infringement by a number of circuits. In *Flick-Reedy Corp. v. Hydro-Line Mfg.*,[29] the Seventh Circuit extended copyright protection to "the arrangement, expression and manner of presentation" of mathematical data and formulae concerning hydraulic cylinders.[30] The same court in *Schroeder v. William Morrow & Co.*, held that the selection, ordering and arrangement of the names and addresses of suppliers of gardening materials was also protected under copyright law.[31] In *Hamilton*,[32] the Ninth Circuit rejected the defendant's argument that the map which it had copied was not entitled to copyright because it was merely a synthesis of information already depicted on maps in the public domain, finding instead that "[w]hen a work displays a significant element of compilation, that element is protectable even though the individual components of the work may not be, for originality may be found in taking the common place and making it into a new combination or arrangement."[33]

A recent Fifth Circuit case rejected the Second Circuit's dissection of a work into components for determining copyrightability. In *Apple Barrel Productions, Inc. v. Beard*,[34] the court stated, "[t]he mere fact that component parts of collector's work

25. 650 F.2d 1365 (5th Cir. 1981).
26. *Id.* at 1368.
27. 583 F.2d 448 (9th Cir. 1978).
28. *Id.* at 450.
29. 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).
30. *Id.* at 548.
31. 556 F.2d 3, 5 (7th Cir. 1977).
32. 583 F.2d 448.
33. *Id.* at 451.
34. 730 F.2d 384 (5th Cir. 1984).

are neither original to the plaintiff nor copyrightable by the plaintiff does not preclude a determination that the combination of such component parts as a separate entity is both original and copyrightable."[35]

*The Nation's* argument on the copyrightability of non-fiction works is equally supported. First, *The Nation's* approach to the fair use doctrine as embraced by the Second Circuit is distinctively different from Harper & Row's approach. *The Nation* used what may be termed as a *dissection* approach. It commenced by breaking down the work to: (1) what was appropriated by the defendant from the plaintiff; (2) if anything was appropriated, whether such appropriation was of copyrightable matter; and, if so, (3) whether it was a substantial and material appropriation.[36] In determining whether the material appropriated was copyrightable the Second Circuit looked to section 102(b) of the Act which grants rights not in ideas or facts, but in expression. The court noted that the distinction between fact and expression is not always easy to draw. The court did seize upon a narrow definition of copyrightable material.

Several Supreme Court decisions support *The Nation's* position. In *Mazer v. Stein*,[37] the Court held that "unlike a patent, a copyright gives no exclusive right to the act disclosed; protection is only given to the expression of the idea—not the idea itself."[38] In *International News Service v. Associated Press*,[39] the Court stated that the "element in intellectual productions which secures such protection is not the knowledge, truths, ideas or emotions which the composition expresses, but the form or sequence in which they are expressed."[40] In employing *The Nation's* definition of expression, the Second Circuit held that "in this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic."[41]

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35. *Id.* at 388.

36. *See* H. Ball, *The Law of Copyright and Literary Property* (1944). Courts have analyzed works in this fashion for decades. *See* American Code Co., Inc. v. Bensinger, 282 F. 829 (2d Cir. 1922), which held, "It is necessary, however, to keep in mind the distinction between copyrightability and the effect, and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it, that is by the degree and nature of the original work." American Code, 282 F. at 834.

37. 347 U.S. 201 (1954).

38. *Id.* at 217.

39. 284 U.S. 215 (1918).

40. *Id.* at 254.

41. Harper & Row, 723 F.2d at 203 (2d Cir. 1983).

Furthermore, the majority stated that "[c]ourts have accordingly held that neither news events, historical facts, nor facts of a biographical nature is deserving of protection under the Act."[42] The court cited *Time Incorporated v. Bernard Geis Associates*,[43] *Hoehling v. Universal City Studios, Inc.*,[44] and *Rosemont Enterprises, Inc. v. Random House, Inc.*,[45] respectively. The policy behind each of these cases is the same. To allow anyone to copyright facts, information, or news would contravene the very purpose of the copyright clause of the United States Constitution, *viz.*, "to promote the progress of science and the useful arts."[46]

Regarding Harper & Row's "totality" concept, *The Nation* rejected this concept as "tantamount to permitting a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions and sentiments he experienced while in office and insisting the work's entire contents are thereby made his alone by virtue of copyright."[47] To so hold would conclude that, in copyrighting his book, Mr. Ford, and through him Harper & Row, gained a monopoly on the facts of the Nixon pardon—precisely what the fact/expression distinction seeks to avoid.[48]

*The Nation* argued that a great deal of the information concerning the pardon decision was presented by President Ford before the Hungate Committee and subsequently printed in a government document and is therefore uncopyrightable.[49] *The Nation* pointed to section 105 of the Act, which provides that "work[s] of the United States Government" are not copyrightable.[50] The argument that factual material published and incorporated at large may not be privately appropriated and taken from the public under the guise of copyright is not new. It has been the law for more than sixty years since announced in *American Code Co. v. Bensinger*,[51] and as recently as *Hoehling*.[52]

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42. *Id.* at 202.

43. 293 F. Supp. 130 (S.D.N.Y. 1968).

44. 618 F.2d 972 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

45. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

46. Harper & Row, 723 F.2d at 202; *See also* U.S. CONST. Art. I, § 8, cl. 8.

47. 723 F.2d at 202.

48. *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (1980); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

49. *See supra* note 14.

50. The court of appeals rejected *The Nation's* argument that oral conversations of President Ford about official business held while in office were works of the United States Government.

51. 282 F. 829 (2d Cir. 1922).

## II. The Fair Use Doctrine in News Reporting

Harper & Row did not contest the idea that the fair use doctrine is a valuable means of balancing society's need for the dissemination of knowledge against an author's exclusive right in his work. They disagreed with the importance that *The Nation* and subsequently the Second Circuit placed on the citizenry's need to be informed.

The fair use doctrine, as codified in section 107 of the Act, includes four factors to be considered in determining whether the use made of a work in any particular case is a *fair use*. These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[53]

In considering the purpose and the character of the use, the first factor, Harper & Row criticized the soundness of *The Nation's* claim of news reporting. They argued that there was nothing *The Nation* did to facilitate the harvesting of knowledge. The material was to be published as excerpts in *Time* magazine in about two weeks and in full book form two weeks later. The knowledge was going to be disseminated by reason of authorized publications planned by the author and his publishers. Harper & Row criticized the Second Circuit for not acknowledging this and for not making any attempt to demonstrate the benefit derived from publishing the material in *The Nation* two weeks prior to publishing in *Time*, and four weeks prior to its release in book form.

Harper & Row attacked the claim by *The Nation* of fair use by news reporting because of *The Nation's* failure to add any original commentary, interpretation or thought to its article.[54] Beyond *The Nation* reporting the upcoming publication of the Ford memoirs, the article appears to be nothing more than a mere paraphrasing of the Ford manuscript. Harper & Row asserted that this mere paraphrasing, together with the lack of public benefit, demonstrated *The Nation's* lack of a legitimate purpose in pub-

52. 618 F.2d 972; *See also* Greenbie v. Nobel, 151 F. Supp. 45 (S.D.N.Y. 1957); Rosemont Enter. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

53. 17 U.S.C. § 107 (1982).

54. *See Wainwright Sec.*, 558 F.2d at 96 where the court held "unlike traditional news coverage . . . the transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysists; and it did not include any critism, praise, or other reactions by industry officials or investigators. . . . This was not a legitimate coverage of a news event . . ."

lishing the work as a news report.

The district court reasoned that because the subject matter of the article had been subject to widespread publicity for five years, "the revelations of the Ford memoirs were not such news, 'hot' or otherwise, as to permit the use of author Ford's copyrighted material."[55]

The second and third factors, the nature of the copyrighted work and the amount and substantiality of the portion used in relation to the copyrighted work as a whole, tie into Harper & Row's *totality* argument. Harper & Row asserted that the value of the memoirs was not in the facts involved; it was Ford's interpretation and revelation upon those facts coupled with the manner and style in which the former President put forth his revelations (his method of treatment, emphasis and selection of details) that made the work original and of value. Harper & Row maintained that, had the Second Circuit applied this standard, the court would have had a case which involved an extensive taking of expression.[56]

Applying the fourth factor, the effect of the use upon the potential market value of the copyrighted work, Harper & Row argued first, that as a result of *The Nation* article, *Time* refused to publish the excerpts. Resultingly, Harper & Row never received the $12,500.00 payable upon the publication of the excerpts.

Harper & Row also argued that the precedent set by this case will adversely affect the incentives to authorship and the dissemination of information. Under the majority holding, Harper & Row maintained that one may, with impunity, illegally obtain a manuscript and publish its contents as long as one takes care to paraphrase less than the entire work and return the manuscript within a short period of time. Harper & Row believed that the sanction of such conduct will not only impair the ability to license the publication of excerpts in advance of a book's publication, but more importantly will lessen the incentive for authorship and adversely affect the dissemination of knowledge. Indeed, Harper & Row's position was that this case illustrates this adverse impact. Since *Time* cancelled its publication, the net result of *The Nation's* publication was that excerpts from the manuscript were disseminated to the public not in *Time* magazine, but in *The Nation*, a magazine that reaches a far smaller audience. It is ironic that this result occurred while a dissemination of knowledge argument prevailed.

Finally, Harper & Row claimed that the majority erred by not

55. Harper & Row, 557 F. Supp. at 1072.
56. *Id.*

considering that the manuscript was unpublished.[57] Harper & Row pointed to legislative history where Congress made clear its intent that the distinction between published and unpublished works was a factor in the fair use analysis.[58] They also argued that before the Act became effective, unpublished works were protected by common law copyright. At common law, the author clearly had "the exclusive right to the first publication of his work."[59] This is also one of the author's exclusive rights as provided in section 106(3) of the Act.[60]

Harper & Row thus argued that legislative and case history made clear Congress' intent that an author's right of first publication should be defeated only in extraordinary circumstances. A user of material from an unpublished manuscript who invokes the fair use doctrine should demonstrate that the public will derive some benefit from the dissemination of the material in advance of its dissemination by the author. Harper & Row claimed that *The Nation* failed to do so. The mere fact that the material may have been of interest to *The Nation's* readers did not provide such a justification where the manuscript was soon to be published.

In support of finding a fair use, *The Nation* and the Second Circuit rejected Harper & Row's and the lower court's analysis of *The Nation's* fair use assertion. First, the Second Circuit chastised the lower court for substituting its own views concerning the quality of journalism. Rather, the majority held that "the task of the courts in fair use analysis, should be understood not as deciding what makes bonafide news, but as examining whether a claim of 'news reporting' is false."[61]

In considering the purpose and character of the use, *The Nation* argued that Harper & Row was mistaken when they claimed that the use was not productive and thus presumptively not fair because nothing original was added. Not only did three experts testify at trial regarding the newsworthiness of the article[62] but *The Nation* relied on the recent decision in *Sony Corp. of America*

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57. The four factors provided in section 107 are not inclusive.

58. *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's right of first publication would outweigh any needs of reproduction for classroom purposes. *Id.*

59. Atlas Mfg. Co. v. Street & Smith, 204 F. 398, 402 (8th Cir. 1913). *See also* Fendler v. Moroso, 254 N.Y. 281, 171 N.E. 56 (1930).

60. *See supra* note 6.

61. Harper & Row, 723 F.2d at 207.

62. *Id.* at 206.

*v. Universal City Studios, Inc.*.[63] At issue in *Sony* was whether home videotaping was a productive use. The Supreme Court referred to the House and Senate Reports on section 107, which included the following example of fair use: "summary of an address or article, with brief quotations, in a news report."[64] *The Nation* countered the Harper & Row argument by asserting that it would impose on the court the onerous task of determining in each case whether the use was productive or non-productive. In deciding copyright cases, *The Nation* pointed out that courts have historically refrained from making these very determinations. In *Blustein v. Donaldson Lithographing Co.*,[65] Justice Holmes, in eschewing such subjective judgment when he refused to exclude circus posters from copyrightable subject matter, stated that "it would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[66]

Finally, *The Nation* rejected Harper & Row's assertion that the court should have inquired into the comparative contribution to the public benefit between *The Nation's* use and the use that *Time* planned to make. Harper & Row claimed that *The Nation*, with its smaller circulation, disserviced the public by publishing its article before *Time* published its excerpts. On its face, this position of greater benefit because of greater circulation is not only unjust but is also filled with constitutional flaws.[67] Regarding the nature of the copyrighted work, *The Nation*, through its fact-distinction analysis, stated that since a great deal of the material in the Ford memoirs is factual, historic and biographical, and since much of the material had been previously printed in a government document, the scope of protection afforded the work should be narrow.

Applying the third factor, *The Nation* argued that the amount of copyrighted material that may be used without ranging beyond the bounderies of fair use varies widely from case to case. In *Sony*, the Court held that verbatim copying of entire movies and television programs were within the boundries of fair use.[68] In *Henry Holt & Co. ex rel Felderman v. Liggett & Myers Tobacco Co.*, the court held that the use of three sentences from a book in an adver-

63. 104 S. Ct. 777 (1984).
64. *Id.* at 807, n.29.
65. 188 U.S. 239 (1903).
66. *Id.* at 251.
67. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983); Williams v. Rhodes, 394 U.S. 23 (1968).
68. Sony, 104 S. Ct. 777 (1984).

tising pamphlet was not fair use.[69] *The Nation* argued that the proper legal standard to be applied was whether the amount used was appropriate to the purpose.[70]

Regarding the effect of the use upon the potential market value of the copyrighted work, *The Nation* rejected Harper & Row's argument that the pre-publication licensing of excerpts and the subsequent dissemination of knowledge will be adversely affected. *The Nation* pointed out that newspapers have frequently printed news articles about forthcoming books prior to their publication.[71] Furthermore, the Second Circuit held that the district court erred in concluding that the fourth factor weighed against a finding of fair use because Harper & Row's agreement with *Time* was aborted. The court of appeals determined that by failing to take into account that the article consisted of wholly uncopyrighted material in the public domain, the district court essentially granted copyright protection by fact where none existed by law.

Disagreeing with Harper & Row's argument that the fact that the manuscript was unpublished should have been taken into consideration, pursuant to section 106(3) of the Act, *The Nation* pointed to section 107 which states: "[n]otwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as . . . news reporting . . ., is not an infringement of copyright."[72] In other words section 106 is subject to section 107 of the Act. *The Nation* also argued that Congress, if it had intended to narrow or abandon fair use in unpublished works, would have done so since it knew how to codify such a distinction. *The Nation* pointed out that the Act expressly incorporates the distinction between unpublished and published works in several sec-

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69. 23 F. Supp. 302 (E.D. Pa. 1938).

70. *See* Italian Book Corp. v. American Broadcasting Co., 458 F. Supp. 65 (S.D.N.Y. 1978). ABC's recording of a portion of the copyrighted song and its subsequent playing on the television program constituted an integral part of a news report on an event of public interest. *See also* 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2] at 13-35 (1984), stating that "in any given case, this question cannot be answered without a consideration of the purpose for which the defendant's work will be used."

71. *See* The New York Times, March 27, 1976, at 9 col. 1 (news article about the Woodward and Bernstein book, THE FINAL DAYS, relating to the resignation of President Nixon); The New York Times, Sept. 23, 1976, at 36 col. 1 (news story about revelations about President Ford in the yet unpublished memoirs of John Dean entitled BLIND AMBITION); The New York Times, Sept. 29, 1976, at 1 col. 2 (news story about forthcoming autobiography of President Nixon based on "164 pages of contemplated manuscript that was closely guarded.").

72. 17 U.S.C. § 107 (1977).

tions.[73] The Act did not do so with respect to fair use. Thus, *The Nation* reasoned that Congress never intended such a distinction to be made in the fair use analysis.

## III. Conclusion

The Copyright Act provides two mechanisms by which the rights of a copyrightholder may be protected without impeding the public's access to information. The first of these devices is the distinction between expression, which is copyrightable, and idea or fact which is not. The second means of balancing an author's right to his work and the public's need to be informed is the doctrine of fair use. With *Harper & Row* presently before the Supreme Court, it is now necessary for the Court to look at the two divergent opinions of what is copyrightable material and what constitutes fair use in works of non-fiction.

Before determining whether an author's use of a prior author's work is fair, it is first necessary to determine whether the material appropriated was even copyrightable. *The Nation's* "dissection approach" appears to be a very rational and workable method. By distilling the subsequent author's work to determine what material was appropriated from the prior author, the court can then better determine whether such appropriation was of copyrightable matter via fact/expression analysis. Finally, if there was an appropriation of copyrightable material, the court can then determine whether such use of the prior author's work was fair within the confines provided by the Act. This approach is much more manageable than that of the district court's approach of commencing with a fair use analysis based on the two works in their entirety.

Once having distilled the subsequent author's work, the court must determine whether the appropriated material is protected by copyright. In doing so, the court must decide whether it was the prior author's expression which was appropriated or whether it was facts or ideas that were used. Subsequently, the court must now define what is expression. Is it merely the author's description of the facts themselves or is it, as Harper & Row argued, the author's marshalling of these facts? In deciding, the court should look to the policy behind the Act balancing the author's rights in his work and the public's need for the free communication of knowledge. In this light, Harper & Row's totality argument would prevent the dissemination of knowledge by granting an author copyright pro-

73. *See* 17 U.S.C. §§ 104, 108, 302(c)(2) (1977).

tection for facts merely because he arranged these facts in a particular order, although the facts are not per se copyrightable.

Finally, in deciding whether *The Nation's* use of Ford's copyrightable material was indeed a fair use, the Supreme Court must determine whether the claim of news reporting is false and if not, whether it was fair. Two of the four factors provided for by the statute clearly in question are the *purpose of the use* and the *effect of the use upon the potential market value of the copyrighted work*. *The Nation* argued that the purpose of the article was news reporting—the reporting of information behind the pardon of a President of the United States. The purpose behind using Ford's copyrightable material was to give credence and credibility to the article. Harper & Row and the lower court both recognized that since much of the information in the memoirs on the Nixon pardon was printed five years earlier in a government document, it was no longer newsworthy. What Harper & Row overlooked was the fact that the scant verbatim appropriation from the memoirs contained never before mentioned information as to Ford's revelations during this time. This material was never revealed before because of Ford's agreement with Harper & Row "to avoid participating in any 'public discussion' of the unique information not previously disclosed."[74] Thus, the material appropriated from the memoirs was indeed newsworthy and subject to fair use.

As to the effect of the use upon the potential market value of the copyrighted work, it is clear that as a result of the article, Harper & Row lost $12,500.00 from *Time* magazine's failure to publish the excerpts. In their argument Harper & Row failed to mention any adverse affects on the sale of Ford's book. What they argued instead is the potential harm to publishers who contract pre-publication excerpt agreements and the potential need to increase security.

Regarding the nature of the copyrighted work, it is apparent that where the work is autobiographical and comprised of a great deal of factual information, the scope of copyright is narrow indeed.[75] Where the quantitative amount of copyrighted material constituted 300 words in an article of over 2,250 words, the amount appropriated is insubstantial.[76]

In determining whether appropriated material from a work of non-fiction is copyrightable, it is necessary to see if the material in

74. Harper & Row, 723 F.2d at 197.
75. Hoehling, 618 F.2d at 974.
76. Harper & Row, 723 F.2d at 208.

**question is fact or expression. In determining whether the use of a prior author's work is fair, one must determine whether the use meets the criterion established by the Act. Before coming to a conclusion one must decide whether a balance between the author's rights in his work and the public's need to be informed has been achieved.**

*Alfred Scope*