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## FAIR USE OF UNPUBLISHED WORKS: AN INTERIM REPORT AND A MODEST PROPOSAL

In 1939, an American court called the fair use doctrine “the most troublesome in the whole law of copyright.”<sup>1</sup> One still hears such complaints,<sup>2</sup> even though Congress codified the doctrine when it revised the federal copyright statute in 1976.<sup>3</sup> In codifying the fair use doctrine, Congress did not intend to change it. Anticipating “a period of rapid technological change,” and convinced that courts could best handle its impact on fair use, Congress left the fair use doctrine in the judiciary’s

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1. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). The courts first developed the doctrine to justify uses of printed material that copyright statutes might otherwise have forbidden. English courts developed the fair use doctrine in the eighteenth and early nineteenth centuries, in cases decided under Great Britain’s copyright statute. See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6-17 (1985). See also *infra* note 33 and accompanying text (citing the British statute). American courts followed suit in cases decided under federal copyright statutes. See *infra* notes 20-23 and accompanying text. Sitting as circuit judge in the District of Massachusetts, Justice Story introduced the fair use doctrine into American law between 1839 and 1841, first as dictum in *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728), then as a rule of decision in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). See PATRY, *supra*, at 18-19. In *Folsom*, Justice Story enumerated the factors that courts should consider in fair use determinations:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

*Folsom*, 9 F. Cas. at 348, quoted in PATRY, *supra*, at 20. See also PATRY, *supra*, at 24-25 (analyzing Justice Story’s application of his factors).

2. The titles of two recent law review articles so attest. See Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

3. 17 U.S.C.A. § 107 (West 1977 & Supp. 1991). The relevant provision, § 107 of the copyright statute, provides that:

Notwithstanding the provisions of sections 106 and 106A, 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.

*Id.*

hands.<sup>4</sup> There the doctrine remains as troublesome as ever.<sup>5</sup>

As Congress expected, technological change has posed new fair use issues for the courts.<sup>6</sup> However, the most controversial fair use question to arise since 1976 concerns traditional activities: may journalists, biographers, and historians quote or paraphrase unpublished sources? Today, courts increasingly are likely to say no.

In *Harper & Row, Inc. v. Nation Enterprises*,<sup>7</sup> the Supreme Court held that the scope of fair use is narrower for unpublished works than for published works.<sup>8</sup> Building on *Harper & Row*, the Second Circuit, in *Salinger v. Random House, Inc.*,<sup>9</sup> held that unpublished works "normally enjoy complete protection against copying."<sup>10</sup> Finally, in *New Era Publications International v. Henry Holt & Co.*,<sup>11</sup> another Second Circuit panel stated that the fair use doctrine bars virtually all use of unpublished sources.<sup>12</sup>

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4. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680. The House Report explained that:

Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

*Id.*

5. One author finds the doctrine incoherent because its theoretical bases conflict. See Fisher, *supra* note 2, at 1693. The author identifies four competing rationales for copyright protection and the fair use privilege: 1) to serve the public welfare by generating and disseminating original works; 2) to ensure contributors the rewards of their intellectual labor; 3) to protect the "personal rights" of artists and writers over their work; and 4) to adhere to and reinforce popular conceptions of decent behavior. *Id.* at 1686-91. These objectives may produce divergent results when applied as rules of decision. *Id.* at 1691. Fisher, therefore, concludes that "the normative foundation of the [fair use] doctrine is fragmented," *id.* at 1693, and proposes both utilitarian and utopian analyses based on economic and cultural productivity. *Id.* at 1695-98.

For efforts to clarify the theory of fair use on market and property grounds, see Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter *Fair Use as Market Failure*]. On the theory of copyright and its application to fair use analysis, see *infra* Part III.

6. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the first fair use case to reach the Supreme Court after passage of the 1976 act, concerned home videotaping of television broadcasts.

7. 471 U.S. 539 (1985).

8. *Id.* at 564.

9. 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

10. *Id.* at 97.

11. 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

12. *Id.* at 583. "Where use is made of materials of an unpublished nature," no court has ever found "in favor of an infringer, and we do not do so here." *Id.*

Although *New Era*'s fair use analysis is only dictum,<sup>13</sup> it alarms its critics because it suggests that "all copying from unpublished work is per se infringement."<sup>14</sup> These critics include several Second Circuit judges,<sup>15</sup> and also members of Congress who seek to amend the federal copyright law to ensure that the fair use privilege applies to unpublished as well as

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13. The Second Circuit's chief judge pointed this out in a sharply critical concurrence. *Id.* at 585 (Oakes, C.J., concurring). Even *New Era*'s author admits that its fair use analysis is "non-dispositive." *New Era Publications Int'l v. Henry Holt & Co.*, 884 F.2d 659, 660 (2d Cir. 1989) (Miner, J., concurring in denial of petition for rehearing), *cert. denied*, 110 S. Ct. 1168 (1990). *New Era*'s fair use discussion is dictum because the court resolved the case on other grounds. 873 F.2d at 577, 584-85 (denying injunction of allegedly infringing work on ground of plaintiff's laches).

14. 873 F.2d at 593 (Oakes, C.J., concurring) (criticizing the court's fair use analysis). Members of literary circles have complained about *New Era*'s "chilling effect" on research, writing, and publishing. R.Z. Sheppard, *Foul Weather for Fair Use: A Wave of Copyright Suits Puts Scholars on the Defensive*, TIME, Apr. 30, 1990, at 86. See also Leon Friedman, *Copyright Wrongs: Fair Use Cases*, THE NATION, Mar. 19, 1990, at 368. Such complaints are especially urgent because the publishing industry is concentrated in New York City, which is within the Second Circuit's jurisdiction. A recent newspaper report is indicative of the *Salinger* and *New Era* cases' effect on publishing. According to the report, editors and publishing house lawyers now widely assume that, under the *Salinger-New Era* standard, quoting more than 50 words from an unpublished source amounts to copyright infringement. Roger Cohen, *Software Issue Kills Liberal Amendment to Copyright Laws*, N.Y. TIMES, Oct. 13, 1990, § 1, at 1 (quoting Leon Friedman).

Some observers fear that *Salinger-New Era* will frustrate the writing of contemporary history. See, e.g., David A. Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80. The article quotes historian Arthur Schlesinger, Jr. as noting: "If the law were this way when I wrote the three volumes of *The Age of Roosevelt*, I might still be two volumes short." *Id.*

The legal difficulties that the *Salinger-New Era* doctrine creates for biographers are already apparent. Biographers of Saul Bellow, Richard Wright, Malcolm X, William Faulkner, and James Agee all face legal challenges to their work. Sheppard, *supra*; Bob Sipchen, *Who is the Owner of the Written Word? Recent Court Rulings Make It Harder for Biographers to Quote From a Subject's Writings. The Problem: Copyright Infringement*, L.A. TIMES, Mar. 12, 1990, View, at E1. Saul Bellow, for example, has delayed the appearance of a biography whose author, Ruth Miller, quotes extensively from his letters to her. Because Bellow threatened legal action, the publisher recalled reviewers' galleys for rewriting. See John Blades, *Stop the Presses: Bellow's Clout Delays Biography*, CHI. TRIB., Apr. 18, 1990, Tempo, at C1; David Streitfeld, *Not on His Life*, WASH. POST, Apr. 15, 1990, Book World, at X15.

Legal questions and not just the notoriety of the writers involved, novelist J.D. Salinger and L. Ron Hubbard, explain much of the nationwide press coverage of *Salinger* and *New Era*. For commentary on *Salinger*, see, e.g., David Margolick, *Whose Words Are They Anyway?*, N.Y. TIMES, Nov. 1, 1987, § 7 (Book Review), at 44; Ted Solotaroff, *The Literary-Industrial Complex: How the Corporate Mentality Has Undermined the Profession of Publishing*, THE NEW REPUBLIC, June 8, 1987, at 28; David Streitfeld, *Appeal Rejected in Salinger Case*, THE WASH. POST, May 5, 1987, at D4. For a discussion of *New Era*, see, e.g., M.R. Montgomery, *High Court Stays Out of Copyright Fight*, BOSTON GLOBE, Feb. 21, 1990, at 41; *Chaos: Fair Use Provisions of the Copyright Law and Unauthorized Biographies*, THE NATION, June 5, 1989, at 759; Robert D. McFadden, *Court Challenges Scholars' Right to Quote from Private Documents*, N.Y. TIMES, Apr. 28, 1989, at A1.

15. See *infra* notes 125-31 and accompanying text.

to published works.<sup>16</sup>

According to its critics, the judiciary's emerging per se rule against the fair use of unpublished sources threatens contemporary history, biography, and journalism.<sup>17</sup> If Congress fails to ensure the fair use of unpublished works, can and should courts do so? Part I of this Note argues that existing law does *not* preclude fair use of unpublished works. Part II establishes that courts are more likely to ensure that the fair use privilege applies to unpublished text than is Congress. Part III surveys the debates about copyright policy to which *Harper & Row*, *Salinger*, and *New Era* gave rise, identifies three policies of copyright law, and, in light of those policies, suggests how courts may revise existing doctrine to allow a finding that an historian, biographer, or journalist has made fair use of unpublished text.<sup>18</sup>

## I. FAIR USE OF UNPUBLISHED SOURCES: THE STATE OF THE LAW

### A. *The Significance of Congress' Revision of Federal Copyright Law in 1976*

Section 107 of the Copyright Statute is part of a sweeping revision of federal copyright law Congress undertook in 1976.<sup>19</sup> To assess that legislation's impact on the protection of unpublished works, one must begin with state common law copyright, which, in 1976, still afforded unpublished works virtually complete protection against copying.<sup>20</sup> Under state common law copyright, authors had an absolute right of first publi-

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16. See Robert L. Koenig, *Simon's Copyright Bill Would Allow "Fair Use"*, ST. LOUIS POST-DISPATCH, May 11, 1991, at C9. Senator Simon's bill revives earlier legislation that Senator Orrin Hatch of Utah killed in committee. See *infra* notes 140-53 and accompanying text.

17. For example, Senator Simon described his first proposal to amend § 107 of the federal copyright statute as "a bill important to scholarly research and the preservation of history" because it would restore the Act's "balance," upset by the Second Circuit, between "the interests of accurate scholarship or journalism" and "the right[s] of authors to control the publication of their own unpublished work." 136 CONG. REC. S3549 (daily ed. Mar. 29, 1990).

18. Focusing strictly on fair use questions, this Note does not address the First Amendment issue *Harper & Row* raises: whether the protection of political speech exempts public political figures' works from copyright protection. For detailed discussions of the First Amendment concerns in *Harper & Row*, see, e.g., Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPYRIGHT SOC'Y 1 (1987); W. Warren Hamel, *Harper & Row v. The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?*, 19 COLUM. J.L. & SOC. PROBS. 253 (1985); Greg A. Perry, Note, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*, 65 NEB. L. REV. 631 (1986).

19. Pub. L. No. 94-553, Title I, § 101, 90 Stat. 2541 (1976). See also PATRY, *supra* note 1, at 213-319 (for legislative history from 1958-1976).

20. PATRY, *supra* note 1, at 123.

cation. The law protected that right by forbidding the copying of most unpublished works.<sup>21</sup> Only unpublished works that already had been publicly disseminated (as a manuscript might be) or performed (as a theatrical work might be) could be quoted.<sup>22</sup> Thus, common law copyright undeniably allowed some copying. But that narrow privilege must not be confused with the fair use privilege, which courts developed in cases concerning the infringement of statutory copyright, and which (like statutory copyright before 1976) only applied to printed works.<sup>23</sup>

According to one authority, Congress did not intend its revision of statutory copyright to disturb common law copyright's rigorous protection of unpublished works.<sup>24</sup> Supporting that argument is the congressional testimony of experts who, from the beginning of congressional efforts to revise federal copyright law, advised Congress that common law precluded the fair use of unpublished works.<sup>25</sup> In addition, when Congress finally enacted the 1976 copyright legislation, the accompanying House Report declared that Congress intended section 107, the section that codified the fair use doctrine, to "restate the present judicial

21. *Id.*

22. *See id.* Under state common law, courts "uniformly held that fair use could not be made of unpublished and undisseminated works." *Id.* *See also id.* at 439-41 (on state common law generally).

23. *See supra* note 1 and accompanying text (discussing the early history of the fair use doctrine).

24. PATRY, *supra* note 1, at 441 ("A review of the legislative history of the 1976 Act reveals that Congress intended to continue the common law prohibition against fair use of unpublished but not voluntarily disseminated works." *See also id.* at 444 n.442. However, Patry recently has rejected this opinion. Accordingly, he:

confesses that he has already undertaken a reexamination of a number of his positions and found them wanting. For example, he has confesses [sic] to mechanically reciting the adage "there is no fair use of unpublished works," thereby failing to adequately take into account the different types of unpublished works and uses thereof. . . .

*Editor's Note*, 36 J. COPYRIGHT SOC'Y [page preceding 167] n.3 (1989).

25. PATRY, *supra* note 1, at 441 n.431. For example, Abraham Kaminstein, then Register of Copyrights, reported to Congress in 1961 that "[u]npublished works under common law protection are also immune from the limitations on the scope of statutory protection that have been imposed in the public interest. These limitations . . . include the fair use doctrine." REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 40, *quoted in* PATRY, *supra* note 1, at 441. At hearings on Kaminstein's report, commentators modified his formula so that it conformed entirely to the state common law scheme. Such a scheme allowed copying from unpublished works that already had been disseminated or performed. The example given was the publicly performed play from which theater critics might quote without risk of a copyright infringement suit. COPYRIGHT LAW REVISION PART 2. DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88th Cong., 1st Sess. 27, *quoted in* PATRY, *supra* note 1, at 442.

doctrine of fair use, not . . . change, narrow, or enlarge it in any way.”<sup>26</sup> Because the fair use privilege applied only to published works in 1976,<sup>27</sup> one may reasonably conclude that Congress did not wish to expose unpublished works to fair use.<sup>28</sup>

Yet Congress did just that in 1976. Despite the House Report’s language, Congress knew it was exposing unpublished works to fair use.<sup>29</sup> In reports issued in 1966 and 1967, the House Judiciary Committee declared: “The applicability of the fair use doctrine to unpublished works is *narrowly limited*. . . .”<sup>30</sup> A limitation on the fair use of unpublished works would be absurd if the privilege did not exist. The “narrowly limited applicability” language reappears unchanged in the Senate Report for 1975,<sup>31</sup> and is incorporated by reference in the House Report for 1976,<sup>32</sup> which accompanied the copyright revision legislation when Congress finally enacted it. Thus, congressional reports suggest that Congress *did* extend the fair use privilege, though in narrowly limited form, to unpublished works.

The legislation itself supports such a conclusion. Earlier copyright statutes, beginning with the Statute of Anne enacted in 1710, applied only to published works.<sup>33</sup> Under powers that the Federal Constitution

26. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

27. *See supra* notes 1, 23, 26 and accompanying text.

28. *See PATRY, supra* note 1, at 441. *See also supra* note 26.

29. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 66 (1966); H.R. REP. NO. 83, 90th Cong., 1st Sess. 37 (1967), *quoted in PATRY, supra* note 1, at 443. According to both reports,

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

*Id.* (emphasis added). The House Reports’ language addresses educational photocopying alone. Educational photocopying was much on the minds of legislators engaged in revising the copyright law, and was the subject of conferences before they drafted the 1976 act and the reports accompanying it. *See PATRY, supra* note 1, at 296-304 (the authoritative history of the conferences). However, the same House Reports elsewhere expand the application of the language quoted above by explaining that “[t]he concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application on other areas.” H.R. REP. NO. 2237, *supra*, at 64; H.R. REP. NO. 83, *supra*, at 35. This language is repeated textually in H.R. REP. NO. 1476, *supra* note 26, at 5686.

30. *See supra* note 29.

31. S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975).

32. H.R. REP. NO. 1476, *supra* note 26, at 5680 (noting that the discussion of educational copying in the House Report of 1967, which the Senate Report of 1975 had adopted, “still has value as an analysis of various aspects of the problem”).

33. An Act for the Encouragement of Learning, 1710, 8 Anne ch. 19 (Eng.).

vests in it,<sup>34</sup> Congress has passed similar laws since 1790.<sup>35</sup> None of these laws extended statutory copyright protection to unpublished works. In 1976, however, Congress enlarged statutory copyright protection to include any "original works of authorship fixed in any tangible medium of expression."<sup>36</sup> Having thereby brought unpublished works under federal copyright law, Congress expressly provided that federal law should preempt equivalent "legal or equitable rights" for protectable works "whether published or unpublished."<sup>37</sup>

By expanding the scope of statutory copyright protection to unpublished works, however, Congress exposed them to fair use.<sup>38</sup> Congress granted the "owner of copyright" "exclusive rights" in protected works, but "[s]ubject to section[ ] 107," subject, that is, to the fair use privilege codified in section 107.<sup>39</sup>

In enacting section 107, Congress intended neither to change nor to immobilize fair use doctrine.<sup>40</sup> But section 107 did change fair use doctrine by enumerating four factors that courts "shall" consider when engaging in fair use analysis: 1) "the purpose and character of the use"; 2) "the nature of the copyrighted work"; 3) "the amount and substantiality of the portion used"; and 4) "the effect of the use upon the potential market for or value of the copyrighted work."<sup>41</sup> These four mandatory factors are "nonexclusive,"<sup>42</sup> so courts may add others to the list. Since

34. U.S. CONST. art. I, § 8, cl. 8 (granting Congress 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").

35. H.R. REP. NO. 1476, *supra* note 26, at 5660 (providing an overview of copyright legislation since the enactment of Article I, § 8).

36. 17 U.S.C.A. § 102(a) (West 1977 & Supp. 1991).

37. Section 301(a) provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . whether published or unpublished, are governed exclusively by this title." 17 U.S.C. § 301(a) (1988).

38. See MELVILLE B. NIMMER & DAVID NIMMER, *THE LAW OF COPYRIGHT* § 13.05[A], n.28.1 at 13-88.7 (1991) [hereinafter *NIMMER ON COPYRIGHT*].

39. 17 U.S.C.A. § 106 (West 1977 & Supp. 1991). The House Report accompanying the Act explains that the rights § 106 confers include "the rights of copying, recording, adaptation, and publishing." H.R. REP. NO. 1476, *supra* note 26, at 5674. By including the "right [ ] of . . . publishing" among the protected rights, Congress again indicated its intention to expand the coverage of statutory copyright protection to include unpublished works.

40. See *supra* note 4 and accompanying text.

41. 17 U.S.C.A. § 107(1)-(4) (West 1977 & Supp. 1991). In its introductory language, § 107 also suggests that copying for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

42. *Harper & Row, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) ("Section 107 requires a



section 107 lists these factors without explaining them, one judge has complained that the factors are “opaque” and “uninformative.”<sup>43</sup> Nonetheless, section 107’s four mandatory fair use factors have governed judicial fair use analysis since the provision’s enactment.<sup>44</sup>

More important, the Supreme Court in *Harper & Row* and the Second Circuit in *Salinger* applied section 107’s four factors in cases concerning unpublished works.<sup>45</sup> The courts rejected the fair use defenses advanced in those cases.<sup>46</sup> However, they did entertain the defenses, thus confirming that the policy of the copyright law of 1976 is to apply statutory copyright protection and the fair use privilege to unpublished as well as to published works.<sup>47</sup>

Thus, Congress “revolutionized the U.S. copyright system” when it revised federal copyright law in 1976 and enacted section 107.<sup>48</sup> But, if the 1976 legislation did indeed abolish an *ancien régime* in copyright,

case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered.”).

43. Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC’Y 167 (1989). Judge Leval observed:

Our statute and our judge-made law talk around the subject [of fair use]. They mention factors, but give no standard. And those factors are stated in an opaque and uninformative way. We are told for example to look at the purpose and character of the secondary use and at the nature of the copyrighted work. “What about them?,” you may ask. We are not told. We are told to look at the amount of the taking and the effect on the market. “How much is too much?” We are not told.

*Id.* The authors of a leading treatise on copyright law agree with Judge Leval:

[T]he four factors of Section 107 purport merely to aid analysis of whether a given use is “fair,” not to offer a comprehensive framework from which that answer may be mechanically determined. It is open to question, however, whether even that modest goal is achieved by the amorphous language of the statute.

3 NIMMER ON COPYRIGHT, *supra* note 38, § 13.05[A][5], at 13-88.13. See also *id.* at 13-88.17.

44. See, e.g., *infra* notes 63-67, 71-89 and accompanying text.

45. See *Harper & Row*, 471 U.S. at 560-69; *Salinger*, 811 F.2d at 96-99.

46. See *Harper & Row*, 471 U.S. at 569; *Salinger*, 811 F.2d at 99.

47. See *Harper & Row*, 471 U.S. at 560-69; *Salinger*, 811 F.2d at 96-99.

48. Barbara Ringer, statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice). According to Ringer, the former Register of Copyrights, Congress “revolutionized the U.S. copyright system” in enacting § 107 “by bringing all unpublished works under the statute and, with some exceptions, doing away with all common law rights in copyrightable subject matter.” *Id.* Accord John M. Kernochan, *Protection of Unpublished Works in the United States Before and After The Nation Case*, 33 J. COPYRIGHT SOC’Y 322, 326 (1986); Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459 (1988) (“With the advent of the 1976 Copyright Revision Act, the erosion of the historic protection provided by the common law copyright accelerated.”).

what circumstances now should lead a court to extend or deny the fair use privilege to a given use or user of unpublished works? Courts have barely begun to answer that question.

### B. *Judicial Doctrine Since 1976*

The fact-specific nature of fair use questions does not readily allow courts to make broad rules.<sup>49</sup> Only two cases currently furnish rules and holdings relevant to the fair use of unpublished works: the Supreme Court's decision in *Harper & Row, Inc. v. Nation Enterprises*<sup>50</sup> and the Second Circuit's decision in *Salinger v. Random House, Inc.*<sup>51</sup> These decisions confirm that, in 1976, Congress exposed unpublished works to the fair use privilege.<sup>52</sup> They also suggest some of the factors that might limit that privilege when the work copied is not yet published.<sup>53</sup>

#### I. *Harper & Row, Inc. v. Nation Enterprises*

In *Harper & Row*, the Supreme Court held that *The Nation* magazine infringed copyright when the magazine printed the most important passages from Gerald Ford's autobiography before that book's publication.<sup>54</sup> To reach that conclusion, the Court engaged in a two-part fair use analysis built on common law copyright and on section 107's four factors.

The Court's analysis began with common law copyright.<sup>55</sup> According

49. See H.R. REP. NO. 1476, *supra* note 26, at 5679 (fair use is "an equitable rule of reason" under which "each case raising the [fair use] question must be decided on its own facts").

50. 471 U.S. 539 (1985).

51. 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

52. See *infra* notes 59, 79-89 and accompanying text.

53. See *infra* notes 66-67 and accompanying text.

54. 471 U.S. at 569. The passages in question concerned Ford's pardon of Richard Nixon. The Court considered them to be the "heart" of Ford's book. *Id.* at 564-65.

55. The Court properly used common law principles. See *infra* notes 59-62 and accompanying text. However, the Court's decision to *begin* its fair use analysis with common law principles may be questioned. The Court claimed statutory authority for its common law argument: "The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common law doctrine." 471 U.S. at 549 (citation omitted). But here the Court may have confused common law copyright with fair use doctrine, which is a judicial doctrine qualifying statutory copyright protection of printed works. See *supra* notes 1, 23, 25 and accompanying text.

The Court also relied on legislative history, which stated that Congress, in enacting § 107, "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 471 U.S. at 549 (quoting H.R. REP. NO. 1476, *supra* note 26, at 5680). If Congress did not intend to enlarge the fair use privilege, the Court may have reasoned, then common law principles still governed copying from unpublished sources. But if it so reasoned, the Court ignored an

to the Court, common law gave authors an absolute right to property in their unpublished work,<sup>56</sup> but tempered that absolute rule by allowing fair use of works already disseminated or performed.<sup>57</sup>

The Court's analysis continued on statutory grounds. Shifted to those grounds, *Harper & Row* presented a very different question to the Court. *The Nation* argued that under the revised copyright law of 1976, the fair use privilege applies in like manner to published and unpublished texts.<sup>58</sup> The Supreme Court observed that, although Congress brought unpublished works within the protection of statutory law and thus exposed them to fair use, Congress did not drain the distinction between published and unpublished works of all legal significance for fair use analysis.<sup>59</sup>

Accordingly, the Court in *Harper & Row* labored to introduce that distinction into fair use doctrine, so that unpublished works might enjoy a level of protection recalling, though not replicating, the absolute protection common law afforded. According to the Court, "the unpublished nature of the [copied] work figure[s] prominently in fair use analysis."<sup>60</sup> Indeed, the Court found the work's unpublished nature to be an important factor that weakened a defense of fair use.<sup>61</sup> Recalling the language of common law copyright, the Court concluded that normally the author's interest in determining the manner of the initial appearance of his or her undissemintated work outweighs a claim of fair use.<sup>62</sup>

Having introduced common law copyright concerns into the fair use doctrine, the *Harper & Row* Court finally considered section 107's four fair use factors.<sup>63</sup> *The Nation*'s having quoted material from Ford's memoirs that he had not yet published informed more than one factor of the Court's fair use analysis. Convinced that market effect is the most important fair use consideration,<sup>64</sup> the Court sought to disallow uses which in purpose or effect might preempt an unpublished work's future

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important fact: Congress preempted common law copyright protection for unpublished works in 1976. See *supra* notes 37-38 and accompanying text.

56. 471 U.S. at 551 (quoting *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907)).

57. *Id.*

58. *Id.* at 552 (paraphrasing *The Nation*'s argument).

59. *Id.* at 553-54.

60. *Id.* at 553.

61. *Id.* at 554.

62. *Id.* at 555.

63. *Id.* at 560-69. See *supra* note 1.

64. 471 U.S. at 566.

market.<sup>65</sup> However, the Court also sought to secure for authors of unpublished works the confidentiality and creative control they might require and held that “[t]he fact that a work is unpublished is a critical element of its nature.”<sup>66</sup> The Court conceded that individuals may take “even substantial quotations” from published or disseminated works, but it insisted that “the scope of fair use is narrower with respect to unpublished works.”<sup>67</sup>

## 2. *Salinger v. Random House, Inc.*

J.D. Salinger gave the Second Circuit its first chance, after the Supreme Court’s *Harper & Row* decision, to decide a fair use case involving quotations from unpublished sources. In *Salinger v. Random House, Inc.*,<sup>68</sup> the reclusive author of *The Catcher in the Rye* sued to enjoin the publication of a biography that paraphrased and quoted extensively from his unpublished letters, letters that their recipients had deposited at university libraries where Salinger’s biographer consulted them.<sup>69</sup> The case

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65. With respect to purpose (the first fair use factor), the *Harper & Row* Court found that *The Nation* attempted to take advantage of the publicity surrounding its unauthorized first publication of a public figure’s work. Exploitation of an infringement, the Court held, could not excuse the infringement. *Id.* at 561. The Court followed its holding in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1983), and found that a commercial use of copyrighted material raises a presumption that the use is unfair because it is commercially harmful. 471 U.S. at 562.

Weighing market effect (the fourth fair use factor), the Court again found that an infringed work’s unpublished status could tilt the balance of equities against fair use. Applying a material impairment test under which “[f]air use . . . is limited to copying by others which does not materially impair the marketability of the work which is copied,” *id.* at 566-67 (quoting 1 NIMMER ON COPYRIGHT, *supra* note 38, § 1.10[D], at 1-87), the Court noted that “extensive prepublication quotations from an unreleased manuscript . . . poses substantial potential for damage to the marketability of first serialization rights.” *Id.* at 569. *But cf.* *Fisher, supra* note 2, at 1673-74 (rejecting the material impairment test as too broad, since any uncompensated use of a copyrighted work deprives the copyright owner of a use fee and thereby materially impairs the owner’s market). *See also infra* note 173 and accompanying text (on the likelihood of double-counting market effect in fair use analysis under § 107).

66. 471 U.S. at 564 (quoting 17 U.S.C. § 107(2) (1982)).

67. *Id.*

68. 811 F.2d 90, 95 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

69. *Id.* at 92-94. Before gaining access to those documents, Salinger’s biographer, Ian Hamilton, signed agreements with the libraries, limiting the uses he could make of the letters without permission from the libraries and the owners of the literary property rights. *Id.* at 93. With Princeton University, for example, he agreed “not to copy, reproduce, circulate or publish” the manuscripts without permission. *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 416 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). *See also id.* at 427 (for the agreements with libraries at Harvard University and the University of Texas).

Despite these restrictions, Hamilton quoted at length from the letters. Salinger, who had obtained galley proofs of the biography, instructed his counsel to object to the biography’s publication until

reached the Second Circuit on appeal from the Southern District of New York, which had found for the biographer on fair use grounds.<sup>70</sup> The Second Circuit rejected almost all of the lower court's fair use conclusions.

After underscoring the traditional doctrine's exclusion of unpublished works from fair use, the Second Circuit embarked on section 107's four-factor inquiry.<sup>71</sup> With respect to the "purpose or character of the use,"<sup>72</sup> the Second Circuit found that scholarly purposes might permit a biographer to quote from a subject's unpublished letters.<sup>73</sup> Because copyright law protects only expression, the Second Circuit held that biographers may quote to substantiate facts,<sup>74</sup> but should be enjoined if they make more than brief quotations of unpublished expressive content.<sup>75</sup> The court found that Salinger's biographer almost had exceeded that limit.<sup>76</sup> It concluded that while the purpose factor favored the biographer, it did not justify his receiving any exceptional consideration.<sup>77</sup>

While discussing the first statutory factor, the court assigned only passing significance to the unpublished status of Salinger's letters.<sup>78</sup> But in discussing the "nature of the copyrighted work,"<sup>79</sup> the court followed *Harper & Row* and held that an infringed work's unpublished status is "critical."<sup>80</sup> However, the court found "some ambiguity" in "the Supreme Court's observation that the *scope* of fair use is narrower with respect to unpublished works."<sup>81</sup> That observation, the *Salinger* court explained, could mean either that *less text* may be quoted, or that courts are *less likely* to approve any quotation at all.<sup>82</sup> Admitting that there

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Hamilton deleted all quotations from the letters. 811 F.2d at 93. In response, Hamilton revised the book. However, even after revision it still closely paraphrased Salinger's language and took some 200 words from the letters. *Id.* Upon reviewing proofs of the revised version, Salinger sued to enjoin publication. *Id.* at 94.

70. 650 F. Supp. at 426.

71. 811 F.2d at 95-99. *See supra* note 1.

72. 17 U.S.C.A. § 107(1) (West 1977 & Supp. 1991).

73. 811 F.2d at 96.

74. *Id.* ("The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material.").

75. 811 F.2d at 96.

76. *Id.* at 97.

77. *Id.*

78. *Id.* at 96.

79. 17 U.S.C.A. § 107(2) (West 1977 & Supp. 1991). *See supra* note 3.

80. 811 F.2d at 97 (quoting *Harper & Row*, 471 U.S. at 564).

81. *Id.* (quoting *Harper & Row*, 471 U.S. at 564).

82. *Id.*

was some support for the first reading,<sup>83</sup> the *Salinger* court nevertheless chose the second. “[U]npublished works,” the court held, “normally enjoy complete protection against copying.”<sup>84</sup> Having thus read *Harper & Row*, the *Salinger* court found that the second fair use factor weighed against Salinger’s biographer.<sup>85</sup>

The Second Circuit considered the significance of an infringed work’s unpublished status for a third and final time when weighing the fourth statutory fair use factor: the “effect of the [infringing] use upon the potential market for or value of the copyrighted work.”<sup>86</sup> Quoting *Harper & Row*, the court called this factor “the single most important element of fair use” because substantial quotation from an unpublished work could damage its marketability.<sup>87</sup> Finding that Salinger’s biographer had taken quotations of such magnitude from Salinger’s letters,<sup>88</sup> the court concluded that “some impairment of the market seems likely.”<sup>89</sup>

### 3. *Harper & Row and Salinger: Their Lessons and Their Limits*

The lessons of *Harper & Row* flow largely from its resolution of the tension between common law copyright and statutory copyright law as revised by Congress in 1976. Common law grants unpublished works

83. *Id.* According to the court, “[s]ome support . . . can be derived from the statement in *Harper & Row* that, though substantial quotations might be used in a review of a published work, the author’s right to control first publication weighs against such use prior to publication.” *Id.* (quoting *Harper & Row*, 471 U.S. at 564).

84. *Id.*

85. *Id.*

86. 17 U.S.C.A. § 107(4) (West 1977 & Supp. 1991). See *supra* note 3. The unpublished status of Salinger’s letters was irrelevant to the court’s analysis of the third statutory fair use factor, the “amount and substantiality of the portion used.” 811 F.2d at 97. According to the Second Circuit, even a “cliche” or “ordinary” word or phrase deserves protection when found in a “passage” that “as a whole displays a sufficient degree of creativity.” *Id.* (citing *Wainwright Securities, Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Nutt v. National Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929)). Applying its high standard to the quotations and paraphrases from Salinger’s letters, the Second Circuit concluded that they “exceed[ed] that necessary to disseminate the facts.” *Id.* at 98 (quoting *Harper & Row*, 471 U.S. at 564). Finding that Salinger’s biographer had made “a very substantial appropriation” of Salinger’s prose, the Second Circuit concluded that “the third fair use factor weighs heavily in Salinger’s favor.” *Id.* at 98-99.

87. 811 F.2d at 99 (quoting *Harper & Row*, 471 U.S. at 566).

88. *Id.* According to Judge Newman, Hamilton took “virtually all of the most interesting passages of [Salinger’s] letters, including several highly expressive insights about writing and literary criticism.” *Id.*

89. *Id.* The court nonetheless concluded that the book’s publication would not harm the letters’ marketability. However, the court held that the final factor slightly favored Salinger. *Id.*

absolute protection,<sup>90</sup> while statutory law, in principle, allows at least some fair use of such works.<sup>91</sup>

Under common law copyright, *Harper & Row* would have been an easy case. The publishers of Gerald Ford's memoirs were keeping them secret to maintain the commercial value of their serialization in *Time Magazine*.<sup>92</sup> Indeed, to copy from the book, *The Nation* used a "purloined manuscript."<sup>93</sup> As an unpublished and undisseminated work, therefore, the book fell under the absolute common law rule against copying. By applying that rule, the Court easily could have found *The Nation* liable for copyright infringement. Instead, by applying section 107's four-factor fair use analysis to a case alleging copyright infringement of an unpublished and undisseminated work, the Court, in effect, acknowledged that in revising copyright law in 1976, Congress changed common law copyright and the fair use doctrine.

In deference to common law, however, the Court established a higher standard for such fair use by narrowing its scope.<sup>94</sup> However, the Court's crucial language about the narrower scope of fair use when applied to unpublished works is ambiguous. Read with the Court's concession that one may take substantial quotations from published works,<sup>95</sup> the narrower-scope language allows shorter quotations from unpublished works. But read in light of the Court's concern with ensuring confidentiality and creative control,<sup>96</sup> the narrower-scope language could suggest still more exacting limitations on the fair use of unpublished works. Nonetheless, such a stringent reading would not cancel the Court's acknowledgment that the fair use privilege applies to unpublished works.<sup>97</sup>

Though it pronounced the unpublished nature of an infringed work "critical,"<sup>98</sup> the Court also held that it is "not necessarily determinative" of the fair use question.<sup>99</sup> The Court held that under "ordinary circumstances," fair use of unpublished sources is unlikely,<sup>100</sup> and, in so hold-

90. See *supra* notes 20-21 and accompanying text.

91. See *supra* notes 29-39 and accompanying text.

92. 471 U.S. at 542-43.

93. *Id.* at 563.

94. *Id.* at 564.

95. See *supra* note 67 and accompanying text.

96. 471 U.S. at 564. "The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.*

97. *Id.* at 563.

98. *Id.* at 564.

99. *Id.* at 554.

100. *Id.* at 555.

ing, implied that it might permit such fair use under *extraordinary* circumstances, which remain undefined.<sup>101</sup> Finally, the Court conceded that “briefer quotes” from a work may be essential to convey the facts sufficiently.<sup>102</sup> Thus, *Harper & Row* furnishes a standard for fair use of unpublished sources that reflects the concerns of common law copyright but does not reproduce its absolute prohibition against copying from unpublished and undisseminated works.<sup>103</sup>

Like the Supreme Court, the Second Circuit in *Salinger* narrowed the scope of the fair use privilege when applying it to unpublished works, but concluded that narrow scope meant “diminished likelihood” of fair use, so that unpublished works “normally enjoy complete protection against copying.”<sup>104</sup> That rule is a faulty and overly restrictive reading of *Harper & Row*’s “narrower scope” language.<sup>105</sup> Conceding that a less restrictive reading of that language is possible,<sup>106</sup> the *Salinger* court defended its more restrictive reading by claiming that it fits “the tenor of the [*Harper & Row*] Court’s entire discussion of unpublished works.”<sup>107</sup> Because the court states that claim in conclusory terms, one cannot assess the reasoning behind it. However, *Salinger*’s restrictive gloss on *Harper & Row* certainly fits the tenor of *Salinger*’s entire discussion of fair use. Since, under the first fair use factor, the *Salinger* court already had held that an individual may take no more than “minimal amounts of [unpublished] expressive conduct,”<sup>108</sup> the court could not insist on still lower amounts for quotations from such sources under the second fair use factor.

*Salinger*’s minimal-amounts formula, therefore, is doubly unfortunate. Applied to published sources it may be wrong, since *Harper & Row* allows “even substantial quotations” from them.<sup>109</sup> Applied to unpublished letters in *Salinger*, the formula forced the court to adopt a rule far sterner than that advanced in *Harper & Row*.<sup>110</sup> However, not even *Sa-*

101. 3 NIMMER ON COPYRIGHT, *supra* note 38, § 13.05[A], at 13-88.7 to 13-88.8.

102. 471 U.S. at 563 (“... for example, Mr. Ford’s characterization of the White House tapes as the ‘smoking gun’ is perhaps so integral to the idea expressed as to be inseparable from it.”).

103. *See* *New Era Publications Int’l v. Henry Holt & Co.*, 873 F.2d 576, 593 (2d Cir. 1989) (Oakes, C.J., concurring), *cert. denied*, 110 S. Ct. 1168 (1990).

104. *Salinger*, 811 F.2d at 97.

105. *See supra* note 94 and accompanying text.

106. *See supra* notes 82-83, 95-96 and accompanying text.

107. 811 F.2d at 97.

108. *Id.* at 96. *See also supra* text accompanying note 75.

109. 471 U.S. at 564.

110. *See* Ralph Oman, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the*



*linger*'s restrictive rule that unpublished works "normally enjoy complete protection"<sup>111</sup> may be described as a per se rule against fair use of unpublished sources.<sup>112</sup> For, like the Supreme Court in *Harper & Row*, the Second Circuit performed the four-factor fair use analysis mandated in section 107 of the federal copyright law. The *Salinger* court thus acknowledged that the fair use privilege applies to unpublished sources.

## II. FAIR USE OF UNPUBLISHED SOURCES: JUDICIAL AND POLITICAL DEBATES (1989-1990)

*Salinger*'s application of *Harper & Row* is, at best, unsettled law in the Second Circuit. The fair use of unpublished sources now has become the subject of judicial and political debates occasioned by a later Second Circuit decision, *New Era Publications International v. Henry Holt & Co.*<sup>113</sup> These debates are important, for they indicate judicial support for the view that *Harper & Row* accommodates fair use of unpublished text.<sup>114</sup>

### A. *The Second Circuit's New Era Decision: Judicial Debates*

Like *Salinger*, *New Era* concerned a biography that quoted from its subject's unpublished writings.<sup>115</sup> The court refused to enjoin the biography's publication on the ground of plaintiff's laches.<sup>116</sup> Nevertheless, in controversial dictum that Second Circuit Chief Judge Oakes later described as "harmful language" at the "ultimate extreme,"<sup>117</sup> the court

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*Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary and the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 37-38 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice). According to Oman, Register of Copyrights and Assistant Librarian for Copyright Services, "[t]his disagreement over the proper interpretation of *Harper & Row* is critical . . . , for I believe it is at the crux of the concern that the Second Circuit has created a virtual per se rule prohibiting fair use of unpublished works." See also *infra* note 125 (for a critique of *Salinger*'s rule by the Second Circuit's Chief Judge).

111. 811 F.2d at 97.

112. Cf. Catherine A. Diviney, Comment, *Guardian of the Public Interest: An Alternative Application of the Fair Use Doctrine in Salinger v. Random House, Inc.*, 61 ST. JOHN'S L. REV. 615, 621 (1987) (*Salinger* "effectively puts unpublished copyrighted works beyond the reach of the fair use doctrine").

113. 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

114. See, e.g., *infra* note 133 and accompanying text.

115. 873 F.2d at 576-78 (concerning RUSSELL MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD, a harshly critical biography about the Church of Scientology's founder).

116. *Id.* at 577, 584-85.

117. James L. Oakes, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the*

addressed the fair use questions before it.

In *New Era*, the court reaffirmed *Salinger*'s rule that unpublished works "normally enjoy complete protection."<sup>118</sup> However, the court further narrowed that rule as it analyzed section 107's first and second fair use factors. With respect to the first, the "purpose or character of the use,"<sup>119</sup> the court rejected as "unnecessary and unwarranted" any distinction between quoting to take the subject's prose and quoting to say something about the subject's "character."<sup>120</sup> Thus, *New Era* suggests that even scholarly purposes cannot excuse authors who quote unpublished sources.<sup>121</sup>

Turning to the second statutory fair use factor, the "nature of the copyrighted work,"<sup>122</sup> the *New Era* court rejected any "distinction . . . between the use of protected expression to liven text and the use of protected expression to communicate significant points about the subject."<sup>123</sup> The Second Circuit found such an approach unnecessary.<sup>124</sup>

*New Era* deeply divided the Second Circuit's judges. The Chief Judge complained in a long concurrence that *New Era* interpreted *Salinger*'s overly restrictive rule as a virtual per se rule against any fair use of unpublished sources.<sup>125</sup> As public debate about *New Era* grew,<sup>126</sup> five of

*Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 2 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice).

118. 873 F.2d at 583.

119. 17 U.S.C.A. § 107(1) (West 1977 & Supp. 1991). See *supra* note 3.

120. 873 F.2d at 583. Cf. *New Era Publications Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1507-08 (S.D.N.Y. 1988) (Leval, J.) (distinguishing "appropriations of the literary talent of the subject to enliven and improve the secondary work" from "instances . . . where the critic exhibits chosen words of the subject to prove a critical point or to demonstrate a flaw in the subject's character"), *aff'd*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990). See also *id.* at 1502-03, 1508-20 (Judge Leval's reasoning for his functional distinction, and his analysis of the challenged quotations in the biography at issue).

121. Qualifying this suggestion is the Second Circuit's concession that a book's scholarly purpose should favor the book's publisher in a copyright infringement suit. 873 F.2d at 583.

122. 17 U.S.C.A. § 107(2) (West 1977 & Supp. 1991). See *supra* note 3.

123. 873 F.2d at 583 (quoting the trial court in *New Era*, 695 F. Supp. at 1504).

124. *Id.*

125. *Id.* at 593 (Oakes, C.J., concurring in the refusal to enjoin on the ground of plaintiff's laches, but criticizing Judge Miner's fair use dictum). According to the Chief Judge, *New Era*'s dictum meant "that all copying from unpublished work is per se infringement." *Id.* Chief Judge Oakes explained that *New Era*'s fair use analysis misread *Salinger*'s misreading of *Harper & Row*'s rule that "the scope of fair use is narrower with respect to unpublished works." *Id.* at 592 (quoting *Harper & Row*, 471 U.S. at 564). *Salinger* erred, according to the Chief Judge, by interpreting "narrower" scope to mean the "diminished likelihood that copying will be fair use when the copy-

the Second Circuit's twelve judges voted to rehear the case en banc,<sup>127a</sup> a remarkable move, since a prevailing party had brought the petition to challenge dictum.<sup>128</sup> Writing for that minority, Judge Newman, *Salinger*'s author, urged his colleagues to correct the "misunderstanding" of authors and publishers convinced that the Second Circuit had outlawed the use of unpublished materials in "scholarly research, biography and journalism."<sup>129</sup>

When the Second Circuit refused to rehear the case, the *Salinger* and *New Era* judges took their differences into law school lecture rooms and law reviews.<sup>130</sup> Judge Newman continued his campaign against *New Era* by urging publishers and their lawyers to challenge the decision in future litigation.<sup>131</sup>

These judicial debates suggest that *New Era*'s fair use dictum is not likely to become law in the Second Circuit. By refusing to rehear *New Era*, the majority was not necessarily endorsing its fair use dictum. Courts do not customarily grant petitions that prevailing parties lodge to challenge dictum.<sup>132</sup> Thus, even the majority may have included judges who, like the dissenters, feared that *New Era* subverts the *Harper & Row-Salinger* principle that fair use allows quotation even from unpublished sources when "necessary" to document facts.<sup>133</sup>

Indeed, some Second Circuit judges may go further still, and confine

righted material is unpublished" and by not reading the Court's language to allow the copying of a diminished amount of text. *Id.* at 592-93 (quoting *Salinger*, 811 F.2d at 97) (emphasis added). See *supra* notes 81-85, 105-108 and accompanying text.

126. See *supra* note 14 and accompanying text.

127. *New Era Publications Int'l v. Henry Holt & Co.*, 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting from denial of petition to grant rehearing en banc).

128. See Statement of Oman, *supra* note 110, at 47 n.139.

129. *Id.*

130. Pierre N. Leval, the Southern District of New York judge who found fair use rather than copyright infringement in both the *Salinger* and *New Era* cases, has twice restated and refined his views on the fair use doctrine. See Leval, *supra* note 42; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). See also Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990) (a rejoinder to Leval).

The Second Circuit judges who wrote *Salinger* and *New Era* also have used lectures and articles to re-examine the issues those decisions raised. See Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC'Y 1 (1989); Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 12 (1989). See also Newman, *supra* note 47.

131. Newman, *supra* note 130, at 17-18. Judge Newman urged publishers not to lapse into self-censorship to avoid the suits that subjects of biographies might bring. *Id.* at 17.

132. See *supra* note 128.

133. 884 F.2d at 663.

*Salinger* to its facts on the ground that its privacy implications<sup>134</sup> distinguish it from ordinary fair use lawsuits against biographers.<sup>135</sup> Should the Second Circuit refuse to take that step, since even statutory copyright protection may serve to protect privacy,<sup>136</sup> it is still likely that the court will remove *New Era*'s gloss on *Salinger*. That likelihood is especially important since it is by no means certain that supporters of a liberalized fair use provision can persuade Congress to adopt such a measure.<sup>137</sup>

### B. *The Congressional Response to New Era: Proposals to Amend Section 107 (1990-1991)*

On March 10, 1990, Representative Robert Kastenmeier of Wisconsin introduced a bill adding four words to section 107. The altered provision would have read: ". . . the fair use of a copyrighted work, *whether published or unpublished*, . . . is not an infringement of copyright."<sup>138</sup> On March 29, Senators Paul Simon of Illinois and Patrick Leahy of Vermont introduced similar legislation in the Senate.<sup>139</sup> Senator Simon identified the bill's purpose as overruling *New Era*'s fair use dictum<sup>140</sup> because the dictum "suggests that virtually any quotation of unpublished materials is an infringement of copyright, and not fair use."<sup>141</sup>

The Simon-Kastenmeier legislation had a short but eventful life before it died in committee in October 1990.<sup>142</sup> In July it was the subject of legislative hearings at which Second Circuit judges testified along with

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134. *New Era*, 873 F.2d at 585 (Oakes, C.J., concurring) ("*Salinger* is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here"). *Accord* Abrams, *supra* note 18, at 3 (" . . . I would, if I could, construct a *Salinger* exception to the fair use doctrine, one which would provide that where someone has demonstrated so consistently for so long his devotion to personal privacy . . . that no part of his letters should be quoted at all without his permission. Pre or post-publication."). *See also* Christopher A. Murphy, Comment, *Salinger v. Random House: The Author's Interests in Unpublished Materials*, 12 COLUM.-VLA J.L. & ARTS 103, 126-27 (1987) (including the privacy interest among the authorial interests *Salinger* protects).

135. 873 F.2d at 589-91 (Oakes, C.J., concurring) (analysis of Second Circuit biography cases).

136. *See infra* note 165 and accompanying text (on the privacy interests now served by statutory copyright).

137. *See infra* notes 149-50 and accompanying text (for a discussion of an earlier failed attempt to pass such legislation).

138. H.R. 4263, 101st Cong., 2d Sess. (1990). *See supra* note 3.

139. S. 2370, 101st Cong., 2d Sess. (1990).

140. 136 CONG. REC. S3549 (daily ed. Mar. 29, 1990) (statement of Sen. Simon).

141. *Id.* *New Era*, Senator Simon warned, raises the "spectre of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals," and creates conditions in which "scholars and historians can be prohibited from citing primary sources." *Id.*

142. *See infra* note 150 and accompanying text.

historians, copyright experts, and representatives of computer industry interests.<sup>143</sup> Fearing that the legislation might expose unpublished software and source code<sup>144</sup> to copying, some members of the computer industry sought to restrict or even to defeat the bills.<sup>145</sup> To that end, they argued that any scheme allowing fair use of unpublished material would violate the Berne Convention, the international agreement on intellectual property, which the United States joined by treaty in 1988, and which became effective on March 1, 1989.<sup>146</sup> Other witnesses who ad-

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143. *Joint Hearings*, *supra* note 48. See also *supra* notes 110 and 117. For brief summaries of statements and testimony, see *Copyright Official Urges Subcommittee to be Specific in Drafting "Fair Use" Bill*, Daily Report for Executives (BNA) No. 134, at A-10 (July 12, 1990). See also Ralph Oman, *Protecting Franny and Zooey: Publishing: An Overhaul of Copyright Law Would Settle the Dispute About Access to Unpublished Material*, L.A. TIMES, July 13, 1990, at B7 (authored by the U.S. Register of Copyrights).

144. "Source code" is a computer program in a high-level language, such as Pascal. It is commonly distinguished from "object code," which is a machine-made, machine-readable-only translation of "source code" into the binary numerical language of the computer. See David Einhorn, *The Scope of Computer Software Copyrights*, in COPYRIGHT LAW SYMPOSIUM NUMBER THIRTY-FIVE 113, 115-16 n.13 (ASCAP 1988).

145. Computer industry opposition was evident from the start of the legislative process. In introducing their legislation, Senators Simon and Leahy pledged to work with computer industry interests to ensure that the legislation would not weaken the protection of computer programs. See 136 CONG. REC. S3550 (daily ed. Mar. 29, 1990). However, members of the computer industry were divided in their reactions to the proposed legislation. One trade association opposed the legislation in the hope of maintaining absolute protection for software, notably for source code. See James M. Burger, Chief Counsel, Government, of Apple Computer, Inc. on behalf of the Computer and Business Equipment Manufacturer Association (CBEMA) and the Software Publishers Association (SPA), Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 2, 16, 19-24, 29 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice).

However, another computer industry trade association supported the Simon-Kastenmeier legislation. This group hoped to ensure fair use copying of unpublished source code, on the ground that source code is "functional" and, therefore, factual material not eligible for copyright protection. See A.G.W. Biddle, President, Computer & Communications Industry Association, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 1-2, 4 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice). For a definition of "source code," see *supra* note 144.

146. See Statement of J. Burger, *supra* note 145, at 24-27. See also Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 7 (1986); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

In his statement for computer industry interests opposing the Simon-Kastenmeier bills, Burger argued that the proposed legislation would violate the Berne Convention in two ways. First, he

dressed the question disagreed.<sup>147</sup>

argued, the bills would violate Article 9(2) of the Berne Convention, by permitting fair use of unpublished works and "confidential business plans," which, Burger maintained, Article 9(2) protected. Statement of J. Burger, *supra* note 145, at 27.

However, Burger's claim that copyright law and Berne protect business plans is debatable. Federal "copyright protection" does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C.A. § 102(b) (West 1977 & Supp. 1991). Furthermore, other legal means protect trade secrets. *See, e.g.*, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (state trade secret law can protect even unpatented industrial technologies). Berne grants "[a]uthors of literary and artistic works" an "exclusive right of authorizing [their] reproduction." But Article 9(2), to which Burger alluded in his statement, qualifies that right in a manner recalling Anglo-American fair use doctrine. Article 9 of the Berne Convention, *supra*. The Berne Convention explains that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." *Id.* That language need not preclude fair use of unpublished works under federal copyright law as the Supreme Court interpreted in *Harper & Row*. In *Harper & Row*, the legitimate authorial interests of unpublished works were of particular concern to the Court. 471 U.S. at 564 (interests in confidentiality and creative control).

According to Burger, the Simon-Kastenmeier bills also would violate Article 10(1) of the Berne Convention. Statement of J. Burger, *supra* note 145, at 27. Under Article 10(1),

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Berne Convention, *supra*. Burger argued that the materials quoted in *Harper & Row*, *Salinger*, and *New Era* had not been "lawfully made available to the public" within the meaning of Article 10(1). Statement of J. Burger, *supra* note 145, at 27. However, such factual determinations need not impair the principle that, under other factual circumstances, quoting or paraphrasing unpublished works may indeed constitute fair use under copyright law, or fair practice under Berne.

147. One copyright expert, Barbara Ringer, opposed the Simon-Kastenmeier bills yet believed that they would comply with Berne if amended. *See* Statement of B. Ringer, *supra* note 48, at 6 (unlimited fair use of unpublished works would violate Berne's Article 10(1) but "a narrow provision might well represent one of the 'certain special cases' in which unauthorized reproductions are allowed under Article 9(2)"). Ringer attacked the Simon-Kastenmeier bills as "too broad" and as having possibly "mischievous effects" on copyright law. *Id.* at 1. She conceded, however, that authors need reassurance that there is "no such thing as a per se rule" against quoting unpublished sources. *Id.*

Ralph Oman, a supporter of the Simon-Kastenmeier legislation, also recommended that the fair use legislation include a published-unpublished distinction and argued that any such legislation, by retaining case-by-case fair use analysis, would meet the "special cases," "normal exploitation," and "legitimate interests" requirements of Berne's Article 10(1). Statement of R. Oman, *supra* note 110, at 54-56; Berne Convention, *supra* note 146. For a still bolder argument that the Simon-Kastenmeier bills were consistent with Berne, precisely because neither establishes a published-unpublished distinction, see Floyd Abrams, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 22-23 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice). According to Abrams, the "right of authorizing . . . reproduction" that the Convention's Article 9(1) grants

By summer's end, computer industry negotiators got what they wanted: compromise legislation, acceptable to representatives of the publishing industry, that completely excluded the fair use of unpublished software and restricted the fair use of any unpublished materials to "history, biography, fiction, news and general interest reporting, or social, political or moral commentary."<sup>148</sup> However, even the compromise legislation failed.<sup>149</sup> In October 1990, Senator Orrin Hatch of Utah blocked Senator Simon's bill in committee and effectively killed it.<sup>150</sup>

The testimony and negotiations of 1990 reveal that the Berne Convention is not an insurmountable obstacle to the fair use of unpublished materials. Nor, in principle, is the requirement that unpublished software, source code, and business records enjoy special protection from copying. Careful tailoring of the fair use doctrine can overcome those obstacles, as Senator Simon tries again to pass legislation ensuring the fair use of unpublished sources.<sup>151</sup> Because Congressional action is uncertain, however, it is prudent to consider a judicial strategy for defining and ensuring the fair use of unpublished sources.

### III. FAIR USE OF UNPUBLISHED SOURCES: COPYRIGHT POLICY AND FUTURE JUDICIAL INQUIRY

Existing law does not preclude the fair use of unpublished works.<sup>152</sup> It remains to be seen, however, how courts in fact may find fair use of such materials. Damaging though it is, *New Era's* fair use dictum is not law. However, *Salinger's* overly restrictive gloss on *Harper & Row*, the rule that unpublished works "normally enjoy complete protection against

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authors, Berne Convention, *supra* note 146, is not equivalent to the right of first publication granted authors in Anglo-American copyright law. In fact it provides less protection. Statement of F. Abrams, *supra*, at 22-23.

In any case, even under Berne, American law governs. As Abrams observed, *id.* at 18-19, the provisions of the Berne Convention are "not self-executing." Berne Convention Implementation Act, *supra* note 146, at § 2(1). Rather, they depend for their force on "appropriate domestic law," *id.* at § 2(2), and may only be enforced in actions under American law. *Id.* at §§ 2(3), 3(1), 4(a)(3).

148. Roger Cohen, *Software Issue Kills Bill to Ease Copyright Laws*, N.Y. TIMES, Oct. 13, 1990, at 1, 9.

149. *Id.* at 9.

150. *Id.* Senator Hatch called the legislation premature and in need of further study. However, *The New York Times* explained Hatch's action as a response to computer-industry lobbying. *Id.*

151. In October 1990, Senator Simon lamented that his legislation was "dead in the water." *Id.* at 1. However, he has since reintroduced his proposed legislation. See *supra* note 16.

152. See *supra* notes 103, 111-12 and accompanying text.

copying,"<sup>153</sup> is currently the law of the Second Circuit. And even if the Second Circuit revises that rule,<sup>154</sup> other problems will remain.

The fair use doctrine is an "equitable rule of reason" that resists generalization, permits only fact-specific determinations, and requires that courts apply traditional "criteria" or factors of analysis and "balanc[e] the equities" as best they can.<sup>155</sup> Thus, even under familiar circumstances, judicial fair use determinations are difficult.

Such determinations are harder still for a court applying the fair use privilege to unpublished sources. In this situation, the court enters comparatively uncharted territory where, in the absence of any precedent in favor of fair use, it must consider the policies that underlie the copyright and fair use doctrines.

Those policies are disparate and potentially conflicting. Some commentators impose theoretical unity upon the field by insisting that copyright law serves, or should serve, only one policy: for example, the utilitarian policy of encouraging cultural productivity.<sup>156</sup> Reducing copyright policy to a single principle, however, will not make fair use doctrine easier to apply. Fair use will remain a rule of reason that even the proponents of a simplified copyright theory may want to retain to handle the variety and complexity of fair use litigation.<sup>157</sup>

If, however, one accepts that copyright and fair use serve multiple policies, one exchanges an elusive theoretical unity for the possibility of refining the fair use doctrine to enable courts equitably to resolve claims for the fair use of unpublished sources. The following pages undertake this task by analyzing the fair use inquiry mandated by the federal copyright statute in light of the multiple policies that copyright and fair use serve.

#### A. *Copyright Policy and its Applications*

The debates occasioned by *Harper & Row*, *Salinger*, and *New Era*

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153. *Salinger*, 811 F.2d at 97. See *supra* notes 105-10 and accompanying text.

154. See *supra* notes 110 and 125 (for authorities who have criticized the rule, including the Second Circuit's chief judge).

155. H.R. REP. NO. 1476, *supra* note 26. But see Leval, *supra* note 43, at 176 (it is "misinformation" to call fair use an "equitable rule of reason," because "it originated in the law courts as a utilitarian limit on the author's monopoly") (citation omitted).

156. See, e.g., Leval, *supra* note 130, at 1105-06 (utility should be sole standard in fair use analysis).

157. See, e.g., Leval, *supra* note 43, at 167, 170-75 (admitting that § 107's factors are "opaque and uninformative," yet retaining the factors and interpreting them in light of a utilitarian theory of copyright).



have focused attention on the diverse policies behind copyright law. Though they have long legal pedigrees, these policies have renewed relevance in *New Era*'s aftermath, as the task of refining fair use doctrine proceeds.

As one writer observes, "[t]he utilitarian theory . . . is undoubtedly the most venerable and oft-recited of the justifications for the American law of intellectual property."<sup>158</sup> According to this theory, which rests solidly on language found in British legislation, the Federal Constitution, and case law,<sup>159</sup> copyright protection enhances society's cultural wealth by giving authors incentives to produce it: that is, the right to profit from their published works.<sup>160</sup> The protection espoused under this theory extends not only to published works but also to unpublished works for the same reason: to protect "the process of *creat[ing]* . . . published works" and thereby encourage the production of cultural wealth.<sup>161</sup> Copyright's

158. Fisher, *supra* note 2, at 1688. See also Dratler, *supra* note 2, at 245-48 (stressing copyright law's utilitarian goal of maximizing cultural productivity).

159. See *supra* notes 33-35 and accompanying text.

160. The most vigorous proponent of the utilitarian theory is Judge Leval. See Leval, *supra* note 43, at 170 (" . . . the governing purpose of the copyright law, the promotion of the progress of the Arts and the advancement of learning, justifies both the artist's monopoly and the limitations on that monopoly in favor of the fair user.").

161. Kernochan, *supra* note 48, at 322. Proponents of the Simon-Kastenmeier Legislation enlisted the utilitarian theory to support that measure. They denied that it would deprive unpublished works of protection. Consider, for example, the congressional testimony of Judge Leval:

Another canard that should be refuted is that under this bill, authors will have no protection for unpublished drafts that they prefer not to publish. . . . Unpublished drafts will continue to be protected upon a full analysis of the fair use factors. The fact that fair use may be made in compelling circumstances of limited amounts of unpublished matter, as would be the case under this bill, does not justify the fear that authors' unpublished drafts will be unprotected form wholesale theft.

Pierre N. Leval, U.S. District Judge, Southern District of New York, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 4 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice).

Proponents of the legislation additionally maintained that it would promote cultural productivity by protecting authors seeking the use of unpublished sources from "widow censors" who might block that use under restrictive doctrines like that of *New Era*. Leval, *supra* note 43, at 172 (warning that *Salinger* and *New Era* establish "a new powerful potentate in the politics of intellectual life, the widow censor. For 50 years after death, an historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors."). In his statement prepared for the legislative hearings of July 1990, historian Taylor Branch wrote of the "unpleasant choices I now face, negotiation with those who control rights in unpublished historical materials, or self-censorship to avert the risk of lawsuits and damages." Taylor Branch, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate*

utilitarian policy provides the theory most favorable to a liberal fair use standard, allowing the use of unpublished works.

Subserving the utilitarian theory of copyright is the theory that copyright is a "property" right prior to any utilitarian purpose that the right might serve. With historical credentials of its own in English and American case law, this theory explains the common law's right of first publication as the result and the reward of an author's labor.<sup>162</sup> Since an author's labor creates and controls intellectual property, this theory suggests that copyright infringement robs and destroys intellectual property.<sup>163</sup>

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*Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 6 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice).

Some of the bills' proponents also pointed out the logistical difficulties of getting consent to use scattered unpublished sources from dispersed copyright owners. According to Branch, most of the documents he used as a historian of Martin Luther King's civil rights movement "were authored by common people whose [sic] wrote without any thought of economic gain." *Id.* at 7. That remark suggests, whether or not Branch so intended, that rights to exploit a text by publishing it and the possible impact on those rights of quoting from that text always need to be considered, even when the text is not written primarily for pecuniary gain. But § 107's fourth fair use factor, market effect, already acknowledges such rights. *See supra* note 3.

162. *See generally* PATRY, *supra* note 1, at 436-39 (English cases), 439-41 (American state common law cases). For a classic statement of the theory of common law copyright, see Lord Mansfield's opinion in *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1769):

From what source . . . is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?

From this argument, because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions; with other reasonings of the same effect.

*Id.* at 2398.

163. *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) ("If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto."). Opponents of the Simon-Kastenmeier legislation relied on this second theory to insist, insofar as the federal copyright statute allowed them, that unpublished works are largely immune from fair use thanks to the common law right of first publication. Statement of B. Ringer, *supra* note 48, at 3 (common law copyright is not "a right of privacy" but "a right of property, derived from authors' historic rights to control the first dissemination of their works"). *See also* Jonathan W. Lubell, Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on*

According to a third and final theory, common law copyright protects privacy. "Privacy" may be that of an individual who does not want to publish at all,<sup>164</sup> or that of a writer who does want to publish eventually, but only after a long process of textual refining and rethinking undisturbed by intrusive public attention. In this second case, authorship and creative control rights need and deserve special legal protection.<sup>165</sup>

The boundaries between these enumerated theories of copyright are unclear.<sup>166</sup> Nevertheless, courts should distinguish them. They can

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*Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 4 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice) ("an unpublished work has a different meaning and impact than published works in regard to the creative process and the marketing of artistic works" and therefore deserves a higher level of protection from fair use). New Era's author, Judge Roger Miner, is the strongest exponent of this view. Though he concedes that the federal copyright statute abolished the dual copyright regime under which unpublished works at one time enjoyed absolute immunity from fair use, he pleads that it be restored to secure the property rights of authors in their still-unpublished and undissemated work. Miner, *supra* note 130, at 2, 4, 8; Roger J. Miner, U.S. Circuit Judge for the Second Circuit, Prepared Statement at *The Joint Hearings on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 4 (July 11, 1990) (statement available from the House Subcomm. on Courts, Intellectual Property, and the Administration of Justice).**

164. See Samuel D. Warren & Louis J. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198-205 (1890). Admitting that cases involving unpublished works appear to be based on the "narrow grounds" of protecting property, the authors nevertheless find in those cases "recognitions of a more liberal doctrine." *Id.* at 204.

[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. . . .

The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

*Id.* at 205.

165. This was the Supreme Court's concern in *Harper & Row*, when it held that copyright protects the confidentiality and creative control of authors. 471 U.S. at 564. See also Kernochan, *supra* note 48, at 322, 326-27 (privacy for creativity), 325 (general right of privacy); Weinreb, *supra* note 130, at 1145-46 (conceding that a utilitarian theory of fair use could accommodate a right of privacy that protects creative authors, but advocating a still broader fairness theory of fair use that would protect the privacy of ordinary persons as well). But see Leval, *supra* note 43, at 178-79 (the protection of privacy is not properly a function of federal copyright law because constitutional and state law assume that task).

A particularly strenuous proponent of reviving copyright law's protection for privacy is Judge Jon Newman, who wrote the Second Circuit's decision in *Salinger*. See Newman, *supra* note 48, at 460.

166. Under the privacy theory, copyright law protects interests beyond the concern of the utilitarian and property theories of copyright. Yet to the extent that the privacy protected is authorial and not just personal, privacy theory approaches the property theory of common law copyright. Simi-

favor divergent interests that courts must balance and between which courts must choose. Since balancing the equities is the essence of fair use analysis,<sup>167</sup> judicial alertness to copyright's competing policies will strengthen judicial inquiries into the competing equities of fair use.

### *B. Fair Use of Unpublished Works: Toward a New Judicial Inquiry*

Strong language in *Harper & Row* and *Salinger* may suggest that a court should not find fair use when the text quoted is unpublished.<sup>168</sup> However, courts need not put a "heavy thumb on the equitable scale" before they consider the fair use of an unpublished work.<sup>169</sup> Neither *Harper & Row* nor *Salinger* really did so, for they proposed not a double standard but a single standard of fair use, applicable to both published and unpublished works alike, yet responsive to the latter's special "nature."<sup>170</sup>

However, applying the four-factor inquiry section 107 mandates<sup>171</sup> has problems. Indeed, one commentator complains that the statute's fair use inquiry is "protean" and should be replaced by a "functional" market-impairment test that would inquire into whether the infringing work replaces the infringed work and thereby damages its market.<sup>172</sup> Another commentator believes that courts may count market impact twice in analyzing fair use claims: once under section 107's market-effect factor, and

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larly, to the extent that privacy theory seeks to protect and encourage creativity, it approaches the utilitarian theory paramount in statutory copyright.

167. See *supra* note 155 and accompanying text.

168. *Harper & Row*, 471 U.S. at 555 ("Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."); *Salinger*, 811 F.2d at 97 ("... we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression.").

169. Statement of F. Abrams, *supra* note 147, at 23 (quoting and commenting on the statement in *Harper & Row* that, for unpublished works, "the balance of equities in evaluating . . . a claim of fair use inevitably shifts," 471 U.S. at 553).

170. See *supra* notes 90-112 and accompanying text.

171. 17 U.S.C.A. § 107 (West 1977 & Supp. 1991). See *supra* note 3.

172. 3 NIMMER ON COPYRIGHT, *supra* note 38, § 13.05[A], at 13-88.18, § 13.05[B], at 13-88.18 to 13-90.6. According to the authors, "if regardless of medium, the defendant's work, although containing substantially similar material, performs a different function than that of the plaintiff's, the defense of fair use may be invoked." *Id.* at 13-88.20 (citation omitted).

The earliest fair use cases used Nimmer's functional test. See, e.g., Statement of R. Oman, *supra* note 110, at 7-8 (a "review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actual violation of literary property.") (quoting *Roworth v. Wilkes*, 1 Camp. 94, 98 (1807)).

once again under the provision's purpose factor.<sup>173</sup>

These problems are not irremediable. To correct them and adapt section 107 to questions involving the fair use of unpublished works, courts may identify the policy each statutory factor serves. Doing so may help courts distinguish the statutory factors, and refine the tools for adjudicating claims of fair use of unpublished works.

1. *Arguments for the Fair Use of Unpublished Works: "Purpose and Character of the Use" and Copyright Law's Utilitarian Policy*

Section 107's first factor, the "purpose and character of the use,"<sup>174</sup> allows users of copyrighted material to make their strongest arguments for fair use. A user's purpose may help to justify an infringing use, as long as that user's purpose serves copyright's utilitarian policy of maximizing society's cultural wealth.<sup>175</sup>

Section 107's first sentence evidences Congress' expectations that some purposes would count heavily in favor of fair use. Even before listing the four factors of fair use analysis, section 107 states that copying "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."<sup>176</sup> That language does not establish any presumption that certain uses are fair uses.<sup>177</sup> Section 107 mandates a multi-factor inquiry and directs courts to weigh other, nonpurpose factors.<sup>178</sup> The statute's list of innocent cultural purposes signals, at the very least, however, Congress' desire to encourage them, in keeping with copyright's utilitarian policy.

Congress, however, did not intend an exclusive list of commendable purposes.<sup>179</sup> Other purposes may serve copyright's utilitarian policy of cultural enrichment, provided they are productive or transformative: that is, purposes to create new works rather than to reproduce old ones.

173. Fisher, *supra* note 2, at 1672.

174. 17 U.S.C.A. § 107(1) (West 1977 & Supp. 1991). *See supra* note 3.

175. *See supra* notes 156, 158-61.

176. 17 U.S.C.A. § 107 (West 1977 & Supp. 1991). *See supra* note 3.

177. According to the Supreme Court in *Harper & Row*, § 107's first sentence does not create presumptive categories of fair use but only suggests "activities the courts might regard as fair use under the circumstances." 471 U.S. at 561 (quoting S. REP. NO. 473, *supra* note 31, at 61).

178. *See supra* note 40.

179. H.R. REP. NO. 1476, *supra* note 26, at 5680 ("The statement of the fair use doctrine in section 107 offers some guidance. . . . However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.").

While the Supreme Court has stated that productivity alone cannot determine fair use decisions, the Court has retained the productivity test.<sup>180</sup> Therefore, that test remains to enable courts to apply the fair use privilege to factual reporting by journalists<sup>181</sup> and biographers.<sup>182</sup> Furthermore, facts are not copyrightable,<sup>183</sup> and authors may quote unpublished text when necessary to communicate facts.<sup>184</sup>

But the fair use of unpublished works may extend further still. In section 107's first sentence, Congress listed uses that may not constitute infringement, among them "criticism."<sup>185</sup> Congress thereby suggested that quoting may be permissible not only when necessary to convey facts, but also when necessary to analyze or criticize text in a secondary but independently productive work of criticism. Critics commonly apply their acumen to literary texts whose authors have published them and have thereby exposed them to criticism. Authors of unpublished works, however, have not exposed their work to criticism and the author's right to private creative control of a text in progress should trump a fair use claim based on criticism. Still, a commentator may have a stronger fair use argument when he or she must not only quote from unpublished text but also comment critically upon it to establish a fact.<sup>186</sup>

If section 107's purpose factor serves copyright's utilitarian policy,

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180. One commentator claims that the Supreme Court has ignored and thereby "subordinated" the productivity test. Fisher, *supra* note 2, at 1686. He explains that "[i]t would be an exaggeration to say that the decisions in *Sony* and *Harper & Row* have expunged the concept of productivity from fair use doctrine. In combination, however, the two decisions have sharply reduced the role played by this factor." *Id.* On the productivity test, see generally *id.* at 1684-86; Leval, *supra* note 43, at 170-72; Leval, *supra* note 130, at 1111-16. See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) ("The distinction between 'nonproductive' and 'productive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative."). *Sony* held that mere video-taping of television broadcasts for a private viewer's convenience constitutes fair use. *Id.* at 454-55. A fortiori, a use that may be said to be productive would be fair, other things being equal.

181. *Harper & Row*, 471 U.S. at 561. Cf. Fisher, *supra* note 2, at 1684-85 (complaining that the Supreme Court in *Sony* subordinated the productivity test and came close to declaring it irrelevant).

182. *Salinger*, 811 F.2d at 96.

183. See *Harper & Row*, 471 U.S. at 560; 17 U.S.C.A. § 102(b) (West 1977 & Supp. 1991).

184. *Harper & Row*, 471 U.S. at 561, 563; *Salinger*, 811 F.2d at 96. See also *New Era*, 884 F.2d at 663 (Newman, J., dissenting); Leval, *supra* note 130, at 1115 n.51; Newman, *supra* note 130, at 14-15.

185. See 17 U.S.C.A. § 107 (West 1977 & Supp. 1991). See *supra* note 3.

186. Consider the remarks of the Second Circuit's chief judge:

[A] biographer or critic [may use] protected expression as a fact to prove a character trait that is at odds with the public image that the [biography's] subject or the subject's supporters have attempted to project. As Judge Leval said, it may be "the words used by [a] public figure (or the particular manner of expression) that are the facts calling for comment."

that policy must guide courts when they ask, as section 107 requires, “whether [a challenged] use is of a commercial nature or is for nonprofit educational purposes.”<sup>187</sup> This language suggests that if an infringer’s motives are commercial, her use is presumptively, though not necessarily, unfair.<sup>188</sup> However, a user’s commercial purpose may not be her only purpose, and the use itself may, in any case, serve the first statutory factor’s utilitarian policy. Here, under a potentially applicable Second Circuit test, commercial motives will defeat a fair use claim only if they outweigh two factors: the public interest in the subject matter disclosed and the necessity for using the protected material (i.e. the absence of alternatives).<sup>189</sup>

Within the *Harper & Row* and *Salinger* framework, therefore, a court may consider a wide range of culturally productive or transformative purposes under section 107’s first fair use factor.

## 2. *Arguments Against Fair Use of Unpublished Sources: The Second, Third, and Fourth Statutory Fair Use Factors and Countervailing Policies of Copyright Law*

Whereas section 107’s first fair use factor permits users to make argu-

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*New Era*, 873 F.2d at 592 (Oakes, C.J., concurring) (quoting *New Era*, 695 F. Supp. at 1502-04) (emphasis in original).

187. 17 U.S.C.A. § 107(1) (West 1977 & Supp. 1991). See *supra* note 3.

188. According to the Supreme Court, commercial motives raise a presumption *against* fair use: “The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. [E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Harper & Row*, 471 U.S. at 562 (quoting *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 451 (1983)).

A related rationale for rejecting a fair use claim is the infringer’s commercial or professional bad faith. Thus, if “the ‘propriety of the defendant’s conduct’” is questionable, the use is probably unfair. *Id.* (quoting 3 NIMMER ON COPYRIGHT, *supra* note 38, § 13.05[A], at 13-88.3). *Id.* at 562-63 (“fair use presupposes ‘good faith’ and ‘fair dealing.’”) (citing *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (quoting John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968))). However, commentators have attacked the bad faith inquiry as unmanageable and irrelevant to fair use analysis. The inquiry may be unmanageable, because it is unclear what standard of fairness or good faith courts should apply under *Harper & Row*. Fisher, *supra* note 2, at 1679-82. Above all, the bad faith inquiry may be irrelevant insofar as copyright’s utilitarian policy should govern the inquiry. Leval, *supra* note 43, at 176.

189. For an authoritative line of Second Circuit cases so holding, see *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57, 61 (2d Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). See also *New Era*, 873 F.2d at 589-91 (Oakes, C.J., concurring) (explaining the above cited cases); PATRY, *supra* note 1, at 72-91.

ments in favor of fair use, the three remaining factors, the “nature” of the copyrighted work, the “amount and substantiality” of the copied matter, and the market effect of the infringement,<sup>190</sup> give copyright owners their best chance to argue *against* fair use. While the first factor serves the utilitarian policy of copyright law and fair use, the remaining three factors serve potentially adverse policies: protecting the market incentives and property rights of authors and protecting personal and authorial privacy.<sup>191</sup>

Of the remaining three factors, the “nature of the copyrighted work”<sup>192</sup> matters most for the fair use of unpublished works. In analyzing this factor, both *Harper & Row* and *Salinger* held that a work’s unpublished status is “a critical element of its ‘nature’” and narrows the “scope” of fair use.<sup>193</sup> The Second Circuit may retreat from *Salinger*’s further holding that unpublished works “normally enjoy complete protection against copying,”<sup>194</sup> to permit the shorter quotations from unpublished sources that *Harper & Row* allows.<sup>195</sup> But courts still will need to consider the policies that the Supreme Court sought to serve in *Harper & Row*: the protection of literary property and authorial privacy, policies the Court served by ensuring the author’s “right of first publication” and the “copyright holder’s interests in confidentiality and creative control.”<sup>196</sup>

So understood, fair use analysis of the unpublished nature of an infringed work has scarcely begun. With respect to the protection of personal and authorial privacy, however, it is already clear that judicial inquiry must focus on *access* to the copied text. Judge Newman suggests a spectrum along which courts might measure access, stretching from

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190. 17 U.S.C.A. § 107(2)-(4) (West 1977 & Supp. 1991). See *supra* note 3.

191. See Fisher, *supra* note 2, at 1686-93 (describing the multiple policies served by copyright law, but deploring what the author takes to be the result: inconsistent fair use doctrine). Fisher writes: “The current fair-use doctrine . . . helps perpetuate the problem, by reinforcing the impression that, when confronted with a question of public policy, we can do no better than balance inconsistent claims derived from conventional, incommensurable premises.” *Id.* at 1695. But he adds, “[t]his is not to suggest . . . that a well-built fair use doctrine would solve our quandary, but every incoherent field of law represents both a part of the problem and a neglected opportunity to begin to solve it.” *Id.* at n.178. That qualifying remark admits that the conflicts between the several policies served by copyright law are irreducible and so must be balanced. That, in any case, is the underlying premise of this Note.

192. 17 U.S.C.A. § 107(2) (West 1977 & Supp. 1991). See *supra* note 3.

193. *Harper & Row*, 471 U.S. at 564; *Salinger*, 811 F.2d at 97.

194. 811 F.2d at 97. See also *supra* notes 154-55 and accompanying text.

195. 471 U.S. at 564. See also *supra* note 68.

196. 471 U.S. at 564.



theft of restricted material to permission to use “deliberately shared” text.<sup>197</sup> Under this privacy theory it is relevant that, in *Harper & Row, The Nation* used a confidential “purloined manuscript.”<sup>198</sup> It may be equally relevant that, in *Salinger*, a biographer quoted from the novelist’s letters after promising the libraries holding them that he would not quote them without permission.<sup>199</sup> However, a privacy claim in *Salinger* is weaker since the works in question were already dispatched (and therefore disseminated) letters.<sup>200</sup> As these examples indicate, confidentiality and the reserved right to consent to copying may be conditions of access to which courts must be alert.<sup>201</sup>

The infringed work’s unpublished nature also may require that courts focus their fair use analyses on an author’s rights to *artistic control* and *first publication*. These are values of authorial privacy that common law copyright formerly protected and, thanks to the Supreme Court’s decision in *Harper & Row*, that federal copyright law now protects.<sup>202</sup>

But when quoting from an unpublished work does not undermine a personal or authorial privacy interest sought to be protected, courts may consider countervailing arguments for fair use. First, the *Harper & Row* Court affirmed copyright law’s distinction between protectible expression and unprotectible facts, and allowed quoting from unpublished works to

197. Newman, *supra* note 48, at 474.

198. Miner, *supra* note 131, at 4 (quoting *Harper & Row*, 471 U.S. at 563). See also *Harper & Row*, 471 U.S. at 564 (on the Ford memoirs’ “confidential” status).

199. Miner, *supra* note 130, at 4-5.

200. See Roger L. Zissu, *Salinger and Random House: Good News and Bad News*, 35 J. COPYRIGHT SOC’Y 13, 15 (1987) (access is relevant, but when, as in *Salinger*, the unpublished work is already in a library and available for public inspection, access should not be controlling); Diviney, *supra* note 112, at 624-25 (an author’s right of first publication should carry less weight in fair use analysis when his or her manuscript is available in a library). As in *Salinger*, however, contractual limitations on access should be relevant. In *Salinger*, the court explained that “Salinger’s letters are unpublished, and they have not lost that attribute by their placement in libraries where access has been explicitly made subject to observance of at least the protections of copyright law.” 811 F.2d at 97.

201. Both contractual and legal rights will be relevant. Confidentiality was a contractual right in *Harper & Row*. 471 U.S. at 546. Confidentiality also may limit fair use of private letters, according to the well-developed fair use doctrine governing letters. That doctrine dictates that copyright in a letter remains with its writer, while an absolute right to destroy, preserve, or even display that letter belongs to its recipient, subject to limitations imposed by confidentiality. 1 NIMMER ON COPYRIGHT, *supra* note 38, § 5.04 at 5-32.16 to 5-32.17.

202. See *Harper & Row*, 471 U.S. at 564 (“The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”); *Salinger*, 811 F.2d at 99. See also *supra* notes 62, 163, 165, 196 and accompanying text.

establish and communicate factual information.<sup>203</sup> Second, texts such as letters or memoranda may deserve less protection because they are not works in progress over which their authors still seek to retain artistic or conceptual control.<sup>204</sup> Third, courts called upon to protect literary property in the letters of celebrated writers such as J.D. Salinger should tailor their holdings narrowly.<sup>205</sup> Broad holdings might impede access to unpublished texts better described as historical documents than as literary properties, texts written by ordinary people and deposited in research collections for the use of scholars.<sup>206</sup>

The same policy concerns, authorial property and privacy, and cultural productivity, that stand behind the second statutory fair use factor also stand behind the third and fourth: the "amount and substantiality" of the text taken and "the effect of the use upon the potential market" for the quoted work.<sup>207</sup> When the source quoted is unpublished, however, the court must analyze the second and third factors together. According to *Harper & Row*, the amount that may be quoted under the fair use privilege varies with the published or unpublished nature of the source.<sup>208</sup> If it is published, *Harper & Row* allows "substantial quotations,"<sup>209</sup> but if it is unpublished, the Court held that only "briefer quotes" may be permissible when "arguably necessary adequately to convey the facts."<sup>210</sup>

Policy questions are no less relevant to the fourth statutory factor, "the effect of the use upon the potential market."<sup>211</sup> According to *Harper & Row*, it is the most important fair use factor.<sup>212</sup> It is also, however, the most conjectural. In analyzing it, courts currently ask whether an infringing work displaces or materially impairs the infringed work's potential market.<sup>213</sup> Under any circumstances, defining potential

203. 471 U.S. at 563.

204. See Zissu, *supra* note 200, at 15.

205. *Salinger*, 811 F.2d at 96 (on Salinger's correspondence as literature), 99 (reporting the estimated current value of Salinger's unpublished letters at \$500,000).

206. Cf. Statement of T. Branch, *supra* note 161, at 6.

207. 17 U.S.C.A. § 107(3)-(4) (West 1977 & Supp. 1991). See also *supra* note 3.

208. 471 U.S. at 564-63.

209. *Id.* at 564.

210. *Id.* at 563.

211. 17 U.S.C.A. § 107(4) (West 1977 & Supp. 1991). See also *supra* note 3.

212. 471 U.S. at 566.

213. Applying the functional fair use test, the Supreme Court in *Harper & Row* defined fair use as "copying . . . which does not materially impair the marketability of the work which is copied." 471 U.S. at 566-67 (quoting 1 NIMMER ON COPYRIGHT, *supra* note 38, § 1.10[D], at 1-87). The

market is a difficult task,<sup>214</sup> but defining the potential market for an unpublished work is harder still, as *Salinger* demonstrates.

In *Salinger*, the court found that a biographer's quotations from Salinger's letters "would not displace the market for the letters."<sup>215</sup> Nevertheless, the court held that "some impairment of the market seems likely."<sup>216</sup> The court explained: "some appreciable number of persons" might suppose that the paraphrases were Salinger's actual words and so be less interested in purchasing the originals.<sup>217</sup> Such a weak argument<sup>218</sup> in an otherwise cogent opinion lends weight to contentions that courts should drop the material impairment test for market effect.<sup>219</sup> Even if courts retain that test, it will be to the advantage of courts and litigants alike to reduce the conjectural character of market-effect analysis.

*Harper & Row* affords an easy but narrow route out of the impasse, as it concerned the quotation of a small but critical passage from Gerald Ford's memoirs that effectively destroyed the value of a book's prepublication serialization.<sup>220</sup> When a case lacks such evidence of actual market destruction, *Harper & Row* suggests another strategy: conjoining market-effect analysis with analysis of the third statutory fair use factor, the "amount and substantiality of the portion used."<sup>221</sup> In *Harper & Row*, the Court held that taking the critical "heart" of a work, even if it amounted only to several hundred words, can damage a work's market.<sup>222</sup>

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Court also embraced Wendy Gordon's fair-use-as-market-failure theory. *Id.* at 566 n.9 (citing with approval Gordon, *supra* note 5, at 1615).

214. See Fisher, *supra* note 2, at 1669-72.

215. 811 F.2d at 99.

216. *Id.* The court reached this conclusion, although Salinger disavowed an intent to publish, on the ground that an author is free to change his or her mind about publishing. *Id.*

217. *Id.*

218. Devotees of literary correspondence are a small group unlikely to settle for anything less than reliable editions of the original texts they cherish. General readers, on the contrary, are unlikely to buy such publications at all. On these grounds alone, it might be argued that Salinger's biography enhanced the potential market for the novelist's letters by bringing those documents to the attention of aficionados. *But cf.* Roger L. Zissu, *Salinger and Random House Part II: Fears, Criticisms of Opinion Result from Misreading of Decision*, 35 J. COPYRIGHT SOC'Y 189, 194 (1988) (defending *Salinger*'s market-effect analysis by observing that the Second Circuit en banc and the Supreme Court chose not to review the decision).

219. See Fisher, *supra* note 2, at 1672.

220. 471 U.S. at 564-65, 567.

221. 17 U.S.C.A. § 107(3) (West 1977 & Supp. 1991). See *supra* note 3.

222. 471 U.S. at 565. According to the Court, the "heart" of Ford's memoirs concerned the Nixon pardon. *Id.* at 568.

Analogously, in *Salinger*, the Second Circuit found that paraphrased portions of Salinger's letters, introduced by such expressions as "he wrote," could "convey the impression that [readers] have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals."<sup>223</sup> One may quarrel with that conclusion,<sup>224</sup> yet adopt the analysis that led to it: deducing probable market effect from such textual evidence as the amount taken and the manner in which it is presented to the public.

### CONCLUSION

The fair use of unpublished works is a new problem for copyright law. It dates to 1976, when the federal copyright statute extended statutory copyright protection to unpublished works and exposed them, for the first time, to the fair use privilege. Interpreting the statute's fair use provision and applying it to unpublished works is a troublesome task for the courts, and the Second Circuit now has come close to holding that quotations from unpublished works are per se illegal.

It is by no means certain that Congress will rescue the courts from the impasse to which they are heading. But the Second Circuit's fair use decisions and the controversies surrounding them reveal that the judiciary may be willing and able to withdraw from that impasse by its own efforts. Hence the arguments advanced here: 1) statute and case law do not preclude the fair use of unpublished sources; 2) the judiciary is prepared to affirm that privilege; 3) doing so will require that the Second Circuit relax its restrictive *Salinger* rule;<sup>225</sup> and 4) fair use analysis should build on the policies that historically have informed copyright law and the fair use privilege.

Since fair use requires the "balancing of equities" and resists the framing of rules,<sup>226</sup> the focus here has been on the questions a court should ask and the factors a court should weigh, not the rules and holdings a court may frame. Those must depend on cases yet to be argued.

*Harold A. Ellis\**

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223. 811 F.2d at 99.

224. See *supra* note 218 and accompanying text.

225. 811 F.2d at 97.

226. See *supra* note 155 and accompanying text.

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