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# FAIRNESS IN THE COPYRIGHT ACT'S FAIR USE DOCTRINE\*

*Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>1</sup>

The Copyright Act<sup>2</sup> grants a bundle of exclusive rights to the copyright-holder. The most important rights enable the copyright holder to regulate reproduction of the copyrighted work<sup>3</sup> and to bring an action for infringement of these exclusive rights<sup>4</sup> if the infringement involves a copying of the original work<sup>5</sup>. These rights are not absolute and various exceptions and limitations exist. One statutory exception is the fair use defense<sup>6</sup> which ex-

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1. 471 U.S. 539 (1985).

2. 17 U.S.C. §§ 101-810 (1982). The Copyright Act of 1976 was the culmination of a major revision of the 1909 Act. The first copyright statute was enacted in 1790. Act of May 31, 1790, ch. 15, 1 Stat. 124. Subsequent revisions were made in 1831; Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; in 1870, Act of July 8, 1870, ch. 230, 16 Stat. 198; and in 1909, Act of Mar. 4, 1909, ch. 16, 35 Stat. 1075. The 1976 Act was the Act of Oct., 1976, Pub. L. No. 94-553, 90 Stat. 2541.

3. 17 U.S.C. § 106 (1982) 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 . . . ;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .

*Id.*

4. 17 U.S.C. § 501(a) (1982) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright.").

5. For general purposes, copying and reproduction can be considered to be synonymous. 2 M. NIMMER, NIMMER ON COPYRIGHT §§ 8.01[A]-.02[A] (1985). The definition of "copies" in section 101 of the Act includes only those copies which are fixed in a tangible medium. 17 U.S.C. § 101 (1982). It is this type of copy to which section 106 applies. The test for determining if a work is copied from another as a basis for an infringement action consists of proof of access and substantial similarity. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) (outlines the elements necessary to find an infringement). See generally 3 M. NIMMER, *supra*, § 13.01[B].

6. 17 U.S.C. § 107 (1982). The relevant statutory language states: notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, newsreporting, 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-

cuses an otherwise infringing work if the purpose of the second work was either criticism, comment, newsreporting, teaching, scholarship, or research. Another is the uncopyrightability of facts and ideas<sup>7</sup> which requires the author's work to be original and limits the copyright to the actual expression used. The primary limitation is the constitutional right of free speech imposed by the first amendment.<sup>8</sup>

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>9</sup> the United States Supreme Court held that an unauthorized use of quotations from a public figure's unpublished manuscript was an infringement of the copyright holder's exclusive rights.<sup>10</sup> The Court found that the use was not excused under the fair use exception and that the author's right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use.<sup>11</sup> Although the Court reached an equitable result, the fair use analysis over-emphasized the economic effect of copyright and particularly the first publication right. This type of analysis disregarded the legislative intent which balanced all of the factors relevant to fair use in order to reach an equitable decision.<sup>12</sup> The Court also refused to apply first amendment values to broaden the scope of fair use,<sup>13</sup> and effectually placed the economic value of copyright above first amendment values. The Court re-emphasized the position that first amendment protections were already embodied in the Copyright Act.<sup>14</sup> This Note will discuss the Court's method of analysis concerning fair use, the "right of first publication," the first amendment, the effect on future co-

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- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

7. *Id.* § 102(b) (copyright embodies the requirement of originality with the author and no author can claim ownership of an idea nor of factual matters).

8. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

9. 471 U.S. 539 (1985).

10. *Id.* at 548-49.

11. *Id.* at 549-50.

12. See 17 U.S.C. § 107 historical note (1982). Referring to H.R. REP. 1476, 94th Cong., 2d Sess. 65 (1976), the historical note states:

Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities.

17 U.S.C. § 107 historical note.

13. 471 U.S. at 555-60.

14. *Id.* at 560.

pyright cases which involve public figures, and, finally, the implications for the press and publishers will be considered.

On April 3, 1979, *The Nation*<sup>15</sup> published a front-page article entitled "The Ford Memoirs—Behind the Nixon Pardon." The article covered the soon-to-be published memoirs of President Gerald Ford,<sup>16</sup> and presented a synopsis of some of the important aspects of the book.<sup>17</sup> The content of the article was almost exclusively drawn from the unpublished manuscript.<sup>18</sup> It included President Ford's impressions, views, and perceptions of various occurrences and personalities which he confronted during his presidency.<sup>19</sup> *The Nation's* article was approximately 2250 words long, 300-400 of which were direct quotes from Ford's book.<sup>20</sup>

Although the appearance of *The Nation's* article precipitated the lawsuit, the publishing agreement between Ford and Harper & Row was the backbone of the dispute. Harper & Row obtained from Ford the right to copyright the book.<sup>21</sup> They also owned the licensing rights for pre-publication excerpts from the book.<sup>22</sup> Time, Incorporated bought the pre-publication rights and paid \$12,500 in advance for them. *Time* was to pay another \$12,500 after publication of its article.<sup>23</sup> *The Nation's* article appeared about two weeks prior

15. *The Nation* is perhaps America's oldest continuously published weekly magazine. *The Nation* primarily presents political commentary and news. The first volume of *The Nation* was published on July 6, 1865. The Ford memoirs article appeared in the April 7, 1979 edition, Volume 228, No.13, p.353.

16. Victor Navasky, *The Nation's* editor, obtained a copy of the unpublished manuscript from an unidentified source. Mr. Navasky read the manuscript, wrote the article and then returned the manuscript to his source. Ford's book "A Time to Heal: The Autobiography of Gerald R. Ford" has since been published and copyrighted through the statutory formalities. No argument has been made as to its right to protection at the time of *The Nation's* article. *Harper & Row*, 471 U.S. at 543

17. *Harper & Row*, 471 U.S. at 543.

18. *Id.*

19. *Id.* at 545. Specific mention was given to Ford's descriptions of the decision to pardon President Nixon, Ford's conversations with members of the White House staff, and other events of Ford's presidency. The Appendix to the Court's opinion reproduces *The Nation* article in full. *Id.* at 570-79.

20. *Id.* at 545. The direct quotes are printed in bold face type in the Court's Appendix. *Id.* at 570-79.

21. Copyright initially vests in the original author. 17 U.S.C. § 201(a) (1982). The author can sell or grant the copyright to another, usually in return for a sum of money. *Id.* § 201(d). Ford was the original author, but contractually agreed to give Harper & Row the exclusive rights under copyright. *Harper & Row*, 471 U.S. at 542.

22. 471 U.S. at 542. Prepublication excerpt rights are often granted as a marketing technique to spark interest in the book. They usually take the form of excerpts from the most interesting part of the work and are printed in a publication with a national audience.

23. *Id.* at 542-43. The *Time* contract specifically included the right to print Ford's version of the Nixon pardon. *Id.*

to *Time's* projected article and *Time* immediately cancelled its contract with Harper & Row.<sup>24</sup>

Harper & Row filed an action alleging copyright infringement and other state law claims shortly after *The Nation's* article appeared and after *Time's* cancellation.<sup>25</sup> The district court found an infringement which was not excused by fair use,<sup>26</sup> and the court's discussion was brief and conclusory.<sup>27</sup> The court used a "totality of the work" approach to the copyrightability problem.<sup>28</sup> The Court of Appeals for the Second Circuit reversed in a 2-1 decision.<sup>29</sup> The court of appeals squarely addressed the copyrightability problem and "stripped away" all of the facts and information appearing in the article which were not copyrightable.<sup>30</sup> They also disregarded any paraphrasing of disparate facts before proceeding with an analysis under fair use.<sup>31</sup> The majority noted the first amendment implications present and considered them throughout their analysis.<sup>32</sup>

The majority of the United States Supreme Court decided it was not necessary to resolve the copyrightability question posed by the court of appeals.<sup>33</sup> Finding that the verbatim quotes from the manuscript (which totalled 300-400 words) were copyrightable expressions, the Court would only excuse their use if it were a fair use.<sup>34</sup>

The Court focused first upon the fact that Ford's manuscript was unpublished.<sup>35</sup> Claiming that the right of first publication is different from the other rights under section 106 of the Act,<sup>36</sup> the Court discussed the importance of preserving this right to the original copyright holder. This right, the majority argued, allows the copyright holder to capture the full commercial value of exclusivity.<sup>37</sup> The copyright holder can also decide when, where, and in what form to first distribute his work.<sup>38</sup> As a result of the stated importance

24. *Id.* at 543.

25. *Harper & Row, Publ. v. Nation Enters.*, 557 F. Supp. 1067 (S.D.N.Y.), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

26. *Id.* at 1073.

27. *Id.* at 1072.

28. *Id.*

29. *Harper & Row, Publ. v. Nation Enters.*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

30. *Id.* at 206.

31. *Id.*

32. *Id.* at 203-04.

33. *Harper & Row*, 471 U.S. at 548-49; *see infra* notes 109-10 and accompanying text.

34. 471 U.S. at 548-49, 560. *The Nation* conceded that the 300-400 words were verbatim quotes and would be copyrightable expression. *Id.* at 565 n.8.

35. *Id.* at 549.

36. *Id.* at 552-53.

37. *Id.*

38. *Id.*

of exclusivity, the majority argued that the balance of equities shifts against the claimant in a claim of fair use of an unpublished work.<sup>39</sup>

Section 106 of the Copyright Act lists the exclusive rights granted to the author and states that they are “subject to section 107.”<sup>40</sup> Section 107, the fair use provision, clearly states “[n]otwithstanding the provisions of section 106” before setting out the relevant factors to consider for analysis.<sup>41</sup> The majority contended that despite the language of the statute, the importance of the right of first publication required the fair use analysis to be viewed narrowly.<sup>42</sup> As a final assertion, the Court proclaimed: “Under ordinary circumstances, the author’s right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use.”<sup>43</sup>

Although the majority properly examined the right of first publication as a part of their total analysis, they imparted too much weight to this factor.<sup>44</sup> The right of first publication should be weighed just like the other statutory factors or other relevant factors. It is this author’s position that an over-emphasis of this factor results in a misapplication of the fair use doctrine in that it does not equitably balance the concerns of each factor individually.

To combat the pre-publication argument, *The Nation* argued that the first amendment values present in the case required a different analysis.<sup>45</sup> *The Nation* asserted that the “substantial public import of the subject matter

39. *Id.*

40. 17 U.S.C. § 106 (1982).

41. *Id.* § 107.

42. *Harper & Row*, 471 U.S. at 549-55. The majority found support for this view from the legislative committee reports during the revision of the 1909 Copyright Act. A Senate Report stated “[t]he 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.” *Id.* at 553 (quoting S. REP. NO. 473, 94th Cong. 1st Sess. 64 (1975)). This passage dealt with fair use as it applied to photocopied materials and was not found in the House Reports. *Id.* at 554 (discussing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, 66 (1976)). The majority cited this passage, discussed the history, and found that the House had incorporated it by reference. *Id.* Further support was found in cases involving common law copyright. See *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907) (dealing with a work of art which had not been shown to the general public, the Court stated “[t]he property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same.”). See generally, 2 M. NIMMER, *supra* note 5, § 8.23 (citing cases and text in support of the majority view of common law copyright’s absolute protection to unpublished works).

43. 471 U.S. at 555.

44. The majority opinion does say: “We conclude that the unpublished nature of a work is ‘[a] key, though not necessarily determinative, factor’ tending to negate a defense of fair use.” *Id.* at 554 (quoting S. REP. NO. 473, *supra* note 42, at 64). However, the tenor of the opinion gave great weight to this factor, rather than an equal share of a balanced analysis.

45. *Harper & Row*, 471 U.S. at 555.

of the Ford memoirs," the newsworthiness of the publication of the book itself, and the "public's interest in learning this news as fast as possible outweigh[ed] the right of the author to control its first publication."<sup>46</sup> *The Nation* further stated that the copying of Ford's expression was essential to the news story and "the precise manner in which [he] expressed himself was as newsworthy as what he had to say."<sup>47</sup> The presence of such important first amendment values, as argued by *The Nation*, persuaded the Court to reconsider its reliance on the strength of the first publication right.

The Court responded to this argument about first amendment values,<sup>48</sup> and its analysis required an understanding of the potential conflict between the first amendment and the copyright law's grant of exclusive rights. The United States Constitution authorizes Congress to enact a copyright statute,<sup>49</sup> while the first amendment states that "Congress shall make no law . . . abridging freedom of speech or the press."<sup>50</sup> The constitutional authority for both of these rights was granted contemporaneously by the framers of the Constitution.<sup>51</sup> It is generally agreed that both rights were intended to coexist and to balance each other.<sup>52</sup> The law that a subsequent author cannot use previously copyrighted words without the copyright holder's permission seems to cause the Copyright Act to collide with the first amendment. This is because the subsequent user's right of free speech is encroached.<sup>53</sup> However, the predominant view is that the Copyright Act incorporated the first amendment rights through limitations within the Act.<sup>54</sup> One such limitation found in the Copyright Act which protects first amendment rights is labeled the idea-expression dichotomy.<sup>55</sup> Copyright protects an author's expression, but not the ideas behind that expression.<sup>56</sup> This limitation allows for a full dis-

46. *Id.* at 556.

47. *Id.*

48. *Id.* at 555-60.

49. U.S. CONST. art. I, § 8, cl. 8. The enabling language reads: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." *Id.*

50. U.S. CONST. amend I.

51. The U.S. Constitution was completed in 1788 and ratified by all 13 states by 1790. The first 10 amendments were completed in 1789 and ratified by 1791. Therefore, it is reasonable to conclude that the Framers drafted and viewed them in light of one another. See also 1 M. NIMMER, *supra* note 5, § 1.10[A] n.7.

52. See Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971).

53. See generally Sobel, *supra* note 52; Goldstein, *Copyright and The First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

54. See generally 1 M. NIMMER, *supra* note 5, § 1.10[B][2].

55. See *id.*

56. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 217-18, *reh'g denied*, 347 U.S.

cussion of the ideas on any subject since no one can claim an exclusive right to the idea. However, copyright does not allow appropriation of the exact or similar expression used to capture the idea by a previous author. Therefore, the copyrightability only of one's expression, and not the ideas embodied therein, "strike a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."<sup>57</sup> In certain situations, the first amendment may expressly limit copyright,<sup>58</sup> and the privilege of the first amendment may be invoked in preference to a fair use analysis.<sup>59</sup> Generally, courts are reluctant to sustain a first amendment defense in copyright cases.<sup>60</sup>

Another limitation embodied in copyright excludes protection to the presentation of facts or information.<sup>61</sup> Copyright protects original works of authorship. Since no one can claim originality to facts, copyright protection of them cannot be invoked. This limitation also preserves first amendment policies since the use of facts and information cannot be monopolized. There-

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949 (1954); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

57. *Harper & Row, Publ. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

58. 1 M. NIMMER, *supra* note 5, § 1.10[C](2). Professor Nimmer suggests that certain situations exist where the idea and the expression are uniquely tied together. The pictures of the My Lai Massacre from the Vietnam War support this theory. Also suggested in support are the Zapruder films of the assassination of President Kennedy. *See Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (case involving a copying of the Zapruder films where the court did not expressly apply the first amendment, but did consider "the public interest in having the fullest information available on the murder of President Kennedy"); *Rosemont Enters. v. Random House*, 366 F.2d 303, 309 (2d Cir. 1966) (in a case involving an unauthorized biography of Howard Hughes, the court stated that the fair use provision was applicable but used language reflective of first amendment values), *cert. denied*, 385 U.S. 1009 (1967); *see also Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (copyright protection does not extend to rules for a game because "the topic necessarily requires," if not only one form of expression, at best only a limited number . . . ." *Id.* at 678 (citations omitted)).

59. 1 M. NIMMER, *supra* note 5, § 1.10[D]. The scope and extent of fair use falls within the discretion of Congress. The limitations of the first amendment are imposed upon Congress itself.

60. *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108, 115 (N.D. Cal. 1972) (court refused to extend first amendment protection to this case and stated that to do so "would serve to obliterate copyright protection in any instance in which the alleged infringer could claim the intent to convey an idea"), *aff'd in part and rev'd in part*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *see also Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1171 (9th Cir. 1977) ("[T]he defendants in this case had many ways to express the idea of a fantasyland with characters, but chose to copy the expression of plaintiffs'. The first amendment will not protect such imitation.').

61. 17 U.S.C. § 102(a) (1982). *See generally* 1 M. NIMMER, *supra* note 5, § 2.11[A] (general rule of nonprotection of factual works).

fore, subsequent authors have free access to them for their particular use. This limitation extends to historical works,<sup>62</sup> some biographical works,<sup>63</sup> and to the news element.<sup>64</sup>

*The Nation* contended that the important first amendment values presented in the case should broaden the scope of fair use.<sup>65</sup> The majority in *Harper & Row* rejected this argument and re-affirmed the traditional view that first amendment values are protected within the Act itself.<sup>66</sup> The majority contended that to accept *The Nation's* arguments concerning the public import in knowing what the President said concerning one of the most important events in recent history would destroy the President's right to receive the financial return on his book.<sup>67</sup> The analysis continued, asserting that the right of first publication and the economic value of that right outweighed any possible claim of free speech.<sup>68</sup> Indeed, the majority stated that "the promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book."<sup>69</sup>

The Court disregarded *The Nation's* first amendment arguments, not using them as a factor in the fair use analysis. They essentially claimed that, even if *The Nation's* article were a "news story," that would not overcome the fact that it was published before the initial release of the book.<sup>70</sup> The

62. See *Hoehling v. Universal City Studios*, 618 F.2d 972, 974 (2d Cir. 1980) (Concerning two books about the Hindenberg dirigible disaster, the court stated: "[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis . . . [T]he cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past.").

63. See, e.g., *Rosemont Enters. v. Random House*, 366 F.2d 303, 306 (2d Cir. 1966) (Concerning a biography of Howard Hughes, the court stated: "[W]hile the mode of expression employed . . . is entitled to copyright protection, [the author] could not acquire by copyright a monopoly in the narration of historical events.").

64. See *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) ("[T]he news element - the information respecting current events contained in the literary production - is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.").

65. *Harper & Row*, 471 U.S. at 555-60.

66. *Id.* at 560.

67. *Id.* at 556.

68. *Id.* at 557.

69. *Id.* (citing *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)). In *Wainwright*, the defendant abstracted plaintiff's original work concerning financial reports of major corporations and printed them as a "news article" in his (defendant's) weekly newspaper which was concerned with financial news. *Wainwright*, 558 F.2d at 93-94. The court held that the abstract was not a news event in that it appropriated almost verbatim the most creative and original aspects of the *Wainwright* reports. *Id.* at 96. Also significant was the fact that defendants attempted to "take away" the market for the original reports. This is also a fairly "commercial" as opposed to "non-profit educational" purpose.

70. *Harper & Row*, 471 U.S. at 556.

majority refused to separate the right of first publication and the first amendment values present in the case. If the Court had done so, it could have balanced these factors along with the other statutory factors.<sup>71</sup> Instead, the Court rejected the first amendment claims by analyzing their effect on the right of first publication. This enabled the Court to further emphasize its apparent belief that the first publication right is more than just a factor to be considered. The majority's approach to the right of first publication factor suggested that it may be of paramount importance in future copyright cases involving first amendment claims.

Turning next to a discussion of the doctrine of fair use, the majority maintained its economic approach to copyright which centered on the right of first publication. The doctrine of fair use originated as an equitable doctrine<sup>72</sup> which excused the use of a work which would otherwise be deemed infringing.<sup>73</sup> The analysis centers on the four statutory factors, but those are not exclusive.<sup>74</sup>

The first statutory factor to consider is the "Purpose and Character of the Use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>75</sup> The majority's discussion opened by agreeing with the court of appeals that *The Nation's* use was "newsreporting."<sup>76</sup> They agreed that if the article were news, it is then a productive use and a factor to consider in the analysis.<sup>77</sup> The Court limited the effect of

71. See 17 U.S.C. § 107 (1982). The statute reads "the factors to be considered shall include," which suggests that the analysis is not limited to the four enumerated factors, but other factors relevant to a particular fact situation should also be considered.

72. The first judicial recognition of fair use was in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901) (quoted in *Harper & Row*, 471 U.S. at 550). The *Folsom* Court stated:

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

*Folsom*, 9 F. Cas. at 344-45. The fair use doctrine was codified for the first time in the 1976 Copyright Revision Act. 17 U.S.C. §§ 101-110 (1982). This codification was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976).

73. 17 U.S.C. § 107 (1983).

74. See *id.* § 101 (defines "including" to be illustrative and not exclusive); see also *supra* note 71.

75. 17 U.S.C. § 107(1) (1983) (Fair use purposes listed in the statute's preamble include "criticism, comment, news reporting, teaching . . . , scholarship or research.>").

76. *Harper & Row*, 471 U.S. at 561.

77. *Id.*

this factor by stating: “[T]he Nation went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a ‘news event’ out of its unauthorized first publication of a noted figure’s copyrighted expression.”<sup>78</sup> The effect of the majority’s statement was to join the “purpose of the use” factor with the “right of first publication” factor. This coupling enabled the majority to lessen the impact of *The Nation’s* clear newsreporting purpose and to again include an economic analysis of the right of first publication.

Also under the “purpose and character of the use” factor, the commercial or nonprofit nature of the work must be considered.<sup>79</sup> The majority quoted language from *Sony Corporation v. Universal City Studios*,<sup>80</sup> which stated that every commercial use of a copyrighted work is presumptively unfair.<sup>81</sup> The majority stated that a use for profit cuts against a finding of fair use.<sup>82</sup> As pointed out by the dissenting opinion,<sup>83</sup> the majority’s reasoning is analytically weak on this point.<sup>84</sup> In an attempt to protect the economic value of copyright, the majority read the statute inconsistently with the obvious intent of Congress. Congress was surely aware that most newsreporting is done for profit. It is inconsistent to include newsreporting as an example of a fair use, knowing it is done for profit, yet have a court presume its unfairness if in fact done for profit.<sup>85</sup>

The second factor of fair use is the “Nature of the copyrighted work.”<sup>86</sup> The majority characterized Ford’s memoirs as an unpublished historical narrative.<sup>87</sup> After acknowledging that a greater public interest lies in disseminating factual works rather than works of fiction, the Court concluded that *The Nation’s* article did more than convey facts.<sup>88</sup> *The Nation’s* extensive use of the “most expressive elements of the work”<sup>89</sup> was deemed to exceed the public interest in knowing facts. The unpublished nature of the work

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78. *Id.*

79. 17 U.S.C. § 107(1) (1983).

80. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

81. *Id.* at 451.

82. *Harper & Row*, 471 U.S. at 562.

83. *Id.* at 580.

84. This may be due to the distinguishing facts of *Sony* when compared to *Harper & Row*. In *Sony*, the use in question was recording copyrighted television programs, using videotape recorders manufactured by Sony, for personal use. *Sony*, 464 U.S. at 420. Congress had expressed no judgment on the use. *Id.* at 431. The use in *Sony* also appropriated the entire work. Since Congress expressly stated newsreporting as an example of fair use, the language in *Sony* on this issue is not persuasive. *Harper & Row*, 471 U.S. at 592 n.16.

85. 471 U.S. at 592 n.16.

86. 17 U.S.C. § 107(2) (1983).

87. *Harper & Row*, 471 U.S. at 563.

88. *Id.* at 564.

89. *Id.*

was again focused on.<sup>90</sup> This reasoning, as the dissent notes,<sup>91</sup> basically protects the full economic impact of the author's work. Even when the nature of the author's work is primarily factual, the majority reasoned that use made of an unpublished work will still be a factor weighing against fair use.

The Court's analysis confused what should be considered under the "nature of the copyrighted work" factor. The analysis should include whether the work is fact or fiction and whether or not the work has already been published. The unpublished nature of a work should not be a categorical presumption against fair use as the majority implies. Rather, it should be weighed as a factor to consider under the "nature of the copyrighted work" heading. The effect of whether the work has already been published is a consideration more relevant to the "effect on the market" factor.<sup>92</sup>

The third factor to be considered under the fair use test concerns the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>93</sup> This analysis includes a quantitative<sup>94</sup> and qualitative<sup>95</sup> examination of the alleged infringing work in comparison to the original work. The majority noted that the quotes used by *The Nation* were "insubstantial" in relation to Ford's final product.<sup>96</sup> However, qualitatively the article excerpted the most powerful and important chapters and used them as the primary focus of the infringing work.<sup>97</sup> This substantial appropriation weighed against finding fair use. The dissent argued that the majority confused its analysis by not distinguishing between expression and information and ideas.<sup>98</sup> Even though *The Nation's* article used the most powerful parts of the original work, it is not persuasive in a substantiality argument if those parts were uncopyrightable subject matter. The dissent also argued that the majority based its analysis upon the use's inappropriateness in relation to its prepublication timing.<sup>99</sup> Although the majority opinion did not actually state this, it can be implied from its analysis. It declared that: "substantial quo-

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90. *Id.*

91. *Id.* at 595.

92. *See infra* notes 101-06 and accompanying text.

93. 17 U.S.C. § 107(3) (1983).

94. *Consumers Union of United States v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983) (verbatim copying of 29 out of 2100 words held to be a fair use), *cert. denied*, 469 U.S. 823 (1984); *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (approximately 1% usage was held to be quantitatively substantial), *aff'd* 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). *See generally* 3 M. NIMMER, *supra* note 5, § 13.05[A][3].

95. *Roy Export Co.*, 503 F. Supp. at 1145 (use of the best scenes from Charlie Chaplin's movies was held to be qualitatively substantially great even though the quantitative use was only 1% of the movie).

96. *Harper & Row*, 471 U.S. at 565.

97. *Id.* at 566.

98. *Id.* at 600.

99. *Id.* at 601.

tations might qualify as a fair use in . . . a news account of a speech that has [already] been delivered to the public.”<sup>100</sup> If the majority believed that substantial quotation would be appropriate post-publication, its primary objection in this case must have been that the substantial quotation was done prior to publication. As a result, the majority incorporated an economic analysis into the “amount and substantiality of the portion used” factor. The majority went beyond looking at the amount and substantiality of the use and added the effect of the use on the market. That analysis should be limited to the factor Congress specifically intended for such analysis: the effect on the market.

The final and most important enumerated factor in the fair use analysis is the effect on the market.<sup>101</sup> Copyright is “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”<sup>102</sup> If an unauthorized use eroded the market value of the original, the purpose of the copyright laws would be frustrated. To effectuate the purpose of copyright, in terms of fair use, the effect on the market must be closely scrutinized.

The majority in *Harper & Row* easily resolved the effect on the market factor. The Court saw *Time*'s cancellation of its contract with Harper & Row to be a clear showing of the effect on the market.<sup>103</sup> The majority also recognized that the effect need only be upon the potential market, not the actual market, for either the copyrighted or derivative work.<sup>104</sup> The majority properly placed great weight on the marketability of pre-publication serialization rights in its analysis.

The dissent believed that the majority again confused the use of information versus that of expression. The dissent found the question to be whether the 300 words quoted verbatim in *The Nation*'s article caused any harm to the copyrighted work and not whether the entire article caused any economic harm.<sup>105</sup> Agreeing with the court of appeals' finding, the dissent could not find evidence to support a finding that the use of the copyrighted words caused *Time* to cancel its contract.<sup>106</sup>

Under the “effect on the market” factor, the majority's reasoning is both sound and persuasive. The holders of a copyright only need to show a

100. *Id.* at 564. This is analogous to a book released to the public.

101. 17 U.S.C. § 107(4) (1983); see also 1 M. NIMMER, *supra* note 5, § 1.10[D].

102. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1983).

103. *Harper & Row*, 471 U.S. at 567.

104. *Id.* at 568.

105. *Id.* at 602. The entire article included facts and information. These aspects should not have been considered in the analysis because facts and information are not copyrightable. Including them in the effect on the market analysis gives protection to unprotectable matter.

106. *Id.* at 602-03.

potential for economic loss. *Time's* cancellation of its contract with Harper & Row represented such a loss. If the infringing article combined both facts and information with the original author's expression, the copyright holder should not be required to affirmatively prove that only the copying of the original author's expression caused the harm. This would be too great a burden on the copyright holder and difficult to prove. As long as a portion of the infringing work was based on verbatim quotes, it is obvious that some of the harm is attributable to them. The court should not put the copyright holder in the position of deciding whether only the verbatim quotes would cause harm; rather, the alleged infringer should be forced to prove that he did not cause any harm.

If fair use is invoked as a defense, any analysis of potential economic harm to the original work by the alleged infringing work should be limited to the effect on the market factor. To do otherwise would be contrary to congressional intent. The statute set up four enumerated factors to consider in addition to any other relevant factors presented.<sup>107</sup> Each factor should be considered within its own scope and definition, avoiding dilution by incorporating analyses which are more relevant to other factors. Fair use is an equitable defense and Congress intended for all factors to be considered in full. Although the effect on the market may be the most important, the majority erred by including this effect in all the other factors.

The significance of *Harper & Row* is that it placed the economic value of copyright, especially the right of first publication, above any first amendment values.<sup>108</sup> The Court did not expressly foreclose future use of the first amendment as a defense in copyright, but certainly showed the lengths it will go in order to avoid such a defense.

Also of significance is what the majority failed to do. In refusing to discuss the copyrightability of a factual narrative, the majority missed an opportunity to settle a judicial difference of opinion on how to analyze that issue.<sup>109</sup> The dissent found it necessary, as an initial matter, to resolve this issue and set out a helpful framework of analysis.<sup>110</sup>

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107. The right of first publication and first amendment values are examples of other relevant factors.

108. This is reflective of a constitutional principle applied in the federal courts that requires exhausting all alternative methods of resolving a dispute before turning to a constitutional answer. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.14(d), at 100-01 (1983).

109. The dispute regards the scope of copyright protection to be afforded an author who combines facts and information with expression. One view is represented in *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). In *Wainwright*, the protection included the author's analysis, structure, choice of words, and marshalling of facts with emphasis on particular aspects of the event.

The other view, stated in *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d

*Harper & Row* will also have an enormous impact on the press and the publishing industry. In the future, it will be difficult to claim newsreporting as the purpose of an article which "scoops" a soon-to-be published book by a public figure. This "standard journalistic practice" of "scooping" the news in an upcoming book<sup>111</sup> will be carefully scrutinized by editors before approving publication. To avoid *Harper & Row* implications, the unpublished book presumably must include a substantial first amendment concern vital to the public interest. *Harper & Row*'s holding also applies to speeches and press releases.<sup>112</sup> Although the harm resulting from work of this type is difficult to conceive, the principle of *Harper & Row* is applicable. A question may arise when an article claimed to be newsreporting is published contemporaneously with the first publication of the work and thereby competes with the profit potential of the book's first publication. Although competing with the market of the original, this type of use should be deemed a fair use if there is a bona fide purpose for the newsreporting. As long as the newsreport is not a verbatim reproduction or close paraphrase of the original, it is difficult to imagine any court saying the revelations of a public figure in a book are not newsworthy. If they did, they would be crossing over the permissible line of freedom of speech and would, in effect, be judicially

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Cir.), *cert. denied*, 449 U.S. 841 (1980), would limit protection only to the actual expression used and to situations where the second work was virtually identical in usage of words and structure of text. The majority characterized these two cases as the leading examples of the two sides of the dispute. *Harper & Row*, 471 U.S. at 468. These cases may be distinguishable on their facts since in *Wainwright* there was clear paraphrasing of expression from the prior work, whereas in *Hoehling* there was use only of the same hypothesis and marshalling of similar facts with the prior work. See generally 1 M. NIMMER, *supra* note 5, § 2.11[D] (Nimmer notes the conflicting lines of cases and suggests that the *Harper & Row* dissenting opinion proposes a test which may resolve the conflict when it inquires into "how closely has the second author tracked the first author's particular language and structure of presentation; and how much of the first author's language and structure has the second author appropriated." *Harper & Row*, 471 U.S. at 583 (Brennan, J., dissenting) (emphasis in original)).

110. *Harper & Row*, 471 U.S. at 579-84 (Brennan, J., dissenting). The dissent adopted the view that infringement must be based on too close and substantial a tracking of expression of the information presented. They also required analysis of the language used and the structure of presentation of the alleged infringing work in comparison to the original work. *Id.*

111. *Id.* at 591 n.14 (Brennan, J., dissenting) (citing 5 different occasions from 1976 through 1984 where the *New York Times* "scooped" a forthcoming manuscript of a public figure, including Cardinal Spellman, John Ehrlichman, President Nixon, and John Dean).

112. See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963). Press release of text of soon-to-be-given speech, given only to the press, was held a limited publication so as not to lose access to copyright protection. *Id.* at 107. This particular case involved common law copyright and the 1909 Copyright Act. The press release in *King* was authorized; presumably an unauthorized press release would be analogous to *Harper & Row*.

determining what is news.<sup>113</sup> The holding in *Harper & Row* makes the first serialization rights even more valuable.<sup>114</sup> It enables publishers to relax any safety measures they use which prevents the unauthorized release of an unpublished manuscript. It could also enable the publisher to give the author more time in which to write the book since the publisher is insulated from any loss caused by an unauthorized pre-publication use. *Harper & Row* may not inhibit pre-publication scholarly reviews or criticisms. But, if this distinction is made, the fine line between reviews and newsreporting (when both are listed in the statute) would be difficult to discern.

It is rare that any work makes news except that by a public figure. Often, the public figure may want to tell his side of the story of important events during his life. Those types of works are invariably going to include facts and information as well as original expression. Public figures deserve copyright protection like anyone else, but in the broadest sense every event of their life and much of what they say is newsworthy. The warning by the dissent that the first author of a historical book will be able to monopolize the depiction of an event, through copyright,<sup>115</sup> is not likely to occur. This is because no author is precluded from writing about an historical event or a public figure's life, but neither can they appropriate what the public figure/author or historical writer says before he has the right to secure all the benefits of first publication.

The proper analysis of a case involving the fair use doctrine should include a complete discussion of any factor relevant to fair use. The discussion of each separate factor should be limited to those issues within the definition and scope of that factor. The analysis should be straightforward and balanced so as to reach an equitable result. If the Court in *Harper &*

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113. See *Harper & Row, Publ. v. Nation Enters.*, 723 F.2d 195, 207, 215 (1983), *rev'd*, 471 U.S. 539 (1985).

114. See 17 U.S.C. §§ 504-505 (1983). These two sections discuss the remedies available for an infringement. The copyright owner may recover from the infringer for the copyright owner's actual damages plus the profits of the infringer or, at the copyright owner's option, he may recover statutory damages which can run from \$250 to \$10,000 as the court deems justified. *Id.* § 504(b), (c). In the case of a wilful infringer, statutory damages can go up to \$50,000. *Id.* § 504(c)(2). Attorney's fees and costs are also recoverable by the copyright owner. *Id.* § 505. These remedies along with the finding of an infringement in *Harper & Row* make it less economically reasonable to "scoop" a news story, thus raising the value of the first serialization rights.

115. *Harper & Row*, 471 U.S. at 584 n.7 (Brennan, J., dissenting); see *Hoehling v. Universal City Studios, Inc.* 618 F.2d 972 (2d Cir.) (a book concerning the Hindenburg disaster with hypothesis and use of facts similar to those of a prior book held not to be an infringement because no copyright available to historical facts), *cert. denied*, 449 U.S. 841 (1980); see also 17 U.S.C. § 102(b) (1983) (although historical facts are not specifically mentioned in section 102(b), they are thought to be covered by the general refusal to grant copyright to any idea, principle or discovery).

*Row* would have used this method, the outcome may have been the same, but the analysis would have been different.

The right of first publication issue would have been a factor weighing against a claim of fair use since *The Nation's* article did usurp that exclusive right. The first amendment values would have supported a claim of fair use. Freedom of speech comes into play in reporting about the newsworthy historical revelations of a public figure. The right to report such news should not be limited by the courts. As to the statutory factors, the "purpose and character of the use" and the "nature of the copyrighted work" both lean toward a finding of fair use in this case. The purpose was newsreporting and the nature of the work was a factual narrative, both of which deserve broad protection under fair use. Factors against the claim of fair use include the "amount and substantiality of the portion used" and the "effect upon the market." *The Nation's* article took the most important qualitative aspects of the book and directly affected the market concerning the first serialization rights. At this point, the court must call upon its equitable powers and weigh each factor in order to decide the case. Even under this type of straightforward approach, the Court's result is justifiable. What is not justifiable is the Court's incorporation of unnecessary elements into the analysis of each factor to add support to its decision.

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