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## Fair Use of Unpublished Works: Scholarly Research and Copyright Case Law Since 1992

Robert Spoo

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# FAIR USE OF UNPUBLISHED WORKS: SCHOLARLY RESEARCH AND COPYRIGHT CASE LAW SINCE 1992

## I. INTRODUCTION

Copyright law in the United States grants authors exclusive rights to reproduce, adapt, distribute, perform, and display their works.<sup>1</sup> These exclusive rights constitute a monopoly, in effect, but it is a limited monopoly inasmuch as it is qualified in three important ways. First, works enjoy copyright protection for a prescribed period of time<sup>2</sup>—currently, the author’s life plus fifty years<sup>3</sup>—at the expiration of which they fall into the public domain and may be freely copied by anyone, without fear of infringement. Second, copyright protects only original expression, not ideas or information.<sup>4</sup> Third, the doctrine of fair use as it has been codified in § 107 of the Copyright Act of 1976 (“1976 Act”) permits users other than the copyright owner to copy protected expression without the owner’s consent, if such copying is done in a reasonable manner and for a legitimate purpose.<sup>5</sup>

These three checks placed upon the copyright monopoly—the first an absolute temporal limitation, the second a conceptual limitation grounded in the idea/expression dichotomy,<sup>6</sup> the third a flexible privilege in the user—serve the same social and pragmatic goal as the monopoly itself: “To promote the Progress of Science and useful Arts.”<sup>7</sup> While exclusive copyright provides authors with an economic incentive to create new works, the fair use privilege permits reasonable copying of those works in the interests of generating still more new works.<sup>8</sup> In this respect, Anglo-American

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1. See 17 U.S.C. § 106 (1994).

2. See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.”).

3. See 17 U.S.C. § 302(a) (1994). Congress has recently extended the present copyright term by twenty years to the author’s life plus seventy years. See Sonny Bono Copy Right Term Extension Act, S. 505 105th Cong. (1997) reprinted in CONG. REC. H9946-9954 (daily ed. Oct. 7, 1998).

4. See *id.* § 102(b). In his dissent in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 589 (1985), Justice Brennan noted that “[a] subsequent author’s taking of information and ideas is in no sense piratical because copyright law simply does not create any property interest in information and ideas.” For the statutory meaning of “originality,” see 1 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[A], at 2-9 (1998) (“Originality in the copyright sense means only that the work owes its origin to the author, *i.e.*, is independently created, and not copied from other works.”). See also 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 1.2.2.3, at 14-16 (1989) (discussing the meaning of “originality” in copyright law).

5. See 17 U.S.C. § 107 (1994).

6. For a succinct discussion of the idea/expression dichotomy (or distinction), see 1 GOLDSTEIN, *supra* note 4, § 1.2.2.4, at 16 (“Copyright law withholds protection from ideas on the principle that the national culture would languish if creators had to pay tribute each time they employed one of these building blocks.”).

7. U.S. CONST. art. I, § 8, cl. 8.

8. The goal of encouraging the composition of useful books by “allowing a second author to use, under certain conditions, a portion of a prior author’s work” formed a consistent theme in early British fair use cases. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 5 (2d ed. 1995). See also 1 GOLDSTEIN, *supra* note 4, § 1.1, at

copyright jurisprudence envisions a kind of creative ecosystem in which rights, privileges, and incentives coexist and works beget works.<sup>9</sup>

The doctrine of fair use has a twofold function in our society. Its initial purpose is a suprallegal one: to foster a climate of understanding in which authors, copyright owners, and users of protected expression recognize their respective rights and responsibilities and, ideally, work together to promote tolerance and creative progress.<sup>10</sup> When that understanding breaks down and a dispute results in litigation, fair use realizes its second purpose as an affirmative defense<sup>11</sup> to a claim of copyright infringement. As such, it allows a defendant to acknowledge the act of copying protected expression but to raise affirmatively certain facts that justify the copying—notably the transformative character of the new work. A new work is considered to be transformative when it does more than merely offer itself as a substitute for the original and “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>12</sup> If a work transforms material taken from its source, it is likely to add in an innovative way to our culture’s store of knowledge and to promote the progress of enlightenment envisaged in the Constitution’s Copyright Clause.<sup>13</sup>

The 1976 Act offers a nonexclusive list of purposes that may qualify for the fair use privilege—“criticism, comment, news reporting, teaching . . . scholarship, or research”<sup>14</sup>—and establishes four nonexclusive factors that are to be used by courts in testing for fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; (4) the effect

6 (“The balance that copyright law strikes between the incentives that authors and publishers need to produce original works and the freedom that they and others need to draw on earlier copyrighted works rests on a judgment about social benefit.”).

9. By the copyright “ecosystem” I refer to the fundamental Anglo-American conception of copyright as a utilitarian overlapping of rights rather than a mine-thine property ideal. Professor Weinreb disagrees with Judge Leval and others who see fair use in instrumental terms—that is, as “a utilitarian limitation on the general utilitarian purpose of the [1976 Copyright] Act”—and places fair use in the context of broader conceptions of “fairness.” Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1150-51 (1990).

10. The attempt in this comment to conceptualize fair use in terms of a larger “suprallegal” role in society—a role that transcends the specifically legal functions of the doctrine—may be compared to Professor Fisher’s notion of fair use as contributing to “the good life”: “uses of copyrighted material that either constitute or facilitate creative engagement with intellectual products should be preferred to uses that neither constitute nor foster such engagement.” William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1768 (1988).

11. See 4 NIMMER, *supra* note 4, § 13.05, at 13-149.

12. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The *Campbell* Court took the term “transformative use” from Pierre N. Leval’s article, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.”). See also Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1466 (stating that *Campbell* “revives the transformative-superseding dichotomy as the dominant consideration” and “reinstates fair use as an integral and essential part of copyright necessary to . . . the encouragement of learning and the ‘Progress of Science’”). The notion of fair use as transformative is not a product of recent times. Patry’s useful survey of the early English cases involving fair use and fair abridgment (1740-1839) shows that courts from the beginning inquired as to whether a defendant had made productive, creative use of the plaintiff’s work, as opposed to merely copying it. See PATRY, *supra* note 8, at 6-18.

13. See U.S. CONST. art. I, § 8, cl. 8.

14. 17 U.S.C. § 107 (1994).

of the use upon the potential market for the copyrighted work.<sup>15</sup> This comment focuses on the first two factors as they relate to scholarly fair use of *unpublished* works, an area of copyright law that has been intensely debated in recent years. Part II of this comment discusses the 1976 Act's codification of the earlier common-law copyright in unpublished works. Part III reviews the pivotal court decisions of the 1980s and early 1990s that threatened to discourage scholars and researchers from making *any* use, fair or foul, of unpublished materials and that led Congress in 1992 to amend the 1976 Act to underscore the continued vitality of fair use of unpublished works.

The great question since 1992 has been whether the amendment will succeed in removing the chill from legitimate use of such works, and whether courts will be more flexible in testing the merits of fair use defenses in this context. Although relevant decisions since 1992 have not been numerous, there are distinctly favorable signs that courts are acquiring a new sensitivity to the fair use needs of scholars. Accordingly, Part IV of this comment surveys post-1992 decisions that have involved the question of fair use of unpublished works.

The conclusion addresses the scholar's predicament in the 1990s when the hostility and vigilance of literary estates remain an obstacle to the dissemination of serious research, and the reluctance of many publishers and editors to stand behind their authors' fair use privilege threatens to neutralize the beneficial changes wrought by recent decisional law. This comment concludes by arguing that, while the present judicial trend is a constructive one which ought to be encouraged, it must be supplemented by fair use advocacy on the part of publishers, editors, authors, librarians, and others who are intimately involved in the transformative uses that have historically justified the fair use privilege. To put it another way, the supralegal culture, no less than the legal one, must play its part in sustaining the vitality of fair use.

As the 1992 amendment serves to remind us, and as courts are now acknowledging, unpublished works form a rich part of our cultural heritage and must yield, within the constraints imposed by a limited monopoly, to the larger needs of society. If these works continue to be viewed solely in their character of private property, they will be prevented from participating fully in the creative ecosystem that generates new embodiments of expression, and the practical ends of Anglo-American copyright law will to that extent be frustrated. The immediate sufferers will be historians, biographers, scholars, and journalists; the ultimate victim will be society itself.

## II. FROM COMMON LAW TO CODE: THE 1976 ACT

Prior to implementation of the 1976 Act, unpublished works enjoyed perpetual common-law copyright protection: the owner's right to exclude all others from the

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15. *See id.*

work.<sup>16</sup> The price paid by an author, her heirs, or assignees for such exclusive control was renunciation of economic benefit and acceptance of the work's obscurity,<sup>17</sup> for common-law protection lasted just so long as the copyright owner chose to withhold the work from publication.<sup>18</sup> Perpetual copyright meant perpetual eschewal of the public sphere. Under the Copyright Act of 1909 ("1909 Act"),<sup>19</sup> which was the predecessor of the 1976 Act, the act of publication with notice conferred federal statutory copyright on a work.<sup>20</sup> When the work passed from the locked drawer to the bookstore shelf, and once the formalities of notice, registration, and deposit<sup>21</sup> had been observed, common-law copyright was extinguished and statutory copyright began.<sup>22</sup>

Under the 1909 Act, statutory copyright afforded protection for a maximum of fifty-six years from the date of first publication.<sup>23</sup> The copyright owner exchanged her perpetual common-law rights for a limited monopoly, a monopoly qualified by an absolute temporal limitation, on the one hand, and by judicially-applied fair use, on the other. As long as a work remained unpublished, however, no unauthorized use

16. See 17 U.S.C. § 2 (1976) (amended 1976, effective Jan. 1, 1978). The 1909 Act originated as Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, (amended by Act of July 30, 1947, ch. 391, 61 Stat. 652, amended Oct. 19, 1976, as Pub. L. No. 94-553, 90 Stat. 2541, effective Jan. 1, 1978). Prior to the effective date of the 1976 Act, copyright protection was administered through a dual system of jurisprudence, with federal courts deciding those cases that fell under statutory law and state courts deciding those that came under the common-law rule regarding unpublished works. The 1976 Act abolished the dual system and placed copyright works, published and unpublished, under federal protection. See PATRY, *supra* note 8, at 132-33, 534-36; 1 NIMMER, *supra* note 4, § 2.02, at 2-18 to 2-19.

17. Goldstein characterizes the author's choice between "divestitive publication" under the 1909 Act and perpetual common-law protection as "a bargain between author and society: An author could enjoy perpetual protection for her work so long as she did not seek economic rewards through the work's dissemination." 1 GOLDSTEIN, *supra* note 4, § 3.2.2., at 236-37. Goldstein also discusses the judicially-recognized exception to divestitive publication, whereby the copyright owner permitted distribution of copies of a work to a limited class of persons for a limited purpose. In such a case, the copyright owner had not surrendered control over further production of copies. See *id.* at 240.

18. The right of exclusive control over an unpublished work was grounded squarely on the author's time-honored common-law right of first publication, a right recognized by British courts in the earliest cases. See, e.g., *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1769); *Donaldson v. Becket*, 4 Burr. 2408 (H.L. 1774) (discussed in PATRY, *supra* note 8, at 4-5, 531 & n.622.) The right of first publication continues to be a potent consideration in our own time. The 1976 Act effectively embodied this right in the copyright owner's exclusive right to distribute copies of the copyright work. See 17 U.S.C. § 106(3) (making that work subject, like all exclusive rights granted to authors under § 106, to the fair use provisions of § 107). See also 1 GOLDSTEIN, *supra* note 4, § 1.6.3, at 33; 4 NIMMER, *supra* note 4, § 13.05[A][2][b], at 13-179 n.172 ("[T]he right of first publication under Section 106 by its terms is limited by the right of fair use under Section 107; accordingly, there can be no categorical presumption against fair use for the Section 106 right of first publication."). The denial of the fair use defense to *The Nation* in its dispute with Harper & Row turned on the Supreme Court's conclusion that, in scooping *Time* magazine's planned publication of former President Ford's unpublished memoirs, *The Nation* had "effectively arrogated to itself the right of first publication, an important marketable subsidiary right." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985). See also PATRY, *supra* note 8, at 135-37, 543-44 (discussing the ruling on right of first publication in *Harper & Row*).

19. See 17 U.S.C. § 2 (1976) (amended 1976, effective Jan. 1, 1978).

20. See 17 U.S.C. § 10 (1976) (amended 1976, effective Jan. 1, 1978). An exception existed under § 12 of the 1909 Act whereby statutory copyright could be acquired in certain types of unpublished works—that is, works not reproduced for sale or distribution—by means of deposit, with claim of copyright, of one complete copy of the work in the Copyright Office. See LEONH. AMDUR, *COPYRIGHT LAW AND PRACTICE* 439 (1936) (discussing the meaning and application of § 12 of the 1909 Act).

21. See 17 U.S.C. §§ 10 - 13, 19 (1976) (amended 1976, effective Jan. 1, 1978).

22. See 1 NIMMER, *supra* note 4, § 2.02, at 2-19, and § 4.01, at 4-3.

23. See 17 U.S.C. § 24 (1976) (amended 1976, effective Jan. 1, 1978).

could be a fair use.<sup>24</sup> Fair use simply did not exist for unpublished works; the doctrine entered the picture only when publication set the statutory machinery in motion.<sup>25</sup>

Fair use was not codified in the 1909 Act, but rather remained essentially what it had been since its inception in the English common law: an equitable doctrine, or rule of reason,<sup>26</sup> which courts applied on a flexible case-by-case basis in suits involving infringement. Prior to the 1976 Act, fair use was not a defense to an action for infringement of an unpublished work, since the exclusive common-law monopoly in such a work prevented that defense from arising in litigation.<sup>27</sup> But the 1976 Act changed all that. Not only did it codify the fair use doctrine;<sup>28</sup> it also brought unpublished works within its statutory scheme by abolishing the common-law distinction between published and unpublished works.<sup>29</sup>

The 1976 Act created this unified system by shifting the beginning of copyright protection from the act of publication to the moment of fixation in a "tangible medium of expression."<sup>30</sup> Under this scheme, once a work has acquired a final form and become "fixed" in some tangible medium, the copyright clock begins to tick and continues ticking for fifty years after the author has died.<sup>31</sup> With this momentous reconceptualization of copyright genesis, the legal distinction between the locked drawer and the bookstore shelf disappeared, for in either locus, public or private, a work enjoyed the benefits of statutory protection.<sup>32</sup>

But were unpublished works subject to the newly codified fair use provision? The question does not admit of a simple answer. William F. Patry, the noted fair use commentator, argues that "Congress intended to continue the common law prohibition

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24. Discussing the American inheritance of British copyright principles, Patry notes: "The division between common law and statutory copyright protection and the unavailability of fair use for unpublished works was continued in the United States." PATRY, *supra* note 8, at 534.

25. See *Stanley v. Columbia Broad. Sys.*, 221 P.2d 73, 78 (Cal. 1950) ("The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right . . . while a statutory copyright permits a 'fair use' of the copyright publication, without deeming it an infringement.").

26. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (stating that fair use is an "equitable rule of reason"); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (noting that "[t]he doctrine is entirely equitable and is so flexible as virtually to defy definition"). Patry takes issue with these judicial characterizations of fair use as an equitable rule of reason, pointing out that many of the early fair use cases were brought at law. "It is therefore incorrect to characterize fair use as a child of equity." PATRY, *supra* note 8, at 5.

27. See PHILIP WITTENBERG, *THE PROTECTION OF LITERARY PROPERTY* 125 (1968) ("Before publication there can be no fair use of works protected under common-law copyright.").

28. See 4 NIMMER, *supra* note 4, § 13.05, at 13-149 to 13-152; 2 GOLDSTEIN, *supra* note 4, § 10.1, at 188.

29. See 17 U.S.C. §§ 104(a), 301(a) (1994). The statute also establishes special durational terms for works created but not published or copyrighted before January 1, 1978, the effective date of the 1976 Act. See *id.* § 303.

30. See *id.* §§ 101, 102(a). Nimmer notes that fixation in a tangible medium is both a "statutory condition to copyright" and a "constitutional necessity," since "unless a work is reduced to tangible form it cannot be regarded as a 'writing' within the meaning of the constitutional clause authorizing federal copyright legislation." 1 NIMMER, *supra* note 4, § 2.03[B], at 2-30.2 to 2-30.3.

31. See 17 U.S.C. § 302(a) (1994). But see *supra* note 3 and accompanying text.

32. See 1 GOLDSTEIN, *supra* note 4, § 3.3, at 254 ("The 1976 Copyright Act substantially preempted common law copyright, thus virtually eliminating any role for divestitive publication [that is, publication that divested a copyright owner of its common-law copyright]. Because the Act made statutory protection attach upon a work's fixation in a copy or phonorecord, it also substantially reduced the role of investitive publication [publication that, if made with the statutorily required notice, invested the work with statutory copyright].").

against fair use of unpublished but not voluntarily disseminated works."<sup>33</sup> Others believe that the drafters of the 1976 Act contemplated at least a narrow applicability of fair use to unpublished works.<sup>34</sup> Whether fair use and unpublished works, kept asunder by the common law, would be allowed to confront each other in the statutory arena was, as it turned out, a question that the courts would have to answer. With the enactment of the 1976 Act, a limited monopoly had come to unpublished works, but did those limitations include fair use? The progress of scholarship might well depend on the answer to that question.<sup>35</sup>

### III. THE BIG CHILL: *HARPER & ROW* AND ITS PROGENY

Although the 1976 Act guaranteed published and unpublished works equal protection under statutory law, the courts quickly showed themselves reluctant to recognize that equality where fair use was concerned. In 1977, Harper & Row acquired publishing rights to former President Gerald Ford's memoirs.<sup>36</sup> Two years later, the firm, as the copyright holder, granted *Time* magazine a prepublication license to print an excerpt from Ford's account of his pardon of former President Richard Nixon.<sup>37</sup> Shortly before the *Time* article was scheduled to appear, however, an editor of *The Nation* obtained an unauthorized copy of Ford's manuscript and scooped *Time* by publishing in *The Nation* an article containing verbatim quotations from the manuscript.<sup>38</sup> As a consequence, *Time* aborted its plan to publish the article and refused to pay Harper & Row the balance under the licensing agreement.<sup>39</sup> In the copyright infringement suit that followed, the U.S. District Court for the Southern District of New York ruled in favor of Harper & Row, but the Second Circuit Court of Appeals reversed, holding that *The Nation's* scoop was a fair use of the copyrighted though as yet unpublished manuscript.<sup>40</sup> The Supreme Court granted certiorari and reversed the Second Circuit.<sup>41</sup>

Justice O'Connor's majority opinion pointed to the unpublished nature of Ford's memoirs as a "key, though not necessarily determinative, factor' tending to negate a defense of fair use,"<sup>42</sup> and placed particular emphasis on the author's "right to

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33. PATRY, *supra* note 8, at 535. Among relevant legislative history materials is the following passage: "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. . . ." PATRY, *supra* note 8, at 134 & n.163 (quoting S. Rep. No. 94-473, at 64 (1975)).

34. That § 107 of the 1976 Act "does not distinguish between the fair use of published and unpublished works . . . is evidence that fair use may be applicable to unpublished works." James Adkins, Note, *Fair Use and Unpublished Works: Public Law 102-492—An Amendment to the Fair Use Statute*, 38 ST. LOUIS U. L.J. 231, 236 (1993-94).

35. Certain scholarly groups, such as the American Historical Association, played an active role in Congressional deliberations leading up to the 1976 Act. See PATRY, *supra* note 8, at 537-41.

36. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985).

37. See *id.*

38. See *id.* at 542-43.

39. See *id.* at 543.

40. See *id.* at 542.

41. See *id.*

42. *Harper & Row*, 471 U.S. at 554 (quoting S. Rep. No. 94-473, at 64 (1975)).

control the first public appearance of his undissemated expression."<sup>43</sup> In this case, the second fair use factor—the nature of the protected work—weighed heavily in favor of the petitioners, Harper & Row. The work's unpublished nature along with the copyright holder's corresponding right of first publication persuaded the majority that "the scope of fair use is narrower with respect to unpublished works."<sup>44</sup> In a strong and lengthy dissent, Justice Brennan argued that *The Nation's* scooping of *Time* was noninfringing in that its article was based in large part on unprotected information and ideas, and that its quotation of 300 words from a 200,000-word manuscript was minimal and justified by the purpose of news reporting. He concluded that the majority Court "adopted an exceedingly narrow view of fair use in order to impose liability for what was in essence a taking of unprotected information."<sup>45</sup>

The dramatic facts of *Harper & Row* make it something of an anomaly among cases involving the question of fair use of unpublished works. *The Nation's* aggressive scooping of its competitor and the costly collapse of *Time's* licensing agreement with Harper & Row virtually guaranteed a reversal of the Second Circuit. Judicial chivalry would not permit the Supreme Court to give assistance to a journalistic predator hiding behind a defense of fair use, whatever the merits of that defense. *Harper & Row's* atypicality made it a particularly unfortunate precedent for scholars, biographers, and historians, whose use of unpublished materials is usually much less aggressive and piratical than was *The Nation's*. The fear expressed in Justice Brennan's dissent that the Court was introducing "a categorical presumption against prepublication fair use"<sup>46</sup> was realized two years later in *Salinger v. Random House, Inc.*, where the Second Circuit, its wrist still smarting from the slap administered in *Harper & Row*, reversed the lower court's denial of a preliminary injunction to author J.D. Salinger.<sup>47</sup>

The famously reclusive Salinger sought a preliminary injunction restraining Random House from distributing Ian Hamilton's unauthorized account of his life.<sup>48</sup> Hamilton, a serious and well-known writer, had drawn heavily upon unpublished letters by Salinger which had been deposited by the recipients or their representatives in various academic research libraries.<sup>49</sup> Salinger, who had somehow received a copy of galleys of the biography prior to its publication, demanded that the book not be released until all quotations from unpublished letters were expunged. Hamilton responded by substantially reducing the amount of direct quotation through rewriting and paraphrasing.<sup>50</sup> Salinger was not placated, however, and promptly brought suit

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43. *Id.* at 555.

44. *Id.* at 564

45. *Id.* at 604 (Brennan, J., dissenting).

46. *Id.* at 595 (Brennan, J., dissenting).

47. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 90 (2d Cir. 1987), *rev'g* 650 F. Supp. 413, 417, 428 (S.D.N.Y. 1986).

48. See *Salinger*, 811 F.2d at 92.

49. See *id.* at 93.

50. See *id.*



in the Southern District of New York.<sup>51</sup> Finding that the vast majority of material used by Hamilton was information and ideas not protected by copyright,<sup>52</sup> and that the remaining instances of quotation or paraphrase were excused under the doctrine of fair use,<sup>53</sup> Judge Leval denied Salinger's application for a preliminary injunction.<sup>54</sup>

Judge Leval held that the Supreme Court in *Harper & Row* "neither stated nor implied a categorical rule barring fair use of unpublished works."<sup>55</sup> In his view, the Court kept the door of fair use appreciably ajar with respect to unpublished materials. On appeal, however, a two-judge panel of the Second Circuit seemed to slam that door shut by holding that *Harper & Row* had in fact "underscored the idea that unpublished letters normally enjoy insulation from fair use copying"<sup>56</sup> and that "such works normally enjoy complete protection against copying any protected expression."<sup>57</sup> Rejecting Judge Leval's calculus of unprotected expression in the letters and finding instead "a very substantial appropriation"<sup>58</sup> of copyrighted material, the Second Circuit reversed and remanded with directions to issue a preliminary injunction.<sup>59</sup> The phrases "normally enjoy complete protection" and "normally enjoy insulation" reflected an exaggerated interpretation of the Supreme Court's position in *Harper & Row*—a marked rigidification which the vast factual differences of the two cases did nothing to soften. With *Salinger*, a chilly season commenced for scholars.

Judge Leval was not to be defeated so easily, however. One year after *Salinger*, he was once again required to rule on the fair use of unpublished materials in an unauthorized biography, this time a harsh critique of the life of L. Ron Hubbard, founder of the Church of Scientology and the theory of Dianetics.<sup>60</sup> New Era Publications International, a holder of the deceased Hubbard's copyrights, sought a permanent injunction barring distribution by Henry Holt and Company of a second printing of Russell Miller's biography of Hubbard, contending that the book contained numerous infringing quotations from Hubbard's unpublished writings.<sup>61</sup>

In a lengthy opinion, Judge Leval struggled mightily to reconcile the harsh rule of *Salinger* with the more moderate interpretation of fair use in *Harper & Row*. The Second Circuit's phrase "normally enjoy complete protection" should be read with an emphasis on "normally," he gamely suggested, for it merely pointed to "the diminished likelihood that fair use will be found in a copying of unpublished material,

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51. *See id.* at 94.

52. *See Salinger*, 650 F. Supp. at 418.

53. *See id.* at 423.

54. *See id.* at 428.

55. *Id.* at 421.

56. *Salinger*, 811 F.2d at 95.

57. *Id.* at 97.

58. *Id.* at 98.

59. *See id.* at 100.

60. *See New Era Publications Int'l v. Henry Holt and Co.*, 695 F. Supp. 1493, 1497, 1508 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989).

61. *See New Era*, 695 F. Supp. at 1497.

not impossibility.<sup>62</sup> “As to the [Hubbard biography] overall,” he noted, “were it not for the ruling of the Court of Appeals in *Salinger*, I would conclude that fair use had been adequately demonstrated.”<sup>63</sup> But, given *Salinger*’s “strong presumption against a finding of fair use for unpublished materials,”<sup>64</sup> he had little choice. Concluding that only a handful of quotations infringed New Era’s copyrights and expressing concern over free speech interests, Judge Leval denied an injunction<sup>65</sup> and awarded damages.<sup>66</sup> The doctrine of first publication rights, he remarked, should not be “perverted into the service of suppression of important critical or historical inquiry.”<sup>67</sup>

When New Era appealed from the denial of injunctive relief,<sup>68</sup> the Second Circuit panel responded with a majority opinion that left no doubt that a high-toned judicial brawl was in progress. While the Second Circuit affirmed the judgment of the district court, it rejected Judge Leval’s rationale and concluded that laches was “the sole bar to issuance of an injunction.”<sup>69</sup> Speedily dispensing with its affirmance, the court proceeded to criticize Judge Leval’s findings in what amounted to several pages of reproving dictum. In particular, the Second Circuit rejected Judge Leval’s distinction between use of protected expression merely to “enliven” a text and use of protected expression to communicate “significant points” about the subject, stating flatly that “[w]here use is made of materials of an ‘unpublished nature,’ the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here.”<sup>70</sup> In stronger language than it had yet used, the Second Circuit declared that its analysis in *Salinger* “creates a daunting obstacle to a fair use defense against the use of unpublished materials.”<sup>71</sup> The *New Era* court seemed to be moving well beyond the case actually before it and issuing a warning to all aspiring fair users.

Perceiving the minatory quality of his colleagues’ language, Chief Judge Oakes in a concurring opinion worried that the majority’s dictum “tends to cast in concrete *Salinger v. Random House*”<sup>72</sup> and gives the impression that where a copyrighted work is unpublished, “protection follows as of course.”<sup>73</sup> Joining Judge Leval in his effort to recover the moderate ground of *Harper & Row*, Chief Judge Oakes argued that the Supreme Court’s position on fair use of unpublished works had “implicitly renounced a per se rule.”<sup>74</sup> A few months later, in denying the prevailing party Holt’s “unprecedented” petition for a rehearing en banc occasioned by its dissatisfaction

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62. *Id.* at 1503. In his influential article, Judge Leval reiterated his expansive interpretation of the Second Circuit’s use of “normally,” saying that “[h]owever extreme [the court’s] formulation may be, the word ‘normally’ suggests that in the unusual instance fair use may be made of unpublished matter.” Leval, *Toward a Fair Use Standard*, *supra* note 12, at 1118.

63. *New Era*, 695 F. Supp. at 1524.

64. *Id.*

65. *See id.* at 1528.

66. *See id.* at 1527.

67. *Id.* at 1503.

68. *See New Era Publications Int’l v. Henry Holt and Co.*, 873 F.2d 576, 577-78 (2d. Cir. 1989).

69. *Id.* at 577.

70. *Id.* at 583.

71. *Id.* at 582.

72. *Id.* at 585.

73. *Id.* at 587.

74. *New Era Publications Int’l*, 873 F.2d at 593.

“with certain nondispositive language”<sup>75</sup> in the *New Era* opinion, the Second Circuit took the opportunity to back slightly away from its uncompromising position, stating that *Harper & Row* “teaches that unpublished copyrighted material very rarely will be the subject of fair use.”<sup>76</sup> A dissent led by Judge Newman summed up the growing climate of concern<sup>77</sup> by noting “the need to avoid misunderstanding on the part of authors and publishers as to the copyright law of this Circuit—misunderstanding that risks deterring them from entirely lawful writings in the fields of scholarly research, biography, and journalism.”<sup>78</sup> But the precedential pattern was unmistakable: *Harper & Row*, *Salinger*, *New Era*. With each decision, a per se rule banning fair use of unpublished works seemed to loom more menacingly.

In 1992, Congress responded to *Salinger* and *New Era* by amending § 107 of the 1976 Act to add the following clarification: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [fair use] factors.”<sup>79</sup> The amendment’s economical language drove straight to the heart of the problem that had been developing in the case law. The phrase “shall not itself bar” addressed the virtual per se rule against fair use of unpublished works; the reminder that courts should consider “all of the above factors” pointed to the importance of an equitable balancing of all the circumstances of a given use. If, in codifying fair use, the 1976 Act had unwittingly encouraged a rigidification of the flexible common-law doctrine—a doctrine that had been applied by judges for nearly three centuries—then the 1992 amendment sought to restore equitable play to the doctrine’s joints.<sup>80</sup> What the statute had unintentionally wrought, the amended statute now strove to undo.

#### IV. SIGNS OF THAW IN POST-AMENDMENT CASE LAW

One year before the passage of the 1992 amendment, the Second Circuit in

75. *New Era Publications Int’l v. Henry Holt, Co.*, 884 F.2d 659, 660 (2d Cir. 1989).

76. *Id.*

77. In 1990, Judge Leval stated that after *Salinger* and *New Era*, “publishers [were] understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of [unpublished letters].” Leval, *Toward a Fair Use Standard*, *supra* note 12, at 1107. In contrast, Patry believes that “[t]he reaction of some in the publishing industry to *Salinger* and *New Era* was hysterical,” and wonders whether some of this reaction was intended “to create a climate of fear that would then be used to justify legislation.” PATRY, *supra* note 8, at 547-48.

78. *New Era*, 884 F.2d at 662 (Newman, J., dissenting). Patry notes that the Second Circuit “was obviously polarized and the disagreements spilled out in a remarkable series of articles and congressional testimony by Judges Leval, Miner, Newman, and Oakes.” PATRY, *supra* note 8, at 99.

79. 17 U.S.C. § 107 (1994). See Leval, *Nimmer Lecture: Fair Use Rescued*, *supra* note 12, at 1462 n.48 (stating that the Act of Oct. 24, 1992, was “intended to reject the Second Circuit’s reasoning in *Salinger* and *New Era*”).

80. See generally S. Rep. No. 102-141, 102d Cong., at 5-6 (1991) (explaining Congress’ intention in passing the 1992 amendment). “[W]e intend to roll back the virtual per se rule of *Salinger* and *New Era*, but we do not mean to depart from *Harper & Row*.” 1 NIMMER, *supra* note 4, § 13.05[A][2][b], at 13-177 n.202 (quoting S. Rep. No. 102-141). See also 4 NIMMER, *supra* note 4, § 13.05[A][2][b], at 13-175, to § 13.05[A][3], at 13-178 (discussing the 1992 amendment and describing it as a response to the Second Circuit’s “bright line rule against fair use of unpublished excerpts”). But see PATRY, *supra* note 8, at 548 (describing the 1992 amendment as “a very modest amendment that affirms *Harper & Row*’s treatment of unpublished works, endorses the Second Circuit’s decision in *Wright v. Warner Books*, does not reverse *Salinger* or *New Era*, and instead merely cautions the courts not to erect a per se rule barring fair use based only on the unpublished nature of the work”).

*Wright v. Warner Books, Inc.*<sup>81</sup> made its own effort to modify the severity of the virtual per se rule. A dispute had arisen between author Richard Wright's widow and Wright's biographer, Margaret Walker, over Walker's use of extensive quotations from the author's published and unpublished writings.<sup>82</sup> Denied permission to quote any material, Walker rewrote portions of her manuscript to reduce her dependency on direct quotation, and the biography was published by Warner Books in 1988.<sup>83</sup> Ellen Wright thereupon brought an action for copyright infringement and other claims, challenging in particular Walker's use of the author's unpublished letters and journal entries.<sup>84</sup> Walker had discovered much of this material at Yale University's Beinecke Library; other material she had drawn from letters that she herself received from Richard Wright many years earlier.<sup>85</sup> The facts sufficiently resembled those in *Salinger* to make their revisitation by the New York federal courts an event that was keenly watched by scholars and fair use advocates.

The U.S. District Court for the Southern District of New York granted summary judgment in favor of Walker and Warner Books and dismissed Wright's claims.<sup>86</sup> On appeal, the Second Circuit affirmed the lower court while disagreeing with aspects of its analysis.<sup>87</sup> Noting that the purpose of Walker's biography was scholarly and transformative, and that her use of the author's creative expression was "sparing,"<sup>88</sup> the Second Circuit found that the balance of fair use factors tipped in the defendant's favor, even though the unpublished nature of the quoted materials weighed for the plaintiff. The majority opinion stressed that the Second Circuit's precedents "leave little room for discussion of this factor [nature of the copyrighted work] once it has been determined that the copyrighted work is unpublished,"<sup>89</sup> and aimed a barb at the lower court for giving "insufficient weight to the unpublished status of the letters and journal entries" in this case.<sup>90</sup>

More significant than this rather mechanical reaffirmation of its position on unpublished works, however, was the majority's assurance that neither *Salinger* nor any other case had "erected a per se rule regarding unpublished works. The fair use test remains a totality inquiry, tailored to the particular facts of each case."<sup>91</sup> In a judicial narrative in which dicta had come to play as large a role as actual decisions in shaping precedent, this superficially throwaway remark added an important new chapter to the ongoing story. Moreover, it represented an acknowledgment by the bench that, despite the codification of fair use in the 1976 Act, the doctrine should retain its essential common-law character as an equitable inquiry. In this respect, the *Wright* opinion accorded with Congress's contemporaneous efforts to craft an

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81. 953 F.2d 731 (2d Cir. 1991), *aff'g* 748 F. Supp. 105 (S.D.N.Y. 1990).

82. *See Wright*, 953 F.2d at 734.

83. *See id.*

84. *See id.*

85. *See id.*

86. *See Wright*, 748 F. Supp. at 107.

87. *See Wright*, 953 F.2d at 734.

88. *Id.* at 739.

89. *Id.* at 737.

90. *Id.*

91. *Id.* at 740.

amendment to § 107, and the House Committee was quick to applaud *Wright* for returning to the more balanced fair use analysis of *Harper & Row*.<sup>92</sup>

That the New York courts seemed to be reaching an entente as to the purpose of fair use of unpublished works did not mean that defendants in copyright infringement actions would automatically prevail in that jurisdiction, as was made clear in *Lish v. Harper's Magazine Foundation*.<sup>93</sup> *Harper's* had printed, without authorization, a large portion of an unpublished letter by writer and teacher, Gordon Lish, who responded by bringing an infringement action in the Southern District of New York.<sup>94</sup> The court, in finding for Lish, ruled that the commercial character of *Harper's* use and the unpublished nature of the letter weighed against a fair use defense.<sup>95</sup> The court engaged in only perfunctory discussion of *Harper's* use of unpublished material, however, and observed of the recent amendment to § 107 that, even if it had "retroactive application" to the instant case, "it would not produce a different result."<sup>96</sup> The outcome of *Lish* was entirely unsurprising. *Harper's* unauthorized printing of the letter, which had been passed to the magazine's executive editor by one of its freelance "stringers,"<sup>97</sup> smacked of the piratical and recalled the more spectacular claim-jumping in *Harper & Row*. Scholarly fair use would have to await a post-amendment case with more typical facts for its vindication.

A candidate appeared in *Norse v. Henry Holt and Company* ("*Norse I*").<sup>98</sup> This time, the California courts would have their turn. Harold Norse, a minor Beat poet, brought a copyright infringement action against biographer Ted Morgan and publisher Henry Holt and Company for the unauthorized use of several phrases from Norse's unpublished letters in Morgan's account of the life of the writer William S. Burroughs.<sup>99</sup> Morgan had discovered the letters at New York University's Fales Library.<sup>100</sup> The federal district court granted summary judgment in favor of the defendants on the infringement claim and other counts.<sup>101</sup> On appeal, the Ninth Circuit, dissatisfied with the ground on which the district court reached its decision regarding infringement, reversed on that claim alone and remanded for a full inquiry into the defendants' fair use defense.<sup>102</sup> The Ninth Circuit's charge to the lower court was carefully worded to stress the equitable nature of the fair use doctrine as well as its role in stimulating the very creativity that the copyright law is designed to foster.<sup>103</sup>

The district court took the hint admirably. Defining fair use as a doctrine that

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92. See Jennifer Leman, Note, *The Future of Unpublished Works in Copyright Law After the Fair Use Amendment*, 18 J. CORP. L. 619, 643-44 (1993) (noting that the Senate agreed with the House that *Wright* had struck the proper balance established by *Harper & Row*).

93. 807 F. Supp. 1090 (S.D.N.Y. 1992).

94. See *id.* at 1092-93.

95. See *id.* at 1101, 1102.

96. *Id.* at 1101 n.10.

97. *Id.* at 1093.

98. 991 F.2d 563 (9th Cir. 1993).

99. See *id.* at 565.

100. See *id.*

101. See *id.*

102. See *id.* at 568-69.

103. See *id.* at 566.

“enables authors, other than the copyright owners, to reasonably use copyrighted material without the copyright owner’s consent,”<sup>104</sup> Judge Legge proceeded to discuss each of the four statutory factors in relation to the defendants’ assertions. With regard to the purpose of Morgan’s quotations, the *Norse II* court pointed to the scholarly character of the biography<sup>105</sup> and distinguished Morgan’s use from that of *The Nation in Harper & Row* by noting that Morgan’s “copying is essentially non-exploitive and the commercial aspect of its use is of minimal significance.”<sup>106</sup> The court’s discussion of the nature of the copyrighted work was brief but pregnant with significance. After citing *Harper & Row* and *New Era* for their restrictive approach to fair use of unpublished works, Judge Legge succinctly noted that, although this factor favored the plaintiff *Norse* in the instant case, Congress in its recent amendment to § 107 “explicitly provided that the fair use defense may apply to unpublished work if the fair use finding is made upon consideration of all four factors.”<sup>107</sup>

The rhetorical structure of Judge Legge’s analysis of the second factor—citation of prior case law; brief, subordinated mention of the plaintiff’s prevailing on this factor; pointed recitation of the language of the 1992 amendment—indicated the presence of a fresh judicial perspective on a test that had become so routine in the courts as to be nearly ritualized. Although Judge Legge’s manifest message was that the letters’ unpublished nature favored the plaintiff, the organization of the passage strongly hinted that the virtual per se rule must be re-examined in the light of the new statutory language. Even though copied expression is unpublished, the passage seemed to say, the second factor should not be allowed to foreclose the possibility of fair use. In the same spirit, the *Norse II* court concluded that “[t]he public will benefit” from Morgan’s biography,<sup>108</sup> and accordingly granted the defendants’ motion for summary judgment, dismissing the plaintiff’s infringement claim.<sup>109</sup>

Another significant contribution to the growing body of post-amendment case law is a cluster of decisions involving Internet copying of the unpublished works of L. Ron Hubbard. Since *New Era*, the Church of Scientology and its copyright holders have aggressively opposed the copying of Hubbard’s works by a variety of users, including journalists and disaffected Church members. As in *New Era*, the plaintiff in these actions—Religious Technology Center (“RTC”)—held a license to Hubbard’s copyrights. The alleged primary infringers were former members of the Church who posted Hubbard’s writings on the Internet for the purposes of discussion and criticism. The convergence of cyberspace technology and copyright law has given these cases a special contemporary relevance, for the role of the fair use doctrine in Internet copying and the paradox of “unpublished” works that may be accessed electronically throughout the world at the stroke of a key are questions

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104. *Norse v. Henry Holt and Co.*, 847 F. Supp. 142, 144-45 (N.D. Cal. 1994) (*Norse II*).

105. *See id.* at 146.

106. *Id.*

107. *Id.*

108. *Id.* at 147.

109. *See id.* at 148.

which copyright jurisprudence has just begun to address.<sup>110</sup>

In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,<sup>111</sup> RTC and another Church-affiliated organization brought an infringement action against Dennis Erlich, a former Scientology minister turned critic of the Church, who had posted Hubbard's published and unpublished works to an Internet discussion group. In considering RTC's motion for a preliminary injunction, Judge Whyte examined the likelihood of Erlich's prevailing on a fair use defense and concluded that, while the second factor (nature of the copyrighted work) weighed in Erlich's favor where Hubbard's published works were concerned, the factor favored RTC with respect to the unpublished writings.<sup>112</sup>

As with the *Norse II* opinion, however, the *Netcom* court's language indicated a change of judicial attitude towards the virtual per se rule. After citing the "narrower scope" language of *Harper & Row*, Judge Whyte noted, by way of dictum, that the courts in *Wright* and *Norse II* had found fair use where portions of unpublished letters were copied by biographers, and went on to state that Congress had amended § 107 "to clarify that the unpublished nature of a work should not itself bar a finding of fair use."<sup>113</sup> Although Judge Whyte concluded that, on balance, Erlich should be enjoined from further unauthorized copying of Hubbard's works—except insofar as such copying might accord with fair use<sup>114</sup>—his discussion of fair use of unpublished works reprised the rhetorical structure of Judge Legge's analysis in *Norse II*, similarly implying that a revisionary approach to the virtual per se rule was in order.

In *Religious Technology Center v. Lerma* ("Lerma P"),<sup>115</sup> the U.S. District Court for the Eastern District of Virginia availed itself of the same rhetorical pattern in denying RTC's motion to enjoin the *Washington Post* from copying Hubbard's writings.<sup>116</sup> Named as a co-defendant in an action brought against Arnaldo Lerma—another disaffected Church member who had transmitted Church documents over the Internet—the *Post* had obtained its copies of the same documents from a public court file in California and published minimal excerpts in a newspaper

110. See, e.g., PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 197-236 (1994) (discussing digital technologies and their implications for copyright law).

111. 923 F. Supp. 1231 (N.D. Cal. 1995).

112. See *id.* at 1245-46. In a connected case, the same court denied RTC's motion for a preliminary injunction against the computer bulletin board service and Internet access provider which Dennis Erlich had used to disseminate Church documents. See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1383 (N.D. Cal. 1995). In a similar action, a Colorado federal court denied RTC's motion for a preliminary injunction against a non-profit archive and bulletin board service run by former Scientologists, noting the likely success of a fair use defense and the potential harm to the public interest. See *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1526-27 (D. Colo. 1995).

113. *Netcom*, 923 F. Supp. at 1245.

114. See *id.* at 1258.

115. 897 F. Supp. 260 (E.D. Va. 1995).

116. See *id.* at 267. In a connected case, the same court denied RTC's motion for summary judgment in its infringement action against the *Washington Post* and two of its reporters, calling RTC's motivation in filing the suit "reprehensible" and awarding attorney's fees to the defendants. See *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1367-68 (E.D. Va. 1995).

article<sup>117</sup> Defining fair use as “designed to balance the exclusive rights of the copyright holder with the public’s interest in dissemination of information,”<sup>118</sup> Judge Brinkema found that “[t]he balance of harms is heavily tilted towards the defendants”<sup>119</sup> and denied RTC’s motion for a preliminary injunction. Once again, as in *Norse II* and *Netcom*, the court acknowledged the “narrower scope” rule of *Harper & Row*, then proceeded to distinguish that case and its “scooping” facts from the *Post*’s more typical newsgathering activities, and concluded with a recitation of the 1992 amendment to § 107.<sup>120</sup> Employing a phrase that fair use advocates had perhaps despaired of encountering in a post-*Salinger* opinion, Judge Brinkema noted that the unpublished nature of the Church’s documents “plays a minimal role in this Court’s consideration.”<sup>121</sup>

That the new judicial trend will not insulate every defendant from the consequences of unauthorized copying of unpublished works is strikingly illustrated by *Religious Technology Center v. Lerma* (“*Lerma II*”),<sup>122</sup> in which RTC successfully moved for summary judgment against Arnaldo Lerma and was awarded statutory damages.<sup>123</sup> Unlike the *Washington Post* in *Lerma I*, decided a year earlier, Lerma had transmitted substantial quantities of Church documents through cyberspace for reasons that the court deemed to be “non-neutral and non-scholarly.”<sup>124</sup> With respect to the unpublished nature of the documents, Judge Brinkema invoked the restrictive language of *Harper & Row*, *Salinger*, and *New Era* in finding against Lerma, and conspicuously omitted any mention of the 1992 amendment to § 107.<sup>125</sup> As the two faces of Judge Brinkema show, *Harper & Row* and its progeny are very much alive and well when it comes to a defendant whose actions and motives deviate from the modest, judicious copying typically engaged in by scholars and news reporters.

## V. CONCLUSION: A MIXED FORECAST FOR SCHOLARS

The winter of discontent for scholars, biographers, and historians, though by no means assuredly over, has become less harsh since 1992. A new series of precedents has emerged to moderate the chill of *Harper & Row* and its progeny. Far-flung, tentative, factually diverse though they may be, the decisions beginning with *Wright* and continuing through *Norse I* and *II*, *Netcom*, and *Lerma I* have responded to the threat of a virtual per se rule banning fair use of unpublished works.

The watershed event, clearly, was the passage of the 1992 amendment to § 107 of the 1976 Act. The amendment’s goal of restoring to judicial decision-making the

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117. See *Lerma I*, 897 F. Supp. at 262.

118. *Id.* at 263.

119. *Id.* at 267.

120. *Id.* at 264.

121. *Id.*

122. No. CIV.A.95-1107-A, 1996 WL 633131, at \*1 (E.D. Va. Oct. 4, 1996).

123. See *id.* at \*13-\*16.

124. *Id.* at \*6.

125. See *id.* at \*7-\*8.



time-honored flexibility of the equitable doctrine of fair use has been realized in the *Norse* and *Lerma* opinions. Scholars may take heart in *Wright* and *Norse II* in particular, for the facts in those cases are typical of the vast majority of serious projects: modest quotation of unpublished materials that have been made available through a research library. The seeming paradox of a copyright owner's refusing permission to quote from publicly accessible documents—sometimes from documents that she herself has sold to the library—is, of course, an inevitable consequence of copyright law's severance of intangible rights from physical property rights,<sup>126</sup> but it is a paradox made more tolerable by the availability of the fair use privilege and by prudent judicial application of the doctrine.

The twofold social function of the fair use doctrine, referred to at the outset of this comment, takes on a special relevance in the new judicial climate. The line of cases beginning with *Wright* bids fair to vitalize the second, specifically legal purpose of the doctrine: its operation as an affirmative defense to a claim of infringement. Its initial purpose, however, is the prelegal, indeed suprallegal one of fostering a climate of mutual tolerance and understanding among authors, heirs, scholars, and other members of the copyright ecosystem. The progress of science and useful arts depends vitally on the robust participation of the members of this ecosystem as well as on their ability to exercise self-restraint. Righteous self-assertion and negative capability must work together to achieve a delicate balance.

In the ideal ecosystem, original expression would retain its character of private property yet lose some of its aura of exclusivity in the dynamic process of socialization. Such a process might be thought of as the sociology of copyright: the collective practices that make up the institution of creating, owning, and using original expression. The much-discussed question of whether, ultimately, there can be such a thing as original expression<sup>127</sup> is beyond the scope of this comment, but it might be suggested in passing that the transformative character of fair use is really a feature of all creativity, and that original expression is therefore a fiction in two senses. The individual talent is inconceivable apart from an enabling tradition. As T.S. Eliot remarked: "Someone said: 'The dead writers are remote from us because we *know* so much more than they did.' Precisely, and they are that which we

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126. See 17 U.S.C. § 202 (1994). The paradox is particularly striking in *Wright*, where the quotations whose publication the plaintiff, Richard Wright's widow, sought to enjoin were from letters that she herself previously sold to Yale's Beinecke Library—a research institution open to the public. See PATRY, *supra* note 8, at 99.

127. In copyright law, "originality" does not, strictly speaking, refer to artistic creativity or genius, but merely to the requirement that protectible expression actually have *originated* with the author—that is, that the author did not copy the expression from another source. See 1 NIMMER, *supra* note 4 § 2.01 [A], at 2-9. Yet even this neutral sense of originality, which presupposes an individual generating his or her own forms of expression, has been challenged by literary theorists and critics, particularly in the context of Romantic literature. One recent trend in theory argues that authorial identity and originality are illusory constructs, and that original expression is in reality a text woven from conscious and unconscious influences and borrowings—that is, that original works are always in some sense copies. See, e.g., ROLAND BARTHES, *The Death of the Author*, in IMAGE/MUSIC/TEXT 146 (1977); HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* (1973); PAUL DE MAN, *THE RHETORIC OF ROMANTICISM* (1984); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans. 1978). For discussions of copyright in relation to notions of Romantic genius, see Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15, 20-22 (1990); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

know.”<sup>128</sup> Although such a claim is anathema to the essentially Romantic myth of sovereign selfhood that sustains our faith in original expression, it is concretely arguable that, far from being a mere exception to genuine creativity, transformative use is the unacknowledged condition of *all* expression. Fair use—and foul—has been central to the operation of the creative spirit. Or, to use terms more typical of copyright jurisprudence, the creator/user dichotomy begins to dissolve when it is recalled that creators are inevitably users.

In order to achieve its supralegal purpose of fostering a lively sense of the interdependence of owners and users, the fair use doctrine requires the cooperation of publishers and editors no less than that of other members of the copyright ecosystem. At a time when authors' estates are more than ever jealous of their privacy and revenues, and are taking an increasingly active role in asserting those rights, scholars stand in need of more than the legal protections of the fair use doctrine: they also require the good-faith assistance of their publishers and editors. Alluding to the heightened vigilance of literary estates, Judge Leval has aptly noted that “[a] ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life—the ‘widow censor.’”<sup>129</sup>

All too often, university presses<sup>130</sup> require their authors to seek detailed permissions for quotations—published as well as unpublished—that by any reasonable calculus fall within the privilege of fair use. Frequently, a press will insist on permissions only after putting the author's manuscript through the lengthy process of evaluation, at which point the author, faced with Hobson's choice of beginning the entire process over with a new publisher who may be equally cautious, usually submits to the demands of the copyright owner. If the copyright owner requests a substantial fee, the university press, anticipating only a modest profit on the scholar's monograph, typically declines to share the cost of permissions. Many scholarly presses and journals subscribe to guidelines which arbitrarily fix the quantities and kinds of quotation that will qualify as “fair use.”<sup>131</sup>

As long as academic presses and journals remain a weak link in the fair use chain, the progress of science and useful arts will suffer. The “keepers of the flame,” as Ian Hamilton has styled hostile and obstructive estates like those of James Joyce<sup>132</sup>

128. T.S. Eliot, *Tradition and the Individual Talent* (1919), reprinted in *SELECTED PROSE OF T.S. ELIOT* 38, 40 (Frank Kermode ed., Harcourt Brace Jovanovich, 1975).

129. Leval, *Toward a Fair Use Standard*, *supra* note 12, at 1118.

130. Several of the cases discussed in this comment—*Harper & Row*, *Salinger*, *New Era*, and *Wright*—involved trade publishers, not university presses, but the latter are in many respects even more central to the concerns of scholars and to their fair use needs. University presses publish the bulk of serious scholarly work in the United States and routinely encounter the demands of literary estates and copyright owners.

131. See Christopher Scarles, *Quote and Be Blessed*, in *TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN* 133-37 (Patrick Parrinder and Warren Chernaik eds., 1997) (discussing arbitrary quotation guidelines adopted by publishers despite the doctrine of “fair dealing,” the British counterpart of fair use).

132. See IAN HAMILTON, *KEEPERS OF THE FLAME: LITERARY ESTATES AND THE RISE OF BIOGRAPHY* 267-90 (1992) (discussing the history of the Estate of James Joyce); see also BRUCE ARNOLD, *THE SCANDAL OF ULYSSES* 64-86 (1991) (giving an account of the copyrights in Joyce's works and the role of the Joyce Estate since Joyce's death). In recent years, the Joyce Estate under the direction of Joyce's grandson, Stephen James Joyce, has taken a particularly scornful and obstructive stance towards scholars, considering them to be insulting to the memory of James Joyce and invasive of the Joyce family's privacy. For a sampling of the disputes that have arisen between the Joyce Estate and Joyce scholars, see Stephen Joyce, Letter to the editor, 30 *JAMES JOYCE Q.* 345, 345-49 (1993); James F. Clarity, *James Joyce*

and Richard Wright, are emboldened by needless and unsolicited capitulations on the part of publishers.<sup>133</sup> (Of course, where an author has likely exceeded fair use, she should expect to seek permissions.) The recent advances in judicial attitudes towards statutory fair use, along with the courts' increasingly flexible application of the statute's language, will remain incomplete until publishers become correspondingly more enlightened and flexible in their dealings with scholars and estates. The dual role of the fair use doctrine in

Anglo-American copyright jurisprudence requires this larger collaboration of forces for the full realization of culture. Where the creative wealth of nations is at stake, fair use is much more than a legal doctrine: It is a principle of wise husbandry and an agent of progress. When it functions vigorously, we grow as a society; when it atrophies, we are the poorer.

*Robert Spoo*

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*Papers Go on Public Display For the First Time*, N.Y. TIMES, Apr. 7, 1992, at B3; and Caryn James, *Joyce Family Letters in Literary Debate*, N.Y. TIMES, Aug. 15, 1988, at B13. See also Patrick Parrinder, *Licensing Scholarship: Some Encounters with the Wells Estate*, in TEXTUAL MONOPOLIES, *supra* note 131, at 57-67 (discussing the difficulties experienced by one scholar with the H.G. Wells Estate, in the context of British "fair dealing").

133. As Editor-in-Chief of the *James Joyce Quarterly*, published at the University of Tulsa, I have experienced the hostility of the James Joyce Estate at first hand. The Estate's open contempt for most Joyce scholars and its routine denial of permissions would make my work and that of the contributors to the journal impossible were it not for vigorous exercise of the fair use privilege.