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COMMENT

YESTERDAY'S LOVE LETTERS ARE TODAY'S BEST SELLERS: FAIR USE & THE WAR AMONG AUTHORS

I. INTRODUCTION

J.D. Salinger is considered the Howard Hughes of American literature.¹ In 1951, Salinger published his only novel, *The Catcher in the Rye*.² In 1953, Salinger moved to a small town in New Hampshire to escape his notoriety.³ Although Salinger has not allowed an interview and has not published any new works since 1965, Salinger remains a source of fascination because of his self-imposed exile.⁴ A biographer, Ian Hamilton, asked Salinger to assist in writing Salinger's biography, but Salinger declined involvement in the project.⁵ During the course of

1. See Andrea Chambers, *In Search of J.D. Salinger, Biographer Ian Hamilton Discovers a Subject who didn't want to be Found*, *TIME*, June 6, 1988, at 50. Jerome David Salinger lived out a fantasy from his book in *The Catcher in the Rye*. In his book, the main character, Holden Caulfield had a fantasy to "build me a little cabin . . . right near the woods." J.D. SALINGER, *THE CATCHER IN THE RYE* (1951). Like the passage, Salinger moved to Cornish, New Hampshire, with a population of 1,268. Because of Salinger's self-imposed isolation, journalists were eager to break his silence. *Id.* It was virtually impossible to get Salinger out of his home, until British poet Ian Hamilton set out to write a literary biography of Salinger without his consent. *Id.*

2. SALINGER, *supra* note 1.

3. Chambers, *supra* note 1, at 50.

4. *Id.* Salinger entered his self-imposed exile because of bad reviews for the short stories he published. *Id.* His characters were autobiographically based, thus Salinger no longer wanted criticism of his work. *Id.* Further, Salinger's isolations may have been borne from his fear of social settings. *Id.* In his biography, Hamilton wrote, "Salinger anecdotes present the young author veering uneasily between extremes of social clumsiness." *Id.*

5. Letter from J.D. Salinger, Author, to Ian Hamilton, Biographer, *available in* Chambers, *supra* note 1, at 50. "I have borne all the exploitation and loss of privacy I can possibly bear in a single lifetime." *Id.* Letter from J.D. Salinger, Author, to Elizabeth Murray, Friend, *available in* Abrams, *infra* note 8. Salinger also wrote to a friend, "I suspect that money is a far greater distraction for the artist than hunger." *Id.* Though that letter was written forty years ago, it seems appropriate for these circumstances.

his research, Hamilton found several of Salinger's unpublished letters.⁶ Hamilton never asked Salinger for permission to use the letters he had discovered.⁷ Since the letters were available to the public, Hamilton used portions of the letters in Salinger's biography.⁸ To avoid violations of United States copyright laws, Hamilton tried to limit the amount of excerpts used in the biography.⁹ However, when Salinger read the galleys of the manuscript,¹⁰ Salinger believed "it was an appropriation of my letters, my personal letters."¹¹

Salinger sued Random House for copyright infringement.¹² Random House argued that Hamilton's quoting and paraphrasing of the letters constituted fair use under federal copyright law, which gives critics and scholars the right to borrow from another's work.¹³ However, Salinger

6. David Kaplan, *J.D. Salinger Fails to Obtain a Preliminary Injunction Restraining Distribution of a Biography Quoting his Unpublished Letters*, 8 ENT. L. REP. 7 (Dec. 1986). Salinger's letters were donated to several research libraries. *Id.* One batch of letters was found at Princeton University's Firestone Library; a collection of 45 letters was found at the University of Texas library; other letters were found at Harvard University library. *Id.* In order for Hamilton to gain access to the letters, "he agreed not to publish the documents without the permission of the universities and of the copyright holders. *Id.* The manuscript of the biography contained substantial quotations from 70 letters." *Id.*

7. *Id.*

8. Floyd Abrams, *Courts Walk a Fine Line between Copyright Law and the First Amendment*, THE MANHATTAN LAWYER, Jan. 12, 1988, at 14. Hamilton used quotations and paraphrase in order to show the imagery that Salinger used in his correspondence. *Id.* Salinger's letter writing was as artful as his books; Hamilton wanted to capture Salinger's style and convey that style to the readers of the biography. *Id.* Hamilton's book traces the author's life on Manhattan's west side, his war years, and his life after the war. *Id.* Hamilton's wanting to capture the "essence" of Salinger may be what Salinger wants to protect the most. *Id.*

9. *Id.*

10. Chambers, *supra* note 1, at 50. Hamilton sent a finished manuscript to Random House. Random House sent 150 bound galleys to reviewers. *Id.* A book dealer sent one to Salinger, who then protested the use of the quotations. *Id.* Salinger asked Hamilton to revise his manuscript, but the revisions did not please Salinger. *Id.* He filed suit declaring he would be "irreparably harmed" by the publication. *Id.* Salinger would only allow Hamilton to publish the biography if all of the unpublished material was deleted. *Id.*

11. *Id.* Hamilton asked Salinger for help in writing the biography, stressing that the book would only be a literary biography dealing only with Salinger's literary works. *Id.* Moreover, Hamilton indicated he would not harass any friends or family; yet Salinger refused to help. *Id.* However, Salinger believed his private letters should not be used, nor paraphrased, and filed suit to enjoin Hamilton's biography from being published. *Id.*

12. *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987). The district court held that "the vast majority of the material taken by Hamilton from the letters was not copyright protected" and "unprotected material of this nature includes far more than the where, when, and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories." *Id.* at 418. All the material challenged by Salinger reported a historical fact.

13. *Salinger*, 650 F. Supp. at 413.

argued that the privilege of fair use did not apply to unpublished works.¹⁴ In considering this issue, the District Court of New York determined that most of the information from the letters was not protected by copyright.¹⁵ However, the Court of Appeals for the Second Circuit overturned the decision.¹⁶ In its ruling, the court prohibited Random House from publishing Salinger's biography because the biography unfairly used Salinger's private letters. The court believed that Salinger's biography went too far in his selection of passages to copy.¹⁷ Consequently, the court held that Random House could only have published Salinger's biography if Hamilton changed the passages containing Salinger's letters.¹⁸

The limitations imposed by the Second Circuit's near per se ruling on quotations from unpublished materials concerned the publishing industry.¹⁹ The ruling meant that quotation of unpublished copyrighted material is almost never fair use.²⁰ Under current copyright law, copy-

14. Edwin McDowell, *Salinger v. Random House, A Gray Area for Publishers*, N.Y. TIMES, Jan. 31, 1987, at A11. "Under federal copyright law, the right to 'fair use' of an author's work for criticism, comment, news reporting, teaching, scholarship, or research is an exception to the author's right to control the publication and distribution of it." *Id.* Publishers are at a loss as to how they can publish works that include primary materials without violating copyright laws. *Id.* The rigid set of circumstances when primary material can be used should be expanded to include the public's need to disseminate the information. *Id.*

15. *Salinger*, 650 F. Supp. at 418.

16. *Salinger v. Random House, Inc.*, 811 F. 2d. 90 (2nd Cir. 1987) [hereinafter *Salinger II*]. The court emphasized the insulation of unpublished works from fair use "under ordinary circumstances" given an author's right to control the first publication of his/her work. *Id.* Hamilton's purpose in using the letters was to "enrich his scholarly biography," thus weighing the first fair use factor on Hamilton's side. *Id.* But the purpose of the use did not entitle Hamilton to any special consideration because the author could have chosen to copy only the factual content of the letters, thereby avoiding risk of an injunction. *Id.*

17. *Salinger*, 650 F. Supp. at 418. It copies "virtually all of the most interesting passages of the letters." *Id.* Passages included the author's resentment of literary critics and private letters indicating his dismay with the writings of other authors. *Id.* Many of Salinger's private opinions were expressed in the letters. *Id.* Moreover, the passages include vivid visual imagery, which was Salinger's signature in his writings, even his letters were like a book of prose. *Id.*

18. *Id.* at 426. The Second Circuit concluded that Salinger suffered damage because of the publication of the biography, but the damage was based on his privacy being abridged; copyright law does not protect against invasions of privacy. *Id.*

19. Paul J. Steven, *Fair Use and Foul Play: Copyright Law Revised Debate About Unpublished Material Heats Up*, N. Y. L. J., Nov. 22, 1993, at S2. All journalists and writers rely on some quotations from primary sources. *Id.* These primary sources are essential in their work. *Id.* Readers do not want to read the paraphrasing of a biographer when they can read the true words of an author. *Id.* Primary quotations make a work more interesting for readers. *Id.*

20. *Id.* at S2. Therefore, a per se rule was created to enjoin any journalist from being able to publish letters, diaries, correspondence, etc. without the permission of the author. *Id.* This rule will stop journalists from doing their job well. Journalists know that readers

right subsists in every work or authorship "fixed in any tangible medium of expression."²¹ Thus, copyright exists in virtually all writings, which include letters and diaries and routine business correspondence.²² Among the exclusive rights of a copyright owner are the rights to reproduce the work and prepare derivative works based on the copyrighted work.²³

Following the *Salinger* decision, the publishing industry went to Congress to obtain a remedy for what the industry perceived to be a serious interference with its First Amendment freedoms.²⁴ Authors and publishers believed that their work would be compromised because secondary authors would have to consider whether a primary author had a copyright over certain unpublished works; which the public had a right to read and authors had a right to publish.²⁵ Secondary authors' First

want to read direct quotations, not a synopsis of the work. *Id.* A direct quotation is the only way to convey the nature of what is being described. *Id.*

21. 17 U.S.C. § 106(a) (1992) states in part:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: literary works.

Id.

22. Slevin, *supra* note 19, at S2.

The Second Circuit's limitations on quotations from unpublished materials derive from the *Harper & Row* case. In that case, Harper & Row and Reader's Digest had contracted to publish the memoirs of President Gerald Ford. They, in turn, licensed to *Time* magazine the valuable "first serial" rights in the book, that is, to published excerpts from the book before the book's release. . . . Somehow, the *Nation* obtained a copy of the manuscript before both publication of the book and *Time's* excerpts. The *Nation*, treating President Ford's words as news, rushed to scoop *Time* with an article describing the contents of the book and quoting at least 300 words. *Time* cancelled its contract with Harper & Row and *Reader's Digest*, and they brought suit against The *Nation* for copyright infringement. The Supreme Court found for the plaintiffs, holding that the *Nation's* article did not constitute fair use. In reaching that result, Justice Sandra Day O'Connor's majority opinion that "the unpublished nature of a work is a key . . . factor tending to negate a defense of fair use."

23. Roger L. Zissu, *Fears, Criticisms of Salinger Opinion Results From Misreading of Decision*, THE NAT'L L.J., Dec. 28, 1987, at 24. "A derivative work is defined in the copyright statute as including an abridgment, condensation, or adaptation of a protected work." *Id.* Hamilton did not take a substantial amount of the original letters to constitute a derivative work. *Id.* It was his use of the quotations and his paraphrase that upset Salinger. *Id.*

24. Slevin, *supra* note 19, at S2. The arduous lobbying effort of the publishing industry culminated with the passage of Public Law 102-492 in 1992. *Id.* This law added a sentence to §107 of the Copyright statute: "The fact that a work is unpublished shall not [in] itself bar a finding of fair use is such finding is made upon consideration of all the above factors." *Id.* "The factors referred to are the four that § 107 directs [to] be taken into account in determining whether a use of previously copyrighted material is fair." *Id.*

25. Lloyd Weintraub, *Commentary: Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1141 (1990). The doctrine of "[f]air use protects only a use that

Amendment rights would be violated if they were censored from writing their works.²⁶ Consequently, the quotation of a modest amount of unpublished materials in a manner that will not preempt the author's copyrights should be found to be "fair use" under the new copyright law.

However, this new amendment to the fair use defense has concerned authors because the rights of the public to disseminate the information from the private works are now preempting their privacy rights. Authors must now deal with secondary authors trying to use their unpublished materials in order to make money. The primary author has the right to use his own works for economic benefit. However, if the primary author does not have the opportunity to use his works prior to the secondary author, the primary author may have lost profits from his own copyright. Salinger should not be given the exclusive opportunity to protect his right to sell his letters.²⁷ Hamilton, the biographer, copied all of the interesting passages from Salinger's letters. Thus, if Salinger wanted to sell his letters, he would have lost any profits from their sale. The court did not deny Hamilton's right to report factual material contained in the letters, but the court would not allow him to use the expressive content of the letters under the fair use defense.²⁸ Courts must realize that the fair use test is a test of inquiry. Each defendant using the fair use defense is a unique case, and courts should look at the facts of each case in order to make a "fair" determination. Many fair use cases are decided

meets two criteria: it must 'serve the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentive for creativity.'" *Id.* (citing Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990)).

26. Tiffany D. Trunko, Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1958 (1989). Salinger's letters would be better protected had he asked the recipients to send the letters back to him instead of donating them to University research libraries. *Id.* "The private writing of a private thought is entitled to protection in the name of privacy only so long as the writer maintains the writing within his grasp." *Id.* Further, a writer's privacy interest must be viewed in light of the First Amendment rights a biographer has in writing about what he has viewed. *Id.* Salinger's letters were on display at university libraries for the public to view. *Id.*

27. Slevin, *supra* note 19, at S2. Salinger's letters were estimated to be worth \$500,000. *Id.* Some impairment to the market place would occur if Hamilton would publish the letters in his biography. *Id.* Since Hamilton copied all the interesting passages, readers may believe they were reading Salinger's words, thus giving Hamilton the edge in the marketplace if Salinger wanted to publish the letters sometime in the future. *Id.* Hamilton would already have entered Salinger's words into society, thus leaving no interest in Salinger's subsequent publication. *Id.*

28. *J.D. Salinger was Entitled to Prevent Publication of Excerpts from his Unpublished Letters*, 8 ENT. L. REP. 9 (1987). The market effect factor prompted the court to state that "if Hamilton's book revealed the literary content of Salinger's letters to such a degree that any appreciable number of potential purchasers would be dissuaded from buying the letters because they had already read them," then Hamilton would be enjoined from publishing the book. *Id.* But, it is difficult to determine whether the quotations and paraphrasing would diminish Salinger's economic rights to his letters. *Id.*

based on the First Amendment and public concerns.²⁹ Courts do not focus on this important factor in determining fair use. Courts must add this "fifth" factor in determining whether a secondary author is protected by the fair use defense. Too many times, courts use the four-factor fair use test in favor of the plaintiff. The test needs to be neutral in its application, and courts must also look at extrinsic evidence (sixth factor), First Amendment and public concerns, as to whether to apply fair use. This six - factor test will be more fair and equitable for all parties concerned. Courts cannot have permission to give the primary author a virtual monopoly over his works.

This Comment will analyze how courts should interpret the four statutory factors in determining a fair use defense, and how the courts need to add First Amendment and public policy concerns in deciding whether to allow the fair use. First, this Comment addresses the current definition of the fair use doctrine and its impact on unpublished works. This Comment will also address the need to create a new fair use defense test to include the First Amendment concerns of secondary authors who cannot create their works without the copyrighted information. Secondly, this Comment discusses the Second Circuit's rationale in applying a per se ban on the use of unpublished, copyrighted materials by secondary authors through the application of the four fair use statutory factors. Moreover, this Comment will provide the Second Circuit's rationale in protecting unpublished works, including the amendment to the fair use defense that was created to stop the per se ban on the use of unpublished materials. Further, the analysis will show the absolute necessity for the courts to include a secondary author's First Amendment concerns and the importance of the public policy concerns. Finally, this Comment will provide a rationale on how the fair use test should be applied in the future.

II. BACKGROUND

A. COPYRIGHT LAW: FAIR USE DOCTRINE

Copyright law can be used to retain the intrinsic economic value in an author's work.³⁰ In the case of correspondence, the author of a letter

29. Trunko, *supra* note 26, at 1957. In order for courts to avoid a First Amendment analysis in fair use cases, courts often focus on the issue of public concern. *Id.* Courts should develop a two-part test, rather than avoid the First Amendment implications. *Id.* (referring to *New Era Publication Intern., v. Henry Holt, Co.*, 884 F. 2d 659, 661 (2nd Cir. 1989)). However, judges are often led to rationalize that copyright law is a virtual monopoly and that "fair use is never to be liberally applied to unpublished copyrighted material, even if the work is a matter of such high public concern as the memoirs of President Ford." *Id.*

30. Stanley F. Birch, *Protecting the Economic Value of a Law Firm's Work Product*, THE NAT'L L.J., Jan. 23, 1989, at 16. "[C]opyright is a federally granted bundle of rights,

retains the ownership of the copyright contained therein while the recipient of the letter acquires ownership of the tangible physical property of the letter itself.³¹ A copyright gives an author the exclusive ownership to his creation.³² Copyright law was designed to stimulate creative thought and artistic activity for the public benefit.³³ In the 19th century, the U.S. Judiciary developed a fair use defense to copyright infringement.³⁴ More than a half century ago, Judge Learned Hand described fair use as "the most troublesome [issue] in the whole law of copyright."³⁵ The doctrine was created to protect the free speech needs of society.³⁶ The fair use doctrine limited the exclusive rights of a copyright owner and allowed reasonable uses by a second author of a first author's work.³⁷

The fair use doctrine has been considered one of the ways in which the copyright laws can accommodate the Constitution's First Amendment protection of the freedoms of speech and press.³⁸ The judge-made rule looked at several factors as to whether the second work would infringe the derivative rights of the primary author and may also substitute the economic value of the original work.³⁹ The 1976 Copyright Act ("Copyright Act") codified the fair use defense and stated the four factors that would assist courts in determining whether any particular use is

statutory in nature, to protect the owner of an original work of authorship." *Id.* Copyright automatically arises by operation of the law when an author's original expression of an idea is "fixed in a tangible medium of expression." *Id.* Copyrights are under the exclusive control of the federal government. *Id.* Under 17 U.S.C. § 301(a), state rights are pre-empted by the 1976 Copyright Act. *Id.*

31. *Id.*

32. *Id.*

33. Martin Fumenbaum, "Fair Use" Under Federal Copyright Law, N. Y. L. J., June 27, 1990, at 3.

34. *Id.*

35. *Dellar v. Samuel Goldwyn, Inc.*, 104 F. 2d 661, 662 (2nd Cir. 1939).

36. *Id.*

37. WILLIAM BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944), quoted in *Rosemont Enterprises v. Random House, Inc.* 366 F. 2d 303, 307 (2nd Cir. 1966), cert. denied, 385 U.S. 1009 (1967). Fair Use is defined as a "privilege in others [other] than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [of the copyright]." *Id.*

38. 17 U.S.C. § 107 (1992). The Fair Use Doctrine states that:

[n]otwithstanding the provisions of § 106 and § 106(a), 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.

Id.

39. *Gray v. Russell*, 10 Fed. Cas. 1065, 1089 (no. 5728) (C.C.D. Mass. 1841); *Folsom v. Marsh*, 9 Fed. Ca. 342, 343 (C.C.D. Mass. 1841).

fair.⁴⁰ The standard of determining fair use may be clear, but the decisions applying the standard have been very ambiguous.

B. FAIR USE DOCTRINE AND UNPUBLISHED WORKS

Traditionally, the fair use defense has been applied more narrowly to unpublished works than to published works.⁴¹ Courts have created new rules supplementing the Copyright Act because courts believe that the Copyright Act is not meant "to impede that harvest of knowledge so necessary to a democratic state," or "to chill the activities of the press by forbidding a circumscribed use of copyrighted words."⁴² The Supreme Court has also stated that even though a work is not published, the status of an unpublished work should not be a determinative factor in prohibiting fair use.⁴³ The Supreme Court further stated that it would not allow authors of unpublished materials to use their copyright "monopoly as an instrument to suppress facts."⁴⁴

The Second Circuit heard two seminal cases and held that any writer using quotations from an unpublished work and invoking the fair use defense would be estopped.⁴⁵ The rulings would inevitably give a writer complete sovereignty over any of his works.⁴⁶ The *Salinger v. Random House* ("SalingerII") and *New Era v. Nation* decisions were now

40. The four factors that were codified in 17 U.S.C. §107 are: (1) the purpose and character of the defendant's use; (2) the nature of the work; (3) the amount and substantiality of the use of the work; (4) the effect of the use on the potential market or value of the work. *Id.*

41. Jonathon Band, *The Fair Use Bill: A Funny Thing Happened on the Way to Congress*, THE COMPUTER LAW, Mar. 1993, at 9. The rationale for this is that an author should have the right to control the first publication of a work. *Id.*

42. *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 198 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

43. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985) [hereinafter *Harper & Row*]. In *Harper & Row*, the *Nation* magazine was trying to publish excerpts from former President Ford's memoirs. *Id.* In reaching its decision that the use was not fair, the Supreme Court stated that the "scope of fair use is narrower with respect to unpublished works", *id.* at 564, and that "under ordinary circumstances, the author's right to control the first public appearances, the author's right to expression will outweigh a claim of fair use. *Id.* at 566. The court also recognized that "the unpublished nature of a work is a key, though not necessarily determinative factor tending to negate a defense of fair use. *Id.* at 554.

44. *Id.* at 554.

45. Vincent H. Peppe, *The Second Circuit Review — 1986-87 Term: Copyright: Fair Use of Unpublished Materials in the Second Circuit: The Letters of the Law*, 54 BROOK. L. REV. 417, 435 (1988). After the *Salinger* decision, a student stated, "[i]f *Salinger* is read to mean that personal interests may be protected through application of copyright law, the future of biographical scholarship is in mortal danger." *Id.*

46. McDowell, *supra* note 14, at A1. J.D. Salinger sought to prevent an unauthorized biographer from quoting his unpublished, copyrighted letters. *Id.* See also *New Era Publications Int'l. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) (involving an unauthorized

the binding law of the Second Circuit.⁴⁷ However, the publishing industry was concerned with several comments made by the Second Circuit, which lead to this virtual per se rule banning the use of unpublished works.⁴⁸ Legislation was introduced in Congress to stop the per se barring of the use of unpublished materials, which greatly affected the publishing industry.⁴⁹ Congress amended the fair use defense, but the amendment is still vague, thus courts would still apply the fair use defense more favorably to the primary author, rather than the secondary author. The fair use doctrine is the most significant limitation on copyright protection.⁵⁰ It is necessary that the courts have an unambiguous rule which courts can apply to fair use defense cases.

C. THE COMPUTER INDUSTRY

Another industry that is affected by the law of unpublished works is

biography of L. Ron Hubbard). The court reasoned that the use of Hubbard's words was to demonstrate Hubbard's personality. *Id.*

47. Mary-Alice Pomputius, *Fair and Foul are Near of Kin: A Suggested Approach to the Fair Use of Unpublished Works*, 15 COLUM-VLA J.L. & ARTS 161, 191 (1991). The Second Circuit contains New York, the publishing capital of the United States, hence, its rulings have a significant impact on the literary community. *Id.* Because there was no decision from the Supreme Court overturning these decisions, the Second Circuit's rulings made the fair use of unpublished materials almost impossible. *Id.* The literary community lobbied Congress to amend the Copyright Act because authors were editing their works in fear of copyright infringement actions. *Id.*

48. Michael Klipperer, *Congress Resumes Consideration of Fair Use of Unpublished Works Issue*, 13 ENT. L. REP. 2 (1991).

(1) [I]f he (a biographer) copies more than the minimal amounts of "unpublished" expressive content, he deserves to be enjoined (*Salinger*); (2) Unpublished materials "normally enjoy complete protection against copying any protected expression" (*Salinger*); and the copying of more than minimal amounts of unpublished expressive material calls for an injunction barring the unauthorized use" (*New Era*). Putting these statements together, they "create a per se rule precluding a finding of fair use where quotations are taken from unpublished works," and "make the issuance of an injunction virtually automatic in such cases."

Id.

49. Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299 (1991). Publishers were hesitant to give biographers advances for their works because of the biographers need to use quotations from unpublished letter and diaries. *Id.* The court's decisions concerning fair use forced many biographers to change their manuscripts or abandon ideas on writings new books. *Id.* The publishing industry believed writers had no guidance from the courts to stop from violating a primary author's copyrights. *Id.*

50. Benjamin Ely Marks, Note, *Copyright Protection: Privacy Rights, and the Fair Use Doctrine: Post Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376 (1997). Fair use is an affirmative defense to copyright infringement. *Id.* Fair use allows the copying of protected expression. *Id.* The judiciary created the fair use defense because certain acts of copying should be allowed because of the overwhelming public interest, which outweighs the primary author's copyright protection. *Id.*

the computer industry.⁵¹ During the congressional hearings, the computer industry also wanted to be heard. The publishing and computer industries both reiterated that they relied on certain unpublished works in order to stay competitive and answer the needs of the inquisitive public.⁵²

Many organizations, including the computer industry, have utilized the copyright concepts to protect unpublished works.⁵³ Piracy is the most serious threat to computer software manufacturers. Essentially, piracy is the copying and sale of a program without permission.⁵⁴ Consequently, no one wants the copier of an unpublished software program to benefit from using the fair use defense.⁵⁵ If copiers of a program are allowed to use fair use as a defense, the primary software creator receives no protection for his original work because software is not copy-

51. James Burger, *Copyright, Computers, and Catcher in the Rye; Access to Unpublished Manuscripts and Software Create Questions of Fair Use*, THE RECORDER, July 19, 1991, at 4. Very few commercial computer programs are published. *Id.* A specific vulnerability for authors of computer programs involves a process called decompilation. *Id.* It is a process in "which a 'pirate' copies the object code of a computer program and then successively translates that code into a source code, a form more easily read and manipulated by the pirate." *Id.* "The pirate avoids the research and development expense necessary to create an original work, alters the program to disguise the copying, and produces a second, similar program which its markets as a substitute product at a lower price." *Id.*

52. *Id.* at 9. First, the publishing industry testified that the decisions have a chilling effect on the ability of "second authors" to make use of unpublished materials – "the building blocks of their trade." *Id.* This is so, according to a witness for Magazine Publishers Association, because "publisher's lawyers [now] have no choice but to advise magazine editors that almost any unauthorized use of previously unpublished materials will lead to a finding of copyright infringement." *Id.* Second, the publishing industry also testified that the fair use analysis is only relying on one element – the unpublished nature of work—which makes the ruling dispositive based on the single issue, rather than looking to the other factors. *Id.* Third, the amendment does not give "second authors" carte blanche to publish unpublished, copyrighted works. *Id.*

53. Band, *supra* note 41, at 10. The computer industry has worked with trade secret concepts to protect confidential information. *Id.* By establishing a trade secret, an organization can protect itself against unauthorized use of information by anyone whom it permits access to the secret. *Id.* Trade secret law does not prevent copying of works by third persons who gain access to the secret, however, so by keeping a copyrighted work unpublished, its owners gain rights against others. *Id.* Courts have always given deference to the fact that an author has not published a work, and the courts try to prevent the use by others. *Id.*

54. Mika, *infra* note 56. The purpose of the use should not hinder the marketability of a copyrighted work. If it does, than the prosecution of cases that deal with pirated works will be a remedy to the aggrieved party. *Id.* The financial income of the software creator may be inhibited because the pirated work is being sold below market value, or being sold prior to the primary software creator's ability to sell his creation. *Id.*

55. *Id.* Increased use and dependence on computer software has created new interest in the United States Copyright Act of 1976. *Id.* The purpose of the protection under the Copyright Act is to give creators of intellectual properties control over how their work will be used. *Id.*

righted.⁵⁶ Consequently, the primary software creator has no protection for his work. Further, the owner may want to carefully control the software's dissemination, similar to that of an author and his private writings.⁵⁷ The computer industry needs to protect its product from any possible infringement or theft.⁵⁸ The United States Copyright Office testified that it did not have an institutional interest in the legislation. Consequently, it would follow the recommendations of Congress and the new amendment.⁵⁹

D. FIRST AMENDMENT CONCERNS

Secondary authors argue that copyright law should comport with First Amendment principles. First Amendment values should be considered even in copyright cases. The late Melvin Nimmer, a distinguished authority on copyright law, prepared an amicus curiae brief for a variety of newspapers when the Supreme Court was hearing *Harper & Row Publishers v. Nation Enters.* ("*Harper & Row*").⁶⁰ In his brief, Nimmer indicated the implications the First Amendment would have on the question of whether a secondary author, i.e. a biographer, can use unpublished quotations in his work.⁶¹ Under copyright law, an idea is not copyrightable, but the expression can receive copyright protection. Consequently,

56. Joseph J. Mika, *Legal Issues affecting Libraries and Librarians; Employment laws, liability and insurance, contracts, and problems patrons*, AM. LIBR. ASSOC., Mar. 1988. The Computer Software Act of 1980 amended § 101 and § 117 of the Copyright Act to extend copyright protection to computer software programs. *Id.* Courts have concluded that databases may be copyrighted because the compilation of the material is required in order to create the software. *Id.*

57. *Id.* Research that can be downloaded can be considered fair use of the material. *Id.* As long as the user deletes the material after his use, it is a valid fair use claim. *Id.* However, courts have not had the opportunity to explore whether the downloading of the material affected the marketability of the database, or what was the nature of the original work that was downloaded to create another work. *Id.*

58. Diane Conley, *Fair Use, Fair Game*, LEGAL TIMES, June 17, 1991, at 45. The computer industry feared that the copyright protection of the source code (the version of a computer program written in language that can be easily read by software experts and therefor used to develop compatible products) would be weakened with the passage of the Copyright Act amendment. *Id.*

59. Alan J. Hartnick, *New Fair Use Amendment: An Investigative Report*, N. Y. L.J., Dec. 4, 1992, at 5. If the subcommittees believe that a legislative solution is more preferable to continued case-law development, the Copyright Office will support the legislation. The Office encourages the flexibility to make fair use determinations. *Id.*

60. Band, *supra* note 41, at 7. The First Amendment, read literally, would invalidate the Copyright Act. However, the Copyright Clause of the Constitution, Art. I, § 8, cl. 8, vests in Congress the power to enact Copyright laws. *Id.* It might be argued that this created a "built-in" immunity from the first amendment for copyright. *Id.*

61. Abrams, *supra* note 8, at 14. Biographers are quick to argue that primary quotations are the best source to successfully write a biography that enhances the person they are writing about. Direct quotations make the work more meaningful. *Id.*

every copyright case would also become a First Amendment case.⁶² James Madison believed that copyright and patent protection were “too valuable to be wholly renounced,” but dangerous enough that the public should retain the right “to abolish the privilege at a price to be specific in the grant of [the copyright].”⁶³ Thomas Jefferson believed that the notion of granting the “exclusive rights to the profits” from ideas “as an encouragement to men to pursue their ideas” was something that “may or may not be done according to the will and convenience of the society.”⁶⁴ Under the First Amendment, the reporting of facts is fully protected, but the use of “more than minimal amounts of unpublished” expressive content is not.⁶⁵

One of the passages from the *Harper & Row* case that is persuasive in adopting First Amendment principles over copyright protection is the observation that the “freedom of thought and expression includes both the right to speak freely and the right to refrain from speaking at all.”⁶⁶ Copyright law should not have the power to preempt the rights a writer or speaker may have from the First Amendment.⁶⁷ A writer’s interests cannot supersede another’s First Amendment rights.⁶⁸ The primary author’s rights are preempting the rights of a biographer who has a pecuni-

62. *Id.* at 19. Any copyright law that allowed monopolization would be unconstitutional. *Id.* Any copyright law sensitive to First Amendment values should give rise to the principle that only expression maybe copyrighted. *Id.* In interpreting both laws together, the principle of fair use was created to accommodate the public’s interest in being informed. *Id.*

63. B. SCHWARTZ, 3 ROOTS OF THE BILL OF RIGHTS 617-18 (1980).

64. J.P. FOCY, 433 THE JEFFERSON CYCLOPEDIA (1967).

65. Hartnick, *supra* note 59, at 12.

66. *Id.* The enjoining of the publication of a book is a serious matter when dealing with one’s first amendment values. *Id.* The courts cannot discount the values of one man to protect the privacy and livelihood of another. *Id.* Are Salinger’s pecuniary interests more important than the occupation of a biographer? Only if a biographer copies more than minimal amounts of unpublished expressive content, only then does he deserve to be enjoined. *Id.*

67. Professor Clarence Wilson, Address at *The John Marshall Law School Art Law Class* (Jan. 17, 1999). An author’s work is no longer considered his own property because another author wants the right to publish the primary author’s words. *Id.* The fair use defense is creating a race to see who can publish the works first. *Id.* No longer will authors be content with creating works for their personal use because they will fear a second author will have more rights to the work than the primary author. *Id.* The creative process will grind to a halt because authors will fear that their works will be diminished by the interference of a third party trying to publish the works. *Id.*

68. Hartnick, *supra*, note 59, at 11. To a lawyer schooled in First Amendment law, a statute that permits on its face the “impounding and disposition of infringing articles” sounds like a statute that encourages book burning. *Id.* A statute that features injunctions as a weapon to be loosed upon speech sounds like one that is insensitive to our nation’s antipathy to prior restraints on speech. *Id.* Such a statute exists, and has existed since the beginning of the republic, and is rooted in the Constitution. *Id.* The copyright statute is sometimes not viewed in accordance with the framers First Amendment values. *Id.*

ary interest in creating a work that is part of his livelihood.⁶⁹ Consequently, the right of privacy is no longer an implied right created by the framers of the Constitution, which provided an intrinsic protection of privacy within the First Amendment.⁷⁰

III. ANALYSIS

A. THE SECOND CIRCUIT DECISION: FAIR USE DEFENSE

The fair use doctrine is an affirmative defense to a copyright owner's claim of infringement of one or several of his fundamental rights.⁷¹ According to the court opinions of the Second Circuit, fair use was not a defense to copying an author's unpublished work.⁷² The Court of Appeals for the Second Circuit overturned the district court's opinion in *Salinger II*.⁷³ The central issue that divided the two courts was the

69. *Id.* (citing D. Stockman, *THE TRIUMPH OF POLITICS* 407 (1986)). Fair Use may be constitutionally mandated. The concept of fair use allows the quotation of a single-word from a book review. *Id.* The courts cannot allow one man to monopolize those words used to describe an incident. For example, the protection of the fair use doctrine that permits a news article about President Reagan to quote from David Stockman's description of the President as "ignoring all the palpable, relevant facts and wandering in circles . . . as a good and decent man" going in an "embarrassing way." *Id.* Stockman may have created the expression, but he should not be able to monopolize the words when a writer may want to convey the sentiment that Stockman was originally writing about in his article. *Id.*

70. *Wojnarowicz v. American Family Ass'n.*, 745 F. Supp. 130, 146 (1990). Judge Connor also employed the First Amendment as a separate fair use factor, asserting that "it is highly significant . . . that plaintiff accepted public funds to support his artwork. *Id.* This fact broadens the scope of the fair use exemptions because of the strong public interest, protected by the First Amendment, in free criticism of the expenditure of federal funds. *Id.*

71. *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 418 (S.D.N.Y. 1986), *rev'd* 811 F.2d 90 (2nd Cir. 1987). The *Salinger* standard for the fair use of unpublished materials "appears to bar the biographer of an author from using any of his subject's protected expression whether done to achieve accuracy in the rendition of the subject's idea or to illustrate comments on the subject's writings style, skill, and power . . . [H]e would not be permitted to take examples of protected material to illustrate the point[s]." *Id.*

72. *Id.* at 420. If the author or owner of has a fundamental right to the unpublished work under Section 106, there could be infringement unless the fair use is permitted. *Id.* The court couples this factor with the unpublished nature of the work in deciding whether fair use should be permitted. *Id.* The Second Circuit frowned on giving a second author fair use to use a primary author's unpublished works. Section 106 provides in part:

to reproduce the copyrighted work in copies or phonorecords;
to prepare derivative works based upon the copyrighted works;
to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
Secondary authors are infringing on the exclusive rights of the copyright holder; however, Congress created exceptions in order to stop the primary author from having a monopoly over his work. Moreover, Section 108 allows libraries to copy a work and Section 110 permits the public performance for teaching or educational purposes.

Id.

73. *Salinger II*, 811 F.2d at 94.

application of the four statutory fair use factors.⁷⁴ The Second Circuit relied on the seminal United States Supreme Court case, *Harper & Row*, in developing their rationale.⁷⁵

The court analyzed each of the four statutory factors separately in order to create the per se rule which barred a secondary author from using the unpublished works of the primary author.⁷⁶ The Second Circuit ruling virtually created a blanket rule that would prohibit any publication of unpublished works.⁷⁷ However, courts must focus on the four statutory factors in a light most favorable to the secondary author, since the secondary author is the party raising the defense.⁷⁸ Further, courts must also include extrinsic evidence in determining whether a secondary author can assert the fair use defense. Consequently, courts must focus their rationale on the four statutory factors and extrinsic evidence.

The Copyright Act codified the fair use defense in § 107.⁷⁹ The fair use defense consists of four statutory factors.⁸⁰ Courts have limited their analysis of the fair use defense to the statutory factors stated in § 107. It is important that courts not limit their opinions to the statutory factors, but review the facts of the case before trying to apply the facts to the rigid statutory factors. This draconian sense of applying statutory law will harm all parties involved in the controversy, and bind other courts to its unpredictable application. The intent of each factor will be discussed below in order to develop a basis for adding the First Amendment and public concern factors to the fair use defense inquiry.

1. *The Purpose and Character of the Use*

Under the Copyright Act, § 107, in determining the validity of a fair use defense, courts are required to consider the first statutory factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."⁸¹ Examples of valid uses are for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship . . . [and] research."⁸² The Supreme Court concluded in *Harper & Row* that a

74. Chambers, *supra* note 1, at 50.

75. *Id.*

76. *Salinger II*, 811 F.2d at 94.

77. *Id.*

78. *Id.*

79. 17 U.S.C. § 107.

80. *Id.*

81. *Id.*

82. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984). "Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have." *Id.* The court further stated that the copyright laws involve "a difficult balance between the interests of authors and inventors in control and exploitation of their writings and discoveries on the one hand, and society's

commercial purpose "tends to weigh against a finding of fair use."⁸³ The Second Circuit's definition of "commercial use" is based on the facts presented in each situation before the court. In *Maxtone-Graham v. Burtchaell*,⁸⁴ the Second Circuit stated that the commercial nature of a work is not absolute, but is "a matter of degree."⁸⁵ The Second Circuit's decision reflects the idea "that economics require authors and publishers to realize profits, and is applicable to a variety of works."⁸⁶

The *Salinger II* court defined "commercial use" within extremely narrow parameters.⁸⁷ The court was concerned that if Hamilton was protected by the fair use defense, Random House would "exploit the headline value of the infringement,"⁸⁸ even though the record did not indicate how Random House would advertise the book.⁸⁹ The Second Circuit took the position that biographical writing should not be given

competing interest in the free flow of ideas, information, and commerce on the other hand." *Id.* Videotape use dictates that the fair use doctrine be applied more rigidly than to books. *Id.*

83. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 [hereinafter *Harper & Row*]. See Alan Goldberg, *Fair Use Update: Has the Sony Presumption Survived?* N.Y. L.J. Nov. 20, 1987, at 1. The *Harper & Row* court limited the Sony presumption to a "tendency." *Id.* The *Harper & Row* court based its finding that the defendant's use was for a commercial purpose upon the fact that the defendant "[s]tood to profit from [the] exploitation of the copyrighted material without paying the customary price," rather than on the proposition that the defendant was in business to make a profit. *Id.*

84. *Maxtone-Graham v. Burtchaell*, 803 F. 2d 1253 (2nd Cir. 1986).

85. *Id.* at 1262. In *Maxtone-Graham*, the Second Circuit found that the educational elements of defendant's book outweighed its commercial elements. *Id.* The court stated that the book had some commercial elements, it was "first and foremost" a work expressing a viewpoint on the issues of abortion. *Id.* The standard that was used in *Maxtone-Graham* was based on the reasoning in *Meerpol*. *Id.* In *Meerpol*, the Second Circuit stated that the inquiry should focus on "whether or not the . . . letters were primarily for scholarly, historical reasons, or predominantly for commercial exploitation." *Id.* at 1269. The facts in *Meerpol* were that Julius and Ethel Rosenberg's personal letters were being quoted verbatim without permission. *Id.* *Maxtone-Graham* interviewed seventeen women discussing their experiences with unwanted pregnancies. *Id.* The book was directed toward a pro-choice readership and featured articles from women who had abortions. *Id.* A catholic priest was writing a commentary on pro-choice literature that stated the church's point of view. *Id.* *Maxtone* argued that the "heart" of the book was taken. *Id.*

86. Peppe, *supra* note 45, at 435.

87. See *Salinger II*, 811 F. 2d at 96. The court found that Hamilton's use of the letters was not overtly "commercial" because he was enhancing a scholarly biography. *Id.* Further, even though Hamilton and Random House produced the book for the sole intention of generating profits," the court could have concluded that the biography could fit in the category of "criticism, scholarship, and review." *Id.* (quoting 17 U.S.C. § 107 (1982)).

88. *Harper & Row*, 471 U.S. at 542. The court believed that Hamilton's manuscript was an attempt to "scoop" Salinger's future publication. *Id.* In *Harper & Row*, the Nation's infringing article was intended to "scoop" a feature story to be published in Time magazine pursuant to Time's license from Harper & Row. *Id.*

89. Peppe, *supra* note 45, at 435. The record contained no evidence regarding how Random House intended on promoting the book, but the Court presumed that Random

"special consideration."⁹⁰ The quotation or close paraphrasing of a letter is subject to a claim of copyright infringement, and thus, risks an injunction of the book's publication.⁹¹ The Second Circuit further reasoned that aesthetic qualities, such as "vividness of description,"⁹² should be protected under the copyright laws.⁹³ In following the court's reasoning, a court would still focus on the primary author, rather than the rights of the secondary author. The four statutory factors cannot be dispositive in determining whether a secondary author is protected under fair use. Therefore, courts must look to extrinsic evidence to balance the fair use defense against the rights of the primary author.

2. *The Nature of the Copyrighted Work*

The second statutory factor in the fair use defense is the "nature of the copyrighted work."⁹⁴ The nature of a work can be compared to a spectrum. One end of the spectrum has "factual works," and the other end has works of entertainment, fiction, or fantasy, which are not as susceptible to a "finding of fair use."⁹⁵ Courts also look at whether a work is published or unpublished.⁹⁶ The Second Circuit concluded that the na-

House would emphasize the fact that Hamilton had "generously" used some of Salinger's unpublished letters. *Id.*

90. *Salinger II*, 811 F.2d at 97. The practical and legal challenges that face authors of biographies do not undermine the rights of the primary author. *Id.* Most courts reason that the unpublished nature of an author's letters strongly cut against the second author's fair use defense. *Id.* The primary author's rights may be more important than the second author because the court cannot find a balance. *Id.*

91. *Salinger v. Random House*, 650 F. Supp. 413, 424 (S.D.N.Y. 1986). The district court reasoned that when a biographer uses a letter as a source for his work, he will try to convey the intent of the letter as precisely as the primary author intended does. *Id.* The circuit court conversely assessed that a biographer could avoid an injunction if he took the "facts" from the letters, rather than copying the author's expression of them. *Id.* The "vividness of description" is precisely the attribute an author wants to protect. *Id.*

92. *Id.*

93. *Id.* Hamilton's testimony demonstrated his desire to capture these qualities in his manuscript. *Id.* Hamilton explained that it was important to use Salinger's style in order to convey the ironic tone Salinger used. *Id.* Further, Hamilton stated that if he were to explain the tone of the letter, rather than copy the letter, it would have become a "pedestrian sentence" to which he would not want to attribute to himself. *Id.* Salinger informed Hamilton he would want a biography done after his death; but, Salinger's reclusive nature makes the biography more financially suitable because people have an interest in what Salinger is presently doing during his life. *Id.*

94. *Salinger II*, 811 F.2d at 96. Salinger's letters were subject to copyright laws because the libraries where they were housed limited access to them. *Id.* The libraries did not have the letters in a public forum. *Id.* Rather, they were located in the archives, where they could be protected from public handling. *Id.*

95. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2nd Cir. 1986).

96. *Salinger II*, 811 F.2d at 97 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) [hereinafter *Harper & Row*]). In *Salinger II*, the Second Circuit concluded that "[t]he fact that a work is unpublished is a critical element of its

ture of Salinger's letters were considered "unpublished." The placement of Salinger's letters in public libraries did not constitute a publication.⁹⁷ Further, a library's lending or the display of a letter does not constitute a publication, even if the library owns the letter.⁹⁸ The exclusive copyright is still held by the author of the letter.⁹⁹ The Second Circuit cited *Harper & Row's* holding that "the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."¹⁰⁰ Consequently, the Second Circuit decided that the rule should be "that unpublished works 'normally enjoy complete protection against copying any protected expression.'"¹⁰¹ Hence, the second factor weighed heavily in favor of Salinger.

However, courts may be able to draw a distinction between works that are intended for publication and those not intended for publication.¹⁰² Letters, journals, and diaries are unpublished works authors do not want to publish; thus, these works are in less need of copyright protection.¹⁰³ This approach will "provide incentives for the creation of

nature." *Id.* After reading Hamilton's transcript, Salinger went to the Copyright Office to register the letters and obtained counsel to ensure that quotes from his unpublished letters were not used. *Id.*

97. 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 1.03(a), at 1-31 (1988). "[A] Library which owns a copy of a work may lend such copy to its patrons without infringing the copyright owner's distribution right." *Id.* Salinger did not relinquish possession of the copyright in the contents by sending the physical embodiment of the expression, the letters themselves. *Id.* Salinger maintains a copyright in the expression, there is no copyright in the possession of the letters. *Id.*

98. Abrams, *supra* note 8.

99. *Id.* Salinger's letters that were donated to the libraries were especially meaningful in determining his state of mind during his self-imposed exile. *Id.* He wrote letters to Ernest Hemingway and many other friends. *Id.* In these letters, he often spoke of his opinions of what was going on in the world, and how he disliked some of the things going on among his circle of friends. For example, he was disgusted with the marriage of his former girlfriend to Charlie Chaplin. *Id.* In his letter he stated, "I can see them at home evenings. Chaplin squatting grey and nude, atop his couch . . ." *Id.* These passages must be quoted in order to understand the essence and mood of Salinger. *Id.*

100. *Harper & Row*, 471 U.S. 539, 564 (1985). The Second Circuit believed that the Supreme Court also applied this standard to unpublished personal letters. *Id.* In fact, the Second Circuit further concluded that the "narrower scope" meant that there would be fewer circumstances where the fair use doctrine would allow a biographer to take a larger amount of information from an unpublished work. *Id.*

101. *Id.*

102. Pomputius, *supra* note 47, at 191. With the distinction, fair use should be broader regarding works created with no intent to publish, such as letters, memos, and journals. *Id.* Fair use should be narrower for works created for the intent to publish. If courts were to use this distinction in deciding the importance of publication, then it could be part of the "nature of work" factor. *Id.*

103. *Id.* "Works intended for publication are the primary reason for extending copyright protection because they are, most likely, created with the monopoly incentive and contribution to society in mind." *Id.* Some assumptions need to be made in order to make Judge

works intended for publication."¹⁰⁴ Courts may also extend the fair use to "publicly disseminated material."¹⁰⁵ Unfortunately, an analysis based on public dissemination would not solve the problem for the literary community about the fair use of unpublished works. Consequently, courts must not limit their reasoning to the statutory factors of the fair use defense. Though certain factors weigh heavily in favor of the primary author, the public's interest is not to limit a secondary author's rights to publication. Thus, the court must balance the inquiry with extrinsic evidence that may include First Amendment values and the public's implied right to know the information.¹⁰⁶

3. *The Amount and Substantiality of the Portions Used*

The third factor of the fair use defense requires courts to evaluate "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹⁰⁷ This factor contains two separate elements: one quantitative and one qualitative.¹⁰⁸ The fair use defense will not allow a person to copy the qualitatively valuable portion of the work, even if the words copied are a small portion of the entire protected material.¹⁰⁹ In *Harper & Row*, the Supreme Court held that the copying of 300 words from President Ford's 200,000 word memoirs was sufficient to preclude a finding of fair use because those passages copied were "essentially the heart of the book."¹¹⁰

Leval's distinctions workable. *Id.* First, one must assume that a judge can determine the intentions of the author at the time of the creation of the work. *Id.* Second, the privacy interest of an author will not be considered in determining whether it is a publication. *Id.*

104. *Id.* at 192. "But not for the creation of works written with no initial intent to publish. Judge Leval's distinction will help to encourage authors to share their work with the public, thereby serving the purpose of copyright law in promoting [the] progress and useful arts." *Id.*

105. *Id.* Judge Miner, a Second Circuit Judge, believes the definition would include "any letters sent without a requirement of confidentiality and any documents, including letter, that have been in existence for a certain period of years without having been copyrighted." *Id.* This approach would benefit the public by furthering the creation and dissemination of ideas.

106. In *Rohauer v. Killiam Shows, Inc.* 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F. 2d 484 (2nd Cir. 1977), the court reasoned that the nature of an infringing work can be considered within the rubric of public interest. *Id.* The court concluded that an important consideration in determining whether an infringer can use the fair use defense is the nature of the infringing work and whether the "distribution would serve the public interest in the free dissemination of information." *Id.*

107. *Salinger II*, 811 F. 2d at 97.

108. NIMMER, *supra* note 97, § 13.05(a).

109. *See generally*, *Roy Export Co. Establishment v. Columbia Broadcasting Sys. Inc.* 672 F. 2d 1095 (2nd Cir. 1982), where the court held that one minute and fifteen seconds from a one hour and twelve minute motion picture precluded fair use. *Id.*

110. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) [hereinafter *Harper & Row*]. The Court stated that "especially in the realm of factual narrative,

The Second Circuit concluded that the amount and substantiality of Hamilton's taking was precluded under fair use. The court asserted that the author's expression included his structure, thus the Second Circuit held that Hamilton had taken too much from Salinger's personal letters.¹¹¹ The Second Circuit also found the copying to be substantial from a qualitative point of view. In *Harper & Row*, the Supreme Court concluded that the verbatim copying of a portion of President Ford's memoirs was evidence of the qualitative value of the material.¹¹² Consequently, the Second Circuit held that the portions of the letters that were used in Salinger's biography were the better aspects of the letters and could be what "made the book worth reading."¹¹³

When courts are adjudicating fair use claims, their inquiry should be on the amount of quotations taken from the work.¹¹⁴ This factor tends to favor the primary author because courts have the power to determine that a single quote may be the primary author's right to "expression."¹¹⁵ Thus, courts must not be limited to the statutory inquiry because of the bias to the secondary author. Extrinsic evidence is necessary in determining whether the public has a right to read the information.

4. *The Effect on the Potential Market*

The fourth and final fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work."¹¹⁶ The Supreme Court has determined that this factor is "the single most important element in fair use."¹¹⁷ The fair use defense is an affirmative defense; however, the courts require the plaintiff to make a prima facie showing of

the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression." *Id.* at 548.

111. *Salinger II*, 811 F.2d at 98. The Second Circuit found that Hamilton had copied, either by quotation or close paraphrase, at least one-third of seventeen letters and at least 10 percent of forty-two letters. *Id.*

112. *Id.* The value taken affected both the author and the copier who seeks to profit from using it. *Harper & Row*, 471 U.S. at 564. Justice O'Connor noted that 13 percent of the *Nation* article consisted of verbatim quotes from Ford's manuscript, and that the article was structured around the excerpt which functioned as its "dramatic focal points." *Id.* at 566.

113. *Salinger II*, 811 F.2d at 98-99.

114. Jon Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y. 12, 14-5 (1989). Judge Newman, another Second Circuit Court Judge, believes that quotations from unpublished works should be allowed, but only quotations that are necessary for accuracy. *Id.* "A fair use of unpublished expression would only include quotes that prove facts; an unfair use would be quotes that merely enliven text." *Id.*

115. *Id.*

116. *Maxtone-Graham v. Burtchaell*, 803 F.2d. 1253, 1269 (2nd Cir. 1986).

117. *Salinger II*, 811 F. 2d at 99.

harm to the protected work.¹¹⁸ In *Harper & Row*, the Supreme Court held that the copyright owner must establish "with reasonable probability" a causal connection between the infringement and the alleged harm.¹¹⁹ For the court to deny a finding of fair use, the plaintiff must show that the defendant's work "should [it] become more widespread, . . . would adversely affect the potential market for the copyrighted work."¹²⁰

Although Salinger stated he had no intention to publish his letters during his lifetime, he still had a right to preserve his opportunity to sell his letters should he change his mind. The Second Circuit asserted that the statutory factor referred to the "potential" market, thus Salinger's intentions were irrelevant.¹²¹ Consequently, the Second Circuit held that Hamilton's use would infringe Salinger's right to publish his letters at a future date and, thus, held the fourth factor in favor of Salinger.¹²² Since the majority of the factors weighed heavily in Salinger's favor, the court held for Salinger.¹²³ The court made an error when the court misplaced the intentions of the primary author, Salinger. Since Salinger indicated he had no intention of publishing the work, he conceded any rights to the works. If the public did not have the opportunity to understand and know more about one of America's great writers, the public

118. Goldberg, *supra* note 83, at 99.

119. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) [hereinafter *Harper & Row*] (citing as examples, actual loss of revenue, impairment of the potential market for original or derivative works, or an adverse affect on the value of any of the copyright holder's rights). The Ford manuscript was on its way to be published, the *Nation's* "scoop" would have diminished the value of the manuscript once it was published. *Id.* The *Nation* impeded Ford's financial interest in his memoirs; the good parts of the manuscript had already been published, saving people the price of purchasing the book. *Id.*

120. *Id.* at 568. Once the plaintiff has established the prima facie showing, the burden shifts to the defendant to show that the harm would have occurred even if there had been no copying of the plaintiff's expression. *Id.* at 567.

121. *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2nd Cir. 1987). The district court's finding that the Hamilton biography would have no effect on the potential market for the letters was based upon their conclusion that Hamilton's infringement was slight. *Id.* Thus, the Second Circuit concluded that it did not share the same point of view. *Salinger II*, 811 F.2d at 99. Salinger's letters were estimated to be worth at least \$500,000 if Salinger wanted to sell the letters. *Id.* The potential market for Salinger's letters was high, thus, even a buyer of a single letter would be dissuaded from purchasing it because all of the pertinent phrases and expressions are located in the biography, thus giving no economic recourse for Salinger. *Id.*

122. Lisa Hoban, *The Salinger File*, N.Y. MAG., June 15, 1987, at 39. "[The letters] catalogue his writing—from his earliest stories to his first attempts at creating Holden [Salinger's alter-ego character, protagonist in the *Catcher in the Rye*] to his deepening interest in Eastern religion . . ." *Id.* [T]hey parallel the lives and loves of the characters in his fiction, making little more legible the line where Salinger leaves off and the Caulfields and the Glasses begin." *Id.*

123. *Salinger*, 650 F. Supp. at 425.

would be harmed.¹²⁴

The court cannot insert its views and beliefs when the primary author has stated unambiguously that he has no intention to publish the works in question. Thus, courts must not limit their rationale to the four statutory factors. A balancing of the rights of the primary author and the public's need for the information must exist in order for the fair use defense to be applied in an equitable manner.¹²⁵ Biographers write about mysterious people about whom the public has a desire to learn.¹²⁶ The public will be irreparably harmed if biographers do not have the opportunity to publish works that would otherwise never enter the public forum. It is imperative¹²⁷ that the public concern is added to the four statutory factors in determining fair use; otherwise, important information would be hidden from the public.

B. THE SECOND CIRCUIT'S POSITION ON UNPUBLISHED WORKS

The Second Circuit believed that the seminal issue in *Salinger II* was the scope of the fair use doctrine; however, the court only helped to create more confusion for other courts when dealing with the issue of

124. Marks, *supra* note 50. Public access to Salinger's life is useful to students and aspiring writers who may want to study his artistic talents. The information in biographies are an essential guide into the lives of great artists. *Id.*

125. Rosemont Enter. v. Random House, Inc., 366 F.2d 303 (2nd Cir. 1966). This was the first case to identify the public interest concern. *Id.* Rosemont asked the court for an injunction barring the publication and distribution of a biography of Howard Hughes. *Id.* Rosemont claimed that the book infringed the copyrights on three articles about Hughes that were published twelve years earlier in *Look* magazine. *Id.* The district court held that the biography quoted 256 words from the articles, eighty words were paraphrased, and the court found twelve additional sections of paraphrasing. *Id.* The Second Circuit did not concur and held that the lower court had "unjustifiably restricted the privilege to scholarly works written and prepared for scholarly audiences." *Id.* at 306. The Second Circuit held that allowing an injunction would deprive the public of the opportunity to know and understand a person of extraordinary talents who was virtually a recluse. *Id.* at 309. The public interest would prevail over the individual's copyrights. *Id.*

126. Hoban, *supra* note 122. The Second Circuit surpassed its power as a court by not taking into account the statement of Salinger that he had no intention of publishing the letters. *Id.* Salinger relinquished any future rights to the letters, thus, the court should not have circumvented the wishes of the primary author. *Id.* The Second Circuit's rationale would bar anyone from publishing the unpublished works, even if they were never to be published by the primary author. *Id.* This would bring to a halt the ability of the public to learn as much as they can about the history of writers, and the times in which they worked. *Id.* This barring would stop authors from reporting important historical facts or events. *Id.* It would be tragic if courts were to follow this rationale. *Id.*

127. Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest*, 59 TUL. L. REV. 135 (1984). Courts developed the fair use doctrine in order to balance the public's interests. *Id.* It is necessary that courts be explicitly given the opportunity to use the public interest as a fifth factor in determining whether the use was fair. *Id.*

unpublished works. In *Harper & Row*, the Supreme Court reasoned that the unpublished nature of a work should be a "key, though not necessarily determinative factor" when applying the fair use doctrine.¹²⁸ However, the Second Circuit misread the holding in *Harper & Row* and developed the per se barring of unpublished works to be protected under the fair use doctrine.¹²⁹ Thus, lower courts no longer have a clear precedent to follow when deciding similar cases.

In *New Era Publications*, New Era claimed that the secondary author Miller's biography quoted too extensively from the primary author L. Ron Hubbard's unpublished writings.¹³⁰ The court further applied the *Salinger II* rule of unpublished works, which have complete protection from fair use.¹³¹ Thus, the misinterpretation and misapplication of *Harper & Row* created a "rippling effect throughout the muddy water of fair use and unpublished works."¹³² The Second Circuit's holding cre-

128. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985) [hereinafter *Harper & Row*]. The Court slighted the idea expression dichotomy by failing to grant a wider scope of fair use to factual works. *Id.* at 556. The Court imposed rigid criteria on a doctrine Congress intended to be a sensitive balancing of interests. *Id.*

129. *Salinger II*, 811 F.2d at 97. The Second Circuit believed that unpublished works should "normally enjoy complete protection against copying any protected expression." McDowell, *supra* note 14, at A11. Moreover, "the court's harsh statement that if . . . [a biographer] copies more than minimal amounts of unpublished expressive content, he deserves to be enjoined, is troubling because it suggests that the Second Circuit may be adopting a hostile attitude toward those authors whose works the fair use doctrine is designed to encourage." *Id.*

130. *New Era Publications Int'l. v. Henry Holt & Co.*, 684 F. Supp. 808 (S.D.N.Y. 1988). Russell Miller wrote a biography of L. Ron Hubbard that was published by Henry Holt & Co. *Id.* Most of the material Miller used was from the unpublished diaries and journals that were given to the Church of Scientology. *Id.* New Era own the copyright to the diaries and journals. *Id.* They claimed that Miller quoted too many passages from the dairies without New Era's consent. *Id.* New Era asserted a copyright infringement claim; Holt defended its actions by claiming fair use. *Id.* The United States District Court held the use of the unpublished materials was an infringement because the use did not pass the "fair use test" of 17 U.S.C. § 107. *Id.* See *New Era Publications Int'l. v. Henry Holt & Co.*, 873 F.2d 576, 579 (2d Cir. 1989). The Second Circuit upheld the district court's ruling. *Id.* The court stated in dicta that it found a compelling case for fair use but denied the defense because "were it not for the ruling of the Court of Appeals in *Salinger*, [the court] would conclude that fair use had been adequately demonstrated." *Id.* at 582. The Second Circuit upheld the *New Era* trial court's denial of fair use. *Id.*

131. David A. Kaplan, *Copyrights Spark Rift in 2nd Circuit*, NAT'L. L.J. Sept. 25, 1989 at 3. Publishers around New York City were astounded by the *New Era* decision. *Id.* The ruling was called a disaster because it almost entirely removed primary sources from being used in biographies or other works. *Id.* The *New Era* court found that the use of L. Ron Hubbard's quotations was not fair use, but the court still denied an injunction against the publication, thus allowing the quotations to be published. *Id.* The court held that because the plaintiff filed its suit too late, the defendant would be irreparably harmed, thus not issuing an injunction. *Id.*

132. Andrea D. Williams, *The Fair Use Doctrine and Unpublished Works*, 34 How. L.J. 115 (1991). The distinctive style of an author is justified in showing character traits of an

ated a stranglehold on the literary community, which forced the community to seek protection from the legislature.

Courts must follow the balancing of equities in order to stop a virtual per se ban on the publishing of unpublished works. If courts do not follow this balancing of equities, they would be giving a primary author a monopoly over his works. It is not the intent of copyright law to give a primary author a monopoly over his works.¹³³ A primary author's works contain valuable teaching or factual material that should be disseminated to the public. Consequently, copyright law cannot insulate a primary author's works when the public's interest in disclosure outweighs the primary author's interest in copyright protection.

C. LEGISLATIVE ACTION

A more effective approach to the fair use analysis of unpublished works would be legislative action.¹³⁴ The legislature needs to create a clear procedure for applying the fair use doctrine.¹³⁵ The United States Congress realized the importance of the fair use defense and codified an amendment that would more clearly indicate how courts should apply §107. In 1992, Congress approved a bill amending the fair use defense.¹³⁶ The purpose of the bill was "to clarify the application of the fair use doctrine to unpublished works. . . ." ¹³⁷ The legislation to amend §107 resulted from the testimony that authors and biographers were inhibited from pursuing their profession because of potential liability in an infringement suit. The legislative history stated that the bill was "intended to overrule the overly restrictive language of *Salinger* and *New*

author's life with quotations convey the writing style. *Id.* A biographer is not trying to infringe on the author's creative expression when he is trying to convey it to an audience. *Id.*

133. U.S. CONST. ART. I, § 8, cl. 8.

134. Marks, *supra* note 50. When Congress amended the fair use doctrine, the amendment only stated that if the work was unpublished, the nature of the work would not create a per se ban on a court finding fair use. *Id.* Consequently, the amendment did not create a clear rule in how the fair use inquiry would be applied. *Id.*

135. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991). The debate during the judicial committee hearings was based on the concern of the publishing industry that "a virtual per se rule barring fair use of unpublished works had led to self-censorship by biographer and historians." *Id.* The self-censorship was due to the fear of a copyright infringement suit for quotations taken from such unpublished primary sources in biographers' and historians' subsequent works. *Id.*

136. S. REP. NO. 141, 102ND CONG., 1st Sess. 7 (1991).

137. *Id.* The bill would amend § 107, the amendment stated:

The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors.

Id.

*Era*¹³⁸ with respect to the unpublished materials."¹³⁹ However, opinions were still voiced over the amendment because of the history of copyright protection itself.¹⁴⁰ Congress feared that an amendment would undermine the property right that was associated with copyright protection.¹⁴¹

The bill did not directly state that it would protect the private interests of authors. It was drafted with the intent that the bill would protect the copyrights implicitly.¹⁴² The amended fair use provision was officially passed after four prior attempts.¹⁴³ Congress clearly created this amendment in order to stop the courts from encouraging a per se rule that would bar fair use in unpublished works.¹⁴⁴ During the discussions, the report stated that the recent *Wright v. Warner Books, Inc.*¹⁴⁵ case used the proper balance between the fair use factors.¹⁴⁶ Further,

138. Arthur Schlesinger, Jr., *The Judges of History Rule*, WALL ST. J., Oct. 26, 1989, at A14 (discussing the effect of the ruling on historical scholarship). Schlesinger, a famous biographer, stated that the *New Era* decision created a blow that would strike against the historical biographer's livelihood. *Id.*

139. S. REP. NO. 141, 102ND CONG., 1st Sess. 7 (1991). The legislative history to § 107 emphasizes that they are not "definitive or determinative" factors in deciding whether fair use doctrine will be less confusing. *Id.* Copyright law was created to "promote the progress of Science and Useful Arts." U.S. CONST. ART. I, § 8, cl. 8.

140. *Id.* The legislative history addressed the limited applicability of the fair use to unpublished works; it was Congress' intent to include unpublished works within the scope of the fair use defense analysis. The Senate Committee report limited the copyright protection afforded to unpublished works because of the author's decision to make it unavailable to the public. *Id.*

141. Jennifer Leman, *The Future of Unpublished Works in Copyright Law After the Fair Use Amendment*, IOWA J. CORP. L. 619, 641 (1993). "Any legislation in this area which gives a right to use unpublished works has the effect of creating similar property rights in subsequent authors, thereby lessening the protection afforded to the original author." *Id.*

142. *Id.* Most American common-law jurisdictions permit protection for authors who are trying to protect their copyrights. *Id.* Judge Miner of the Second Circuit asserted the right to withhold a work from public dissemination is substantially intertwined with notions of privacy. *Id.*

143. H.R. REP. NO. 836, 102ND CONG., at 9 (1992). The more succinct bill kept the last sentence of the former bill and added one sentence at the end of the provision: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [four fair use] factors." *Id.*

144. *Id.* In fact, the committee report went further to state that a court should adjudicate a claim of fair use on a case-by-case basis, considering all four factors, as well as other relevant material. *Id.*

145. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2nd Cir. 1991). Ellen Wright was the copyright owner of the published and unpublished works of her deceased husband, Richard Wright. *Id.* Richard Wright was the author of the books, *Native Son* and *Black Boy*. *Id.* Mrs. Wright did not give permission for any of Richard Wright's published or unpublished works to be used in a biography. *Id.* Mrs. Wright sued Warner Books to stop the publication of the biography of her husband alleging the biography constituted copyright infringement. *Id.*

146. Williams, *supra* note 132. The district court held that the use of the unpublished materials was protected by the fair use doctrine. *Id.* The court reached this conclusion

the court's language was important to the bill, which stated that the unpublished nature of a work is an obstacle, but not an insurmountable one, to a finding of fair use.¹⁴⁷

However, the bill that was passed was still ambiguous.¹⁴⁸ The slight change in §107 is not absolute in protecting biographers, historians, or original authors of primary works. In order to satisfy those who are affected by the amendment, alternatives to the amendment are necessary to stop the confusion among scholars in applying the fair use defense.¹⁴⁹ Consequently, courts must stop applying an ambiguous rule. Courts must follow a balancing of equities in order to determine whether fair use should be a viable defense.

D. THE COMPUTER INDUSTRY

Authors of computer programs fear that the recent "fair use" cases will harm their work.¹⁵⁰ Due to the growing use of computers, and the development of a computer-based society, courts are having a difficult time trying to apply laws to a field that is uncertain.¹⁵¹ An ongoing problem courts face is how to distinguish between computer programs and functional aspects of computer programs. The heart of copyright law is based on the proposition that copyright protects the expression of an idea; consequently, others are able to copy the "functional aspects" of a copyrighted work.¹⁵² The foremost issue facing courts is how to apply

because it concluded that Dr. Walker's biography was for educational purposes; the biography quoted only minimal passages; and the quotes contained factual material. *Id.*

147. Rubin, *Binges & Trysts*, N.Y. TIMES, Nov. 24, 1987, § 6 (Book Review), at 12, col. 5. "What is the point of literary biography, anyway, if not to illuminate the sources—historical, familial, geographical, social—of the author's literary imagination and to interpret, as best possible, the ties between an author's life and what he or she wrote?" *Id.*

148. *Wright*, 953 F.2d at 731. The suit dealt with Wright's unpublished letters and journals. *Id.* The *Wright* opinion incorporated the balance of the author's interests and the public benefit. *Id.* The court considered that the writer tried to paraphrase and take minimal portions of the work to relate historical facts. *Id.* Further, the district court in *Wright* compared the use of Walker's unpublished letters with the use of Salinger's letters; Salinger's letters were copied for expression, whereas Wright's were not. *Id.*

149. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) [hereinafter *Harper & Row*]. One must remember that fair use is a "mixed question of law and fact" that allows courts to consider other relevant factors. *Id.*

150. Stephan McJohn, *Fair Use of Copyrighted Software*, 28 RUTGERS L.J. 593 (1997). According to the computer industry, an "author in a computer program holds the copyright on the program, both in the source code, in which the program is written, and in the binary code, which actually runs in the computer." *Id.*

151. *Id.* Courts have been forced to decide cases about how much an existing program can be used in the creation of another program. *Id.* The main issues deal with "whether a programmer can copy another program's functional aspects, copy another program's user interface, reverse-engineer a program, mimic its structure, or copy abstract elements of the program." *Id.* at 593-94.

152. PAUL GOLDSTEIN, COPYRIGHT 1, § 2.15.2 (1996).

the fair use defense.¹⁵³ The Ninth Circuit has rejected the fair use defense in an important computer case, *Triad Systems Corp. v. Southeastern Express Co.*¹⁵⁴ The court emphatically stated that the "exclusive rights of a copyright holder are not absolute."¹⁵⁵ The court reasoned that people may use another's copyrighted material without permission.¹⁵⁶ Courts have reasoned that a defense of fair use is probable in cases where an author will suffer no loss from the taking; the author would not likely deny permission to the person using the material; and in situations where the court believes the copyright is creating a "virtual monopoly" over the work, which is contrary to public policy concerns.¹⁵⁷ The Ninth Circuit focused on only two factors of the fair use defense.¹⁵⁸ The court emphasized the nature of the use and the harm to the market for the copyrighted work. The courts denied the defendant's fair use defense because they viewed the costs of the use as being too high. The copyright holder would lose revenues and profits because a competitor was servicing their computers.¹⁵⁹ The court believed the competitor was "free-loading" off of the hard work of the software creator and servicer. The Ninth Circuit held that the competitor must seek a license from the original software creator in order to service the computer and could not rely on the fair use defense to mitigate their infringement.¹⁶⁰ The court further stated the work of servicing a computer is not a form of expression thus, it is not entitled to copyright protection like the creation of a software program. This distinction gives software manufacturers and creators the necessary protection from pirates and those who are

153. *Triad Systems Corp., v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995). Triad Systems manufactured computers that were used by car parts dealers to keep records of their sales and inventory, in order to have records for their bookkeeper. *Id.* Triad also provided software. *Id.* The operating system that was already in the computer was used to perform the tasks that the store needed. *Id.* Triad also serviced the computers that they had sold. *Id.* There was a competing service that also serviced the Triad computer: Southeastern Express company. *Id.* In order for a Southeastern technician to service a Triad computer, the technician had to copy the software that Triad had already loaded onto the computer. *Id.* Southeastern would copy this software to another hard disk. *Id.* The Ninth Circuit held that Southeastern infringed on Triad's copyright because they were copying Triad's software. *Id.*

154. *Id.*

155. *Id.*

156. McJohn, *supra* note 150, at 598. A person watching television may tape a program without permission; a student may copy material from a textbook or journal; a musician may parody a song; a software creator may copy a program into a computer to see how the software works. *Id.* However, fair use draws a line between reporting, education, and authorship. *Id.* A magazine cannot publish excerpts from a book that has not been published, nor can an author take elements of a film to write a play, unless it is a parody. *Id.*

157. *Id.* at 599.

158. 17 U.S.C. § 107 (1992).

159. *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995).

160. *Id.*

downloading the information for their own use or pecuniary gain. The fair use defense was not created to give a secondary author benefits of a pecuniary interest. The fair use defense was created to allow the public to enjoy certain copyrighted material without having to seek the copyright holder's permission to use. The Ninth Circuit also applied a "public policy concern" factor in their analysis.¹⁶¹ Courts have determined the importance of involving the public in reaching its decisions. The public policy concern has become implicit in the fair use evaluation. Courts will not venture to allow fair use of software because of the necessity of developing and upgrading better software. Copyright law is the main body of law that can protect software developers. For courts to allow fair use would weaken the protection afforded by copyright law.¹⁶² Software designers expect their creations to be protected by copyright law. To apply the fair use defense would be clearly erroneous in light of the codified statute.

E. FIRST AMENDMENT IMPLICATIONS

The information in certain news articles often proves to be extremely important in the news-reporting business.¹⁶³ For example, the information in the *Nation* article deals with very important news: how President Ford dealt with former President Nixon.¹⁶⁴ The article contained information that the public wanted to read; one may even assert that the article contained an important piece of information that the public had a right to read.¹⁶⁵ "The subject matter of the article rendered it political speech, and thus within the core of protected First Amend-

161. *Id.* The Ninth Circuit believed the actions of Southeastern were borderline "parasitic." *Id.* The court could find "no appreciable public benefit" from Southeastern's actions. *Id.*

162. *Id.*

163. *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F. 2d 195, 208 (2nd Cir. 1983), *rev'd* 471 U.S. 539 (1985). In *Harper & Row*, in order for the Second Circuit to find fair use, the court had to accommodate the defendant's First Amendment rights. *Id.* The court stated that "[t]o decide otherwise would be to ignore those values of free expression which have traditionally been accommodated by the statute's fair use provisions." *Id.*

164. Robin Feingold, *When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in Harper & Row, Publishers, Inc., v. Nation Enterprises*, 72 CORNELL L. REV. 218, 239 (1986). "The information in the *Nation* article provided news concerning one of the most significant political events in recent decades: the pardon of a former president who had resigned from office, narrated by an eyewitness observer of privileged matters of state." *Id.*

165. Jeff Mashek, *Where They're Already Running for President*, U.S. NEWS & WORLD REP., Feb. 12, 1979, at 57-8. The article had great significance for the democratic process. *Id.* Ford was considered a contender for the Republican presidential nomination. *Id.* Ford's interpretation of the events of his presidency could have affected voter's decisions in the upcoming primaries. *Id.*

ment values."¹⁶⁶ "When copyright law conflicts with the dissemination of political speech, courts should use the fair use doctrine to balance the competing interests of copyright law and the core First Amendment values."¹⁶⁷ If the courts do not follow this procedure, copyright laws become an exception to one's First Amendment rights.¹⁶⁸

Under this analysis, the Supreme Court should have held that the *Nation's* article constituted fair use.¹⁶⁹ The *Harper & Row* decision permits copyright law to protect information as well as expression when they are intertwined.¹⁷⁰ Newspapers or other news reporting agencies will fear that using excerpts to report the news may come under fire because the excerpts may infringe on a copyright holder.¹⁷¹ Our news information will no longer be able to function in a capacity that the American public demands when watching television or reading a newspaper.¹⁷² A narrow reading of copyright laws should not constrain the freedom of the press.¹⁷³

166. Hartnick, *supra* note 59. Consequently, "the Court should have given the speech the highest First Amendment protection." *Id.*

167. *Id.*

168. See NIMMER, *supra* note 97. "A First Amendment exception to copyright is unnecessary because the fair use doctrine provides flexibility that furthers the dissemination of information." *Id.*

169. *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F. 2d 195, 197 (2nd Cir. 1983), *rev'd* 471 U.S. 539 (1985). The work's factual nature and the need to use direct quotations were necessary to insure the factual accuracy of the story. *Id.* The Court should have applied the fair use defenses more broadly because the work dealt with a public figure on a matter of public concern. *Id.* Further, the public's need to disseminate information should be a factor in determining that the article constituted fair use. *Id.* "Copyright protection should not be construed as an absolute exception to the First Amendment." *Id.*

170. *Id.* "Harper & Row effectively creates a monopoly over the facts underlying history and news where the reporting of those facts requires a limited use of another's expression." *Id.*

171. *Id.* It is deceptively easy to side with the author. *Id.* The author's work may be a product of unique talent. *Id.* Creativity is one of the society's vital assets that the copyright law is intended to foster. *Id.* Such works are valuable because they do more to inform and enhance the reader's insight into how and why other people live. *Id.* Creativity may be in biography, history, and journalism, thus the court cannot stop a second author's creativity. *Id.*

172. J. MEYERS, *THE CRAFT OF LITERARY BIOGRAPHY* 69 (1985).

[L]iterary subjects differ considerably: from those, like Proust, Gide, Kafka, Beckett, whose works are so supercharged with their lives that a line of demarcation is difficult to draw: to others, such as Conrad, Lawrence, Joyce, Eliot, Ound, Mann, for whom there are visible seams between life and work, however, finely stitched the seam is. To each of these groups there accrues a particular problem, in strategy, tool, taste, Yet for each writing is the life: his exaltation and his thralldom.

Id.

173. *Mathieson v. Associated Press*, No. 90 Civ. 6945 1992 U.S. Dist. Ct. Lexis 9269, at *2 (S.D.N.Y. June 25, 1992). The court held that the Associated Press had not violated the copyright of a photographer when they published an advertisement brochure for body armor being marketed by Iran Contra defendant, Oliver North. *Id.* The Associated Press

The Second Circuit concluded that the Copyright Act is not created "to impede that harvest of knowledge so necessary to a democratic state, or to chill the activities of the press by forbidding a circumscribed use of copyrighted words."¹⁷⁴ A proposed analysis that courts must use is a two-step inquiry when deciding whether a second author's use of expression is fair use. First, the court must analyze the expression under §107's four factors, and courts should balance the interests between copyright law and the First Amendment by weighing the burden imposed on the copyright owner by the use of expression.¹⁷⁵ Courts have dealt with this situation by weighing the public's need to see the information.¹⁷⁶

The Constitution gives Congress the 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."¹⁷⁷ Congress gave certain rights to authors, such as the right to reproduce and distribute a work. However, these rights have been given certain limitations, one of which is the doctrine of fair use. Fair use was created in an attempt to keep copyright laws from allowing overly extensive monopolies on a work;¹⁷⁸ Congress has now codified fair use in the copyright statute. Despite the codification, fair use is still a judicially maintained

asserted the defense of fair use because the photo reflected North's intent and actions during the Iran/Contra scandal. *Id.* The court weighed the first factor, the character of the use, when determining its decision; in fact, the court determined that the other three factors weighed in favor of the photographer, but the public interest factor weighed more heavily in determining the case. *Id.*

174. *Harper & Row Publisher v. Random House*, 723 F.2d 195, 209 (1983).

175. *Birch*, *supra* note 30, at 197. The courts should develop a balance to accommodate First Amendment values and further the aims of copyright law. *Id.* "If the injury to the copyright owner is speculative or de minimus, or if the public interest in the information is substantial, the public interest should prevail. . . [p]ressing first amendment concerns may justify a use of copyrighted material that mechanical statutory fair use review should prohibit." *Id.*

176. For example, in *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968), Abraham Zapruder filmed President Kennedy's assassination. *Id.* His film was purchased by *Life* magazine. *Id.* The defendant sought permission to use certain frames in his book. *Id.* *Life* denied the request. *Id.* The defendant used charcoal sketches that were a replica of the home movie frames. *Id.* The court held that the defendant's use in his book of the sketches of the frames from the Zapruder films represented fair use because of the "public interest in having the fullest information available." *Id.* at 146.

177. U.S. CONST. Art. I, § 8, cl. 8.

178. Charles J. Sanders, *Fair Use and the First Amendment*, N.Y. L.J., Jan. 14, 1994. Courts must add the First Amendment to the fair use inquiry because the court can determine whether there is a strong public interest in reading the material. *Id.* Rather than constricting the fair use defense, as many courts have done through their recent decisions, the fair use defense should be broadened through the use of broader, less restrictive views of the statutory factors and additional extrinsic evidence. *Id.*

rule.¹⁷⁹ However, Congressional codification of fair use has not clarified any of the confusion courts have dealt with when determining fair use.¹⁸⁰ If an author is allowed to use his copyright solely to prevent his works from enriching society's "store of knowledge," the copyright is being used unconstitutionally.¹⁸¹ The goals of the Constitution are best served by encouraging, not suppressing, individual expression.¹⁸²

The language of §107 indicates that Congress intended that courts find fair use when there is "market failure."¹⁸³ Market failure depends upon situations where the copyrighted work is not available to the potential user; or the market does not adequately value the potential user's work, such as with a work's political value.¹⁸⁴ Congress has declared that the Copyright Act is meant to effect a constitutional mandate. However, the statute must be interpreted in light of that mandate.¹⁸⁵

F. THE UNJUSTIFIABLE JUSTIFICATION FOR OVER-PROTECTING UNPUBLISHED WORKS

Scholars believe the overzealous protection of unpublished works ex-

179. 17 U.S.C. § 106 (1976).

180. *Dellar v. Samuel Goldwyn, Inc.* 104 F.2d 661, 662 (2nd Cir. 1939). Fair use is considered "the most troublesome in the whole law of copyright. . . ." *Id.*

181. Lisa Merrill, *Should Copyright Law Make Unpublished Work Unfair Game*, 51 OHIO ST. L.J. 1399, 1401 (Fall 1990). "Therefore, whenever copyright is at issue, the facts of the case must be carefully analyzed to ensure the fulfillment of the constitutional mandate of encouraging the creation of works." *Id.*

182. Sanders, *supra* note 178, at 46. Copyright protection, when coupled with First Amendment principles, can be considered the "engine of free expression," the expansion of the fair use defense should ideally create an avenue in which secondary authors can create public discourse in their works. *Id.*

183. Peppe, *supra* note 45, at 435. Unpublished works play a vital role in the publishing industry. The industry relies on letters, diaries, and journals in order to write something new for the public. Biographers like to use personal materials, but often the author does not want to "authorize" the biographers work. *Id.* Journalists write stories which are "breaking" news, which usually includes materials that have not been published. *Id.* Reporters gain their livelihood through investigation and inside sources. Primary sources are the best sources writers like to cite in their works. *Id.*

184. *Id.* Unpublished works are vital in journalism. *Id.* Journalists copy speeches and debates in order to present the news to the public. If journalists are required to ask for permission to print, the system will be brought to a halt. The dissemination of information will be based on a bartering system, no longer free speech because individuals will want a property right in the words they are using. *Id.*

185. *Harper & Row v. Random House*, 723 F.2d 195, 197 (1983). "Because the purpose of the copyright act is to encourage the creation of new works, the court must look carefully to see if a particular use will discourage future authors from creating authors do not have the copyright act on their mind when they are creating their works." *Id.* In fact, the Copyright Act may muddle the creative rights an author has to a work he created, thus, the Copyright Act may act as a deterrence to the creation of works. *Id.*

ists because such protections encourage artists to create.¹⁸⁶ However, authors write works to publish.¹⁸⁷ Authors create because they have certain property-like rights in what they do decide to publish.¹⁸⁸ Hence, the belief that an author will create a work because the author has copyright protection lacks substance. The only reason for protecting unpublished works is the creator's privacy. Authors may seek to restrain publication of personal letters for privacy reasons.¹⁸⁹ Copyright law was not created to protect an author's privacy,¹⁹⁰ though artists and writers try to use copyright law to stop their earlier works from the public dissemination.¹⁹¹ Protecting the unpublished works against any form of

186. Anthoy Zissu, *Salinger Case Amy Aid Paraphrasers, But Complicate Work of Historians*, NAT'L L.J., Apr. 27, 1987, at 28, col. 2. Courts should evaluate the availability of works in research libraries. *Id.* The unpublished works have been given to the library for public viewing. *Id.* The copyright holder should realize that a large amount of people will view the works. *Id.* Persons who view the documents in the libraries have disseminated the expressive material. *Id.* The copyright law should allow the public to further benefit from their use by subsequent authors for such purposes as biography, history, and criticism. *Id.*

187. Stephen Thau, *Copyright, Privacy and Fair Use*, 24 HOFSTRA L. REV. 179 (1995). The Constitutional purpose of copyright was "To promote the Progress of Science and Useful Arts." *Id.* (citing U.S. CONST. Art. 1, § 8, cl. 8). Courts have interpreted this to create an incentive for artists to produce works. *Id.* Courts conclude that with these rights encourage creativity and artists have the opportunity to receive a monetary return on their works. *Id.*

188. L. EDEL, *LITERARY BIOGRAPHY* 36 (1959). While it may be argued that some works should not be considered disseminated unless their authors have personally distributed them, this argument is less applicable to personal letters of literary figures. *Id.* Authors are usually aware that they relinquish ownership of their letters when they mail them. *Id.* The copyright law should not protect an author's unreasonable expectation that the recipients of such valuable letters will never offer them to the public by donating them to libraries. *Id.* Henry James often requested his correspondent's to "burn this, please, burn, burn." *Id.* Similarly, Georgia O'Keefe asked that her correspondents should return her letters, so they would remain undisclosed. *Id.* A biographer of Georgia O'Keefe was told by her editor not to quote the best part of the letters because of the Salinger opinion. *Id.*

189. Samuel D. Warren & Luis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). "The principle which protects personal writings and all other personal production . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality." *Id.* See, e.g., *Salinger II*, 811 F. 2d at 100. Public interest in one's personal letters is likely to remain strong, especially after the death of the author, hence, the copyright exists 50 years after the author's death so its heirs can still receive the benefits. *Id.*

190. Marks, *supra* note 50. The right to privacy was codified by state laws and "ha[s] nothing to do with artistic or intellectual creativity." *Id.*

191. Richard A. Epstein, *Privacy, Property Rights, and Misrepresentation*, 12 GA. L. REV. 455, 463 (1978). Privacy rights are not essential to the maintenance of a free society. *Id.* Richard Epstein makes the point that privacy rights are second-order rights because there is truly "no right to privacy." *Id.* No one has offered a coherent statement of the interests protected by privacy. *Id.*

publication¹⁹² protects an artist's privacy, but does not further the goals of copyright law.¹⁹³

Copyright is granted for the sole reason of encouraging artists to increase the store of society's knowledge, not to protect an artist's privacy interests. Protecting privacy interests does not encourage authors to create more.¹⁹⁴ Using copyright to protect an author's privacy is beyond the constitutional mandate.¹⁹⁵ No statutory or congressional reason exists to protect works because the work is unpublished. If the copyright law addressed privacy, then the free flow of information will be based on one's copyright protection.¹⁹⁶ The history of the fair use doctrine was to interpret the defense very narrowly because the unpublished nature of a work is by deliberate choice of the copyright owner.¹⁹⁷ A copyright owner's "right to first publication" must not outweigh the rights and needs of a second author.¹⁹⁸

192. Sanders, *supra* note 178. "Where information concerning important matter of the state is accompanied by a minimal borrowing of expression, the economic impact of which is dubious at best, the copyright holder's monopoly must not be permitted to prevail over a journalist's communication." *Id.*

193. Hartnick, *supra* note 59. If copyright law protected privacy, then privacy would not be well protected because copyright only protects expression, and not ideas, which provoke is meant to protect. *Id.* However, copyright does imply it may protect privacy because a biographer is able to report facts which are contained in letters, the copyright only protects the expressive content. *Id.*

194. Zissu, *supra* note 186. The constitutional and statutory policy of promoting public access to knowledge by encouraging authorship through copyright protection plays a less significant role with respect to letters than to autobiographies and other historical works; "there would seem to be little need for copyright to encourage us to write to our friends." *Id.*

195. Roger Rosenblatt, *Who Killed Privacy?*, N.Y. TIMES, Jan. 31, 1993, § 6 (magazine), at 24. People who write about privacy tend to be in favor of it, a large portion of the literature consists of articles extolling the virtues of privacy. *Id.* "As society becomes increasingly voyeuristic, and technology enables the collection and dissemination of almost every personal fact about use, our personal privacy is being shorn away to nothing." *Id.*

196. *United States Dep't of Justice v. Reporters' Comm.*, 489 U.S. 749, 763 (1989). The Supreme Court has held that an individual has "the right to control information concerning an individual's person." *Id.* Courts have allowed a person to prevent the commercial publicity of one's own name and image. *Id.* See also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). The court values the implicit right one has to his privacy. *Id.*

197. Peppe, *supra* note 45, at 435. People do not write letters for financial gain. *Id.* Letters are written to communicate to another person. *Id.* The goal of the copyright holder would be best served by a fair use analysis that favored the subsequent author, who is more likely to be motivated by the copyright's economic incentive, and who seeks to utilize the expression contained in the letters to create a new work which may benefit the public. *Id.*

198. Williams, *supra* note 132. Courts should not forget to include the social values of fairness to the original author when deciding fair use. *Id.* Courts often tend to favor one party's rights over the other in deference to trying to be "fair." *Id.* The court does not need to determine "fair" in a fair use defense, but whether the second author has the authority to use the material in a manner consistent with the values of copyright. *Id.*

G. THE FUTURE OF THE FAIR USE DOCTRINE AND UNPUBLISHED WORKS

The legal community has been deliberating how to settle the confusion of the fair use doctrine.¹⁹⁹ The publishing community believed its problems were solved because of the new amendment to §107.²⁰⁰ However, the amendment has not clarified any of the problems that courts had when dealing with the fair use issue;²⁰¹ consequently, when courts and authors have different concepts of copyright protection, controversy will be inevitable.²⁰²

Courts interpret the fair use doctrine as narrowly and rigidly as possible; however, courts should favor an approach that places the burden on the copyright owner to prove he will be placed in such a detrimental situation if the fair use is allowed.²⁰³ The world has become a marketplace of ideas, and courts should realize the importance of injecting these ideas in the public forum.²⁰⁴ The fair use doctrine has become an influ-

199. Mary Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986). The central issue in copyright law is how uncopyrightable elements such as fact and idea combine with copyrightable elements to form protected expression. *Id.* The courts deal with these issues using a three-step process. First, the must determine whether the work should be copyrightable. *Id.* Second, the court must determine whether the second author's work is so similar as to warrant a copying. *Id.* Third, courts look at the amount and substantiality of the work that has been used in the second authors work. *Id.* These steps are subjective and force the court to insert its values when making a determination. *Id.*

200. Marks, *supra* note 50.

201. Williams, *supra* note 132. The legal community has developed three basic themes in applying the fair use defense. First, the courts need to create standards that recognize the value of the unpublished works if the author decides to publish the works in the future. *Id.* Second, courts should narrow their scope to looking at the nature of the work being used and whether it promotes a greater public concern. *Id.* Third, courts need to recognize that certain works have a higher social concern that will affect the public good rather than the solitary primary author. *Id.*

202. Harvey Weindraub, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1148 (1990). Copyright holders often view the copyright as private property, while others regard it as property "conditional on and subservient to the public good." *Id.* If an unpublished work is viewed as private property, the Fifth Amendment of the Constitution guarantees that private property shall not be taken with just compensation. *Id.* However, the judiciary and legislature are unwilling to travel down the path treating copyright as a property right protected with the Fifth Amendment. *Id.*

203. Feingold, *supra* note 164. The Supreme Court narrowed the scope of the fair use defense by creating certain presumptions in the fair use analysis. *Id.* The Court legitimized the presumption against the fair use of expression by commercial enterprises. *Id.* Second, it ruled that use of expression from an unpublished work does not constitute fair use. *Id.* The Court neglected to accommodate the competing interests of the copyright law and the First Amendment. *Id.* The Court should have balanced the burden imposed on the individual in permitting the use and the burden on the public if the use was deemed unfair. *Id.*

204. MEYERS, *supra* note 172, at 69. The biographer's challenge has been characterized as "[t]he biographer of a literary subject must relate the latter's life and work to each other

ential doctrine in shaping how courts will interpret what degree of "copying" is allowed. Secondary authors rely on the fair use doctrine in order to copy portions of another's work "for purposes of criticism, comment, news reporting, teaching . . . scholarship, or research."²⁰⁵

The court cannot have the power to restrict a secondary author's access to using the fair use defense when the author is adding something to the material in order to create his own work.²⁰⁶ Secondary authors would lose their livelihood if courts were to narrowly apply the only defense these authors have to stop a primary author's copyright monopoly.²⁰⁷ An author should not be condemned for borrowing from another when the borrowing is fundamental to the creative process.

H. SALINGER REVISITED

J.D. Salinger's worst nightmare came true on June 22, 1999: his private letters were auctioned in a public auction.²⁰⁸ Many scholars believe Salinger's letters will give insight into the life and the mind of the reclusive author because Salinger has not published any works since 1965. He has guarded his privacy with earnest. Virtually all of Salinger's pub-

meaningfully and profoundly." *Id.* If he cannot achieve that end, the biography, whatever its other illumination, fails. *Id.* Yet this apparently same statement harbors, possibly, the most difficult part of all biography, since it involves the writer in several areas both practical and theoretical. *Id.* He must be, in this enterprise, an aesthetician, a novelist, a linguist, a philosopher, a literary critic, a historian, a psychologist. *Id.*

205. 17 U.S.C. § 107 (1988).

206. In *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (1992), the ninth circuit court held fair use when the copying was done to produce a work that competed with the copyright owner. *Id.* The court held that the copying of a program into RAM was fair use because the copy was made to understand the compatibility requirements of the program that ran the video game. *Id.* The court reasoned that the investigation into the compatibility of the games was not a burden on the market. *Id.* The increase in video games in the market was a "benefit" to the public. *Id.*

207. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). The use [of the material] must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. Judge Leval also stated that "When we place all unpublished private papers under lock and key, immune from any fair use, for periods of 50 to 100 years, we have turned our back on the Copyright Clause. We are using the copyright to achieve secrecy and concealment instead of public illumination." *Id.* at 1119.

208. Peter Applebome, *Love Letters in the Wind: Salinger's for Auction*, N.Y. TIMES, (visited MAY 12, 1999) <<http://www.newyorktimes.com/library/books/052199salinger-letters.html>>. Fourteen of Salinger's love letters are going to be auctioned in Sotheby's auction house. *Id.* The recipient of the letters, Joyce Maynard, had a brief romance with Salinger. *Id.* Their affair lasted only nine-months; she was a freshman at Yale, and he was a 53 year-old author. *Id.* She left school to live with Salinger, but the romance did not last. *Id.* Maynard told the press the reason for her selling the letters was because "I'd rather put my children through college than own a box full of Salinger letters They were a piece of my past that I've finished with, and I'd rather use them to help support my family." *Id.*

lic appearances have been legal efforts to maintain his privacy. The letters are extremely private, and the recipient of the letters on the auction block, Joyce Maynard, is selling the letters in order to "put my children through college."²⁰⁹ Ms. Maynard was emphatic that the letters were a piece of her past, and she believed the auction would help scholars and students who are interested in his works.²¹⁰ The letters would be a view into Salinger's life that no one had the opportunity to read about. The auction house, Sotheby's, also created a "stir" when the auction house would only show the letters to "bona-fide purchasers."²¹¹ Sotheby's would only allow "serious purchasers" to view the letters.²¹² The auction house indicated this policy was required because of Salinger's copyright in the letters.²¹³ However, Sotheby's has never conformed to copyright laws when auctioning its products. J.D. Salinger commands such respect, that he has instilled a sense of fear in most of the art world and the auction houses. His vehement actions in protecting his privacy are unparalleled. He is a man willing to protect his privacy through bitter court battles. Again, Salinger won his battle for privacy.²¹⁴ At the end of the auction, the purchaser stated he was going to return the letters to Salinger.²¹⁵ Once again, the recluse had protected his honor and privacy with the fear of copyright litigation pending into the millennium. However, Salinger has not been able to stop the woman in his life from baring all.²¹⁶ His daughter, Peggy, is going to publish a memoir of her life

209. *Id.*

210. *Id.*

211. Dinita Smith, *J.D. Salinger's Love Letters Sold to Entrepreneur Who Says He Will Return Them*, (visited June 23, 1999) <<http://www.nytimes.com/news/arts/salinger-auction.html>>. Salinger's love letters were sold at the Sotheby's auction on June 23, 1999. *Id.* The letters were estimated to sell for \$65,000-80,000; however, they sold for \$156,500. *Id.* John Norton, the software entrepreneur placed the winning bid. *Id.* After the auction, he told the press he bid on the letters in order to "do whatever he (Salinger) indicates to me he wants done with them." *Id.* at 1. Norton further stated "he may want them returned. He may want me to destroy them. He may not care at all." *Id.* at 2.

212. *Id.*

213. *Id.* Sotheby's allowed the letters to be viewed in a private room that was guarded for a week. *Id.* People who Sotheby's determined were prospective buyers could only view the letters. *Id.*

214. *Id.*

215. *Id.*

216. Joyce Wadler, *About Salinger's Love Letters, the Point Is, Um. . .*, (June 22, 1999) <<http://www.nytimes.com/library/books/062299maynard-profile.html>>. Salinger began his courtship with Joyce Maynard in 1972. *Id.* Ms. Maynard published an article, "A Teenager Looks Back at Life," in the *N.Y. Times Magazine*. *Id.* Maynard portrayed herself as a heroine who could be from a Salinger book. *Id.* It is believed Salinger read the article and wrote her a letter. *Id.* In the letter he gives her advice about her sudden popularity, and warned her against people exploiting her talents. *Id.* Maynard sent Salinger a response, and their letter-writing courtship began. *Id.* As the relationship continued, the letters became discussions of the world, much in the style Salinger wrote *The Catcher in the Rye*.

growing up with the eccentric author. Her memoir is tentatively scheduled to be published in the fall of 2000.²¹⁷ Readers who love Salinger, scholars who enjoy parsing Salinger, and people who just love controversy, will always have articles to write or read because J.D. Salinger is considered an enigma.²¹⁸ He is a man looking for a quiet life. Many critics agree with Salinger's sentiment that their lives should remain private. Many critics and writers urge the courts to save their privacy rights.²¹⁹ Salinger believes that "[p]rivacy is privacy. Letters were

Id. The letters included his favorite books, authors, television programs, sports, and his love of homeopathy. *Id.* He wrote about his life in New York, though he had no intention of publishing again. *Id.* After a few months of letters, Maynard left Yale to live with Salinger in Cornish, N.H. *Id.* She lived with him until their affair ended in August 1973. *Id.* In 1998, Maynard wrote a memoir about her time with Salinger entitled *At Home in the World*. *Id.* She had kept their affair a secret until publishing this memoir. *Id.*

217. Doreen Carvajal, *Salinger's Daughter Plans to Publish a Memoir*, (June 24, 1999) <<http://www.nytimes.com/library/books/062499salinger-daughter.html>>. J.D. Salinger's daughter is writing a memoir about her life with a famous father. *Id.* Publishers believe that this memoir is important because it tells a story about a woman who grew up like no other person. *Id.* Salinger led a very unique life, and people are interested in reading her story. Her father's notoriety and reclusiveness have introduced the opportunity for books about his life to be published. *Id.* Salinger received a \$250,000 advance on the book. *Id.* Publishers predict the book will be successful.

218. Lacey Fosburgh, *J.D. Salinger Speaks about his Silence*, (Nov. 3, 1974) <<http://www.nytimes.com/books/98/09/13/specials/salinger-speaks.html>>. In early November 1974, an unauthorized publication of Salinger's earlier short stories was published. *Id.* Salinger believed that "some of my stories, my property, have been stolen . . . [s]omeone's appropriated them. It's an illicit act. It's unfair. Suppose you had a coat somebody liked and somebody went into your closet and stole it. That's how I feel." *Id.* The unauthorized publication contained two short stories about Holden Caulfield, the protagonist of Salinger's first book, *The Catcher in the Rye*. *Id.* Other stories were taken from Salinger's writing in the *Saturday Evening Post*, *Colliers*, and *Esquire*. *Id.* Salinger went to court to enjoin bookstores from purchasing or selling more copies of the book. *Id.* Salinger stated "it's amazing some sort of law and order agency can't do something about this, [w]hy if a dirty old mattress is stolen from your attic, they find it. But they are not even looking for this man." *Id.* Salinger was referring to the agent who went around the United States selling these books to the bookstores. *Id.* No one could identify who he was, or what company he worked for. *Id.*

219. Walder, *supra* note 216. An editor of the *National Review* called Joyce Maynard a "opportunistic nymphet." *Id.* Maureen Dowd of the *N.Y. Times* called her a "leech woman." *Id.* The novelist, E.L. Doctorow did not comment on Ms. Maynard, but was upset with the fact that Ms. Maynard was trying to make money off of her personal relationship with Salinger. *Id.* He believed the relationship "was being commodified, as seems to happen frequently in this country. . . I think the word sad is appropriate." *Id.* Cynthia Ozick, a writer, stated "[w]hat we have is two celebrities, one who was once upon a time a real writer of substance, and an artist, one who has never been an artist and has no real substance and has attach herself to the real artist in order to suck out his celebrity." *Id.* A reader of the *N.Y. Times* was upset about this commentary, and sent a letter to the editor. In the letter, she stated that "Ms. Maynard did not 'attach herself' to him; he actively pursued her when she was only eighteen years old and a freshman at Yale." *Id.*

meant for a certain pair of eyes and those eyes alone."²²⁰ However, Salinger is not following his own advice: "You'd better not spend your life looking over your shoulder to see what people are saying about you."²²¹ But that is exactly what Salinger is doing every time he enters the courtroom to enjoin a writer from using his work. Salinger was a great writer, and his experience in life is valuable for the public to know. His brilliant career is worth a few biographies and articles to extol the virtues of his excellent storytelling. Salinger has forgotten how to take a compliment while living in self-imposed exile.²²² As long as he hides from the public eye, the public will always want to seek him out. Salinger can run, but he cannot hide. Consequently, if the courts were to allow the public policy concerns to be a factor in determining whether copyrightable information can be used, Salinger would keep his privacy, and the public would have a new book to read.

IV. CONCLUSION

Fair use is a privilege in someone other than the owner of the copyright. The purpose of this privilege is to stop unrestricted access for the public.²²³ The court decisions, the legislative history of the fair use doctrine, and Congress' amendment of the fair use doctrine will still not stop the confusion that the fair use defense has created. The literary community is not protected under the fair use defense as it is codified. If courts apply the four statutory factors with the First Amendment and public policy concerns, then secondary authors will be protected. The current vagueness of the fair use doctrine will only exacerbate the claims that are based on social values, such as freedom of speech and privacy.²²⁴ Courts are still required to follow past precedent in applying the four factors in the fair use analysis and this rationale may prove to be "fatal

220. *Id.*

221. *Id.*

222. Clyde Haberman, *A Recluse Meets His Match*, (June 18, 1999) <<http://www.nytimes.com/library/national/regional/061899ny-col-haberman.html>> After viewing the letters for auction at Sotheby's, Haberman states the letters contain "Salinger's views on celebrity [and] are often funny and trenchant. *Id.* There are unmistakable echoes of Holden Caulfield." *Id.*

223. Netanel, *infra* note 232. United States Copyright law has treated an author's creation as an object of ownership. *Id.* The Copyright Act gives an author control over his work and derivative works. *Id.* Copyright law gives a property interest to the author rather than Continental European Copyright Doctrine. *Id.* Continental Doctrine views the author's work as an extension of his person, not a property interest that can be assigned. *Id.*

224. Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, 16 *CARDOZO ARTS & ENT. L.J.* 1 (1988). Mr. Fraser states emphatically, "there is no reason why public interest cannot or currently is not a factor in a fair use defense or First Amendment privilege, particularly since the public interest lies at the heart of the First Amendment and copyright law." *Id.*

to the fair use amendment's goal of abolishing the per se rule against fair use of unpublished works."²²⁵

The Supreme Court narrowed the scope of the fair use doctrine by not allowing a commercial enterprise to have the right to publish works that the public has a right to read.²²⁶ Further, the Second Circuit's holding in *Salinger* created a per se bar on commercial publishers to disseminate "newsworthy" information. All courts should not be held to such a rigid rule; thus, the four statutory factors plus the First Amendment and public policy concerns are necessary in determining whether the fair use doctrine should protect the interests of the secondary author over the copyright holder.²²⁷

In upholding the values of the First Amendment, courts must not be limited to rigid rules.²²⁸ The law is an evolving body that must grow with the public's growing need for information that author's may not want to have published.²²⁹ A single author cannot hold a monopoly over

225. Hartnick, *supra* note 59. "The history of the amendment will serve to educate authors, legislatures, and courts as to the benefits and detriments of a per se rule against fair use for unpublished works in history and news where the reporting of those facts requires a limited use of other's expression." *Id.* It is important that the public realizes the importance of stopping a virtual ban on the publishing of unpublished, copyrighted works. *Id.* The public's right to know information will be suppressed if the courts are allowed to continue to stop secondary authors from using the fair use defense. *Id.*

226. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985) [hereinafter *Harper & Row*]. In *Harper & Row*, the Supreme Court held that a magazine in a news commentary announcing an upcoming book about a public figure's career may not quote verbatim from the copyrighted factual book. *Id.* The Court held that the dissemination of information for the public to be informed was not an important enough factor in encouraging the Court to allow the information to be brought into commerce. *Id.* The "free trade of ideas" was not an important factor in allowing the fair use. *Id.*

227. Feingold, *supra* note 164. An author's resulting economic reward needs to be an important factor that court's look toward in evaluating fair use cases. *Id.* The balancing of interests between an author and the public interest conflict with the ultimate goal of copyright law, which aims to advance public welfare through the free flow of information and ideas. *Id.* The goals of the First Amendment also aim to advance the flow of information and ideas; yet both are opposing forces when courts are forced to evaluate a fair use defense. *Id.* The protection of the copyright owner would not impose a heavy burden on the public by stopping or infringing on the public's right to disseminate information. *Id.*

228. H.R. REP. NO. 2222, 60th Cong., 2nd Sess. 7 (1909). The tension between copyright law and its ends are reflected by a statement by the House Committee on Patents:

In enacting a copyright law, Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; second, how much will the monopoly granted by detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

Id.

229. *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). Ideas are the common property of all and must remain common property for self-governing people to make informed decisions. *Id.* Authors build on the works of their predecessors. As one commentator noted, "A dwarf standing on the shoulders of a

information that may be more valuable to the public.²³⁰ Hence, the courts must follow the four statutory factors, and include the First Amendment implications and public policy concerns, which will help the court in making a fair decision.

Consequently, the courts must have a set of factors that balance the equity for both the primary and secondary author; thus, no artistic rights are restricted.²³¹ Copyright is a privilege designed to serve the public, and not an entitlement because one has created a work.²³² Jonathan Swift appropriately captured the essence of the artist's struggle when he wrote, "[f]or poets, law makes no provision. . . ."²³³

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giant can see farther than the giant himself." *Id.* Justice Brandeis memorialized this legal norm when he said, "[t]he general rule of law is, that the noblest of human production — knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." *Id.* See ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS* 31 (1965). Moreover, Sir Isaac Newton acknowledged that his achievements were possible because "he was able to stand 'on ye shoulders of giants.'" *Id.*

230. M. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1182 (1970). The First Amendment grants speakers and the press freedom to express divergent views, and favors free dissemination of speech, particularly on matter of political and public concern. *Id.* Political speech lies at the core of First Amendment protection and receives the highest degree of protection. *Id.* Any interpretation of copyright law should be sensitive to First Amendment values, but must also include an accommodation to the fair use defense, and the public's need to be informed. *Id.*

231. AYN RAND, *PATENT AND COPYRIGHTS, IN CAPITALISM: THE UNKNOWN IDEAL* 126 (1967). The right of a producer of a work is based on a social convention that he should have autonomy over his own work. *Id.* However, one can assert that the right to one's work is based solely on the will of the sovereign, thus if the sovereign states the producer has no rights in his work, then the producer has no rights in his work. *Id.* These rulings do not limit the artist's ability to create. *Id.*

232. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS AND ENT. L.J. 1 (1994). The purpose of the United States copyright law is socially based. *Id.* The limited monopoly privileges given to authors were created to advance the public welfare while giving authors an incentive to create. *Id.* Authors are given "exclusive rights" in order to encourage more creation of their works. *Id.* The Continental European Doctrine does not follow this reasoning, yet European artists still create works. *Id.* Artists are not concerned with laws when they are creating. *Id.*

233. Jonathan Swift, *On Poetry: A Rhapsody*, in *THE COMPLETE POEMS* 522, 523 (Pat Rogers ed., 1983).

