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## Harper & Row, Publishers, Inc. v. Nation Enterprises: Pirating Unpublished Copyrighted Works: Does the Fair Use Doctrine Vindicate First Amendment Rights, 19 J. Marshall L. Rev. 501 (1986)

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**HARPER & ROW, PUBLISHERS, INC. V.  
NATION ENTERPRISES:\* PIRATING  
UNPUBLISHED COPYRIGHTED WORKS: DOES  
THE FAIR USE DOCTRINE VINDICATE FIRST  
AMENDMENT RIGHTS?**

Copyright law<sup>1</sup> confers on an author certain exclusive rights to his work<sup>2</sup> for the purpose of encouraging the broad dissemination of information and ideas.<sup>3</sup> At common law, the author had an absolute

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\* 105 S. Ct. 2218 (1985).

1. The concept of copyright began in Tudor England as a form of censorship in which the Crown granted a publishing monopoly to a select group of publishers called "stationers." B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 2-7 (1967); Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 *VAND. L. REV.* 1161, 1169-76 (1975) (thorough historical discussion of copyright law). Copyright law in England eventually vested rights in the author rather than the publisher. 8 Anne, ch. 19 (1710) (Statute of Anne). This was the predecessor of the first federal copyright statute in the United States. Act of May 31, ch. 15, 1 Stat. 124 (1790) (secured an author's exclusive right to reprint his books for fourteen years with a right of renewal). H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 16-17 (1944); L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 143-46 (1968). As technology made available new ways for authors to create and preserve their work, the copyright statute evolved to provide adequate protection.

Many amendments and complete revisions in 1831, 1870, 1909, and 1976 have expanded authors' rights to provide protection to any "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1982). See Act of Feb. 3, ch. 16, § 1, 4 Stat. 436 (1831); Act of July 8, ch. 230, § 86, 16 Stat. 212 (1870); Act of Mar. 4, ch. 320, § 4, 35 Stat. 1075 (1909); Act of Oct. 19, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1982)).

The copyright clause of the Constitution empowers Congress to enact copyright legislation to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

2. Section 106 grants to the copyright owner the following exclusive rights:

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

17 U.S.C. § 106 (1982).

3. In several recent cases the Supreme Court has outlined the philosophy underlying the exercise of Congress' power to issue copyrights. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) ("monopoly created by copyright thus rewards the individual author in order to bene-

right to prevent the publication of his work.<sup>4</sup> The Copyright Act of 1976,<sup>5</sup> however, which abrogated the common law of copyright,<sup>6</sup> codified the judicially-created "fair use" doctrine.<sup>7</sup> This doctrine

fit the public"). Also, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), the Court observed:

The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labor of authors."

*Id.* at 156 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)). See also 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 1.10 [A] at 1-69 to 1-70 (1983) (primary purpose behind copyright law is to benefit the public through encouragement of creative works); Goldwag, *Copyright and the First Amendment*, 29 *COPYRIGHT L. SYMP. (ASCAP)* 1 (1983) (primary consideration is to serve the public welfare). It is important to note that, similar to patent statutes, "copyright law. . . makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

4. Prior to the 1976 copyright revision, there was a dual system of protection for author's works. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908); *Roy Export Co. v. Columbia Broadcasting Sys.*, 672 F.2d 1095, 1101 n.13 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, 129, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5745 [hereinafter cited as HOUSE REPORT]. Until publication, an author had to rely on common law protection or sometimes state law. 1 M. NIMMER, *supra* note 3, § 2.02 at 2-16. See, e.g., CAL. CIV. CODE § 980(a) (West 1982). Under the common law, one's property right in his work was unqualified and perpetual. See Hutchinson, *Section 2 of The Copyright Act: A Statutory Maverick*, 19 *COPYRIGHT L. SYMP. (ASCAP)* 143, 160 (1971). The author of an unpublished work at common law exclusively held the right of first publication in his work. See *Werckmeister v. American Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 346, 244 N.E.2d 250, 254, 296 N.Y.S.2d 771, 776 (1968); Hutchinson, *supra* at 151-54. This right consists of two elements: the author's right to publish or refrain from publishing, and the author's right to prevent others from publishing without his consent. *Id.* at 153-54. Under the common law right of first publication, an author was protected in perpetuity. However, this ceased the moment publication occurred. 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 4.03, 4-15 to 4-16 (1983).

5. 17 U.S.C. §§ 101-810 (1982). Title 17, was enacted on July 30, 1947, ch. 391, 61 Stat. 652. The present act, 17 U.S.C. §§ 101-810, took effect July 1, 1978. Pub. L. No. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541.

6. The new act expressly preempts common law copyrights and state copyright law. 17 U.S.C. § 301 (1982). The purpose of the preemption was to eliminate an "anachronistic, uncertain, impractical and highly complicated dual system." HOUSE REPORT, *supra* note 4, at 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680.

7. Pub. L. No. 94-553 § 102, 90 Stat. 2541, 2598 (1976) (codified at 17 U.S.C. § 107 (1982)). The fair use statute provides that:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copy-

permits the unauthorized use of portions of a copyrighted work where the first amendment interest in permitting the use<sup>8</sup> outweighs the infringement on the author's exclusive interest.<sup>9</sup> In *Harper &*

righted work;

(4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

Fair use was not codified under the 1909 Copyright Act. Courts, however, realized that in some situations public policy required that the copyright owner's rights yield to the public's right to free access to information. Courts thereafter began to consider equitable factors when determining whether a fair use privilege applied. As early as 1740 an English case recognized the concept of fair use, *see Gyles v. Wilcox*, 2 Atk. 141, 26 Eng. Rep. 489 (1740). Although Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901), is usually considered the first American expression of the fair use doctrine, he actually laid the groundwork in an earlier case, *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).

The doctrine, as an equitable rule of reason, however, has never been defined. *See* HOUSE REPORT, *supra* note 4, at 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679. The most widely quoted definition is "a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright." H. BALL, *supra* note 1, at 260; *see, e.g., Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); STAFF OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2d Sess., Report on Copyright Law Revision 5 (Comm. Print 1960) (Study No. 14 by Alan Latman on fair use in copyright law) [hereinafter cited as Study No. 14]; *see also* Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 45-46 (1955). It is important to note, however, that the fair use doctrine as well as the Copyright Act are designed to fulfill the purpose of the copyright clause of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 8, or *supra* note 1 for text of the clause. As such, the rights of the author are secondary or incidental to the basic constitutional goal of introducing creative works into the public domain. *See, e.g., Rosemont Enters., Inc.*, 366 F.2d at 307 ("fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance"), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.) (copyright holder's interest secondary to constitutional objective of providing creative works to the public), *cert. denied*, 379 U.S. 822 (1964).

8. Courts that decided copyright infringement cases before the 1976 Act became effective developed the doctrine of fair use to ease the inherent tensions between the limited monopoly given to the copyright holder and the public's interest in the free dissemination of ideas. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 [A] (1983).

Copyright law and the doctrine of fair use both promote the dissemination of ideas, but each in a different way. Copyright law provides economic incentives for authors to be creative, thereby increasing the store of ideas and information available to the public. The granting of such a monopoly, however, in some sense restricts, rather than promotes, access to ideas. In such situations, the fair use doctrine allows reasonable use of copyrighted works, notwithstanding the monopoly given to the copyright owner. *Berlin*, 329 F.2d at 543-44.

Not only is there a public need for the free flow of ideas, but the public's constitutional right to seek such information is well recognized. U.S. CONST. amend. I. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The first amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

9. In its report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this difficult balance:

*Row, Publishers, Inc. v. Nation Enterprises*,<sup>10</sup> the United States Supreme Court confronted the issue of whether publishing excerpts from a former President's unpublished memoirs was a fair use.<sup>11</sup> The Court shortsightedly held that the verbatim quotation of President Ford's original expression was an infringement and was not excused as a fair use because it was too substantial.<sup>12</sup>

Harper & Row, Publishers, Inc. and The Readers Digest Association, Inc. owned the publication rights<sup>13</sup> for "A Time To Heal,"<sup>14</sup> the memoirs of President Gerald Ford. In 1979, when the former President neared completion of his memoirs, Harper & Row sold *Time* magazine the exclusive rights to publish excerpts from the manuscript.<sup>15</sup> Thirteen days prior to *Time's* scheduled publication, *The Nation* magazine published an article paraphrasing limited portions of the manuscript, including minor quotations.<sup>16</sup> When *Time* learned of *The Nation's* article, it cancelled its publication contract

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be 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.

See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).

10. 105 S. Ct. 2218 (1985).

11. *Id.* See *supra* notes 7 & 8 (fair use doctrine).

12. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2235.

13. *Id.* at 2221-22. Harper & Row contracted for the exclusive right to publish the hard cover edition of the book and also the right to license prepublication excerpts or "first serial rights," often referred to as serialization rights. *Id.*

14. President Ford's memoirs, entitled "A Time To Heal," were to "contain 'significant hitherto unpublished material' concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon and 'Mr. Ford's reflections on this period of history, and the morality and personalities involved.'" *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2221 (quoting Appendix to Petition for Certiorari at C14-C15). Further, there is no dispute that this is a literary work, 17 U.S.C. § 102(a)(1) (1982), or that the publishing agreement between Ford and Harper & Row was appropriately recorded according to 17 U.S.C. § 205(d) (1982).

15. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2221-22. On March 14, 1979, Harper & Row and Reader's Digest entered into an agreement with *Time*, Inc. granting *Time* the right to publish excerpts, not to exceed 7,500 words, from chapters 1 and 3 of President Ford's memoirs, dealing with Nixon's resignation and pardon. Brief for Respondent at 2-3, *Harper & Row, Publishers, Inc.*, 105 S. Ct. 2218 (1985). See *supra* note 13 for a discussion of "exclusive rights" secured in Harper & Row's contract with Ford.

16. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2222 n.8. The majority opinion decided to deal only with the verbatim quotations of material which the Second Circuit had found copyrightable. See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 206 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985). The court of appeals held that only "approximately 300 words" were copyrightable. *Id.*

with Harper & Row and refused to pay the balance due.<sup>17</sup> Harper & Row filed suit against Nation Enterprises in the United States District Court for the Southern District of New York<sup>18</sup> for copyright infringement and various state law violations.<sup>19</sup>

After trial without a jury, the district court held that *The Nation's* article infringed President Ford's copyright.<sup>20</sup> The Court found that the use was not fair because it quoted and paraphrased Ford's copyrightable expression too substantially.<sup>21</sup> The United States Court of Appeals for the Second Circuit reversed.<sup>22</sup> It found that much of the material claimed under Ford's copyright was not copyrightable because it was factual material,<sup>23</sup> was in the public domain,<sup>24</sup> and was not the original expression of the author.<sup>25</sup> The

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17. *Time's* contract with Harper & Row provided for \$12,500 paid in advance for the right to print pre-publication excerpts, and an additional \$12,500 to be paid when the excerpts were published. See *Harper & Row, Publisher, Inc.*, 723 F.2d at 198, *rev'd*, 105 S. Ct. 2218 (1985). Interestingly, when *Time's* editor read *The Nation* article he called Harper & Row to request that *Time* be permitted to move its publication date up one week. Brief for Respondent at 5, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218 (1985). When Harper & Row refused, *Time* chose not to run the serialization at all, cancelling its contract instead. *Id.* Harper & Row argued that it had refused because it had carefully planned the serialization date to coincide with the release of the book. *Harper & Row, Publishers, Inc.*, 723 F.2d at 199, *rev'd*, 105 S. Ct. 2218 (1985).

18. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 501 F. Supp. 848 (S.D.N.Y. 1980), *modified*, 723 F.2d 195 (2d Cir. 1983), 104 S. Ct. 2655 (1985).

19. *Id.* at 848. Charges of conversion and tortious interference with contractual relations were filed in addition to the copyright infringement claims. *Id.* The district court ruled, however, that federal copyright law preempted these state law claims. *Id.* at 851-54; 17 U.S.C. § 301 (1982) (preemption clause).

On appeal, the Second Circuit affirmed the dismissal of the conversion claim, concluding that a "temporary interference" is not the equivalent of a "complete exclusion of the rightful possessor." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 2218 (1985). Further, the circuit court of appeals affirmed the district court's ruling that the claim of tortious interference with contractual relations was preempted, reasoning that federal copyright law preserved the legal rights in question. *Id.* See 17 U.S.C. § 301 (1982).

20. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1073 (S.D.N.Y.), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985).

21. *Id.*

22. *Harper & Row, Publishers, Inc.*, 723 F.2d 195, *rev'd*, 105 S. Ct. 2218 (1985). Judge Kaufman wrote the majority opinion, joined by Judge Pierce. *Id.* at 197. Judge Meskill wrote a dissenting opinion. *Id.* at 212. The court of appeals criticized the district court for beginning its opinion by considering *The Nation's* fair use argument rather than considering "the threshold issue whether the material used by the magazine was copyrightable." *Id.* at 202.

23. Judge Kaufman cited to 17 U.S.C. § 102(b) (1982), noting that facts and news events are not copyrightable and that the idea/expression dichotomy serves to "protect authors without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression." *Harper & Row, Publishers, Inc.*, 723 F.2d at 202, *rev'd*, 105 S. Ct. 2218 (1985). See 17 U.S.C. § 102(b) (1982). See also *infra* note 42 (text of statute). For a more detailed discussion of the scope of protection for factual works see Patry, *Copyright in Collections of Fact: A Reply*, 6 J. COMM. AND THE LAW 11 (1984).

24. *Harper & Row, Publishers, Inc.*, 723 F.2d at 205, *rev'd*, 105 S. Ct. 2218

court therefore held that *The Nation's* use of such unprotected portions could not constitute infringement.<sup>26</sup> The Second Circuit further held that *The Nation's* use of the copyrightable portions was a fair use because its article had incorporated only minimal segments of President Ford's expression which were necessary to convey the news content.<sup>27</sup>

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(1985). Additionally, the court of appeals held that any quotations from government documents, such as information concerning the Nixon pardon presented before the Hungate Committee, was not copyrightable under the government work exemption. *Id.* See *Pardon of Richard M. Nixon, and Related Matters*, 1974: *Hearings Before the Subcomm. on Crim. Just. of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 90-151 (1974). See also 17 U.S.C. §§ 101, 105; *infra* note 42 (idea/expression dichotomy).

The traditional copyright analysis for works combining both original and non-original material was set out in an early case, *American Code Co. v. Bensinger*, 282 F. 829 (2d Cir. 1922), and has been followed for decades. In *American Code*, the Court wrote:

If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work.

*Id.* at 834. *Accord*, *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Norman v. Columbia Broadcasting Sys., Inc.*, 333 F. Supp. 788, 797 (S.D.N.Y. 1971); *Greenbie v. Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957); *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 817 (S.D. Cal. 1937).

25. *Harper & Row, Publishers, Inc.*, 723 F.2d at 205, *rev'd*, 105 S. Ct. 2218 (1985). The court of appeals refused to give any copyright protection to sections that were only paraphrased, *id.* at 203, or quoted information that was attributable to conversations with third persons. *Id.* at 205. See 17 U.S.C. § 102(a) (1982), which requires that the author's work be original to him.

The district court, in analyzing these sections, refused to "enter the thicket" of deciding which statements were exact quotations of third persons and therefore not protected by copyright, and which were reconstructions of statements or statements pieced together by Ford and therefore copyrightable. *Harper & Row, Publishers, Inc.*, 557 F. Supp. 1067, 1072-73, *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985). The district court reasoned that this approach was justified because it found that the totality of the historical facts, memoranda, and statements were "integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." *Id.* at 1073.

26. *Harper & Row, Publishers, Inc.*, 723 F.2d at 208-09, *rev'd*, 105 S. Ct. 2218 (1985). See also H. BALL, *supra* note 1, at 343. "In a suit for copyright infringement, the court directs its inquiry to a determination of: (1) What was appropriated by the defendant from the plaintiff; (2) if anything was appropriated, whether such appropriation was of copyrightable matter; and, if so, (3) whether it was substantial and material appropriation." *Id.* Using this approach the majority determined that much of the appropriated material was not copyrightable in the first place, therefore, *The Nation's* use was not infringement as to these portions. *Harper & Row, Publishers, Inc.*, 723 F.2d at 202-06, *rev'd*, 105 S. Ct. 2218 (1985). See also *supra* notes 23-25.

27. *Harper & Row, Publishers, Inc.*, 723 F.2d at 208, *rev'd*, 105 S. Ct. 2218 (1985). See also *supra* notes 7 & 8 (discussion of the fair use statute and historical

The Supreme Court reversed the Second Circuit.<sup>28</sup> The Court considered whether first amendment privilege<sup>29</sup> or the fair use provision of the Copyright Act<sup>30</sup> excused a news magazine's unauthorized quotation of a former President's original expression<sup>31</sup> from his soon to be published memoirs.<sup>32</sup> The Court determined that separate consideration of *The Nation's* first amendment claims was unnecessary because such interests were already protected under the Copyright Act.<sup>33</sup> After analyzing the fair use question, the Court held that *The*

background of the doctrine).

28. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218, 2221 (1985).

29. *Id.* at 2228-30. See *supra* note 8 for a discussion of the first amendment interest involved.

30. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231-35. See *supra* notes 7 & 8 (discussion of fair use statute and historical background).

31. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2221. The originality necessary to support a copyright merely requires independent creation without copying. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 489-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 837 (1977); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970). So the requirement to support a copyright is modest, since originality "means little more than a prohibition of actual copying." See also *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951).

32. *Time* was to have published excerpts of "A Time to Heal" thirteen days after *The Nation's* publication. The Court also addressed the question of the copyrightability of a factual autobiography such as "A Time to Heal." *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2224-25. The Court acknowledged that "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 2224. Compare *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977) (protection given to author's analysis, use of facts, and structuring of the material), *cert. denied*, 434 U.S. 1014 (1978), with *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.) (protection limited to the ordering and choice of words), *cert. denied*, 449 U.S. 841 (1980). See also 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.10[D], 2-164 to 2-165 (1985). The Court found, however, that a factual work may contain originality and be entitled to some measure of copyright protection. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2224.

The Court cited prior case law to establish that even a pure factual work is entitled to some protection and entails some degree of originality. *Id.* See, e.g., *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977) (protectible originality in a gardening directory); cf. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (copyright protection in a photograph). The Court reasoned that it did not have to determine what measure of protection President Ford's work should receive as a whole because *The Nation's* admitted quotation of 300 to 400 words was sufficient to establish infringement. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2224-25. The portions constituting verbatim quotation of copyrightable expression were determined in the Second Circuit's review of the case. See *supra* note 16.

33. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2228-30. The Court concluded in this regard that copyright law itself protects first amendment interests because only original expression may be copyrighted, and the fair use doctrine allows reasonable use of such copyrightable expression. *Id.* See the discussion of idea/expression dichotomy *infra* note 42. See also the discussion of fair use *supra* notes 7 & 8.

Starting in the 1960's courts and commentators began discussing the possibility of a "public interest" or first amendment exception allowing use of copyrighted materials. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968); *Public Affairs Assocs., Inc. v. Rickover*, 268 F. Supp. 444, 446, 456



*Nation's* use was not a fair use because the quoted passages represented substantial copying that went beyond the scope of factual reporting,<sup>34</sup> because it "scooped" the forthcoming hard cover edition and serialization,<sup>35</sup> and because the use usurped President Ford's right of first publication.<sup>36</sup>

The Court<sup>37</sup> began its analysis with an examination of the respondent's claims of first amendment privilege<sup>38</sup> and fair use.<sup>39</sup> The Court observed that through the idea/expression dichotomy<sup>40</sup> the Copyright Act provides that an author may receive a limited monopoly only in his original expression,<sup>41</sup> leaving the public free access to facts and ideas.<sup>42</sup> It also observed that the Copyright Act allows rea-

(D.D.C. 1967); *Rosemont Enters., Inc. v. Randon House, Inc.*, 256 F. Supp. 55, 67 (S.D.N.Y.), *rev'd*, 366 F.2d 303, 311-313 (2d Cir.) (Lumbard & Hays, J.J., concurring), *cert. denied*, 385 U.S. 1009 (1967); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). Until recently the courts found fair use and the idea/expression dichotomy capable of reconciling any tensions between copyright and the first amendment. Two Second Circuit decisions, including *Harper & Row*, were the first to take a different approach and choose to "construe the concept of copyrightability in accord with first amendment freedoms." See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985); *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *petition for reh'g en banc denied*, 730 F.2d 47, 48 (1984) (Oakes, J., dissenting), *cert. denied*, 105 S. Ct. 100 (1984).

34. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232. In examining the fair use question, the Court noted that factual works, such as memoirs, are usually allowed wider dissemination than fictional works under the fair use analysis. *Id.* at 2232. See Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT Soc'y. 560, 563 (1982) ("gradation as to the relative proportion of fact and fancy" and therefore the "extent to which. . . expressive language" can be copied will vary). Further, the Court conceded that some quotation may arguably be necessary to communicate the ideas President Ford was conveying. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232. The Court held, however, that *The Nation* had far exceeded what was necessary. *Id.* Cf. 1 M. NIMMER, *supra* note 3, at § 1.10[C].

35. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232.

36. *Id.* at 2223-24.

37. *Harper & Row, Publishers, Inc.*, 105 S. Ct. 2218. Justice O'Connor delivered the majority opinion, in which Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens joined. *Id.* Justice Brennan filed a dissenting opinion joined in by Justice White and Marshall. *Id.*

38. *Id.* at 2228-30. See *supra* notes 8 & 33.

39. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231-35. See *supra* notes 7 & 8 (fair use).

40. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2228, 2230; 17 U.S.C. § 102(b) (1982); *infra* note 42 (idea/expression dichotomy and text of statute).

41. See *supra* note 31 (original expression).

42. The idea/expression dichotomy is codified at 17 U.S.C. § 102(b) (1982) and sets forth limitations on copyrightability as follows: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." *Id.*

Unlike a patent, a copyright gives no exclusive right to the art form. *Mazer v. Stein*, 347 U.S. 217. Copyright protection is only given to the expression of an idea and not to the idea itself. 17 U.S.C. § 102(b); *Sid & Marty Krofft Television v. Mc-*

sonable unauthorized use of copyrightable expression through the doctrine of fair use.<sup>43</sup> Based on these observations the Court concluded that the idea/expression dichotomy and the fair use analysis embodied all necessary first amendment protections and, therefore, no individual discussion of first amendment interests was necessary.<sup>44</sup>

With the first amendment issue resolved, the Court focused on the respondent's claim of "fair use."<sup>45</sup> The Court first noted that at common law, the creator of an unpublished work had absolute ownership and no unauthorized use of such works was allowed.<sup>46</sup> It observed that the Copyright Act of 1976 abrogated the common law and codified the right of first publication making unpublished works subject to "fair use."<sup>47</sup> The Court emphasized, however, that the legislative history of the Act indicated Congress' intent to provide extra protection to unpublished works, thereby restricting applicability of the fair use doctrine to unpublished works.<sup>48</sup> Further, the Court rea-

Donald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977).

The Court emphasized that there is no copyright protection afforded facts or current events and that these portions of President Ford's book were readily available for *The Nation's* or any one else's use. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2229. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 726, 91 S. Ct. 2140, 2147 (1971) (Brennan, J., concurring) (copyright laws are not restrictions on freedom of speech because free use of ideas is still allowed and only the author's particular expression is protected).

43. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2230; see also *supra* notes 7 & 8 (fair use doctrine).

44. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2230.

45. *Id.* at 2231-35.

46. *Id.* at 2225-27. When someone wrote a manuscript or composed a song but had not yet published it, the law historically gave all the rights in the unpublished work to the creator, including the exclusive right to copy the work. *American Tobacco v. Werckmeister*, 207 U.S. 284 (1907) ("the property of the author. . . in his intellectual creation was absolute until he voluntarily parted with the same"). The theory was that since there was no publication, the author had not consented to any use whatsoever of his work by anybody. See Strauss, *Protection of Unpublished Works* (1957), reprinted in Study No. 29 in *Copyright Law Revision Studies Nos. 29-31, PREPARED FOR THE SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS., 4, n.32* (1961) (citing cases); R. SHAW, *LITERARY PROPERTY IN THE UNITED STATES* 67 (1950) ("there can be no 'fair use' of unpublished material"); H. BALL, *supra* note 1, at 260 n.2 ("the doctrine of fair use does not apply to unpublished works"); A. WEIL, *AMERICAN COPYRIGHT LAW* § 276, at 115 (1917) (author of an unpublished work "has, probably, the right to prevent even a 'fair use' of the work by others"). But see *Towle v. Ross*, 32 F. Supp. 125, 127 (D. Ore. 1940) (criticism of the implied consent theory); Study No. 14, *supra* note 7, at 7; 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 13.05, at 13-55 (1983).

47. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2227. In 1976, Congress enacted a new copyright law and abolished common law copyright, merging it with the so-called statutory copyright that protects a work after it has been published. 17 U.S.C. § 301(a) (1982). See *supra* note 6 for relevant text of statute. All of the exclusive rights granted an author in section 106 of the Copyright Act are made expressly subject to section 107 which is the fair use statute. See 17 U.S.C. §§ 106-107 (1982); *supra* note 2, 6-8. 17 U.S.C. § 106(3) includes the right of first publication.

48. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2227 (citing *STAFF OF THE*

soned that since the potential damage to an author in losing his right of first publication is substantial,<sup>49</sup> this fact should weigh heavily against a finding of fair use.<sup>50</sup>

With its analysis focused on the unpublished nature of the manuscript and President Ford's right of first publication, the Court undertook a traditional fair use analysis. It examined each of the four factors suggested in the Copyright Act in order to determine whether *The Nation's* use of the Ford memoirs was a fair use.<sup>51</sup> These factors include:<sup>52</sup> (1) the purpose and character of the use; (2)

SENATE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 40 (Comm. print 1961) ("unpublished works under common law protection are also immune from the limitations on the scope of statutory protection that have been imposed in the public interest [which limitations] . . . include the fair use doctrine. . ."). See also Study No. 14, *supra* note 7, at 7 ("the general assumption is that the fair use doctrine does not apply to common law literary property"); STAFF OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION 53 (Comm. Print 1960) ("the 'fair use' doctrine is generally thought not to apply to unpublished works") (Varmer, *Photoduplication of Copyrighted Material by Libraries*); STAFF OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION 4 n.32 (Comm. Print 1961) ("even the 'fair use' theory, applicable to works under statutory copyright, does not apply to works under common law protection" (citing *Stanley v. CBS*, 221 P.2d 95 (1950)) (Strauss, *Protection of Unpublished Works*, Study No. 29); *Final Report of the National Commission on New Technological Uses of Copyrighted Works* 43 (1978) ("the doctrine of fair use may be applied more narrowly to unpublished than to published works"); H. BALL, *supra* note 1, at 260 n.5; Cohen, 6 COPYRIGHT L. SYMP. (ASCAP) 43 (1955).

49. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2227. The Court cited S. REP. NO. 473, 94TH CONG., 1ST SESS., 61-67 (1975) which states:

A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is "out of print" and unavailable for purchase through normal channels, the user may have more justification for reproducing it. . .

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

*Id.* at 64. The Committee used photocopying for classroom use as its example, but it emphasized that "the same general standards of fair use are applicable to all kinds of uses of copyrighted material." *Id.* at 65.

50. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2227.

51. *Id.* at 2231. 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute).

52. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231. The statute uses language to the effect that in a fair use determination, the "factors to be considered shall include. . .the four listed." 17 U.S.C. § 107 (1982) (emphasis added). Note also that the first sentence in the prologue of Section 107 is comprised of two parts, each of which contains important terms that are statutorily defined to be illustrative only. *Id.* See *supra* note 7 for text of section 107. The first part of the sentence begins, "[n]otwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by. . ." 17 U.S.C. § 107 (1982) (emphasis added). The second part of the sentence begins, "for purposes such as. . ." 17 U.S.C. § 107 (1982) (emphasis added). The terms "including" and "such as" are defined in section 101 of the Act as "illustrative and not limitative." 17 U.S.C. § 101 (1982). This flexibility in the fair use doctrine was deliberate as revealed in the legislative reports: "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no dispo-

the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the original copyrighted work.<sup>53</sup> The court then weighed each of these factors in what has been called a "balancing of the equities"<sup>54</sup> to determine if *The Nation's* use was excusable as a fair use.

First, the Court analyzed the purpose and character of the use. It agreed with the Second Circuit that news reporting was the basic purpose of *The Nation's* article.<sup>55</sup> The Court noted that the Copyright Act listed news reporting as an example of a possible fair use.<sup>56</sup> It cautioned, however, that Congress did not intend that this express example of a fair use should be conclusive in a fair use analysis.<sup>57</sup> Although the Court acknowledged *The Nation's* right to be the first to report the information contained in Ford's manuscript,<sup>58</sup> it found that the article had gone beyond the mere reporting of un-

tion to freeze the doctrine in the statute, especially during a period of rapid technological change." H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1966); S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975). Although the reports also stated an intent to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way," the passage quoted above demonstrates that Congress did not intend to prevent the courts from changing, narrowing, or enlarging fair use to fit each individual case.

53. 17 U.S.C. § 107 (1982); *supra* notes 7 & 8.

54. It is common to refer to fair use as an "equitable rule of reason." S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976). In *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), the Supreme Court merely cited to these legislative reports in support of its characterization of fair use as an "equitable rule of reason," *id.* at 792, and did not undertake any review of its own to determine the accuracy of the characterization. *Id.*

55. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231.

56. *Id.* at 2231. 17 U.S.C. § 107 (1982). The legislative reports evidence somewhat divergent views on this point. Compare S. REP. No. 473, 94th Cong., 1st Sess. 67 (1975) with H.R. REP. No. 1476, 94th Cong., 2d Sess. 74-75 (1976).

Newsreporting fair use was rejected in *Roy Export Co. v. CBS*, 672 F.2d 1095 (2d Cir.) (bad faith involved in securing excerpts of copyrighted work), *cert. denied*, 459 U.S. 826 (1982); *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981) (psychologist's "love" analysis misappropriated and used as entertainment in magazine); *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57 (2d Cir. 1980) (ABC surreptitiously copied a film of wrestler submitted to it for review); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (financial news publisher's abstracting of financial news analysis called "chiseling for profit").

57. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231. Although there is no presumption that news reporting (or any other use) is a fair use, section 107 does list news reporting as a possible fair use. 17 U.S.C. § 107 (1982). It is also mentioned in the legislative reports as a possible fair use. H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 61 (1975).

58. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231. As the *Harper & Row* Court cautioned, "courts should be chary of deciding what is and what is not news." *Id.* at 2231 (citing *Harper & Row, Publishers, Inc.*, 723 F.2d at 215 (Meskill, J., dissenting)). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-346 (1974) (media right to report on public figures).

copyrightable information.<sup>59</sup>

As to the character of the use, the Court found that *The Nation* published its article in order to "scoop" the forthcoming hard cover and serialization releases, and that it quoted excerpts verbatim to lend authenticity to its article.<sup>60</sup> It also found that because publication of the article was commercial in character, a presumption arose against a finding of fair use.<sup>61</sup> These findings as to the purpose and character of the use tipped the balance of equities against a finding of fair use.<sup>62</sup>

In its analysis of the second fair use factor, the nature of the copyrighted work, the Court characterized the Ford manuscript as an unpublished historical autobiography.<sup>63</sup> It observed that this would normally lead to a liberal application of the fair use analysis because of the great need to disseminate factual works.<sup>64</sup> The Court,

59. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232.

60. *Id.* The Court put a great deal of weight in its analysis of the character and purpose of the use on the alleged "bad faith" of *The Nation's* use. The Court observed that *The Nation's* article "had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." *Id.* "Fair use presupposes 'good faith' and 'fair dealing.'" *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 *IOWA L. REV.* 832 (1968)).

The dissent suggested, however, that *The Nation's* actions of "scooping" *Time's* article were "standard journalistic practice," and noted *New York Times* articles regarding the memoirs of John Erlichman, John Dean's "Blind Ambition," and Bernstein & Woodward's "The Final Days" as proof of such practice. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2246-48 (Brennan, J., dissenting); *N.Y. Times*, Mar. 16, 1984 at C22 col. 2.

61. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

62. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231-32.

63. *Id.* at 2232.

64. *Id.* The court of appeals held that, because the memoirs were predominantly factual, copyright protection was narrowed. *Harper & Row, Publishers, Inc.*, 723 F.2d at 202, *rev'd*, 105 S. Ct. 2218 (1985).

Support for this proposition can be found in an early opinion by Judge Learned Hand: "Not only are all the facts recorded in history in the public domain, but . . . [t]here cannot be any such thing as copyright in the order or presentation of the facts, nor, indeed in their selection, although into that selection may go the highest genius of authorship. . . ." *Myers v. Mail and Express Co.*, 36 COPYRIGHT OFF. BULL. 478, 479 (S.D.N.Y. 1919) (unreported). *Cf. Suid v. Newsweek Magazine, Inc.*, 503 F. Supp. 146 (D.D.C. 1980) (adopting this reasoning in the District of Columbia); *Morrison v. Solomons*, 494 F. Supp. 218 (S.D.N.Y. 1980) (extending this approach to scientific texts). Many other recent cases have followed this line of reasoning. See, e.g., *Rosemont Enters., Inc. v. Randon House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (Howard Hughes biography), *cert. denied*, 385 U.S. 1009 (1967); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.) (Hindenburg disaster), *cert. denied*, 49 U.S. 841 (1980); *Mount v. Viking Press, Inc.*, 204 U.S.P.Q. (BNA) 353 (2d Cir. 1979); *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978) (*Roots*); *Gardner v. Nizer*, 391 F. Supp. 940 (S.D.N.Y.) (Rosenburg trial), *modified on other grounds*, 396 F. Supp. 63 (1975); *Fuld v. National Broadcasting Co.*, 390 F. Supp. 877 (S.D.N.Y. 1975) (death of "Bugsy" Siegal). *Accord, Norman v. Columbia Broadcasting System*, 333 F. Supp. 788 (S.D.N.Y. 1971) (Ezra Pound biography).

however, again found that the unpublished nature of the work, including President Ford's right of first publication, was the manuscript's "critical" characteristic.<sup>65</sup> Accordingly, the Court concluded that President Ford's loss of first publication rights and *The Nation's* direct quotations tipped the balance away from a finding of fair use on this factor.<sup>66</sup>

The third fair use factor that the Court considered was the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>67</sup> The Court first noted that quantitatively the infringing material constituted a very small portion of the original.<sup>68</sup> It found, however, that case law supported the district court's conclusion that the quoted portions, although not quantitatively substantial, were qualitatively the "essence" or "heart" of President Ford's work.<sup>69</sup> The Court, therefore, concluded that *The Nation's* unauthorized use of qualitatively significant portions of President Ford's work constituted a substantial taking and weighed against a finding of fair use.<sup>70</sup>

Finally, the Court addressed "the effect of the use upon the potential market for or value of the copyrighted work."<sup>71</sup> The Court stated that this was the most important factor to be considered in determining fair use.<sup>72</sup> In reversing the Second Circuit's finding that there was no causal connection between *The Nation's* publication and Harper & Row's loss of its contract with *Time*,<sup>73</sup> the Court stated that "[r]arely will a case of copyright infringement present such clear cut evidence of actual damage."<sup>74</sup> The Court, therefore, concluded that this evidence of actual damage tipped the balance heavily in favor of the copyright holder and against a finding of fair use.<sup>75</sup>

Thus, after examining all of the fair use factors, the Court

65. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232.

66. *Id.* at 2233.

67. *Id.* See 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute).

68. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2233.

69. *Id.* The Court found that the court of appeals erred in overruling the district court's determination that *The Nation's* taking was qualitatively substantial. *Id.* See, e.g., *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095 (2d Cir.) (taking 55 seconds out of a one hour and twenty-nine minute film deemed substantial), *cert. denied*, 459 U.S. 826 (1982).

70. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2233-34.

71. *Id.* at 2234. See 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute).

72. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2234. See 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13-76 (1983) (citing cases).

73. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2235. See *supra* note 17; *infra* note 112 and accompanying text (evidence that *Time's* cancellation may have been precipitated by Harper & Row's refusal to allow *Time* to move up publication date).

74. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2234.

75. *Id.* at 2235.

found that each one weighed against a finding of fair use.<sup>76</sup> The Court concluded, therefore, that the "balance of equities" had tipped in favor of Harper & Row. Accordingly, the Court held that *The Nation's* unauthorized use was not a fair use, but was an infringement.<sup>77</sup>

Arguably, the result of the Court's decision in *Harper & Row* is equitable. The Court's reasoning, however, is inconsistent with the underlying principles of the Copyright Act. To fully understand these inconsistencies in the Court's analysis, it is first necessary to understand some of the basic principles of the fair use doctrine and copyright law in general.

In order to balance the interests of authors in the control and commercial exploitation of their writings on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other, Congress defined two major limits on the exclusive rights granted to copyright holders.<sup>78</sup> One of these limiting factors is embodied in the idea/expression dichotomy, which prohibits copyright protection of ideas and facts.<sup>79</sup> The other limitation exists in the fair use doctrine, which allows reasonable unauthorized use of a copyrighted work.<sup>80</sup> Copyright law, therefore, is designed to grant authors limited monopolies in their work in order to encourage creativity while at the same time protecting the public's interest in the free dissemination of ideas.<sup>81</sup>

With these general principles of copyright in mind, it is apparent that there are two reasons why the Court's analysis is in conflict with statutory and constitutional law. First, the Court's inordinate emphasis on the unpublished nature of the original work and the right of first publication ignores the first amendment interests that the fair use doctrine and the idea/expression dichotomy are

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76. *Id.*

77. *Id.*

78. See *supra* notes 7 & 8 (fair use limitation) and 42 (idea/expression limitation). These are only two of a number of limitations placed on the copyright holder's exclusive rights. See 17 U.S.C. §§ 107-118 (1982). The most basic limitation on a copyright owner's exclusive right is that the subject matter of the original must be "copyrightable." 17 U.S.C. § 102 (1982). To qualify for a copyright, a work must be original and fixed in a tangible medium of expression. *Id.* The most fundamental limitation on copyrightability is that an idea cannot be copyrighted. *Id.* Rather, it is the individual creative expression which is worthy of protection. *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

The principal limitations on the exclusive right in a valid copyright are contained in 17 U.S.C. §§ 107-118 (1982). For example, certain exemptions are made for libraries and non-profit educational institutions. See *id.* § 108 (libraries) and § 110 (educational institutions).

79. See *supra* note 42.

80. See *supra* notes 7 & 8.

81. See *supra* note 3.

designed to protect.<sup>82</sup> Second, the Court's analysis does not encourage the dissemination of creative ideas which is the ultimate purpose of the Copyright Act.<sup>83</sup>

The Court's inordinate emphasis on the unpublished nature of the original work and right of first publication is the major flaw in its fair use analysis. Ironically, the Court acknowledged that the unpublished nature of a work and the right of first publication should not be the controlling factors in a fair use analysis,<sup>84</sup> but then proceeded through an analysis that made these factors controlling. The ineffectiveness of a fair use analysis applied in this manner is illustrated most vividly in contrasting the way the Court applied the four fair use factors in this case against their more traditional application in prior case law.

The first factor is the purpose and character of the use.<sup>85</sup> In the Copyright Act, Congress suggested that unauthorized uses for the purpose of "news, commentary, and criticism"<sup>86</sup> could be considered fair. The *Harper & Row* Court agreed with the Second Circuit that the general purpose of *The Nation's* article was news reporting.<sup>87</sup> Under a traditional "fair use" analysis, the news quality of *The Nation's* article should have tipped the balance in favor of finding a fair use.<sup>88</sup> The Court, however, cavalierly chose not to focus on the

82. See *supra* note 9 and accompanying text.

83. The purpose of copyright law is to promote the public welfare. 1 N. NIMMER, *supra* note 3, at § 1.10[A]. For this reason, copyright holders are granted a limited exclusive right to control their works. *Id.* In this respect, the copyright holder can effectively control the distribution of the expression of his idea. The purpose of the first amendment, however, is to provide free access to ideas. *Id.* To the extent that copyright law results in a monopoly on the expression of ideas, it conflicts with the first amendment by limiting free access to ideas. In fact, one commentator has characterized a copyright as "the uniquely legitimate offspring of censorship." Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

84. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2227.

85. 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute).

86. See *supra* note 56.

87. See *supra* note 55.

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

One commentator stated: "The world goes ahead because each of us builds on the work of our predecessors. A dwarf standing on the shoulders of a giant can see farther than the giant himself." Chafee, *Reflections on the Law of Copyright*: I, 45



news quality of the publication, instead citing dicta from *Sony Corp. of Am. v. Universal City Studios, Inc.*,<sup>89</sup> to demonstrate that the commercial nature of the publication created a presumption that the use was not fair.<sup>90</sup> Thus the news value of the infringing article was given almost no weight in the Court's balance.

In analyzing the character of the use, the Court criticized *The Nation's* attempt to make a "news event" out of being first to publish a public figure's expression.<sup>91</sup> According to the Court, this preemptive tactic resulted in the loss of President Ford's first publication rights and showed bad faith on the part of *The Nation*.<sup>92</sup> Following the *Harper & Row* analysis to its logical conclusion, no news story sold commercially about a copyrighted unpublished work would constitute a "fair use" on the first factor. The balance would always tip in favor of the copyright holder because the commercial nature of the article would create a presumption that the use was not fair and the preempting of the author's right of first publication would show bad faith. Any first amendment protection for free dissemination of ideas and rights of the press are suppressed in favor of protecting the author.

The second factor in a fair use analysis shifts the focus from the purpose and character of the infringing use to the nature of the copyrighted work.<sup>93</sup> As previously mentioned,<sup>94</sup> the *Harper & Row*

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COLUM. L. REV. 503, 511 (1945); see also *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (few books, even in antiquity, are truly "new and original"); Cohen, *supra* note 7, at 49 (some dependence on past works cannot be deemed infringement). Many commentators have recognized that the fair use doctrine plays an important role in disseminating information. See, e.g., Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1604-05 (1963); Kramer, *Foreward to Symposium on Literary and Artistic Products—Copyright Problems*, 19 LAW & CONTEMP. PROBS. 139-40 (1954); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790, 801-04 (1975). The societal interest in allowing certain borrowings, however, limits the economic protection afforded authors. Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS., Autumn 1981, 3, at 3. Permission to use excerpts from another's work was intended "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 at 1354.1 (1983) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)); see also Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 73, 78 (1965) (effectuating constitutional objective of copyright is "most accepted justification" for fair use).

89. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2231 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 659 F.2d 963 (9th Cir. 1981), *rev'd on other grounds*, 104 S. Ct. 774 (1984)).

90. *Sony Corp. of Am.*, 659 F.2d 963 (idea is implied in dicta only; not an actual holding); *supra* note 61.

91. See *supra* note 60.

92. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232; *supra* note 60.

93. 17 U.S.C. § 107 (1982); *supra* note 7.

94. See *supra* note 63.

court characterized President Ford's work as an historical autobiography.<sup>95</sup> Ford's manuscript pertained to public figures and was, therefore, of "high public concern."<sup>96</sup> Traditionally, works of high public interest or works that are predominantly composed of facts and historical events receive less copyright protection because ideas and facts are uncopyrightable.<sup>97</sup> Because the Court was dealing with

95. *Id.*

96. *The Nation's* article centered around President Ford's pardon of former President Nixon. Brief for Respondent at 4, *Harper & Row Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218 (1985). The article also reports other newsworthy information such as information concerning Ford's retention of Henry Kissinger as Secretary of State and Ford's consideration of Ronald Reagan as his 1976 running mate. *Id.* Further, the fact that both Ford and Haig (who is also focused on in the article) were both considered possible candidates for the election would indeed make their thoughts and perceptions newsworthy. *Id.*

97. A long line of cases illustrates the traditional approach of applying fair use principles with deference toward first amendment values. See generally *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (noting public interest in Rosenberg letters); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (noting public interest in information on life of Howard Hughes), *cert. denied*, 385 U.S. 1009 (1967); *Keep Thompson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (noting public interest in debate on political candidates' qualifications); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (noting public interest in information regarding John F. Kennedy assassination). In *Rosemont Enterprises*, 366 F.2d at 307, the court stated that "while the Hughes biography may not be a profound work, it may well provide a valuable source of material for future biographies (if any) of Hughes or for historians or social scientists." *Id.* There is a public benefit in encouraging historical biographical works "so that the world may not be deprived of improvements, or the progress of the arts. . .retarded." *Sayre v. Moore*, 1 East. 361, 102 Eng. Rep. 138, 139 (K.B. 1801). In *Keep Thompson Governor*, 457 F. Supp. at 959, the plaintiff purchased the copyright rights to a song "Live Free or Die." The plaintiff edited this song to include a one-minute narrative on life in New Hampshire and used the edited version to promote his political campaign. *Id.* The defendant used a 15 second portion of the plaintiff's campaign song in his own political advertisement. *Id.* In determining that the use was a fair use, the court stated that discussing public issues and debating the qualifications of candidates are "integral to the operation of the system of government established by our Constitution." *Id.* at 959.

It is also interesting to observe how the courts have treated first amendment interests in areas of high public concern in other areas of law. For instance, *New York Times v. Sullivan*, 376 U.S. 254 (1964), is an excellent example of how the Supreme Court has applied the first amendment to preserve the notions on which this country was founded. In *New York Times*, the plaintiff, an elected official, sued for libel resulting from an advertisement published in the defendant's newspaper. *Id.* at 256. The advertisement contained false and misleading statements. *Id.* The Court, denying relief, held that in light of the first amendment interest in criticizing government for the sake of improvement, mere falsity was not enough. *Id.* at 273. The Court held that statements about public officials must be made with "actual malice" to be actionable. *Id.* at 279-80.

It is significant to note that in many countries mere descriptions of current events are noncopyrightable. See, e.g., Austrian Copyright Statute 44(3); German Copyright Statute: Literary and Musical Works 18; Japanese Copyright Statute art. II(2). These statutes, and all other foreign statutes cited hereafter may be found in Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1576-77 (1963) (citing UNESCO, COPYRIGHT LAWS AND TREATISE OF THE WORLD (1961)). In other countries articles on current political or social problems can be reproduced without the author's consent. E.g., Brazilian Copyright

a work of great public interest that was based primarily on uncopyrightable facts and events,<sup>98</sup> traditional copyright principles should have been applied, which should have tipped the balance toward a finding of fair use.<sup>99</sup>

These characteristics of President Ford's manuscript were, however, deemphasized and the Court focused once again on the unpublished nature of the work calling it a "critical element of its nature."<sup>100</sup> This unpublished nature of the copyrighted work and the original owner's loss of the right of first publication became the only weighted factors entering into the balance. The Court reiterated its distaste for the "hastily patched together" article and the clandestine publication,<sup>101</sup> indicating that the Court's analysis of the first fair use factor clouded its consideration of the second factor. It appears that the Court let its distaste for *The Nation's* actions interfere with its ability to fairly and evenly weigh all aspects of this factor in coming to its conclusion.

Third, Congress suggested that courts consider the "amount and substantiality of the portion used in relation to the original copyrighted work."<sup>102</sup> The *Harper & Row* Court found that the quality of the material taken was as critical as the quantity.<sup>103</sup> *The Nation* had used only 300 to 400 words of Ford's original expression from a 220,000 word manuscript,<sup>104</sup> or little more than one-tenth of

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Statute art. 666(II). Still others will allow reprinting of such articles unless it has been expressly prohibited. See, e.g., Czechoslovakian Copyright Statute art. 17(I)(f); Danish Copyright Statute 15; Italian Copyright Law art. 65; Indian Copyright Statute 52(I)(m); Turkish Copyright Statute art. 36; Venezuelan Copyright Statute art. 36(9). In the above countries, the concern for compensating the author for his efforts is secondary to the concern that the public be informed. In the United States and England, protection for authors of these historical and factual works has developed judicially and has resulted in a greater concern for the private interest of the copyright holder. Courts and commentators have expressed concern over these judicially created monopolies in an area where the legislature has not spoken. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215, 262-67 (1918) (Brandeis, J., dissenting); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1316-21 (1940).

98. See *supra* notes 96 & 97.

99. For a discussion of traditional fair use application under these circumstances, see *supra* note 97.

100. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2232.

101. *Id.* at 2233.

102. *Id.* at 2233-34; 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute). See also *supra* notes 67-70 and accompanying text (discussion of Court's analysis on this point).

103. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2233.

104. *Id.* at 2225. The Court here focused on *The Nation's* use of 300-400 words that the court of appeals identified as Ford's copyrightable expression. *Id.* See *Harper & Row, Publishers, Inc.*, 723 F.2d at 206, *rev'd*, 105 S. Ct. 2218 (1985). See also *supra* note 16. As previously discussed, the court of appeals based this finding on the uncopyrightability of facts and events, quotations attributed by Ford to third persons, and quotations from government documents. *Harper & Row, Publishers, Inc.*, 723 F.2d at 203-205, *rev'd*, 105 S. Ct. 2218 (1985). See *supra* notes 23-26 and accompanying text.

one percent. Neither prior case law nor publishing industry practice supports a finding of infringement in such an infinitesimally small taking.<sup>106</sup> The *Harper & Row* Court, however, found that the quality of the use was the controlling factor, observing that the quotation was from the "heart" of Ford's manuscript.<sup>106</sup> Thus, notwithstanding clear precedent,<sup>107</sup> the Court gave no weight to the fact that *The Nation's* unauthorized use was quantitatively insignificant. The result of this ruling is that even if *The Nation* had only paraphrased Ford's work, the same loss of news value and therefore first publication value would have occurred. Following this logic, no substantive use of an unpublished work is permissible no matter how minute the use, and the statute's third factor for determining fair use is of no import.

The fourth fair use factor encourages review of the effect of the use on the potential market for the copyrighted work.<sup>108</sup> In *Harper & Row*, the Court justifiably emphasized the importance of this factor because economic incentive is the cornerstone of copyright protection.<sup>109</sup> To show the potential for loss, the Court pointed to the actual loss of benefits from the contract with *Time* and the loss of President Ford's right to first publication.<sup>110</sup> According to *Time's* contract, however, any publication, even a paraphrasing without direct quotation, would have resulted in cancellation of its contract with Harper & Row.<sup>111</sup> Further, the evidence indicated that *Time* would have published the serialization notwithstanding *The Na-*

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105. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (verbatim copying of the entire original found to be a fair use where there was public interest in the information). In *Geis*, an amateur photographer took a movie of the fatal seconds during which President Kennedy was assassinated in Dallas. *Id.* at 132. *Time* purchased the rights to this movie and printed individual frames in *Life* magazine. *Id.* The defendant wrote a book, "Six Seconds in Dallas," using the *Life* magazine photographs. *Id.* The court noted the public interest in allowing the defendant's analysis of the tragic events to reach the public. *Id.* The court, finding no infringement, held that the defendant's book was a fair use. *Id.*

The general rule of thumb within the publishing industry as to what constitutes a useable quantity of an original copyrighted work is somewhere in the neighborhood of two to three percent.

106. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2233.

107. See *supra* note 105.

108. 17 U.S.C. § 107 (1982); *supra* note 7 (text of statute).

109. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2234. In *Mazer v. Stein*, 347 U.S. 201, 219 (1954), the Court stated that the economic philosophy behind the copyright clause is the idea that the best way to encourage individuals to advance public welfare through their creative efforts is to offer the prospect of personal gain. *Id.*

110. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2234-35.

111. On signing the contract, *Time* paid \$12,500 to Harper & Row for pre-publication rights and was to pay another \$12,500 on publication of the excerpts. The contract further provided that *Time* was allowed to renegotiate the second installment in the event there was any publication from Chapters I and II prior to *Time's* publication. Brief for Petitioner at 6, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218 (1985) (Petition for Cert.).

tion's article if Harper & Row had allowed *Time* to step up its publication date one week.<sup>112</sup>

These facts suggest, therefore, as the Second Circuit observed,<sup>113</sup> that *The Nation's* actual quotation was not the precipitating factor in the loss of *Time's* contract.<sup>114</sup> Under the Supreme Court's balancing, any use of an unpublished work will always preempt the right of first publication resulting in a potential economic loss. If the *Harper & Row* analysis is followed, no matter what the news value of the publication or the first amendment interests involved, this factor will always balance against a finding of fair use.

As the foregoing discussion indicates, in the Court's analysis of each of these fair use factors, the unpublished nature of Ford's work outweighed all first amendment considerations. As previously discussed,<sup>115</sup> the *Harper & Row* Court concluded that all necessary first amendment protections were embodied in the fair use analysis and the idea/expression dichotomy. However, since the Court's analysis of fair use ignored first amendment concerns, only the idea/expression dichotomy remained as a possible source of first amendment protection. The Court reasoned in this regard that the idea/expression dichotomy incorporates first amendment interests because it allows the public free use of underlying facts and ideas.<sup>116</sup> The Court prevented the public's free use, however, when it gave President Ford essentially an absolute right of first publication. Even if *The Nation* had only paraphrased Ford's work, using no original expression, *The Nation* still would have usurped the economic value of being the first to publish.

Thus, the first major flaw in the Court's analysis is that there is no longer any protection of first amendment interests when the unpublished nature of the work is afforded such overriding significance in determining fair use and over the idea/expression dichotomy. The potential hazard is that a future court may follow a similar analysis for an unpublished work and deny a legitimate first amendment interest in publication. There are more effective ways to reach an equitable result and deal with infringement of an unpublished work while still inspiring creativity and protecting first amendment interests. Unfortunately, a discussion of these alternatives is beyond the

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112. See *supra* note 17 (evidence that *Time* would have published if Harper & Row had allowed it to move up publication date one week).

113. *Harper & Row, Publishers, Inc.*, 723 F.2d at 198, *rev'd*, 105 S. Ct. 2218.

114. *Id.* See *supra* note 17.

115. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2230. See *supra* notes 38-44 and accompanying text for discussion of the Court's consideration of first amendment protections.

116. *Harper & Row, Publishers, Inc.*, 105 S. Ct. at 2230. See also *supra* note 42 (idea/expression dichotomy).

scope of this casenote.<sup>117</sup>

While inspiring creativity is one aspect of copyright law, the ultimate goal of copyright is to achieve publication and dissemination of creative works.<sup>118</sup> It is in reaching this ultimate goal that the second major flaw of the *Harper & Row* analysis is found. The Court's holding amounts to absolute protection for unpublished works. As such, it encourages creativity, but stops short of encouraging publication. Absolute protection under common law copyright has in fact resulted in the public's loss of some irreplaceable works, such as Mark Twain's "A Murder, A Mystery, and a Marriage."<sup>119</sup> Extra

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117. It is apparent that cases involving the infringement of unpublished works cannot be adequately analyzed if the focus of the analysis is confined to fair use. There are more effective ways to achieve protection for an author than molding the traditional fair use analysis to meet a task it is unequipped to handle at the expense of any first amendment considerations. It is beyond the scope of this casenote to thoroughly discuss all other alternatives, but some suggestions follow.

The protection of the author's first right of publication is in direct conflict with the public's right to free dissemination of information. This situation is like the one described by Cardozo: "The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law." B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 254 (1927). One possible solution to this dilemma is to provide a separate first amendment privilege for a case involving infringement of an unpublished work. This could be a special test that would focus on the public's interest in the information and look at other factors that may tip the balance specifically in relation to the first amendment interest. Possible considerations would include how soon the author intended to publish and whether the public has need of the information sooner than the publication date. In the *Harper & Row* case, the Court would have weighed the fact that no urgent information was contained in the memoirs and balance this with the fact that *Time* intended to publish in thirteen days. The result would be the same as that actually reached by the Court, but the focus would be properly placed on the particular facts that made this result the equitable one.

Another and perhaps better solution is to turn completely away from the law of copyright in a case involving an unpublished factual work. It must be recognized that the law of copyright, which protects expression only, may not be the ideal vehicle for the protection of an unpublished factual work where the value is not so much in the expression but in the right of first publication and the labor, effort and expense of compiling the work. The most protective principles might be found in the branch of unfair competition law dealing with misappropriation. Copyright law is designed to protect expression, while misappropriation is designed directly to protect the business advantage derived from the work. Such use of unfair competition principles would afford adequate protection for the author and allow the courts to fashion remedies which are more specific to the facts of the individual case, such as injunctions for specific periods of time.

Still another suggestion to remedy this problem would be that Congress establish standards appropriate to particular types of works, as in setting a particular limitation on the time an author can exclusively protect his right of first publication. In restricting this time to some reasonable time frame, relating to the approximate time required for publication within the industry, Congress could provide the extra protection an unpublished author needs, thereby giving him the incentive to create the work in the first place while still reaching the ultimate goal of copyright: to get creative works to the public.

118. See the discussion of the common law's absolute protection of unpublished works, *supra* at note 4.

119. The danger in granting absolute unlimited protection to unpublished

protection is needed to encourage production of works such as Twain's,<sup>120</sup> but some limitation is necessary on how long an author may enjoy exclusivity and refrain from publishing.<sup>121</sup>

In conclusion, the *Harper & Row* Court's analysis of copyrightability and of infringement effected an improper extension of the language in the Copyright Act in order to reach a desired result thought unattainable in any other way. The Court's inordinate emphasis on the unpublished nature of President Ford's manuscript approached a finding of copyrightability for facts and events. Such an analysis does protect the original author and may inspire creativity, but first amendment interests in the dissemination of ideas and the right of the press to publish newsworthy information are virtually ignored. Because the scope of this holding is so broad that it applies to all unpublished works, the advancement of these first amendment interests have been effectively left to the discretion of the original author, unfortunately allowing him alone to determine when such unpublished information may reach the public.

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works, such as was done at common law, is evident in the case of *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1944).

The plaintiffs, as successor trustees under the will of Samuel L. Clemens (Mark Twain) sued to restrain the defendant Feldman from publishing, producing, or reproducing a story by Clemens entitled "A Murder, A Mystery, and A Marriage." *Id.* This story was written by Twain in 1876 with the plan of enlisting the aid of other famous authors, such as Bret Harte, each to write his own final chapter for the work. *Id.* Twain submitted the manuscript to William Dean Howells, editor of the *Atlantic Monthly*, but the plan fell through. *Id.* When Twain died in 1910 the manuscript was not found among his effects and had never been published anywhere by anyone. *Id.* In 1945, the defendant Feldman purchased it in New York at an auction sale of rare books that had belonged to Dr. James Brentano Clemens (no relation to Twain). *Id.* Eager to publish it, Mr. Feldman sought permission of the trustees under the author's will, and being refused, went ahead with the publication anyway. *Id.* The trustees' suit to enjoin such publication met with final success in 1950 when the Court of Appeals in the State of New York agreed that Mark Twain had never parted with his common law copyright. *Id.* The court hinted that it had doubts as to the advisability of "permitting literary flowers so to blush unseen," and that it would prefer the work to go into the public domain for all to enjoy. *Id.* This result, however, could not be achieved because the author's right of deciding when and where to publish continued in perpetuity. *Id.*

120. See *supra* notes 2 & 3 (limited monopolies through exclusive rights in their works are given to authors to encourage creativity).

121. See *supra* note 117 (suggestion that there is a restriction as to the time an author may enjoy protection of his first right of publication).