

St. John's Law Review

Volume 58
Number 3 *Volume 58, Spring 1984, Number 3*

Article 7

June 2012

The Stage of Publication as a "Fair Use" Factor: Harper & Row, Publishers, Inc. v. Nation Enterprises

Joseph R. Re

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Re, Joseph R. (1984) "The Stage of Publication as a "Fair Use" Factor: Harper & Row, Publishers, Inc. v. Nation Enterprises," *St. John's Law Review*. Vol. 58 : No. 3 , Article 7.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol58/iss3/7>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE STAGE OF PUBLICATION AS A "FAIR USE" FACTOR: *HARPER & ROW,* *PUBLISHERS, INC. V. NATION* *ENTERPRISES*

Federal copyright laws¹ are designed to promote the general welfare by encouraging the creation and dissemination of new ideas.² By granting authors "exclusive rights" to reproduce their work and prepare derivative works, these laws ensure that authors have an economic incentive to create new works.³ The doctrine of

¹ 17 U.S.C. §§ 101-810 (1982). The concept of copyright originated in mid-sixteenth century England when a group of leading publishers attempted to silence the Protestant Reformation by controlling the printing industry. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2-7 (1967); A. LATMAN, THE COPYRIGHT LAW 2 (5th ed. 1979); see L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28-30 (1968); F. SKONE JAMES & E. SKONE JAMES, COPING AND SKONE JAMES ON THE LAW OF COPYRIGHT 5-10 (9th ed. 1958). The first federal copyright law in the United States, Act of May 31, ch. 15, 1 Stat. 124 (1790), was based upon the Statute of Anne, 8 Anne, c. 19 (1710), which secured an author's exclusive right to reprint his books for a 14-year period and for an additional term if the author were alive at termination of the original term. H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 16-17 (1944); L. PATTERSON, *supra*, at 3, 7, 143-46; see also H. BALL, *supra*, at 30-32 (state copyright acts predate federal legislation); L. PATTERSON, *supra*, at 183-92 (same).

² See U.S. CONST. art. I, § 8, cl. 8. Congress was granted the power to enact copyright legislation "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* The primary purpose of the copyright laws was not always clear. L. PATTERSON, *supra* note 1, at 181-82. Four general purposes of copyrighting have been advanced—to enhance learning, to prevent monopolies, to provide order in the book trade, and to secure the author's right to his literary work. *Id.* at 181. Gradually, however, it has become recognized that the main purpose of the copyright laws is to encourage artistic production. See Mazer v. Stein, 347 U.S. 201, 219 (1954). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and Useful Arts.'" *Id.*; see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (ambiguity of copyright statutes caused by technological change must be resolved in light of ultimate aim to promote general welfare); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (primary object of copyright system is to ensure public benefits derived from the labors of authors).

³ 17 U.S.C. § 106 (1982) provides that:

[t]he 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 or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"fair use," by allowing reasonable unauthorized uses of copyrighted material,⁴ balances this need to provide economic incentives to the author against the public's interest in the free dissemination of information.⁵ In making fair use determinations, courts are given

(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 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.

Id. A violation of any of these exclusive rights constitutes a copyright infringement. 17 U.S.C. § 501 (1982).

⁴ The concept of fair use was recognized in England as early as 1740, see *Gyles v. Wilcox*, 2 Atk. 141, 26 Eng. Rep. 489 (1740), and in America by 1844, see *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901). However, no precise definition of the doctrine has emerged. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679 [hereinafter cited as HOUSE REPORT]. The most widely quoted definition is "a privilege in others than the owner of the copyright, to use the copyright material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright." SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *Fair Use of Copyrighted Works*, COPYRIGHT LAW REVISION 5 (Comm. Print 1960) (Study No. 14 by Alan Latman) [hereinafter cited as Study No. 14] (quoting H. BALL, *supra* note 1, at 260); see Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 45-46 (1955). The fair use concept is tailored to effectuate the copyright clause in the constitution. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) ("fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance"), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.) (copyright holder's interest incident to general constitutional objective), *cert. denied*, 379 U.S. 822 (1964).

⁵ See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350, 1362-63 (Ct. Cl. 1973), *aff'd mem. by an equally divided court*, 420 U.S. 376 (1975) (federal non-profit institution not infringing since photocopying of medical articles necessary to advance medical field); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306-07 (2d Cir. 1966) (biographer of Howard Hughes who extracted portions from magazine articles not guilty since publication may encourage development of historical works), *cert. denied*, 385 U.S. 1009 (1967); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 960-61 (D.N.H. 1978) (use of opponent's campaign song in gubernatorial race permissible considering strong desire for free discussion of governmental affairs and political elections); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (slight injury to copyright holder subordinated to public interest in information on Kennedy assassination); L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 31 (1978).

In a seminal work, Professor Chafee stated: "The world goes ahead because each of us builds on the work of our predecessors. A dwarf standing on the shoulders of a giant can see farther than the giant himself." Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945); see also *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (few books, even in antiquity, are truly "new and original"); Cohen, *supra* note 4, at 49 (some dependence on past works cannot be deemed infringement). Many commentators have recognized that the fair use doctrine plays an important role in disseminating information. See, e.g., Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1604-05 (1963); Kramer, *Foreword to Symposium on Liter-*

statutory guidance in section 107 of the Copyrights Act of 1976 (the Act).⁶ Nevertheless, the applicability of the statute to unpublished works remains unclear.⁷ Recently, however, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁸ the Court of Appeals for the Second Circuit, applying the fair use doctrine, held that portions of an *unpublished*, copyrighted manuscript may be copied and published in a news magazine even though it is known that the

ary and Artistic Products—Copyright Problems, 19 LAW & CONTEMP. PROBS. 139, 140 (1954); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790, 801-04 (1975). The societal interest in allowing certain borrowings, however, limits the economic protection afforded authors. Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS., Autumn 1981, 3, at 3. Permission to use excerpts from another's work was intended "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05, at 1354.1 (1983) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)); see also Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 73, 78 (1965) (effectuating constitutional objective of copyright is "most accepted justification" for fair use); see *supra* note 2; *infra* note 44.

⁶ Pub. L. No. 94-553 § 101, 90 Stat. 2541, 2546 (1976) (codified at 17 U.S.C. § 107 (1982)). The fair use statute reads:

§ 107. Limitations on exclusive rights: Fair use

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, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), 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 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.

17 U.S.C. § 107 (1982). This section, along with most of the Copyrights Act of 1976, became effective January 1, 1978. Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598 (1976). The 1976 revision was designed to reflect the drastic changes in technology that occurred since the last revision in 1909. See HOUSE REPORT, *supra* note 4, at 47, reprinted in 1976 U.S. CONG. & AD NEWS at 5660.

⁷ See Goodale, *Mr. Ford and The Nation: A Test of 'Fair Use' & the 1st Amendment*, NAT'L L.J., June 16, 1980, at 23, col. 2. Mr. Goodale questioned whether the fair use doctrine applies to unpublished copyrighted works and if its application should be limited by analogy to the protection afforded prior to the 1976 Act. *Id.* at 23, col. 3; see *infra* note 39 and accompanying text; see also *Copyright and Privacy Protection of Unpublished Works—The Author's Dilemma*, 13 COLUM. J.L. & SOC. PROBS. 351, 377 (1977) (scope of fair use unclear with regard to unpublished works) [hereinafter cited as *Unpublished Works*].

⁸ 723 F.2d 195 (2d Cir. 1983), cert. granted, 104 S. Ct. 2655 (1984).

entire work is on the verge of publication.⁹

In *Harper & Row*, President Ford gave exclusive rights to Harper & Row, Publishers, Inc., and The Reader's Digest Association (Harper & Row) to publish his then unwritten memoirs.¹⁰ When the manuscript was near completion, Harper & Row sold exclusive serialization rights to *Time* magazine.¹¹ Subsequently, however, an unidentified person gave an unauthorized copy of the manuscript to the editor of *The Nation*, a weekly magazine devoted to political news and commentary.¹² Just two weeks before *Time* was to publish selected segments, *The Nation* published an article that relied almost exclusively upon the memoirs as source material.¹³ In light of this article, *Time* made a request to publish the excerpts a week earlier than scheduled. Harper & Row refused and *Time* ultimately did not publish any part of the manuscript, declining to pay the balance due under the license.¹⁴ Harper & Row then filed suit against *The Nation* for copyright infringement and various state law violations.¹⁵ The district court rejected *The Nation's* fair use defense and upheld Harper & Row's infringement claim.¹⁶

On appeal, a divided Second Circuit panel reversed.¹⁷ Writing

⁹ *Id.* at 208.

¹⁰ *Id.* at 197. The memoirs, entitled "A Time To Heal," were to discuss the circumstances surrounding the pardon of former President Nixon. *Id.* Under the contract, President Ford was obliged to avoid public discussion of unique material contained in the memoirs to protect the value of the publication rights. *Id.* at 197-98.

¹¹ *Id.* at 198. *Time* paid \$12,500 in advance for the right to print pre-publication excerpts, and agreed to pay an additional \$12,500 when the edition containing the excerpts was completed. *Id.*

¹² *Id.* at 198. Although the editor of *The Nation* testified that he neither solicited nor paid for the manuscript, he was aware that his temporary possession had not been authorized by the publishers. *Id.*

¹³ *Id.* *The Nation's* reliance upon the manuscript has been estimated at 83%—1,870 words of the 2,250 contained in the article were copied or closely paraphrased from the unpublished manuscript. See Appellee's Answering Brief at 12-13. The article is reprinted in the appendix of the court's opinion. See 723 F.2d at 209-12.

¹⁴ *Id.* at 199. On the day *The Nation* article appeared, *Time* requested permission to advance the scheduled publication date. *Id.* Harper & Row refused since it carefully planned the serialization date to coincide with the release of the book. *Id.*

¹⁵ 723 F.2d at 199. The district court ruled that claims of conversion and tortious interference with contractual relations under state law were preempted by federal copyright law. *Id.*; see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 501 F. Supp. 848, 851-54 (S.D.N.Y. 1980); 17 U.S.C. § 301 (1982); *infra* note 17.

¹⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072-73 (S.D.N.Y. 1983).

¹⁷ 723 F.2d at 197, 208. Judge Kaufman wrote the majority opinion in which Judge Pierce joined. Judge Meskill filed a separate dissenting opinion. The court dismissed the

for the court, Judge Kaufman noted that copyright laws protect only an author's expression, not ideas or facts.¹⁸ The "state of mind" of a former President, the majority reasoned, was no less fact than were any of his actions.¹⁹ Therefore, the majority determined that much of the appropriated material was not copyrightable in the first place.²⁰ The court emphasized that the public has a significant interest in "the most important details of our nation's historical and political life."²¹ Yet, rather than hold that overriding first amendment considerations precluded the need for a stringent copyright analysis, the court applied a fair use test.²² Applying the statutory fair use criteria,²³ the court concluded that *The Nation* article was designed to benefit the public,²⁴ was necessary to lend authenticity to a news report,²⁵ and had caused economic harm that, at most, could be characterized as "dubious."²⁶

In a persuasive dissent, Judge Meskill asserted that the major-

conversion claim concluding that a "temporary interference" does not amount to a "complete exclusion of the rightful possessor," 723 F.2d at 201, and affirmed the district court's ruling on preemption of the claim of tortious interference with contractual relations. *Id.* The court determined that the legal rights in question are preserved by the copyright laws and therefore are preempted pursuant to § 301 of the 1976 Act. *Id.*; see *infra* note 36 and accompanying text.

¹⁸ 723 F.2d at 202; see *infra* note 52.

¹⁹ 723 F.2d at 204-05.

²⁰ See 723 F.2d at 206. The majority determined that no more than 300 words used in *The Nation* article were copyrightable. *Id.* The court refused to grant any protection to sections that were merely paraphrased. *Id.* at 203. In addition, the court noted that some of the information concerning the Nixon pardon had been presented by President Ford before the Hungate Committee and therefore was not copyrightable under the government work exemption. 723 F.2d at 205; see *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Crim. Just. of the Comm. on the Judiciary*, 93rd Cong., 2d Sess. at 90-151 (1974); see also 17 U.S.C. §§ 101, 105 (1982). Lastly, the court stated that conversations attributable to others cannot gain copyright protection since 17 U.S.C. § 102(a) requires that the author's work be created by him. 723 F.2d at 205.

²¹ 723 F.2d at 205; see *id.* at 197 (copyright laws should not "impede that harvest of knowledge so necessary to a democratic state"); *id.* at 208 (court's holding necessitated by "values of free expression"); *id.* (court guided by "conviction that the statute not meant to obstruct citizen's access to vital facts"); *id.* at 209 (copyright laws not intended to "chill the activities of the press").

²² *Id.* at 206-08.

²³ See *supra* note 6.

²⁴ 723 F.2d at 208. The court determined that when the use of copyrighted material is beneficial to the public it is irrelevant that personal profit is involved. *Id.*

²⁵ *Id.* The court noted that the quotations were informative and insubstantial in light of the purpose of the article, which was to report news of a factual nature. See *id.* Thus, the court held that the borrowed expression did not "supersede the use of the original work." See *id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901)).

²⁶ 723 F.2d at 208; see *infra* notes 78-82 and accompanying text.

ity had misapplied the copyright laws to bolster the freedom of the press.²⁷ The dissent contended that the memoirs deserved full copyright protection as "expressions" of President Ford's "state of mind."²⁸ The case law relied upon by the majority was distinguished in Judge Meskill's opinion by observing that *The Nation* article was of "trivial originality."²⁹ In addition, Judge Meskill argued that the majority's holding was not necessary to protect the public's access to information since the material would have been published, and therefore would have been available to the public, without the unauthorized use.³⁰

Inherent tension between the first amendment and the law of copyright has been noted frequently.³¹ Rather than dwell on the need for a separate first amendment defense to copyright infringement, this Comment will focus on the basis of the court's holding in *Harper & Row* and will suggest a more equitable approach to the fair use doctrine. It is submitted that in its fair use analysis, the *Harper & Row* court failed to give appropriate weight to the fact that the copyrighted work in question was about to be published. In so doing, it is suggested, the court undermined goals common to both the first amendment and the fair use doctrine.

COPYRIGHT PROTECTION AND THE UNPUBLISHED WORK

At common law, the author of an unpublished work had a

²⁷ 723 F.2d at 212 (Meskill, J., dissenting).

²⁸ *Id.* (Meskill, J., dissenting). The dissent argued that the material should have been protected from paraphrasing as well as from verbatim copying even assuming it was factual in nature. *Id.* at 213 (Meskill, J., dissenting).

²⁹ *Id.* at 214 (Meskill, J., dissenting). The two cases distinguished by the dissent were *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) and *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Judge Meskill noted that, in *Hoehling* and *Rosemont Enterprises*, the defendants had produced original accounts accompanied by independent research, 723 F.2d at 214 (Meskill, J., dissenting), whereas *The Nation's* exclusive reliance upon the copyrighted work constituted mere "chiseling for personal profit." *Id.* at 216 (Meskill, J., dissenting) (quoting *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

³⁰ 723 F.2d at 216 (Meskill, J., dissenting).

³¹ See, e.g., Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 284 (1979); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 984 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1180 (1970); Sobel, *Copyright and the First Amendment: A Gathering Storm*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 61 (1969).

right of "first publication,"³² a right that was protected like any other property right.³³ In contrast, federal statutory copyright protection traditionally was afforded only to published works,³⁴ since the system was designed primarily to reward only those who re-

³² See *Werckmeister v. American Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 346, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 776 (1968); Hutchinson, *Section 2 of The Copyright Act: A Statutory Maverick*, 19 COPYRIGHT L. SYMP. (ASCAP) 143, 151-54 (1971). The right of first publication included the rights to publish as one saw fit and to prevent others from doing the same. *Id.* at 151. It has been suggested that the right to prevent the publication of one's work is a concomitant of the right of free speech, namely, the freedom not to speak publicly. See *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Estate of Hemingway*, 23 N.Y.2d at 348, 244 N.E.2d at 255, 296 N.Y.S.2d at 778; SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *Protection of Unpublished Works*, COPYRIGHT LAW REVISION 49 (Comm. Print 1961) (Study No. 29 by W. Straus) (statement of Irwin Karp) [hereinafter cited as Study No. 29].

³³ See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908); *Frohman v. Ferris*, 238 Ill. 430, 435-36, 87 N.E. 327, 328 (1909), *aff'd*, 223 U.S. 424 (1912); Study No. 29, *supra* note 32, at 3-4. The common-law right of first publication included protection in perpetuity, unless, of course, the work was published. 1 M. NIMMER, *supra* note 5, § 4.03, at 4-15 to 4-16.

³⁴ Study No. 29, *supra* note 32, at 1; 1 M. NIMMER, *supra* note 5, § 2.02, at 2-16. Prior to the 1976 revision of the copyright laws, the owner of an unpublished work had to rely on common-law protection, see *supra* notes 32-33 and accompanying text, or sometimes state law, see, e.g., CAL. CIV. CODE § 980(a) (West 1982), however, the owner could gain statutory protection by registering his unpublished work with the copyright office, 17 U.S.C. § 408 (1982), or by publishing the work with the notice of copyright affixed thereto, *id.* § 401. As a result of either act, common law protection would be forfeited. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908) (publication); *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.*, 220 F. 448, 450 (2d Cir. 1915) (registration). Thus, the Copyright Act of 1909, ch. 320, 35 Stat. 1075, provided for a dual system of copyright protection in which common-law and statutory protection could not coexist. See *Bobbs-Merrill Co.*, 210 U.S. at 347; *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834); *Roy Export Co. v. Columbia Broadcasting Sys.*, 672 F.2d 1095, 1101 n.13 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 60 (1983); HOUSE REPORT, *supra* note 4, at 129, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5745; see also *Goldstein v. California*, 412 U.S. 546, 558 (1973) (constitution did not grant federal government exclusive control of copyrights). However, statutory protection by registration was not available "to unpublished works in the classes of books, periodicals, maps, reproductions of works of arts, and prints." Study No. 29, *supra* note 32, at 7. Therefore, defining "publication" was crucial for most works to determine the type of protection to which a copyright holder was entitled. *Id.* at 8-15; S. REP. NO. 473, 94th Cong., 1st Sess. 113 (1975). The publication concept has troubled the courts as the definition varies depending upon the nature of the work and the context in which the term is used. See *Roy Export Co.*, 672 F.2d at 1101; *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 945 (2d Cir. 1975); H. BALL, *supra* note 1, at 132; *Unpublished Works*, *supra* note 7, at 356-57 & n.35. In *Bartok*, the Second Circuit adopted Professor Nimmer's definition of publication as the time "when by consent of the copyright owner, the original or tangible copies of a work are . . . made available to the general public." 523 F.2d at 945. Today, the publication concept has lost much of its former significance since federal copyright protection begins when the original work is "fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1982); see *infra* note 37 and accompanying text.

vealed their work to the public.³⁵ This federal statutory system was altered when the copyright laws were unified in 1976.³⁶ Pursuant to the Copyright Act of 1976, common-law remedies previously available to the unpublished author were preempted,³⁷ except those common-law rights not "equivalent" to those protected by the federal statute.³⁸ For the first time, the author of an unpublished work was afforded statutory protection upon creation.³⁹ Ironically, however, if the fair use doctrine is rigidly applied to soon-to-be-published works, the Act, while ostensibly broadening statutory coverage, will serve to deprive the author of an unpublished work of rights that are truly necessary for complete copyright protection.⁴⁰ It is suggested that such a deprivation was not contem-

³⁵ See *supra* note 2 and accompanying text; Hutchinson, *supra* note 32, at 181; *Unpublished Works*, *supra* note 7, at 369.

³⁶ See 17 U.S.C. § 301 (1982).

³⁷ See *id.* The Copyright Act of 1976 abrogated common-law protection for copyrightable subject matter provided that the protection afforded by non-federal law is "equivalent" to the rights granted by the 1976 Act. See *id.*; HOUSE REPORT, *supra* note 4, at 130, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5746.

³⁸ 17 U.S.C. § 301(b) (1982). The section provides that "[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State . . ." *Id.*

³⁹ See *id.* § 102(a) (protection exists for material "fixed in any tangible medium"). This includes works "whether published or unpublished." *Id.* § 301; see HOUSE REPORT, *supra* note 4, at 130-31, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5746. Nevertheless, registration of the copyrighted material is required pursuant to 17 U.S.C. § 408 (1982) before an infringement suit may be instituted. See *id.* § 411; *id.* § 412 (registration required to recover statutory damages and attorneys fees). Another advantage of registering the work is that the registration serves prima facie evidence of valid copyright. *Id.* § 410(c).

⁴⁰ In the process of drafting the 1976 Act, the Register of Copyrights recognized the "overbalancing reasons to preserve the common law protection of undissemated works until the author or his successor chooses to disclose them," REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., *General Revision of the U.S. Copyright Law* 41 (Comm. Print 1961) [hereinafter cited as REGISTER'S REPORT], thus acknowledging the need to protect an author's republication rights in the event of federal preemption. However, it was unclear prior to the 1976 Act whether the fair use doctrine should be applied to works protected at common law. In 1969, the New York Supreme Court excused an alleged copyright infringer on the grounds of fair use even though the copyrighted work was unpublished. See *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 470, 279 N.Y.S.2d 51, 60 (Sup. Ct. N.Y. County), *aff'd mem.*, 29 App. Div. 2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd on other grounds*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1969); see also *Diamond v. Am-Law Publishing Corp.*, 1984 COPYRIGHT L. REP. (CCH) ¶ 25,627 (S.D.N.Y.). But see Study No. 29, *supra* note 32, at n.32 (fair use doctrine not applicable to works protected at common law); H. BALL, *supra* note 1, at 260 n.5 (fair use inapplicable to unpublished works). A question remains over the applicability of the doctrine to unpublished works even after the 1976 Act. See *supra* note 7 and accompanying text. Mr. Goodale wrote:

Since the common law copyright is merged under the new act and since the new act permits copying, then it would appear that the old doctrine that there can be no fair use in a common law copyright is gone because the statute clearly says

plated by Congress and runs contrary to objectives underlying the copyright system as a whole.⁴¹

Section 107 of the Act is a codification of the common law that lists the factors frequently employed by courts in determining fair use.⁴² Congress expressly recognized the need for courts to apply the section flexibly and did not intend to restrict fair use analysis to the enumerated criteria.⁴³

that there can be such fair use. Or does it?

Goodale, *supra* note 7, at 23, col. 2. Thus assuming an unpublished work is copied in a "reasonable manner" as determined by the fair use criteria, the author may suffer monetary damages for which the copyright laws offer no redress. *Unpublished Works, supra* note 7, at 377. The extent of an author's republication interests include:

- (1) a possessory interest—the property interest in retaining physical possession and ownership of the work itself; (2) a pecuniary interest—the preservation of the value of the author's work and the identification of his name with the work; and (3) a privacy interest—the protection of the privacy of the work until and if the author decides that it be made public.

Unpublished Works, supra note 7, at 365.

⁴¹ Failing to distinguish between published and unpublished works in applying fair use, it is suggested, both preempts "equivalent" remedies and implicitly disposes of certain nonequivalent, common law rights. Such a result is contrary to explicit statutory language. *See supra* note 38. Professor Nimmer argued that the court improperly disposed of the state conversion claim in *Harper & Row*. *See* 1 M. NIMMER, *supra* note 5, § 1.01[B], at 114.3 n.51.

⁴² HOUSE REPORT, *supra* note 4, at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, at 5680. The fair use statute "is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." *Id.*; *see* *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 745 n.8 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980); Freid, *Fair Use and the New Act*, 22 N.Y.L. SCH. L. REV. 497, 499, 510 (1977). The factors are listed in the statute by way of example as the phrase "the factors to be considered shall include" indicates. 17 U.S.C. § 107 (1980). Section 101 defines "including" as "illustrative and not limiting." *Id.*; *see* 3 M. NIMMER, *supra* note 5, § 13.05[A], at 13-56 n.15. One commentator has listed as many as eight pertinent factors to be considered including:

- (1) the type of use involved; (2) the intent with which it was made; (3) its effect on the original work; (4) the amount of the user's labor involved; (5) the benefit gained by him; (6) the nature of the works involved; (7) the amount of material used and; (8) its relative value.

Cohen, *supra* note 4, at 53.

⁴³ *See* HOUSE REPORT, *supra* note 4, at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, at 5680. Congress had "no disposition to freeze the doctrine in the statute" and hoped that the courts adopted the doctrine "to the particular situations on a case by case basis." *Id.* Thus, the statute was designed to aid the courts in applying the doctrine as well as to provide a general guide for users. *See id.*; L. SELTZER, *supra* note 5, at 18. Statutory assistance was deemed necessary since the fair use doctrine had been labeled "the most troublesome in the whole law of copyright," *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939), and possibly "one of the most difficult questions which can well arise for judicial consideration," *Lawrence v. Dana*, 15 F. Cas. 26, 59 (C.C.D. Mass. 1869) (No. 8,136). *See* Cohen, *supra* note 4, at 52-53. Specifically, courts have had difficulty in distinguishing whether the copier's use is an excusable infringement or whether the material falls outside the realm of copyright. *See* Study No. 14, *supra* note 4, at 6; Cohen, *supra* note 4, at 47-48. Professor Nimmer urged that the doctrine of fair use should operate as an affirmative de-

The fair use doctrine was justified at common law by the fiction that the copyright owner implicitly consented to reasonable uses upon publication.⁴⁴ A corollary to this theory is that reasonable use is sanctioned by custom upon publication.⁴⁵ These ratio-

fense. 3 M. NIMMER, *supra* note 5, 13.05[A], at 13-56; see H. BALL, *supra* note 1, at 26 (fair use is "technically an infringement").

The statute has been viewed as a potential impediment to further judicial development of fair use criteria. See Rosenfield, *Customary Use as "Fair Use" in Copyright Law*, 25 BUFFALO L. REV. 119, 119 (1975). Prior to the statute, courts were more "unpredictable" and did not systematically use criteria such as those listed in § 107. Hayes, *Classroom "Fair Use": A Reevaluation*, 26 COPYRIGHT SOC'Y BULL. 101, 117-19 (1978). In fact, one commentator predicted that § 107 would destroy "vitality [of the fair use doctrine] and its ability to accommodate itself to all conditions and to those as yet unseen." *Copyrights Act: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., sec. 8, pt. 3 at 1706 (statement by John Schulman); see Schulman, *Fair Use Act*, 53 IOWA L. REV. 838 (1968); Note, *supra* note 5, at 90; see also *Comments and Views Submitted to the Copyright and the Revision of the Copyright Office on Fair Use of Copyrighted Works*, Study No. 14 in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 2d Sess. 39-40 (1958) (fair use concept more workable if left to the courts).

Conversely, one critic of the statute argued that it fails to define fair use specifically and fails to order the delineated criteria in terms of priority. L. SELTZER, *supra* note 5, at 19; see Hayes, *supra*, at 118. Indeed, it has been suggested that the statute should specify the quantity and types of work that may be copied in order to assist the courts in interpreting the "vague and obscure language." Rubin, *Some Thoughts on the "Fair Use" Doctrine Under the Copyright Act of 1976*, 59 CHI. B. REC. 24, 29 (1977). Lastly, one author concluded that codification of the doctrine has not resulted in a more careful fair use analysis by the courts. Leavens, *supra* note 5, at 10.

⁴⁴ See, e.g., *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905) (republication of city directory constitutes infringement since no "implied" or "common consent" can be found as in the arts and sciences); *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 175 (S.D. Cal. 1955) (burlesque motion picture not within fields of "art" where consent implied from copyright holder), *aff'd sub nom.*, *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Karl v. Curtis Publishing Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941) (owner of copyrighted song dedicated to professional football team consented "by implication" to others' reasonable uses); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938) (no implied consent where copier's use is purely commercial). Implied consent to some degree of use should be recognized since the author has engaged in a "figurative bargain" to gain statutory protection. Study No. 14, *supra* note 4, at 7. It has been suggested, however, that this theory no longer applies because unpublished works are now afforded statutory protection. See *Unpublished Works*, *supra* note 7, at 369 n.95. In addition, the implied consent theory has been questioned since authors place restrictive legends on their works that prohibit copying "in whole or in part, but nevertheless gain no greater protection." 3 M. NIMMER, *supra* note 5, § 13.05, at 13-55; see Study No. 14, *supra* note 4, at 7. But see Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 214 (1954) (author's restrictive legend cannot affect judicial determination of what taking is fair). Nevertheless, it has been suggested that the best summary of the fair use test is whether a reasonable copyright owner would have consented to the use. Study No. 14, *supra* note 4, at 15.

⁴⁵ See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (customary for biographers to extract material from earlier accounts), *cert. denied*,

nales, however, clearly do not justify the application of the doctrine before the implied act of consent—publication—has occurred.⁴⁶ In addition, the period just prior to publication is crucial in determining the financial success of a written work.⁴⁷ Therefore, it is submitted that a high degree of copyright protection is required immediately before publication to preserve the author's economic incentives to publish.

Reconciling Copyrights and the First Amendment

The earliest copyright laws were little more than crude attempts at censorship.⁴⁸ More recently, courts applying these laws have better accommodated the public's first amendment interest in free access to information.⁴⁹ The fair use doctrine and the idea/expression dichotomy⁵⁰ are means by which courts attempt to bal-

385 U.S. 1009 (1967); *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (although customary to rely on prior works, copying of manner and style impermissible); Case Note, *Copyrights—"Fair Use"*, 15 S. CAL. L. REV. 249, 250 (1942) (implied consent to reasonable use may promote science and the arts). When it is customary to use copyrighted material for a non-profit educational purpose, the use is deemed fair per se. See, e.g., *William & Wilkins Co. v. United States*, 487 F.2d 1345, 1362 (Ct. Cl. 1973), *aff'd mem. by an equally divided court*, 420 U.S. 376 (1975); *Rosenfield*, *supra* note 43, at 119; *cf.* 17 U.S.C. § 108 (1982) (special exemption for libraries).

⁴⁶ It is submitted that it is logically impossible to imply consent to use of a copyrighted work that has been purloined. In addition, it cannot be contended that *The Nation* acted customarily since there exists "a degree of trust in the publishing business" that honors the confidence of unpublished manuscripts. Appellee's Answering Brief at 35.

⁴⁷ See *Unpublished Works*, *supra* note 7, at 366-67. Confidence within the publishing industry that manuscripts will not be revealed prematurely "promotes the exploitation of subsidiary rights, and enhances public access to the copyrighted work." Appellee's Answering Brief at 35.

⁴⁸ See *supra* note 1.

⁴⁹ See *supra* note 5 and accompanying text. The public's right to be informed is a recognized interest derived from the first amendment. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); Meiklejohn, *The First Amendment is Absolute*, 1961 Sup. Ct. Rev. 245, 255-62. It is this right to know and not the speaker's interest that is of prime concern, see A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 102-03 (1948), since one does not "engage in self-expression in any meaningful sense" by appropriating the expression of another. 1 M. NIMMER, *supra* note 5, at § 1.10[B][2], at 1-76. This is true even if the expression is one's own but the copyright interest has been sold to another. *Dodd, Mead & Co. v. Lilienthal*, 514 F. Supp. 105, 108 (S.D.N.Y. 1981).

⁵⁰ See *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The *Wainwright Securities* court noted that:

What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals 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

ance this public interest against an author's legitimate need to protect the embodiment of his expression.⁵¹ Indeed, it is generally accepted that a proper fair use analysis will avoid most first amendment confrontations⁵² and that a copyright holder's interests should be subordinated only when the material is of value solely in its original form.⁵³ Yet, those instances in which the author's ideas are truly "wedded" to his expression are rare and usually involve graphic works.⁵⁴ In these cases, first amendment inter-

events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events and characterization."

Id. (quoting *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). This is the idea/expression dichotomy, see 1 M. NIMMER, *supra* note 5, § 1.10[B], at 1-72, that is codified in the copyright laws, see 17 U.S.C. § 102 (1982). See also HOUSE REPORT, *supra* note 4, at 56-57, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5670. The dichotomy is based on the theory that "information does not owe its origin to the author," and therefore the authorship requirement for copyright protection is not met. Denicola, *Copyright in Collection of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 525 (1981).

⁵¹ 17 U.S.C. § 102(b) (1982). The balance sought by the idea/expression dichotomy was recognized with approval by Nimmer when he wrote:

On the whole . . . it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as a part of the democratic dialogue.

1 M. NIMMER, *supra* note 5, § 1.10[B], at 1-76. The copyright law also accommodates free speech interests by the limited duration of copyright protection, 17 U.S.C. § 302(a) (1982) (life of author plus 50 years), the requirement of authorship, U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (1982) and the government work exemption, 17 U.S.C. § 105 (1982). See Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320, 322-24 (1979). See generally Goldstein, *supra* note 31, at 1006-35 (analysis of ways in which laws balance copyright monopoly and the public's access to information).

⁵² See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1178 (5th Cir. 1980), *aff'g on other grounds*, 445 F. Supp. 875 (S.D. Fla. 1978); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). In *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), however, the court noted that "legitimate in depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment.'" *Id.* at 95 (citations omitted) (quoting Nimmer, *supra* note 31, at 1200); see *supra* note 21 and accompanying text.

⁵³ See Note, *Copyright Law—One Step Beyond Fair Use: A Direct Public Interest Qualification Premised on the First Amendment*, 57 N.C.L. REV. 150, 160 (1978).

⁵⁴ 1 M. NIMMER, *supra* note 5, § 1.10[C], at 1-82. For most graphic works, Nimmer

ests are implicated.⁵⁵ In *Harper & Row*, therefore, even if the exact expression of President Ford constituted the only "news" in the manuscript,⁵⁶ holding that *The Nation's* use was protected independently by the first amendment would have been preferable to distorting the fair use doctrine in an effort to apply a traditional copyright analysis.⁵⁷

Moreover, it is suggested that in emphasizing the public's

favors copyright protection. *Id.* at 1-84. However, when a news photograph is involved, such as photos of the My Lai massacre, copyright interests must be subordinated. *Id.* One commentator has suggested that in circumstances in which the author's expression must be used, compensatory or statutory damages should be awarded. Note, *supra* note 52, at 335. An alternative suggestion envisions some form of compulsory licensing. See 1 M. NIMMER, *supra* note 5, § 1.10[D], at 1-92. It should be noted, however, that the first amendment may bar injunctive relief normally available under the copyright laws. Note, *supra* note 51, at 339.

⁵⁵ See *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (1983) (fair use liberally applied if quotation needed for accurate reporting); Brittin, *Constitutional Fair Use*, 28 COPYRIGHT L. SYMP. (ASCAP) 141, 187 (1982); see also Cambell, *Copyright and News Values: An Accommodation*, 25 COPYRIGHT L. SYMP. (ASCAP) 121, 154 (1980) (paraphrasing newsworthy literary material may be inadequate to convey "tone and meaning"). Nimmer noted that such a contention may have been possible in *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). 1 M. NIMMER, *supra* note 5, § 1.10[D], at 1-90 n.82. In *Meeropol*, the Second Circuit held that verbatim copying of letters written by Julius and Ethel Rosenberg was not fair use. 560 F.2d at 1070. The holding indicated that the "additional speech value" should be outweighed by the copyright holder's interest. 1 M. NIMMER, *supra* note 5, § 1.10[D], at 1-90 n.82. *But see* Brittin, *supra*, at 185.

⁵⁶ See *supra* note 25 and accompanying text. It is suggested that in *Harper & Row*, that *The Nation* could have reported the information without appropriating any of President Ford's own expression. See 1 M. NIMMER, *supra* note 5, § 1.10 [D], at 1-88. Several scholars, in addition to Nimmer, have criticized *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), because it did not involve conveying information that was inextricably related to the expression taken. See L. SELTZER, *supra* note 5, at 42-43; Denicola, *supra* note 31, at 294-95; see also *Sid & Marty Kroft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1171 n.17 (9th Cir. 1977). The benefits derived from the preservation of an author's economic incentive more than compensate for the substance lost by having to replace his original expression. 1 M. NIMMER, *supra* note 5, § 1.10[B], at 1-75.

⁵⁷ The fair use doctrine will become "disfigured" and ultimately will fail to fulfill its traditional role if it is to effect first amendment interests. Denicola, *supra* note 31, at 316; see Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425, 457 (1984) (fair use manipulation satisfies neither first amendment nor copyright interests). The failure to distinguish the first amendment from the fair use concept poses a "grave danger" to the copyright system. 1 M. NIMMER, *supra* note 5, § 1.10 [D], at 1-86.1; see Sobel, *supra* note 31, at 79-80 (unfair uses become acceptable when swayed by "public interest" factor). Several commentators have expressed the need for an independent first amendment privilege. See, e.g., Sobel, *supra* note 31, at 79-80; Rosenfield, *The American Constitution, Free Inquiry, and the Law*, in FAIR USE AND FREE INQUIRY 288, 302-03 (1980) (fair use based on both first and ninth amendments); Note *supra* note 53, at 162-63.

right of access to the appropriated information,⁵⁸ the *Harper & Row* court unnecessarily subordinated the copyright holder's interests. As Judge Meskill explained, the public would have had access to the information regardless of *The Nation* article.⁵⁹ This contention could validly be made in almost all cases in which copyrighted work is near publication.⁶⁰ In short, it is suggested that a predominant first amendment rationale for subordinating a copyright holder's interests is not truly implicated when there is some reliable indication that the work in question is on the verge of publication.⁶¹

Copyright protection is, in fact, designed to ensure dissemination by encouraging publication.⁶² If this goal is to be realized, it is imperative that authors who are about to publish are afforded adequate protection; this is true regardless of the level of public interest in the material.⁶³ To relax the level of protection afforded

⁵⁸ See *supra* note 21 and accompanying text.

⁵⁹ 723 F.2d at 216-17 (Meskill, J., dissenting).

⁶⁰ It is conceded that situations may arise in which it is important that the material be revealed prior to the author's release. However, such extraordinary circumstances were not shown in *Harper & Row*. Therefore, *The Nation* contributed nothing to the public dialogue by destroying the serialization rights of *Time*. Professor Denicola has written:

The public benefit derived from the use diminishes significantly . . . in those instances in which the defendant has added little or nothing to the plaintiff's contribution. The extent of the independent research conducted by the defendant has thus received consistent attention, even in decisions purportedly based on the complete exclusion of factual material from the scope of copyright.

Denicola, *supra* note 31, at 538; see also 1 M. NIMMER, *supra* note 5, § 1.10[D], at 1-90 (no constitutional justification for copying "expression along with idea"). The *Harper & Row* court rejected the contribution theory because the "essence" of news reporting is merely to recount information. 723 F.2d at 207. News reporting in itself may be considered a productive use of copyrighted material, see *Sony Corp. of Am. v. Universal City Studios, Inc.* — U.S. —, 104 S. Ct. 774 (1984) (Blackmun, J., dissenting), but it is the creative use, not the wider distribution of copyrighted material, that is the reason for the fair use doctrine, *Pacific and S. Co. v. Duncan*, 572 F. Supp. 1186, 1195 (N.D. Ga. 1983).

⁶¹ The fact that the material in *Harper & Row* was about to be published should distinguish the case from one where the copyright owner actively seeks to prevent the publication of the copyrighted material. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966) (plaintiff could not prevent publication of biography which "ought to be available to a reading public"). It is suggested that the *Rosemont* analysis is not applicable to the circumstances of *Harper & Row*.

⁶² See *supra* note 2 and accompanying text.

⁶³ See Denicola, *supra* note 31, at 313 (inherent danger in considering public importance as a factor in judicial determination of scope of first amendment privileges); Sobel, *supra* note 31, at 77-78 ("definitional" rather than "ad hoc" approach); see also *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57, 61 (2d Cir. 1980) (fair use does not permit "theft" of expression whenever "work contains material of possible public importance"); cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (rejecting ad

works prior to publication because of their great interest to the public would be to adopt the anomalous approach of affording the least incentive to produce material that is of the most interest to the public.⁶⁴ It is submitted that this anomaly can be avoided, and the constitutional objectives of the copyright system realized, only by adjusting the fair use analysis in cases like *Harper & Row* in which the material is in a soon-to-be-published state.

NECESSARY ADJUSTMENTS IN THE FAIR USE CRITERIA

The first fair use factor listed in section 107 of the Copyrights Act is the purpose and character of the copier's use.⁶⁵ Although it

hoc approach of weighing public interest in allegedly libelous material). In a case decided after *Harper & Row*, however, the Second Circuit observed that the fair use doctrine should be applied liberally in matters of high public concern. See *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983).

⁶⁴ Sobel, *supra* note 31, at 76. The fair use cases decided on the public interest factor "do violence to the whole notion of copyright protection." *Id.* The long term goals of the copyright system should outweigh the public's immediate desire in "unfettered access to worthwhile literary material." *Id.* at 79.

⁶⁵ 17 U.S.C. § 107(i) (1982); see *supra* note 6. A finding that the use is either commercial or of a nonprofit, educational character is not conclusive in determining fair use. A. LATMAN, *supra* note 1, at 212, nor does a "noncommercial motive" necessarily lead to a fair use conclusion. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 n.9 (9th Cir. 1981), *rev'd on other grounds*, 104 S. Ct. 774 (1984). Some of the types of uses that may be permitted under the fair use doctrine are:

Quotation of excerpts in a review or criticism for purposes of illustration or comment.

Quotation of short passages in a scholarly or technical work, for illustration or classification of the author's observations.

Use in a parody of some of the content of the work parodied.

Summary of an address or article, with brief quotations, in a news report.

Reproduction by a library of a portion of a work to replace part of a damaged copy.

Reproduction by a teacher or student of a small part of a work to illustrate a lesson.

Reproduction of a work in legislative or judicial proceedings or reports.

Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported.

REGISTER'S REPORT, *supra* note 40, at 24. Traditionally, courts have evaluated "whether the paraphrasing and copying was done in good faith or with evasive motives" in order to determine a user's purpose. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (citing *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1146-47 (1980)); see also *Wainwright Securities*, 558 F.2d at 96 (self-serving intent of publisher a factor). Investigating the intent of the user is important since the fair use doctrine presupposes good faith and fair dealing. See *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1146-47 (S.D.N.Y. 1980) (denial of use and acquisition of material by misrepresentation violates "industry standards of ethical behavior"), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); cf. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481-82 (1974) (state trade

is recognized that news reporting is a legitimate fair use purpose, it is suggested that the propriety of an alleged news reporting purpose should be more carefully scrutinized when the user knows that the copyrighted material is about to be published in its entirety by the author.

The second factor listed in section 107 is "the nature of the copyrighted work."⁶⁶ Guided by this requirement, the *Harper & Row* court looked to the type of material contained within the memoirs and characterized it as primarily factual in nature.⁶⁷ Nevertheless, an article's factual nature should not excuse a verbatim copying, since the idea/expression dichotomy of copyright law protects the manner in which facts are expressed, and not the information contained in the work.⁶⁸ It is submitted that in determining the nature of the work, the court's main consideration should have been the stage of publication, rather than the work's content.⁶⁹

The third factor codified in the statute is "the amount and substantiality" of the material used relative to the copyrighted work.⁷⁰ However, when the infringing work relies almost exclu-

secret laws, by prohibiting the misappropriation of trade secrets, maintain "standards of commercial ethics" since the "'necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world'" (citations omitted).

⁶⁶ 17 U.S.C. § 107(2) (1982).

⁶⁷ 723 F.2d at 208. Due to the factual nature of the manuscript, the court determined that it deserved only "narrow" protection. *Id.* (citing *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980)). However, the "factual nature determination" has bearing only on the issue of copyrightability, not on the amounts to be deemed fair. *See* 17 U.S.C. § 102(b) (1982).

⁶⁸ *See, e.g., International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Roy Export Co. Estab. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1143-44 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); *see supra* note 52.

⁶⁹ One commentator has written that "the fact that the work is unpublished would be a factor, albeit not the only one, in determining whether the particular use of the work was a 'fair' one." *Unpublished Works, supra* note 7, at 377. Evaluating the work in terms of its stage of publication would correspond to Professor Latman's view that analysis of the copyrighted work "appears to be closely related to the implied consent theory." A. LATMAN, *supra* note 1, at 213; *see supra* notes 44-46 and accompanying text. The district court mentioned the "soon to be published" state of the manuscript as a relevant fair use factor. 557 F. Supp. at 1072.

⁷⁰ 17 U.S.C. § 107(3) (1982). Traditionally, "wholesale copying" could never be fair use, *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937) (dictum), and today such a proposition is evidenced by the term "portion" in § 107. A. LATMAN, *supra* note 1, at 213. *But see Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973) (proposition that wholesale copying is never fair use is an "overbroad generalization"), *aff'd mem. by an equally divided court*, 420 U.S. 376 (1975).

sively upon the copyrighted material, a more important factor to consider is the amount copied in relation to the *defendant's* own work.⁷¹ This analysis requires weighing the relative value of the copied material with respect to both the copyrighted and allegedly infringing work.⁷² This relative value approach, which was used by the district court,⁷³ is preferable because it reflects the equitable nature of the fair use doctrine.⁷⁴ It is submitted that this approach should have led the *Harper & Row* court to conclude that the amount taken was excessive, particularly in view of the unpublished state of the copyrighted work.⁷⁵

The fourth factor enumerated in the statute is the potential for economic harm.⁷⁶ Proof of actual economic harm need not be shown to overcome a fair use defense.⁷⁷ To impose that burden

⁷¹ See, e.g., *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938) (three lines from science book representing one twentieth of defendant's pamphlet could not be deemed insubstantial). The copied material may be half of the new work but only one-thousandth of the copyrighted material. Cohen, *supra* note 4, at 68. In *Harper & Row*, the defendant extracted 83% of a three page article from a 655 page manuscript. 723 F.2d at 198.

⁷² *Carr v. National Capital Press, Inc.*, 71 F.2d 220, 220 (D.C. Cir. 1934); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); Study No. 14, *supra* note 4, at 16.

⁷³ See 557 F. Supp. at 1072. In the opinion below, Judge Owen wrote that "*The Nation* took what was essentially the heart of the book." *Id.* On appeal, the Second Circuit noted that the copyrighted amount taken in relation to the new work, 300 words in a 2250 word article, was "insubstantial." See 723 F.2d at 208.

⁷⁴ See *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (fair use doctrine is "entirely equitable").

⁷⁵ One commentator has suggested that "the amount of paraphrasing or quotation of an unpublished work should be substantially less than that permitted of a published work." Goodale, *supra* note 7, at 23, col. 3. This suggestion is based on the idea that the theories of privacy and consent—"which underlie the theory of copyright under common law, would . . . still be relevant to a prepublication copyright under the new statute of 1976." *Id.* Such an opinion is in accordance with the Senate Judiciary Committee's view:

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.

S. REP. NO. 473, 94th Cong., 2d Sess. 64 (1975); see Note, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134, 148-49 (1980) (legislative history suggests intention to have fair use applied restrictively to unpublished works).

⁷⁶ 17 U.S.C. § 107(4) (1982). Professor Nimmer believes the courts view this factor as the most important, 3 M. NIMMER, *supra* note 5, § 13.05[A], at 1365, yet he notes that some courts view this factor improperly "as merely raising the question of the extent of damages," *id.*; see *infra* notes 79-82 and accompanying text.

⁷⁷ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 793 (1984). In a recent fair use decision, Justice Stevens wrote: "Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable

would be inconsistent with the presumption of statutory damages set forth in the copyright laws.⁷⁸ Furthermore, the speculative nature of copyright damages caused by the infringement of a work prior to publication makes it unreasonable to require proof of actual damages.⁷⁹ Therefore, the *Harper & Row* court's determination that proof of economic harm was "dubious at best"⁸⁰ seems unrealistic.

In limiting its analysis to statutory factors, the Second Circuit in *Harper & Row* provided ammunition for those who argue that the codification of the fair use doctrine would curtail its judicial development.⁸¹ A more complete evaluation of all relevant factors does not support the court's fair use determination.

CONCLUSION

The Second Circuit in *Harper & Row* denied proper copyright protection by failing to acknowledge the peculiar needs of a copyright holder prior to publication. This oversight has produced a precedent that is inconsistent both with the purpose of the copyright laws and the doctrine of fair use. The *Harper & Row* court should have granted the necessary protection by a proper adjustment of the traditional fair use analysis. It is submitted that, by permitting first amendment considerations to dominate its fair use analysis, the court improperly concluded that the borrowed expression was minimal.⁸² The court's approach minimizes the impor-

damage. Nor is it necessary to show with certainty that future harm will result." *Id.*; see *Leavens*, *supra* note 5, at 8. *But see Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (Ct. Cl. 1973) (fair use found since defendant's copying not shown to cause financial harm), *aff'd mem. by an equally divided court*, 420 U.S. 376 (1975).

⁷⁸ 17 U.S.C. § 504(c) (1982). The Copyright Act of 1976 provides for statutory damages from \$250 up to \$10,000 "as the court considers just." *Id.* An infringement does not depend on harm to the plaintiff, and all of the statutory copyright remedies are based upon infringement, rather than harm. *Leavens*, *supra* note 5, at 9; see 17 U.S.C. § 502 (1982) (injunction); *id.* § 503 (destruction of infringing copies); *id.* § 505 (recovery of costs). Statutory remedies are based on the notion that any infringement, "however nominal, causes harm to a copyright holder." *Leavens*, *supra* note 5, at 8; see *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982).

⁷⁹ *Leavens*, *supra* note 5, at 9. One commentator has noted that reliance on the potential economic effect factor "ignores . . . non-economic harms" that "may cause disincentives greater than pecuniary loss." *Id.* These latter interests become most evident when an author's prepublication interests are invaded. *Id.* at 910; see *supra* note 39.

⁸⁰ 723 F.2d at 208. The court contended that the plaintiff's evidence failed to show that *Time* rescinded wholly because of "the very limited use of expression per se." *Id.*

⁸¹ See *supra* note 43.

⁸² It is submitted that the ideals of the first amendment are fostered by protecting a

tance of the copyright laws.⁸³ While the first amendment may well suggest an appropriate defense to a copyright infringement charge under certain circumstances, first amendment arguments should not be indiscriminately incorporated into a fair use analysis without considering that the copyrighted work is on the verge of publication. It is hoped that the Supreme Court will not adopt the Second Circuit's fair use analysis since "the interests of all—authors, publishers and the public—are best served by the maintenance of a sound system of copyright protection for all literary material—even that which is in the public interest."⁸⁴

Joseph R. Re

publisher's serialization rights. That is, without assurance that a manuscript will be adequately protected, authors will be loath to distribute their manuscripts for publication in serial form.

⁸³ See Margolick, *The Nation Ruling: News and the Public Domain*, N.Y. Times, Nov. 18, 1983 at B4, col. 6. The *Harper & Row* decision appears to weaken copyright laws to the point that authors will be left with insufficient protection unless they secure their manuscripts under lock and key. *Id.*

⁸⁴ Sobel, *supra* note 31, at 78.