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When Fair Is Foul A Narrow Reading of the Fair Use Doctrine in Harper& Row Publishers Inc. v. Nation Enterprises

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WHEN "FAIR IS FOUL": A NARROW READING OF THE FAIR USE DOCTRINE IN *HARPER & ROW, PUBLISHERS, INC. v. NATION ENTERPRISES*

In *Harper & Row, Publishers, Inc. v. Nation Enterprises,*[1] the Supreme Court narrowed the scope of permissible fair use[2] of copyrighted works. The Court held that a magazine in a news commentary announcing a forthcoming book about a public figure's career may not quote verbatim from the copyrighted factual book. The Court concluded that *The Nation*'s verbatim quotation of 300 words in its news article was not a fair use because *The Nation* is a commercial medium and the book was not yet published.[3] By relying on two categorical presumptions in its fair use analysis, presumptions against fair use of unpublished works and fair use in commercial publications, the Court imposed rigid criteria on a doctrine Congress intended to be a sensitive balancing of interests. Furthermore, the Court slighted Congress's idea-expression dichotomy[4] by failing to grant a wider scope of fair use to factual works. In so doing, the Court upset the balance between copyright law, which protects authors' interests, and the first amendment, which protects the dissemination of information so that the public may be informed through a "free trade in ideas."[5] By enlarging the copyright owner's monopoly over expression, the Court has granted a concomitant monopoly in the ideas and information that are inextricably entwined with protected expression.

This Note argues that by introducing categorical presumptions into the fair use analysis, the Court unwisely altered the efficacy of the fair use doctrine as a means of accommodating the often competing interests of copyright and the first amendment. Further, the Court's decision may chill news reporting and otherwise restrict the dissemination of information. Finally, this Note proposes an alternative fair use analysis that ensures that courts give due deference to the values underlying copyright law and the first amendment.

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1 471 U.S. 539 (1985).

2 Fair use is defined as "a privilege in others 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 by the copyright." H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY § 125, at 260 (1944). The Supreme Court partially quoted this definition in *Harper & Row*. 471 U.S. at 549.

3 *Id.* at 560-69.

4 *See infra* notes 23-28 and accompanying text.

5 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

I
BACKGROUND

A. The Purposes of Copyright Law and the First Amendment

The copyright clause of the Constitution expressly authorizes Congress to grant authors exclusive rights in their works for limited periods.[6] Congress's primary purpose in enacting copyright legislation is to provide authors with incentives to create works that benefit the public welfare by disseminating information and advancing knowledge in the public domain.[7] The authors' resulting economic rewards are merely a secondary consideration.[8] Moreover, enforcement of copyright legislation requires a sensitive balancing of interests between authors' interest in the control of their works and the competing public interest in the dissemination of information.[9] By granting a temporary monopoly to authors, copyright law may conflict with the ultimate goal of copyright as well as fundamental first amendment values,[10] both of which aim to advance the public welfare through the free flow of information and ideas. If protection of

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6 U.S. CONST. art. I, § 8, cl. 8 states, "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"

7 *See generally* Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y U.S.A. 560 (1982) (Congress and courts have devised doctrines to limit copyright holder's monopoly over his work, including idea-expression dichotomy and fair use doctrine). The Supreme Court used similar reasoning in Mazer v. Stein, 347 U.S. 201, 219 (1954): "The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . ." Construing the purpose of copyright legislation, the Court has stated that "[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors." Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

8 *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("[R]eward to the owner [is] a secondary consideration . . . [that] serves to induce release to the public of the products of his creative genius." (citing Fox Film Corp. v. Doyal, 286 U.S. 123 (1932))).

9 In Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984), the Court stated that the copyright laws involve "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."

10 The tension existing between the means used by copyright and its ends are reflected in the statement of 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; 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.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT S7 (E. Brylawski & A. Goldman eds. 1976).

the copyright owner's interest were overly broad, copyright law would impose too heavy a burden on the public by chilling the dissemination of information and relegating ideas of public concern to private ownership.[11]

The first amendment grants speakers and the press freedom to express divergent views, and favors free dissemination of speech, particularly on matters of political and public concern.[12] In recent first amendment cases, the Supreme Court has categorized various types of speech into a hierarchy of levels of protection. Obscenity and fighting words receive no protection from the first amendment, while commercial speech receives less protection than political speech.[13] The Court has held that political speech lies at the core of first amendment values and therefore receives the highest degree of protection.[14] Political speech facilitates "a self-governing body politic, whose freedom of individual expression should be cultivated . . . for the positive purpose of bringing every citizen into active and intelligent sharing in the government of his country."[15] The Court has ruled that political speech may not be curtailed absent "a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."[16] Thus, the first amendment, as an amendment to the Constitution, limits the power of Congress, under the copyright clause, to grant authors a monopoly that en-

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11 *See generally* Chafee, *Reflections on the Law of Copyright: I,* 45 COLUM. L. REV. 503 (1945) (although purpose of copyright law is to protect scientific and artistic works, scope of protection should depend on property's nature and on appropriate benefits and burdens caused by private ownership).

12 *See, e.g.,* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (plurality opinion) (to encourage robust debate on public issues, constitutional protection must be extended to discussion and communication involving matters of public and general concern); Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (profound national commitment to principle that debate on public issues should be uninhibited, robust, and wide open).

13 *See, e.g.,* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (plurality opinion) (first amendment protection required for speech of political content, but no protection required for fighting words, obscenity, libel, and less protection required for profanity and commercial speech); Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (plurality opinion) (whether speech is protected by first amendment depends on content of that speech).

14 *See supra* note 12 and accompanying text.

15 Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245, 260-61.

16 Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

croaches upon fundamental first amendment values.[17]

The Copyright Revision Act of 1976 (the 1976 Act)[18] attempts to accommodate the competing interests of copyright law and the first amendment by granting authors exclusive rights to control their work subject to a series of exceptions. Section 106 of the 1976 Act provides that copyright owners enjoy the exclusive right "to reproduce the copyrighted work in copies," "to prepare derivative works based upon the copyrighted work," and "to distribute copies . . . of the copyrighted work to the public."[19] Sections 107 through 118 list several exceptions to these exclusive rights. For example, the fair use doctrine, set forth in section 107, allows others to copy portions of the work under certain circumstances without permission from or payment to the copyright owner during the copyright holder's monopoly.[20] Congress and the courts have also sought to limit the scope of the copyright monopoly through the idea-expression dichotomy, which protects an author's rights in expression but not ideas.[21] Such limits on the copyright owner's monopoly have been expanded or contracted, depending on whether the legislature

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17 *See* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1182 (1970).

18 Pub. L. No. 94-553, 90 Stat. 2541 (1978) (codified as amended at 17 U.S.C. §§ 101-810 (1982 & Supp. III 1985)). To achieve the difficult balance of accommodating the competing interests of copyright law and the first amendment, as well as to adapt to technological change, Congress has amended the Copyright Act numerous times. The first Congress passed the initial copyright statute. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1845). Congress has completely revised the Act four times: Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1846); Act of July 8, 1870, ch. 230, §§ 85-111, 16 Stat. 198, 212-16 (1871); Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (formerly codified at 17 U.S.C. §§ 1-216 (1976)); and the Copyright Revision Act of 1976 (present act).

19 Section 106 provides in full:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (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;
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> (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
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> (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).

20 17 U.S.C. § 107 (1982). Other exceptions include § 108(a), which allows libraries and archives to make no more than one copy of the phonorecord or work, and § 110(1)-(2), which permits public performances for purposes such as teaching and educational broadcasting.

21 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.03[D] (1985); *see infra* notes 23-28.

and the judiciary have favored either protection as an incentive for authors or free dissemination of ideas for the public benefit.[22] Under the balance struck by the 1976 Act, copyright owners possess a limited, temporary monopoly over their works.

1. *The Idea-Expression Dichotomy*

The idea-expression dichotomy, set forth in section 102(b) of the 1976 Act,[23] establishes that copyright protects literary form and choice of words but does not protect ideas or facts. The rationale for this dichotomy rests in the belief that ideas are the common property of all and must remain common property for a self-goveruing people to make informed decisions.[24] This doctrine further recognizes that authors build on the works of their predecessors. As one commentator noted, "A dwarf standing on the shoulders of a giant can see farther than the giant himself."[25] Justice Brandeis memorialized this legal norm when he said, "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[26] The Supreme Court has embraced the notion that authors cannot copyright facts and ideas, stating that "[u]nlike a patent, a copyright gives no exclusive right to the act disclosed; protection is given only to the expression of the idea—not the idea itself."[27] Courts have applied this principle to factual works, such as those concerning history and biography, and traditionally have held that historical facts are in the public domain and hence unprotected by copyright.[28]

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22 *See* Gorman, *supra* note 7, at 560.

23 Section 102(b) states:

> 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.

17 U.S.C. § 102(b) (1982). This section reflects Congress's explicit intent to limit the scope of protection to the expression of ideas rather than the ideas themselves. The Register of Copyrights has stated, "Copyright does not preclude others from using the ideas or information revealed by the author's work. . . . [A]nyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's form of expression." REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION 3 (Comm. Print 1961).

24 *See* Nimmer, *supra* note 17, at 1189-92.

25 Chafee, *supra* note 11, at 511.

26 International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

27 Mazer v. Stein, 347 U.S. 201, 217 (1954).

28 *See, e.g.*, Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966) (although first author's mode of expression is protected, he cannot acquire monopoly by copyright in narration of historical facts), *cert. denied*, 385 U.S. 1009 (1967); Gardner v. Nizer, 391 F. Supp. 940, 942-43 (S.D.N.Y. 1975) (facts copied from biography of Ethel and Julius Rosenberg are not copyrightable); Norman v. Columbia Broad-

2. *The Doctrine of Fair Use*

The fair use doctrine allows subsequent authors to use limited amounts of expression from copyrighted works to serve the public interest. Fair use is "a privilege in others 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 by the copyright."[29] There are limits to such use—the subsequent user cannot appropriate material so extensively as to cause substantial injury to the copyright owner.[30] The doctrine of fair use evolved as a judicially-created exception to the copyright laws.[31] Congress codified the doctrine for the first time in section 107 of the 1976 Act.[32]

Although some courts have viewed the doctrine as a legal fiction of implied consent by the copyright owner, most recognize that such consent is irrelevant in light of the important social policy considerations[33] and unambiguous statutory language in the 1976

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casting Sys., 333 F. Supp. 788 (S.D.N.Y. 1971) (no copyright in facts about life of Ezra Pound).

29 H. BALL, *supra* note 2, § 125, at 260.

30 *Id.* at 261. The Supreme Court recently explained the mechanics of the fair use doctrine in limiting the exclusive rights granted to copyright owners. "[T]he definition of exclusive rights in § 106 of the present Act is prefaced by the words 'subject to sections 107 through 118.' Those sections describe a variety of uses of copyrighted material that 'are not infringements of copyright' 'notwithstanding the provisions of section 106.' " Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 (1984). Thus, fair use of a copyrighted work does not constitute copyright infringement.

31 *See* 3 M. NIMMER, *supra* note 21, § 13.05, at 13-62; Cohen, *Fair Use in the Law of Copyright,* 6 COPYRIGHT L. SYMP. (ASCAP) 43, 48-49 (1955) (tracing case history of "fair use" and its development into legal doctrine).

32 Section 107 of the 1976 Copyright Act states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . 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—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982). This codification "endorse[d] the purpose and general scope of the judicial doctrine of fair use," H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 [hereinafter HOUSE REPORT], *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5680, but did not attempt to "freeze the doctrine in the statute." *Id.*

33 The policies supporting the fair use exception include the recognition that the public has an interest in the dissemination of ideas and information and that authors build upon the works of their predecessors. *See* Cohen, *supra* note 31, at 43, 49. Similar policies support the idea-expression dichotomy limit on copyright. *See supra* notes 23-28 and accompanying text.

Act.[34] The most clearly recognized examples of fair use—the right to quote from a copyrighted work for the purposes of news reporting, criticism, comment, illustration, or reference in preparation of a subsequent work—benefit the public by disseminating information and advancing knowledge.[35] Thus, the fair use doctrine serves as a safety valve to resolve possible conflicts between copyright and the first amendment.[36]

Section 107 of the 1976 Act directs courts to consider four factors for determining whether a given use is "fair": the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the language used, and the effect of the use on the market for the original.[37] Section 107's language and legislative history reveal that Congress intended that the four factors serve as illustrations of the major considerations in fair use analysis. Congress did not ascribe weights to any of these factors, and no single factor is meant to control.[38] Furthermore, the enumerated factors do not exhaust the types of interests courts can weigh in the fair use calculus.[39] Rather, Congress directed courts to consider section 107's four factors along with any other relevant considerations in balancing the interests of the copyright holder, the user, and the public.[40]

a. *The Purpose of the Use.* Under the "purpose and character of the use" factor, courts examine the purpose for which the expression is excerpted from the author's work. The preamble to section 107 expressly endorses several purposes: "criticism, comment, news reporting, teaching . . ., scholarship, or research."[41] These enumerated purposes are not exclusive but merely illustrative.[42]

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34 17 U.S.C. § 107 (1982).

35 Cohen, *supra* note 31, at 51-53.

36 *See* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression,* 67 CALIF. L. REV. 283, 299 (1979) (fair use doctrine's avoidance of potential conflicts between property rights and first amendment interests makes elevating doctrine to constitutional status unnecessary); *see also* Quinto v. Legal Times of Washington, Inc., 506 F. Supp. 554, 560-61 (D.D.C. 1981) (clash between first amendment and copyright is adjusted through doctrine of fair use).

37 17 U.S.C. § 107 (1982).

38 HOUSE REPORT, *supra* note 32, at 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680; S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975) [hereinafter SENATE REPORT], *reprinted in* W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 499 app. at 500 (1985); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448, 454-55, 455 n.40 (1984) (discussing "equitable rule of reason" as requiring case-by-case analysis with no one factor wholly determinative); *id.* at 476 (Blackmun, J., dissenting) (quoting House and Senate reports).

39 HOUSE REPORT, *supra* note 32, at 65-66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678-80; 3 M. NIMMER, *supra* note 21, § 13.05[A], at 13-65 n.15.

40 3 M. NIMMER, *supra* note 21, § 13.05[A], at 13-66.

41 17 U.S.C. § 107 (1982).

42 3 M. NIMMER, *supra* note 21, § 13.05[A][1], at 13-67 n.21.

Furthermore, because the doctrine requires balancing competing interests rather than applying rigid rules, even if a particular use qualifies as one of the enumerated purposes, courts must balance this factor against the other three factors.[43] For instance, under the purpose factor, courts consider whether the use is commercial or nonprofit.[44] The Supreme Court ruled in *Sony Corp. of America v. Universal City Studios, Inc.*[45] that the commercial nature of an activity is "not conclusive," but rather a factor to be "weighed in any fair use decision,"[46] stating further that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[47] Whether a use that is arguably commercial will be deemed a fair use depends upon whether the use is "primarily for scholarly, historical reasons" or "primarily for the public benefit"[48] rather than predominantly for private commercial gain. In *Rosemont Enterprises, Inc. v. Random House, Inc.*,[49] for example, the Second Circuit explicitly sanctioned the fair use of factual material in popular and commercial works where the works benefit the public by disseminating information on matters of public conceru. The court concluded that, in such instances, the public interest in obtaining information should prevail over possible damage to the copyright owner's interest.[50]

b. *The Nature of the Copyrighted Work.* Section 107 also directs courts to consider the nature of the copyrighted work from which expression is taken.[51] Courts have declared that copyright protection is narrower (and the scope of fair use broader) for informa-

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43 *Id.* at 13-69.

44 17 U.S.C. § 107(1) (1982).

45 464 U.S. 417 (1984).

46 *Id.* at 448-49.

47 *Id.* at 451.

48 *See, e.g.*, Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (advertising use was fair use where purpose of advertisement was to report factual information), *cert. denied*, 469 U.S. 823 (1984); MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981) ("[T]he court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain."); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980) (advertisement was fair use because its purpose was to present truthful and comparative advertising to public); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977) (index which was taken from but served different purpose than original was fair use as it conveyed important information to public).

49 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

50 366 F.2d at 309. The court also stated that privacy rights are limited for public figures and that " 'at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy.' " *Id.* (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

51 17 U.S.C. § 107(2) (1982).

tional and factual works than for entertainment and artistic works.[52] Courts have made this distinction because some ideas can be expressed in only a limited number of ways,[53] and because of the strong public interest in the free flow of information.[54] The *Sony* Court noted that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture."[55] Similarly, the Second Circuit held in *Hoehling v. Universal City Studios, Inc.* that for factual works, copyright protection "is narrow indeed, embracing no more than the author's original expression," and "absent wholesale usurpation of another's expression, claims of copyright infringement . . . are rarely successful."[56] Thus, for factual works, a subsequent author may have to provide a verbatim reproduction or very close paraphrase of the entire work before a court will deem the use an infringement.[57]

Courts also consider whether a copyrighted work is published. The scope of fair use is narrower for unpublished works that are deemed confidential by their owners.[58] However, where an author's decision to remain unpublished is not motivated by a desire for privacy or confidentiality, at least one court has held that fair use is permitted.[59]

c. *The Amount and Substantiality of the Portion Used.* Courts consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[60] This factor requires that courts evaluate the expression used both quantitatively and qualitatively. The amount refers to the number of words used and the substantiality refers to the qualitative value of the expression.[61] Section

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52 *Compare* Rubin v. Boston Magazine Co., 645 F.2d 80 (1st Cir. 1981) (reproduction of scientific scales in popular magazine to entertain readers held unfair use) *with* Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65 (S.D.N.Y. 1978) (television news broadcast containing portion of plaintiff's song held fair use).

53 *See* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied,* 469 U.S. 1037 (1984).

54 *See, e.g.,* Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984) ("[I]nformational . . . works may be more freely published . . . ."); Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) ("Since the risk of restraining the free flow of information is more significant with informational works, the scope of permissible fair use is greater."), *cert. denied,* 469 U.S. 823 (1984).

55 *Sony,* 464 U.S. at 455 n.40.

56 618 F.2d 972, 974 (2d Cir.), *cert. denied,* 449 U.S. 841 (1980). The court justified its holding by citing the fundamental policy underlying the copyright laws: "encouraging contributions to recorded knowledge." 618 F.2d at 980.

57 1 M. NIMMER, *supra* note 21, § 2.11[A]-[B].

58 3 *id.* § 13.05[A][2], at 13-73.

59 Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984) (if author does not seek confidentiality, fair use is not necessarily precluded as to unpublished work).

60 17 U.S.C. § 107(3) (1982).

61 *See, e.g.,* Consumers Union of United States, Inc. v. General Signal Corp., 724

107 invites courts to calculate a ratio by comparing the amount of expression used to the original work as a whole.[62] Originally, the fair use doctrine permitted only the use of an insignificant portion of material, but it now allows more significant copying of protected material where copying is clearly in the public interest and serves the underlying purpose of the Copyright Act.[63]

The crucial difficulty in applying the fair use doctrine is determining what is substantial similarity.[64] An insubstantial similarity which has little or no impact on the original work is a fair use under the principle of *de minimus non curat lex* (the law does not take notice of very small or trifling matters).[65] Conversely, a verbatim copying of most or all of the original is usually an infringement of copyright.[66] Thus, while the ends of the spectrum are clear, the middle ground is undefined. The court's decision of what constitutes substantial similarity is further complicated by interaction with the other three factors in the fair use analysis. For example, a wider scope of fair use, and hence a greater amount and substantiality of expression, is permitted for informational works and works benefitting the public.[67]

d. *The Effect of the Use on the Market for the Original.* Finally, sec-

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F.2d 1044 (2d Cir. 1983) (copying verbatim 29 words of total work of 2,100 words held fair use), *cert. denied,* 469 U.S. 823 (1984); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980) (copying magazine cover held fair use although copying contents might not have been so).

62 Section 107(3) focuses on "the amount and substantiality of the portion used *in relation to the copyrighted work as a whole.*" 17 U.S.C § 107(3) (1982) (emphasis added).

63 Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir.) (because fundamental purpose of copyright law is "the encouragement of contributions to recorded knowledge," copyright protection for historical works is narrower than for nonfactual works), *cert. denied,* 449 U.S. 841 (1980).

64 3 M. NIMMER, *supra* note 21, § 13.05, at 13-64.

65 *See, e.g.,* Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir.) (insignificant paraphrasings from plaintiff's scholarly works in magazine article held fair use), *cert. denied,* 355 U.S. 907 (1957); Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975) (insubstantial copying held fair use).

66 *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (excessive copying precludes fair use even if other factors point to contrary result), *cert. denied,* 439 U.S. 1132 (1979); Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977) (verbatim copying of major portions of copyrighted research report sold to subscribing businesses held unfair use), *cert. denied,* 434 U.S. 1014 (1978); Quinto v. Legal Times of Washington, Inc., 506 F. Supp. 554 (D.D.C. 1981) (reprinting approximately 92% of plaintiff's story precludes fair use defense). *But see* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (verbatim copying of entire copyrighted works permitted where copying done for private use and no evidence of damage to original's market presented).

67 *See, e.g.,* Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.) (scope of copyright protection for historical accounts is narrow), *cert. denied,* 449 U.S. 841 (1980); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (reproduction of photographs of Kennedy assassination deemed fair use because of public interest in dissemination of news).

tion 107 of the 1976 Act requires that courts determine whether the use of the expression has a detrimental effect on the value of, or market for, the original work.[68] In most cases, this factor determines the outcome.[69] Courts evaluate whether the second work replaces demand for the original, thus decreasing the value of the copyright owner's interest.[70] Furthermore, courts consider not only actual damages incurred by the copyright owner, but rather "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work."[71] In *Sony,* the Supreme Court explained that "[w]hat is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists."[72] Where the two works are in different media or serve different functions, the likelihood decreases that the second work will encroach on the original's market, and thus fair use is usually permitted.[73] One commentator has noted that where both works consist of factual matters the defendant may more readily invoke the fair use defense even if both works serve similar functions, provided the copying has not been extensive.[74] Furthermore, the Second Circuit in *MCA, Inc. v. Wilson*[75] explained that the fourth factor requires courts to strike a balance

> between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.[76]

B. Application of the Fair Use Doctrine and the Idea-Expression Dichotomy to Factual Works

The tension between the copyright monopoly and the dissemination of information is particularly striking when a factual work is

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68 17 U.S.C. § 107(4) (1982).

69 3 M. NIMMER, *supra* note 21, § 13.05[A][4], at 13-76; *see, e.g.,* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); Dow Jones & Co. v. Board of Trade, 546 F. Supp. 113 (S.D.N.Y. 1982); H.C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620 (S.D.N.Y. 1976), *aff'd sub nom.* Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978).

70 Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543 (2d Cir.), *cert. denied,* 379 U.S. 822 (1964).

71 3 M. NIMMER, *supra* note 21, § 13.05[A][4], at 13-77 (footnote omitted).

72 *Sony,* 464 U.S. at 451.

73 3 M. NIMMER, *supra* note 21, § 13.05[B], at 13-79.

74 *Id.* at 13-79 n.40.

75 677 F.2d 180 (2d Cir. 1981).

76 *Id.* at 183 (citations omitted).

the subject of a fair use controversy.[77] The public has a strong interest in obtaining information about important discoveries, historical events, and the like,[78] and subsequent authors may need to appropriate parts of a work to relate facts that can be expressed in only so many ways.[79] Courts have therefore allowed a greater scope of fair use for factual works than for artistic and literary works.[80] For example, because courts have held that the facts contained in historical biographies of such public figures as Ezra Pound,[81] the Rosenbergs,[82] and Howard Hughes[83] are not copyrightable, courts have permitted extensive use of expression from such factual works by subsequent authors. Courts explain that one cannot obtain a copyright for facts,[84] news,[85] and historical interpretations[86] and that the use of expression from such works is a fair use. Thus, both before and since the enactment of the 1976 Act, courts have recognized a wide scope of fair use for informational works whose dissemination benefits the public.

II

HARPER & ROW, PUBLISHERS, INC. V. NATION ENTERPRISES

Harper & Row acquired the copyright to former President Ford's memoirs in February 1977. The agreement with Ford gave Harper & Row exclusive rights to publish Ford's then-unwritten

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77 Gorman, *supra* note 7, at 561.

78 *Id.*

79 Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.), *cert. denied,* 469 U.S. 1037 (1984).

80 *See* Gorman, *supra* note 7, at 561; *supra* notes 51-59 and accompanying text.

81 *See* Norman v. Columbia Broadcasting Sys., 333 F. Supp. 788 (S.D.N.Y. 1971).

82 *See* Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975).

83 *See* Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

84 In *Rosemont,* the court recognized that because the idea-expression dichotomy renders ideas noncopyrightable, copyright does not protect facts and information in copyrighted articles. 366 F.2d at 306.

85 In International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918), the Supreme Court held that news stories are not protected by copyright because

> the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

86 In Hoehling v. University City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied,* 449 U.S. 841 (1980), the Second Circuit affirmed the district court's summary judgment for the defendants on the issue of infringement. The defendants' fictional account had used ideas and some expression from plaintiff's historical interpretation of the Hindenberg's last voyage. 618 F.2d at 979-80.

In addition, 17 U.S.C. § 102(b) (1982) provides that ideas and discoveries are not copyrightable. *See supra* note 23.

memoirs.[87] The agreement imposed a duty upon Ford to preserve the book's value by withholding from the public any information not already disclosed about his career.[88] Shortly before publishing the memoirs, Harper & Row contracted to sell *Time* the first-serialization rights to print a chapter of the book.[89]

In March 1979, an undisclosed source gave a manuscript of Ford's unpublished memoirs to Victor Navasky, editor of *The Nation,* a weekly news and political commentary magazine.[90] Navasky knew that Harper & Row owned the copyright and planned to soon publish the memoirs,[91] but claimed ignorance of any other contractual agreements involving the book.[92] He consulted with legal counsel, who advised him that he could publish an article about the forthcoming book under the fair use provision of the Copyright Act.[93] Believing the memoirs contained important information about the Nixon pardon, Navasky wrote a news article about the forthcoming book and published it in *The Nation.*[94]

The article, which is approximately 2,500 words long and quotes approximately 300 words from the memoirs,[95] appeared on

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87 Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 197 (2d Cir. 1983).

88 The agreement demonstrated the value of the information in the book, as information rather than expression, to Harper & Row. It stated:

> Author acknowledges that the value of the rights granted to Publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the Work hereunder.

Agreement between President Gerald R. Ford and Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. § 20(b) (Feb. 28, 1977), *reprinted in* 2 Joint Appendix to Petition for Certiorari at 484, *Harper & Row,* 471 U.S. 539 (1985) (No. 83-1632). This agreement influenced Ford's decision not to appear on an NBC television special exploring the pardon of former President Nixon. *Harper & Row,* 723 F.2d at 198.

89 *Time* agreed to pay $25,000 for the first-serialization rights. It agreed to pay $12,500 on signing the contract and reserved the right to renegotiate the second payment if material from the book was disseminated before *Time* printed its excerpts. *Harper & Row,* 471 U.S. at 542-43.

90 *Harper & Row,* 723 F.2d at 198. At trial undisputed testimony established that Navasky neither solicited nor paid for the book. *Id.*

91 Harper & Row, Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1069 (S.D.N.Y. 1983).

92 *Harper & Row,* 723 F.2d at 198.

93 *Id.*

94 *Id.* At the time, Ford was considered a serious contender for the 1980 Republican presidential nomination. Mashek, *Where They're Already Running for President,* U.S. NEWS & WORLD REP., Feb. 12, 1979, at 57-58.

95 The article is reproduced in its entirety in the appendix to the Supreme Court's opinion. 471 U.S. at 570 app. The Court footnoted the portions of the article that quote Ford's memoirs. *Id.*

newsstands on April 3, 1979.[96] The article announced the expected publication dates of the book and *Time*'s excerpts, summarized information about Ford's decision to pardon Nixon, Ford's dealings with Henry Kissinger, Alexander Haig, and several other prominent public figures, and mentioned Ford's decision to run for a full term as president.[97] The same day, *Time* requested permission from Harper & Row to publish its serialization a week earlier than planned. Harper & Row denied the request and *Time* cancelled its serialization agreement. *Time* did not print any excerpts and refused to pay the balance outstanding from the agreement.[98]

A. The District Court Decision

Harper & Row brought a copyright infringement suit against *The Nation*'s publishers in federal court in the Southern District of New York. The district court held that *The Nation* had infringed Harper & Row's copyright because its use of paraphrased material and 300 words of verbatim quotations was not a fair use.[99] Applying the fair use factors, the court held that (1) the purpose of the article was commercial profit, (2) the nature of the original work was soon-to-be published, (3) the amount and substantiality of the portion used was "the heart of the book," and (4) the market effect caused *Time* to cancel its serialization agreement, thus diminishing the copyrighted work's value.[100] Although the court noted that historical facts and interpretations are not copyrightable, it reasoned that "these facts and memoranda collected together with Ford's reflections" formed a copyrightable totality.[101] The court denigrated the article's alleged news reporting purpose, claiming that this was not "such news, 'hot' or otherwise, as to permit use of . . . Ford's copyrighted material."[102]

B. The Court of Appeals Decision

The Second Circuit reversed, holding that only 300 words of *The Nation* article were copyrightable and that *The Nation*'s use of this limited amount of expression constituted a fair use.[103] The court

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96 *Harper & Row*, 723 F.2d at 198. By this date Navasky had learned of *Time*'s plans to publish excerpts in its April 23 issue, but did not know which portions of the book *Time* planned to excerpt. *Id.*

97 *See Harper & Row*, 471 U.S. at 570 app.

98 *Harper & Row*, 723 F.2d at 199. Harper & Row claimed that its carefully planned marketing program for the book would be harmed by *Time*'s earlier serialization.

99 *Harper & Row*, 557 F. Supp. at 1072.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Harper & Row*, 723 F.2d at 208.

first examined the portion of the article that was not verbatim quotations and concluded that historical facts, interpretations, memoranda written by other persons, conversations attributed to and originating in other persons, and information contained in government documents were not copyrightable.[104] The court rejected the district court's "totality" theory, noting that joining copyrightable expression with uncopyrightable facts does not transform the whole work into a protected totality. The court reasoned that such a totality theory would impermissibly expand copyrightable matter, allowing any public official "to take private possession of the most important details of a nation's historical and political life by adding language."[105] Examining the 300 words of verbatim quotations under the statutory fair use factors, the court held that (1) the purpose of *The Nation* article was news reporting, (2) the nature of the copyrighted work was factual and thus the scope of permissible fair use was broad, (3) the amount and substantiality used were quantitatively "meager" and qualitatively reasonably necessary for the purposes of a news article, and (4) although the article caused *Time*'s cancellation, the use's market effect on the copyrighted work was questionable because the publication of facts rather than the limited use of expression had caused the breach.[106] The court noted that the article communicated important public matters and used a limited amount of expression to achieve that end, stating that "the copyright holder's monopoly must not be permitted to prevail over a journalist's communication. To decide otherwise would be to ignore those values of free expression which have traditionally been accommodated by the statute's 'fair use' provisions."[107] A dissent argued that *The Nation*'s use of both the facts and verbatim quotations was not a fair use because *The Nation* sought to profit from the use and the article caused "substantial incursion into the market for the primary work."[108]

C. The Supreme Court Decision

The Supreme Court, in a 6-3 decision, reversed the Second Circuit. Justice O'Connor, writing for the majority, concluded that *The*

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104 *Id.* at 203, 205.

105 *Id.* at 205.

106 *Id.* at 207-08. The court reasoned that *The Nation*'s motive—profit—was, by itself, legally irrelevant if the work offered some public benefit. *Id.*

107 *Id.*

108 *Id.* at 216 (Meskill, J., dissenting). Judge Meskill endorsed the district court's totality theory, arguing that facts can be copyrighted to protect an original author's articulation, presentation, method of treatment, and selection of details. He maintained that because the article contained no independent research, it was not original and thus did not qualify as news. Rather, the article appropriated more of the memoirs than was necessary. *Id.* at 212-16.

Nation's use of 300 words of verbatim quotations was not a fair use. Although the Court briefly noted that the law is currently unsettled regarding the copyright protection to be accorded to factual works, it chose not to reach this issue.[109] The Court instead focused solely on whether the 300 words of verbatim quotations used in the article constituted a fair use.[110] Employing the fair use factors, the Court found that although the article's general purpose was news reporting, the publication's commercial nature negated a finding of fair use. The Court quoted *Sony Corp. of America v. Universal City Studios, Inc.* for the proposition that "every commercial use of copyrighted material is presumptively . . . unfair."[111] Examining the nature of the copyrighted work, the Court found that its factual nature supported a finding of fair use; however, its unpublished status was also "a critical element of its 'nature' " which weighed against such a finding.[112] Regarding the amount and substantiality of the portion used, the majority noted that although the words were quantitatively insubstantial, qualitatively, *The Nation* had used "'the heart of the book.' "[113] The Court compared the amount of material quoted to the total number of words in the article, concluding that "the fact that a substantial portion [thirteen percent] of the infringing work was copied verbatim is evidence of the qualitative value of the copied material."[114] Finally, in evaluating the article's impact on the original's market, the Court ruled that the article precipitated both *Time*'s cancellation of the serialization agreement and consequent refusal to pay the balance owed. Further, the Court stated that "a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general."[115]

Justice Brennan, joined by Justices White and Marshall, dissented. He argued that the majority had overly protected the copyright owner's economic interests by adopting an "exceedingly narrow definition of the scope of fair use" which threatened to "stifle the broad dissemination of ideas and information copyright is intended to nurture."[116] The dissent deemed *The Nation*'s quotation of 300 words a fair use, reasoning that the use's purpose was news

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109 *Harper & Row*, 471 U.S. at 548.

110 *Id.* at 549.

111 *Id.* at 562 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

112 *Id.* at 563-64. The majority noted that the common law of copyright provided a narrow scope of fair use for unpublished works. *Id.* at 550-51.

113 *Id.* at 564-65 (quoting *Harper & Row*, 557 F. Supp. at 1072).

114 *Id.* at 565.

115 *Id.* at 569.

116 *Id.* at 579 (Brennan, J., dissenting).

reporting, a purpose explicitly endorsed as a fair use by Congress in section 107 of the 1976 Act.[117] For the dissent, the copyrighted work's factual nature demanded a broader scope of fair use than that provided nonfactual works.[118] The amount of the words copied was quantitatively small. Qualitatively, the words taken were expressive and poignant, but were neither "excessive [n]or inappropriate" given the article's purpose.[119] Finally, the article's market effect was questionable—the significant facts in the article, rather than the verbatim quotations, caused *Time* to cancel the agreement. The dissent concluded that the majority's "exceedingly narrow approach to fair use permit[ted] Harper & Row to monopolize information."[120]

III
ANALYSIS

Harper & Row, Publishers, Inc. v. Nation Enterprises addressed the issue of whether and to what extent the Copyright Act's fair use provision sanctions a magazine's use of quotations from a public figure's unpublished manuscript depicting a matter of public concern. In *Harper & Row,* the Supreme Court narrowed the scope of the fair use doctrine by presuming that any use of expression by a commercial publisher and any use of expression from an unpublished work are unfair.[121] By creating rigid presumptions in a doctrine Congress intended to be a sensitive balancing of interests, the Court restricted the utility of the fair use doctrine as a way to accommodate the sometimes competing aims of copyright and the first amendment. The Court's restrictive interpretation also undermines copyright law's ultimate goal: to disseminate information. The decision may chill reporting of news on matters of public concern in situations where limited quotation of copyrighted expression is necessary to convey ideas. Rather than employing presumptions in its fair use analysis, the Court should have employed an interest-balancing ap-

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117 *Id.* at 591.

118 *Id.* at 588-90. The dissent noted that

> [w]ith respect to a work of history, particularly the memoirs of a public official, the statutorily-prescribed analysis cannot properly be conducted without constant attention to copyright's crucial distinction between protected literary form and unprotected information or ideas. The question must always be: was the subsequent author's use of *literary form* a fair use within the meaning of § 107?

Id. at 588.

119 *Id.* at 601.

120 *Id.* at 605. The dissent further warned that the majority's holding "effect[s] an important extension of property rights and a corresponding curtailment [of] the free use of knowledge and of ideas." *Id.* (quoting International News Serv. v. Associated Press, 248 U.S. 215, 263 (1918) (Brandeis, J., dissenting)).

121 *See supra* notes 109-15 and accompanying text.

proach, weighing the copyright owner's interest in controlling his writings against the public's interest in dissemination of information.

A. The Majority's Misapplication of the Fair Use Factors

In its zeal to protect authors' first-publication royalties, the Court gave insufficient weight to first amendment concerns. Similarly, the Court slighted the congressional scheme of fair use and the idea-expression dichotomy's limit on the copyright owner's monopoly. The Court protected property interests at the expense of core first amendment values. It effectively granted copyright owners a monopoly on information in cases where the information is inextricably interwoven with expression, or more accurately, where the information is the form of expression itself. In *Harper & Row,* former President Ford's words and his interpretation of historic events were the news event. The Court should have construed the fair use doctrine liberally where a public official wrote on matters of public concern.

1. *The Purpose of the Use*

Although the Court acknowledged that the use's purpose was news reporting, a congressionally sanctioned use, the Court argued that the publication's commercial nature was "a separate factor that tend[ed] to weigh against a finding of fair use."[122] The Court deemed *The Nation*'s use commercial because it "had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."[123] The Court concluded that because *The Nation*'s use was commercial, it was presumptively unfair.[124] Thus, the Court invoked a rigid presumption against fair use by commercial enterprises to supersede the news reporting aspect of the fair use analysis.

This presumption conflicts with the aims, policies, and explicit language of the fair use doctrine as set forth in section 107. This section lists news reporting as an example of an approved purpose for fair use.[125] Because Congress listed news reporting as an example and also stated that courts should give the use's commercial nature some weight in the analysis, Congress must not have intended that courts consider news reporting a commercial purpose. The majority claimed that the crux of the fair use issue is "whether the user stands to profit from exploitation of the copyrighted material with-

122 *Harper & Row,* 471 U.S. at 562.
123 *Id.*
124 *Id.*
125 For the text of § 107, see *supra* note 32.

out paying the customary price."[126] But this can be said of any fair use. That one may use copyrighted material without making the customary payment to the copyright owner is the central concept of fair use, because fair use is an approved exception to the copyright holder's monopoly. Under the Court's presumption, no commercial publisher could ever use copyrighted material without permission. An alternative interpretation of the statute, one which is more consistent with congressional intent, is that Congress listed news reporting as an example of fair use because it viewed dissemination of information as presumptively of public benefit.[127]

Furthermore, the Court's reliance on *Sony Corp. of America v. Universal City Studios, Inc.*,[128] for the proposition that any commercial use is presumptively unfair is misplaced.[129] In *Sony,* the Supreme Court held that the public's use of Betamax Video Tape Recorders for purposes of timeshifting and taping of copyrighted television programs was a fair use because it was not a commercial activity, it served the public interest by making broadcasting more available, and it was not shown to harm the copyright holder's monopoly.[130] Similarly, *The Nation* article was not created merely for commercial gain. The article increased public exposure to Ford's memoirs and disseminated important information. *Harper & Row* presents a stronger case for fair use than *Sony* because *The Nation* article used expression from an informational work on a matter of public concern, while *Sony* concerned the copying of entertainment works. Unlike the Betamax product, *The Nation* article's primary purpose was to provide the public with political news and information.

2. *The Nature of the Copyrighted Work*

The *Harper & Row* Court noted that Ford's work was factual in nature and that the law generally recognizes a broad scope of fair use for such works. The Court concluded, however, that the work's unpublished status was "a critical element of its 'nature,' " one which outweighed the factors favoring fair use.[131] Noting that "the unpublished nature of a work is '[a] key, though not necessarily de-

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

127 *See* Brief for Respondents at 31, *Harper & Row,* 471 U.S. 539 (1985) (No. 83-1632). Interestingly, Harper & Row did not appeal the court of appeals' rejection of the commercial publication argument. *Id.*

128 464 U.S. 417 (1984).

129 The *Harper & Row* Court quoted *Sony* for the proposition that "every commercial use of copyrighted material is presumptively an unfair exploitation." 471 U.S. at 562 (quoting *Sony,* 464 U.S. at 451).

130 464 U.S. at 454-55.

131 *Harper & Row,* 471 U.S. at 564.

terminative, factor' tending to negate a defense of fair use,"[132] the Court nevertheless concluded that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[133] The majority thus created a rigid presumption against the fair use of unpublished works.

This presumption is flawed in several respects. First, the right of first publication, like all other exclusive rights in section 106, is expressly made subject to section 107.[134] Congress chose not to distinguish between published and unpublished works in creating the fair use exception.[135] Second, federal copyright law preempts the common law rule denying fair use of unpublished works.[136] In *Harper & Row,* the Court relied on common law doctrine to support its belief that copyright protects " 'undisseminated works until the author or his successor discloses them.' "[137] The common law, however, restricted the fair use doctrine in the case of unpublished works to protect the copyright holder's privacy interests,[138] not to protect commercial interests. But no privacy interest existed in the instant case, because Ford consented to the public dissemination of his manuscript. Thus, the soon-to-be published status of the manuscript indicated de facto publication of the work and should have "tip[ped] the balance of equities in favor of prepublication use."[139]

The Court's presumption against prepublication fair use serves to protect the author's "property interest in exploitation of prepublication rights."[140] This overarching conceru for property rights clashes with Congress's intent to prevent copyright from squelching the dissemination of ideas. The Court's presumption could bar any use of expression before the author chooses to sell it, and thus sub-

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132 *Id.* at 554 (quoting SENATE REPORT, *supra* note 38, at 64, *reprinted in* W. PATRY, *supra* note 38, at 501).

133 *Id.* at 555.

134 For the text of § 106, see *supra* note 19.

135 In other sections of the 1976 Act, Congress did distinguish between published and unpublished works. *See, e.g.,* 17 U.S.C. §§ 104, 108 (1982).

136 *See* 1 M. NIMMER, *supra* note 21, § 4.01[A].

Prior to 1976, federal copyright protection started at the time of publication. In the 1976 Copyright Act, Congress extended statutory copyright protection to the time of a work's creation. HOUSE REPORT, *supra* note 32, at 129, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5745.

137 *Harper & Row,* 471 U.S. at 553 (quoting REGISTER OF COPYRIGHTS, *supra* note 23, at 41).

138 3 M. NIMMER, *supra* note 21, § 13.05[A][2], at 13-73 (under the common law, "the scope of the fair use doctrine is considerably narrower with respect to unpublished works *which are held confidential by their copyright owners*" (emphasis added)).

139 *Harper & Row,* 471 U.S. at 551.

140 *Id.* at 555. The majority stated that the commercial value of the right of first publication lies in its exclusivity. *Id.* at 553.

stantially affects the public's ability to receive information.[141] Furthermore, this presumption effectively voids the statutorily mandated exceptions to authors' exclusive rights from the time of a work's creation until publication.[142] In a dramatic overstatement, the Court asserted that any fair use of prepublished material would "effectively destroy any expectation of copyright protection in the work of a public figure" and would eliminate "incentive to create . . . such memoirs."[143] Contrary to the Court's fears, the fair use doctrine would still protect informational works by public figures. There is no need to narrow the fair use calculus by bright-line rules and rigid presumptions.

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

The majority conceded that the 300 words quoted verbatim were an insubstantial amount. However, it then compared this amount to the total number of words in the article, rather than to the number of words in Ford's memoirs, and concluded that the quotations comprised a substantial part of the article—thirteen percent. But the Court compared these 300 words of quotations to the wrong piece. Had it not adopted this reverse proportionality theory, the Court would have been forced to concede that the article used an insubstantial amount of the original work.

The Court's conclusion, that the excerpts qualitatively were not a fair use because of their expressive value, was misguided. The Court relied on the district court's holding that *The Nation* had taken " 'the heart of the book.' "[144] The district court, however, erred in its analysis by treating the copyright "totality" as ideas and information coupled with expression.[145] Although the Court rejected the district court's "totality" theory,[146] it affirmed the flawed conclusion reached by the lower court.

4. *The Effect of the Use on the Market for the Original*

Failure to consider the idea-expression dichotomy skewed the Court's analysis of the use's impact on the market for the original work. The serialization agreement between Harper & Row and *Time* reveals that the *information* in the memoirs, rather than the *expression,*

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141 *See* Brief for Respondents, *supra* note 127, at 43.

142 In the 1976 Copyright Act, Congress extended federal statutory copyright protection to works from the time of their creation, rather than, as previously, from the time of publication. *See supra* note 136.

143 *Harper & Row,* 471 U.S. at 557.

144 *Id.* at 565 (quoting *Harper & Row,* 557 F. Supp. at 1072).

145 *See supra* notes 99-101 and accompanying text.

146 *See supra* notes 101 & 113 and accompanying text.

was the valuable commodity.[147] As the dissent stated, "If it was this publication of information, and not the publication of the few quotations, that caused Time to abrogate its serialization agreement, then whatever the negative effect on the serialization market, that effect was the product of wholly legitimate activity."[148] The Supreme Court justified its conclusion on the theory that "an infringer who commingles infringing and noninfringing elements 'must abide the consequences.' "[149] The Court reached an erroneous conclusion by collapsing a two-step inquiry into one. The information disclosed was a noninfringing use because copyright law does not protect ideas or information, and the expression used, if appropriately analyzed apart from the information, was a noninfringing use because of the reasonable amount taken and the purpose of the use.

B. First Amendment Implications

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. The article disclosed information not yet revealed to the public. Furthermore, the article appeared when its subject matter had great significance for the democratic process: Ford was considered a prime contender for the Republican presidential nomination,[150] and Ford's interpretation of the events of his presidency could have affected voters' decisions in the upcoming primaries. The subject matter of the article rendered it political speech, and thus within the core of protected first amendment values.[151] As such, the Court should have given the speech the highest first amendment protection.[152]

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 core first amendment values. Otherwise, copyright becomes an exception to the first amendment. A first amendment exception to copyright is unnecessary because the fair use doctrine provides flexibility that furthers the dissemination of information.[153] Thus, the fair use doctrine requires a flexi-

147 For terms of the agreement, see *supra* note 88.

148 *Harper & Row*, 471 U.S. at 602 (Brennan, J., dissenting).

149 *Id.* at 567 (majority opinion) (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406 (1940)).

150 *See supra* note 94.

151 *See supra* notes 12-17 and accompanying text.

152 *See supra* notes 13-16 and accompanying text.

153 *See* Nimmer, *supra* note 17, at 1182; *see also* Cohen, *supra* note 31, at 48-49 (dis-

ble balancing of interests in order to accommodate first amendment values. Rigid categorical presumptions undermine this flexibility and encroach upon the first amendment.

The *Harper & Row* Court should have deemed *The Nation*'s limited use of verbatim expression a fair use. First, because of the work's factual nature and the need to quote the speaker to ensure accuracy, the Court should have broadly applied the fair use privilege to the work of a public figure on a matter of public concern. Second, first amendment values require that *The Nation*'s use of a limited amount of expression to disseminate political news be deemed a fair use. Copyright protection should not be construed as an absolute exception to the first amendment. Fair use provides the safety valve that allows the accommodation of copyright's monopoly with the first amendment's dissemination requirement, but only if courts sensitively balance the interests in a manner free of categorical presumptions.

When viewed in this context, the fair use inquiry resolves into whether suppression of a particular expression will violate political freedom. The *Harper & Row* problem must be analyzed with two factors in mind: first, the public had a right to know the events and perspectives reported, and second, the press had a duty to inform the public about this political information and to use a limited amount of verbatim expression to achieve that end. The *Harper & Row* decision permits copyright law to protect information as well as expression, particularly where ideas and expression are inextricably entwined. This result may seriously impede dissemination of factual works and news. *Harper & Row* effectively grants a monopoly over the facts underlying history and news where the reporting of those facts requires a limited use of others' expression. Most newspapers and other media, as commercial enterprises, may in the future refuse to report on forthcoming books concerning matters of public concern for fear that using isolated quotations from unpublished original works will constitute copyright infringement.

Such vital public concerns outweigh the burden on copyright owners' first-serialization royalty rights. A rigid and narrow reading of the copyright laws should not constrain the freedom of the press. The Second Circuit correctly observed that the Copyright Act is not intended "to impede that harvest of knowledge so necessary to a democratic state"[154] or "to chill the activities of the press by forbidding a circumscribed use of copyrighted words."[155] To effectuate

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cussing utility of fair use doctrine in furthering dissemination of information); Gorman, *supra* note 7, at 561-63 (same).

154 *Harper & Row*, 723 F.2d at 197.

155 *Id.* at 209.

the aims of copyright and to accommodate first amendment principles, courts should employ a fair use doctrine unrestricted by categorical presumptions and should equitably balance the interests of the copyright holder against those of the public.

C. Proposed Analysis

Courts should employ a two-step inquiry when deciding whether a second author's use of expression is a fair use. First, they should analyze the expression under section 107's prescribed factors, giving due regard to both the nature of the work from which expression is taken and the purpose of the subsequent work. Second, 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 against the burden imposed on the public by the denial of fair use. They should strike this balance to accommodate first amendment values and further the ultimate aims of copyright law.

Although the *Harper & Row* majority applied the statutorily-prescribed fair use factors, it did not expressly balance the competing interests of the copyright owner in exploiting his writing against the public interest in the dissemination of information. Other courts thus remain free to utilize the interest-balancing approach in future cases, distinguishing *Harper & Row* on this basis. Furthermore, section 107 does not preclude such interest-balancing, because the codification is not exhaustive but merely illustrative, leaving courts free to enlarge and adapt the fair use doctrine on a case-by-case basis. Courts should consider whether the work serves the public interest by disseminating valuable information. 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.

Pressing first amendment concerns may justify a use of copyrighted material that mechanical statutory fair use review would prohibit.[156] Such a situation would occur where expression and ideas are so inextricably mixed as to forbid dissection, and the public interest in disseminating the information far outweighs the damage incurred by the copyright owner. For example, in *Time Inc. v. Bernard Geis Associates,*[157] the court held that the defendant's use in his book of sketches of frames from films of the Kennedy assassination, of which the plaintiff owned the copyright, represented a fair use because of the "public interest in having the fullest information

156 *See* Nimmer, *supra* note 17, at 1197-99.
157 293 F. Supp. 130 (S.D.N.Y. 1968).

available."[158] The court stressed that the copyright to the films did not give its owner an "oligopoly" on the facts of the assassination.[159] One commentator stated that in *Bernard Geis,* "it was only the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue."[160]

Similarly, in *Rosemont Enterprises, Inc. v. Random House, Inc.,*[161] the Second Circuit prominently considered the public interest in deciding that the defendant's use of material from copyrighted articles in his biography on Howard Hughes was a fair use. After balancing the copyright owner's interest in privacy against the public's interest in obtaining information about the life and career of a public figure, the court concluded that "in balancing the equities . . . the public interest should prevail over the possible damage to the copyright owner."[162]

Interest-balancing focuses fair use analysis by enabling courts to consider expressly the competing interests. First, interest-balancing helps courts avoid wooden application of the fair use doctrine burdened by categorical presumptions and gives appropriate weight to countervailing first amendment values. Second, it enables courts to effectuate the ultimate aim of copyright—advancing knowledge in the public domain—rather than sacrificing this aim by granting an overly broad monopoly to copyright owners. Finally, interest-balancing allows the fair use doctrine to serve its intended function as a safety valve to accommodate both copyright and the first amendment.

CONCLUSION

In *Harper & Row, Publishers, Inc. v. Nation Enterprises,* the Supreme Court narrowed the scope of the fair use doctrine by invoking categorical presumptions in the fair use analysis of copyrighted material. First, the Court legitimized the presumption against the fair use of expression by a commercial enterprise. Second, it ruled that use of expression from an unpublished work does not constitute fair use. In so doing, the Court carved out exceptions to previously permissible uses. It also established fixed criteria in a calculus Congress intended to be flexible and fact-sensitive. In restricting the scope and flexibility of the fair use doctrine, the Court curtailed the ability of fair use to accommodate the sometimes competing aims of copyright and the first amendment. Instead, the

158 *Id.* at 146.
159 *Id.* at 143-44.
160 Nimmer, *supra* note 17, at 1198.
161 366 F.2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).
162 366 F.2d at 309.

Court should have recognized the unique nature of factual works by granting a *greater* scope of fair use for such works. More specifically, the Court should have balanced the burden imposed on the copyright owner in permitting the use against the burden imposed on the public in prohibiting the use—determining whether first amendment values require that courts deem the press's use of a limited amount of quotation from a public figure's memoirs a fair use. Instead, the Court chose rigid presumptions over sensitive balancing and injected mercenary values into the public's "marketplace of ideas." In construing what should have been "fair" as "foul," the Court sanctioned the ownership of speech by a public official on matters of public concern.

Robin Feingold

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