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Commentary

*1105 TOWARD A FAIR USE STANDARD

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Random distribution has dealt me a generous share of copyright suits involving claims of fair use. The court of appeals' disagreement with two of my decisions [FN1] provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values. Is this because no rational defining values exist, or is it rather that judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework? This commentary suggests that a cogent set of governing principles exists and is soundly rooted in the objectives of the copyright law.

Not long after the creation of the copyright by the Statute of Anne of 1709, [FN2] courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as "fair abridgment,"' later "fair use,"' would not infringe the author's rights. [FN3] In the United States, the doctrine was received and eventually incorporated into the Copyright Act of 1976, which provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."' [FN4]

What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. In Folsom v. Marsh, [FN5] in 1841, Justice Story articulated an often-cited summary of how to approach a question of fair use: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."' [FN6] The 1976 Copyright Act largely adopted his summary. [FN7] These formulations, ***1106** however, furnish little guidance on how to recognize fair use. The statute, for example, directs us to examine the "purpose and character"' of the secondary use as well as "the nature of the copyrighted work."' Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the "purpose and character"' of the secondary use. It gives no clues at all regarding the significance of "'the nature of"' the copyrighted work. Although it instructs us to be concerned with the quantity and importance of the materials taken and with the effect of the use on the potential for copyright profits, it provides no guidance for distinguishing between acceptable and excessive levels. Finally, although leaving open the possibility that other factors may bear on the question, the statute identifies none. [FN8]

Curiously, judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void. Uttering confident conclusions as to whether the particular taking was or was not a fair use, courts have treated the definition of the doctrine as assumed common ground.

The assumption of common ground is mistaken. Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals [FN9] and divided ***1107** courts [FN10] are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

Confusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes. After recent opinions of the Second Circuit casting serious doubt on any meaningful applicability of fair use to quotation from previously unpublished letters, [FN11] publishers are understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of such sources.

The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

I. THE GOALS OF COPYRIGHT

The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.

> [C]opyright is intended to increase and not to impede the harvest of knowledge. . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.
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> . . . [The Constitution's grant of copyright power to Congress] "is a means by which an important public purpose may be achieved. It ***1108** is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ." "The monopoly created by copyright thus rewards the individual author in order to benefit the public." [FN12]

The fundamental historic sources amply support the Supreme Court's explanation of the copyright objectives. The copyright clause of the Constitution, for example, evinces the same premises: "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." [FN13] Several aspects of the text confirm its utilitarian purpose. [FN14] First is its express statement of purpose: "To promote the Progress of Science and useful Arts . . . ." By lumping together authors and inventors, writings and discoveries, the text suggests the rough equivalence of those two activities. In the framers' view, authors possessed no better claim than inventors. The clause also clearly implies that the "exclusive right" of authors and inventors "to their respective Writings and Discoveries" exists only by virtue of statutory enactment. [FN15] Finally, that the right may be conferred only "for limited times" confirms that it was not seen as an absolute or moral right, inherent in natural law. The time limit considered appropriate in those days was relatively brief-a once-renewable fourteen-year term. [FN16]

A similar utilitarian message is found in the original British copyright statute, the Statute of Anne of 1709.

[FN17] Its caption declares that ***1109** this is "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors . . . during the Times therein mentioned."' [FN18] The preamble declares the statute's purpose to be "for the Encouragement of Learned Men to compose and write useful Books."' [FN19] Elaborating the justification, the preamble exhibits a prevalent concern for the financial entitlements of authorship by noting that the practice of pirated publication without the author's consent "too often [[[causes] the Ruin of [Authors] and their Families."' [FN20]

The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.

If copyright protection is necessary to achieve this goal, then why allow fair use? Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.

First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. [FN21] Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.

Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process. Three judicially created copyright doctrines have addressed this problem: first, the rule that the copyright does not protect ideas, but only the manner of expression; [FN22] second, the rule that facts are not within the copyright protection, notwithstanding the labor expended by the original author in uncovering ***1110** them; [FN23] and finally, the fair use doctrine, which protects secondary creativity as a legitimate concern of the copyright.

II. THE NATURE AND CONTOURS OF FAIR USE

The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. As Lord Ellenborough explained in an early dictum, "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science."' [FN24] Thus, the introductory language of our statute explains that fair use may be made for generally educational or illuminating purposes "such as criticism, comment, news reporting, teaching . . . scholarship, or research."' [FN25]

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law.

A. The Statutory Factors

Following Story's articulation, the statute lists four pertinent "factors to be considered"' "in determining whether the use made of a work in any particular case is a fair use."' [FN26] They are, in summary, the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work. [FN27] Each factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, ***1111** and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.

1. Factor One-The Purpose and Character of the Secondary Use.-Factor One's direction that we "consider[] . . . the purpose and character of the use"' [FN28] raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. [FN29] A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects"' of the original. [FN30] If, on the other hand, the secondary use adds value to the original-if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. [FN31]

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.

The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. A biographer or critic of a writer may contend that unlimited quotation enriches the portrait or justifies the criticism. The creator of a derivative work based on the original creation of another may claim absolute***1112** entitlement because of the transformation. Nonetheless, extensive takings may impinge on creative incentives. And the secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner.

The importance of a transformative use was stressed in the early decisions, which often related to abridgements. For example, Gyles v. Wilcox [FN32] in 1740 stated:

> Where books are colourably shortened only, they are undoubtedly infringement within the meaning of the [Statute of Anne] . . . .

> But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because . . . the invention, learning, and judgment of the [[[secondary] author is shewn in them . . . . [FN33]

In the United States in 1841, Justice Story wrote in Folsom:

> [N]o one can doubt that a reviewer may fairly cite [quote] largely from the original work, if . . . [its design be] . . . criticism. On the other hand, it is as clear, that if he thus [quotes] the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, [infringement will be found]. [FN34]

Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. This detailed inquiry is particularly important in instances of a biographical or historical work that quotes numerous passages from letters, diaries, or published writings of the subject of the study. Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede. For example, in the recent cases of biographies of Igor Stravinsky [FN35] and J.D. Salinger, [FN36] although each biography overall served a useful, educational, and instructive purpose that tended to favor the defendant, some quotations from the writings of Stravinsky and Salinger were not justified by a strong transformative secondary objective. The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification.

***1113** I confess to some error in Salinger's case. Although the majority of the biographer's takings were of unprotected facts or ideas and some displayed transformative value in sketching the character portrait, other takings of highly expressive material exhibited minimal creative, transformative justification. My finding of fair use was based primarily on the overall instructive character of the biography. I failed to recognize that the non-transformative takings provided a weak basis for claiming the benefits of the doctrine and that, unless attention were focused on the individual passages, a favorable appraisal of the constructive purpose of the overall work could conceal unjustified takings of protected expression. The converse can also be true: a low estimation of the overall merit of the secondary work can lead to a finding for the copyright owner in spite of a well-justified, transformative use of the particular quotation that should justify a favorable finding under the first factor.

Although repentantly agreeing with Judge Newman's finding of infringement in at least some of the challenged passages, I respectfully disagree with his reasoning, which I contend failed to recognize the need for quotation as a tool of accurate historical method. His opinion suggested a far-reaching rule-that unpublished matter is off-limits to the secondary user, regardless of justification. "[Unpublished] works normally enjoy complete protection against copying any protected expression."' [FN37]

The Second Circuit's New Era opinion carried this suggestion further. [FN38] In New Era, unlike Salinger, various persuasive justifications were proffered as to why quotation was necessary to accomplish the biographer's objective. For example, the biographer sought to support a portrait of his subject as a liar by showing he had lied; as a bigot by showing he had made bigoted pronouncements; as pompous and self-important by quoting self-important statements. The biographer similarly used quotations to show cruelty, paranoia, aggressiveness, scheming. [FN39] These are points which often cannot be fairly ***1114** demonstrated without quotation. The Second Circuit's majority opinion rejected the pertinence of even considering the necessity of quotation of unpublished matter to communicate such assessments. Citing Salinger, it reasserted that "[unpublished] works normally enjoy complete protection."' [FN40]

I believe the Salinger/New Era position accords insufficient recognition to the value of accurate quotation as a necessary tool of the historian or journalist. The biographer who quotes his subject is characterized as a parasite or free rider. If he copies "more than minimal amounts . . . he deserves to be enjoined."' [FN41] Nor does this restriction "interfere . . . with the process of . . . history,"' the Salinger opinion insists, because "[t] he facts may be reported"' [FN42] without risk of infringement. Can it be seriously disputed that history, biography, and journalism benefit from accurate quotation of source documents, in preference to a rewriting of the facts, always subject to the risk that the historian alters the "facts"' in rewriting them? [FN43]

As to ideas, the analysis is similar. If the secondary writer has legitimate justification to report the original author's idea, whether for criticism or as a part of a portrait of the subject, she is surely permitted to set it forth accurately. Can ideas be correctly reported, discussed, or challenged if the commentator is obliged to express the idea in her own different words? The subject will, of course, reply, "That's not what I said."' Such a requirement would sacrifice clarity, much as a requirement that judges, in passing on the applicability of a statute or contract, describe its provisions in their own words rather than quoting it directly.

***1115** Is it not clear, furthermore, as Chief Judge Oakes' separate opinion in New Era recognized, [FN44] that at times the subject's very words are the facts calling for comment? If a newspaper wishes to report that last year a political candidate wrote a personal letter demeaning a race or religion, or proclaiming ideals directly contrary to those now stated in his campaign speeches, how can it fairly do this without quotation from the letter? If a biographer wished to show that her subject was cruel, jealous, vain, or crazy, can we seriously contend she should be limited to giving the reader those adjectives, while withholding the words that support the conclusion? How then may the reader judge whether to accept the biographer's characterization?

The problem was amusingly illustrated in the fall-out of Salinger. After the decision, the biographer rewrote his book, this time without quotations. Resorting to adjectives, he described certain of Salinger's youthful letters as "self-promoting . . . boastful"' [FN45] and "buzzing with self-admiration."' [FN46] A reviewer, who had access to the letters, disagreed and proclaimed that the letters were in fact "exuberant, self-deprecating and charged with hope."' [FN47] Where does that leave the reader? What should the reader believe? Does this battle of adjectives serve knowledge and the progress of the arts better than allowing readers to judge for themselves by reading revelatory extracts?

The Second Circuit appears divided over these propositions. After the split vote of the original New Era panel, rehearing en banc was narrowly defeated by a vote of 7-5. [FN48] Judge Newman, joined by three colleagues, argued that rehearing en banc was warranted "to avoid misunderstanding on the part of authors and publishers . . .-misunderstanding that risks deterring them from entirely lawful writings in the fields of scholarly research, biography, and journalism."' [FN49] His opinion recognized that "even as to unpublished writings, the doctrine of fair use permits some modest copying of an author's expression . . . where . . . necessary fairly and accurately to report a fact set forth in the author's writings."' [FN50] In this discussion, Judge Newman retreated substantially from his position expressed in Salinger of normally complete protection. [FN51]

***1116** Quoting is not necessarily stealing. Quotation can be vital to the fulfillment of the public-enriching goals of copyright law. The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations. If a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors. [FN52] Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense. [FN53] The

strength of that justification must be weighed against the remaining factors, which focus on the incentives and entitlements of the copyright owner.

2. Factor Two-The Nature of the Copyrighted Work.-The nature of the copyrighted work is a factor that has been only superficially discussed and little understood. Like the third and fourth factors, it concerns itself with protecting the incentives of authorship. It implies that certain types of copyrighted material are more amenable to fair use than others.

Copyright protection is available to very disparate categories of writings. If it be of original authorship, i.e., not copied from someone else, and recorded in a fixed medium, it is protected by the copyright. [FN54] Thus, the great American novel, a report prepared as a duty of employment, a shopping list, or a loanshark's note on a debtor's ***1117** door saying "Pay me by Friday or I'll break your goddamn arms"' are all protected by the copyright. [FN55]

In the early history of copyright, British courts debated whether letters written for private communication should receive any protection at all from the Statute of Anne. [FN56] The question was soon satisfactorily settled in favor of protection, and I do not seek to reopen it. I do not argue that writings prepared for private motives should be denied copyright protection. In the unlikely event of the publication of the Collected Shopping Lists (or Extortion Notes) of a Renowned Personage, of course only the author should enjoy the author's rights. When it comes to making fair use, however, there is a meaningful difference between writings conceived as artistic or instructive creation, made in contemplation of publication, and documents written for a private purpose, as a message or memo, never intended for publication. One is at the heart of the purpose of copyright-the stimulation of creative endeavor for the public edification. The others are, at best, incidental beneficiaries. Thus, the second factor should favor the original creator more heavily in the case of a work (including superseded drafts) created for publication, than in the case of a document written for reasons having nothing to do with the objectives of copyright law.

The statutory articulation of this factor derives from Justice Story's mention in Folsom of the "value of the materials used."' [FN57] Justice Story's word choice is more communicative than our statute's "nature of,"' as it suggests that some protected matter is more "valued"' under copyright law than others. This should not be seen as an invitation to judges to pass on literary quality, but rather to consider whether the protected writing is of the creative or instructive type that the copyright laws value and seek to foster.

The Nation, Salinger, and New Era opinions discussed the second factor solely in terms of whether the copyrighted work was published or unpublished. The Nation opinion observed that the unpublished status of a copyrighted work is a critical element of its nature and a ***1118** "factor tending to negate the defense of fair use"'; [FN58] "the scope of fair use is narrower with respect to unpublished works."' [FN59]

The Second Circuit in Salinger and New Era extended this principle. As interpreted in Salinger, the Supreme Court's discussion "conveys the idea that [[[unpublished] works normally enjoy complete protection against copying any protected expression."' [FN60] However extreme this formulation may be, the word "normally"' suggests that in the unusual instance fair use may be made of unpublished matter. New Era, however, rejected fair use even when necessary for accurate presentation of a fact; the court thus created an apparently insurmountable obstacle to the fair use of unpublished matter. Under the Salinger/New Era view, the unpublished nature of a quoted document trumps all other considerations.

The Supreme Court and the Second Circuit justify these positions by the original author's interest in con-

trolling the circumstances of the first public revelation of his work [FN61] and his right, if he so chooses, not to publish at all. [FN62] These are indeed legitimate concerns of copyright law. An author who prefers not to publish a work, or wishes to make aesthetic choices about its first public revelation, will generally have the legal right to enforce these wishes. [FN63] Due recognition of these rights, however, in no way implies an absolute power to bar all quotation, regardless of how persuasive the justification.

A ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life-the "widow censor."' A historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors for fifty years after the subject's death. When writers ask permission, the answer will be, "Show me what you write. Then we'll talk about permission."' If the manuscript does not exude pure admiration, permission will be denied. [FN64]

The second factor should not turn solely, nor even primarily, on the published/unpublished dichotomy. At issue is the advancement of the utilitarian goal of copyright-to stimulate authorship for the ***1119** public edification. Inquiry into the "nature"' or "value"' of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements. Notwithstanding that nearly all writings may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public. [FN65] The law was not designed to encourage shoppers to make written shopping lists, executives to keep orderly appointment calendars, or lovers to write love letters. Certainly it was not to encourage the writing of extortion notes. To conclude that documents created for purposes outside the concerns of copyright law should receive more vigorous protection than the writings that copyright law was conceived to protect is bizarre and contradictory. To suggest that simply because a written document is unpublished, fair use of that document is forbidden, or even disfavored, has no logical support in the framework of copyright law.

I do not argue that a writer of private documents has no legal entitlement to privacy. [FN66] He may well have such an entitlement. The law of privacy, however, and not the law of copyright supplies such protection. Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination. [FN67]

I do not dispute that publication can be important in assessing the second factor. Publication for public edification is, after all, a central concern of copyright. Thus, a work intended for publication is a favored protectee of the copyright. [FN68] A secondary use that imperils ***1120** the eventual publication of a creation en route undermines the copyright objective. I therefore agree with the Supreme Court, on the particular facts of the Nation case, that the nature of the copyrighted work strongly favored its protection- but not merely because it was unpublished. In that case, the Nation, a weekly magazine of news and comment, published purloined extracts from the memoirs of former President Gerald Ford, shortly prior to the scheduled appearance of the first authorized serialization in Time Magazine. [FN69] Time then cancelled its plan to print the memoir and withheld payment of the balance of the license fee. [FN70] The Supreme Court rejected the Nation's claim that the newsworthiness of the President's memoir justified a finding of fair use. [FN71]

The critical element was that President Ford's memoir was written for publication, and was on its way to publication at the time of the Nation's gun-jumping scoop. The Supreme Court emphasized that the Nation's scoop unreasonably diminished the rewards of authorship. [FN72] The Court noted further that if the practice

were tolerated on the grounds of newsworthiness, it would discourage public figures from writing and publishing valuable memoirs. [FN73] Read in context rather than excerpting isolated phrases, the Nation decision communicates a concern for protection of unpublished works that were created for publication, or on their way to publication, and not for unpublished matter created for private ends and held in secrecy.

It is not always easy to draw the distinction between works created for publication and notations or communications intended as private. A diary, memoir, or letter can be both-private in the first instance, but written in contemplation of possible eventual publication. In a sense, professional authors are writing either directly or indirectly for publication in their private memos and letters, as well as in their manuscripts. In private letters and notebooks, they practice the writer's***1121** craft, trying out ideas, images, metaphors, cadences, which may eventually be incorporated into published work. [FN74]

The attempt to distinguish, for purposes of the second fair use factor, between work created for publication and other written matter should recognize that the copyright objectives include a reasonable solicitude for the ability of the author to practice the craft in the privacy of the laboratory. A critique of an author's writing based solely on rough drafts that the author had superseded might well be an unreasonable intrusion. [FN75]

On the other hand, notwithstanding the highly protected status of a draft, the privacy of the laboratory should yield in some situations. Assume the following hypothetical cases:

> (1) An author's first novel is greeted with critical acclaim for its elegant style and masterful command of the language. A skeptical critic undertakes to show that the author is a literary fraud, the creation of a talented and unscrupulous editor. In support, the critic quotes brief excerpts from the author's very different original manuscript, revealing a grammatical ignorance and stylistic awkwardness she contends could not conceivably have come from the same pen as the elegant published version. The author sues to enjoin publication of the review.
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> (2) Author A publicly accuses Author B of plagiarism; A claims that B's recently published book steals a metaphor from a letter A wrote to B. B denies the charge and asserts that his first draft, written before he received A's letter, included the same language. The critic quotes from B's first draft, disproving B's defense by showing that the metaphor was not yet present.

Both examples seem convincing cases of fair use, in which the critic's productive and transformative justification would take precedence over the author's interest in maintaining the privacy of the unpublished draft. [FN76]

***1122** In summary, several principles emerge from considering the second factor in light of the copyright objectives: this factor concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage. Thus, a text, including drafts, created for publication, or on its way to publication, presents a far stronger case for protection against fair use than matter written exclusively for private purposes. The more the copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding. The fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication. [FN77] If, on the other hand, the writing is on its way to publication, and premature secondary use would interfere significantly with the author's incentives, its as yet unpublished status may argue powerfully against fair use. Finally, this factor is but one of four-it is not a sufficient basis for ruling out fair use. There is no logical basis for making it determinative, as was effectively done in Salinger and New Era. Although the second factor implies a characterization of the protected work on a scale of copyright-protected

values, no category of copyrighted material is either immune from use or completely without protection. Wholesale appropriation of the expressive language of a letter, without a transformative justification, should not qualify as fair use, even though the writer of the letter had never considered publication. On the other hand, if a sufficient justification exists, and the quotations do not cause significant injury to the author's entitlements, courts may allow even quotations from an unpublished draft of a novel.

3. Factor Three-Amount and Substantiality.-The third statutory factor instructs us to assess "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."' [FN78] In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use. ***1123** This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market).

As to the first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification. A solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.

In its relation to the market impact factor, the qualitative aspect of the third test-"substantiality"'-may be more important than the quantitative. In the case of President Ford's memoir, a taking of no more than 400 words constituting " 'the heart of the book' " [FN79] caused cancellation of the first serialization contract-a serious impairment to the market for the book. As to the relationship of quantity to the market, presumptively, of course, the more taken the greater the likely impact on the copyright holder's market, and the more the factor favors the copyright holder. Too mechanical a rule, however, can be dangerously misleading. One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential. Consider, for example, a lengthy critical study analyzing the structure, symbolism and meaning, literary antecedents and influences of a single sonnet. Fragments dispersed throughout the work of criticism may well quote every word of the poem. Such quotation will not displace the market for the poem itself. If there is strong justification and no adverse market impact, even so extensive a taking could be a fair use.

Too rigid a notion of permissible quantity, furthermore, can seriously distort the inquiry for very short memos or communications. If a communication is sufficiently brief, any quotation will necessarily take most or all of it. Consider, for example, the extortion note discussed above. [FN80] A journalist or historian may have good reason to quote it in full, either for historical accuracy, to show the character of the writer, or to suggest its effect on the recipient. The copyright holder, in seeking to enjoin publication, will argue that the journalist has taken not only the heart but the whole of the protected work. There are three responses, which relate to the first, second, and fourth factors. First, there may be a powerful justification for quotation of the entirety of a short note. Second, because the note was written for private motives and not for publication, quotation will not diminish ***1124** the inducement to authors to create works for the public benefit. Finally, because the note is most unlikely to be marketed as a work of its author, there is no effect on its market. Courts must then evaluate the significance of the amount and substantiality factor in relation to the copyright objectives; they must consider the justification for the secondary use and the realistic risk of injury to the entitlements of authorship.

4. Factor Four-Effect on the Market.-The fourth factor addresses "the effect of the use upon the potential market for the copyrighted work."' [FN81] In the Nation, the Supreme Court designated this "the single most important element of fair use."' [FN82] The Court's recognition of the importance of this factor underlines, once

again, that the copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious. The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor. [FN83]

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in Nation, this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. [FN84] Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

How much market impairment must there be to turn the fourth factor against the secondary user? By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. [FN85] Therefore, if an insubstantial loss of revenue ***1125** turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. [FN86] And if we then gave serious deference to the proposition that it is "undoubtedly the single most important element of fair use,"' [FN87] fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial. [FN88] When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.

Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, [FN89] or, in Story's words "supersede[s] the use of the original."' [FN90] Only to that extent are the purposes of copyright implicated.

B. Are There Additional Factors?

1. False Factors.-The language of the Act suggests that there may be additional unnamed factors bearing on the question of fair use. [FN91] The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright. They may have bearing on the appropriate remedy, or on the availability of ***1126** another cause of action to vindicate a wrong, but not on the fair use defense.

(a) Good Faith.-In all areas of law, judges are tempted to rely on findings of good or bad faith to justify a decision. Such reasoning permits us to avoid rewarding morally questionable conduct. It augments our discretionary power. It provides us with an escape from confronting questions that are difficult to understand. The temptation has been particularly strong in dealing with the difficult issue of fair use. [FN92] This practice is, however, misguided. It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.

Copyright seeks to maximize the creation and publication of socially useful material. Copyright is not a privilege reserved for the well-behaved. Copyright protection is not withheld from authors who lie, cheat, or steal to obtain their information. If they have stolen information, they may be prosecuted or sued civilly, but this has no bearing on the applicability of the copyright. Copyright is not a reward for goodness but a protection for the profits of activity that is useful to the public education.

The same considerations govern fair use. The inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits. This decision is governed by the factors reviewed above-with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.

A secondary user, like an original author, may be liable to criminal prosecution, or to suit in tort, if she has stolen information or has committed fraud. Furthermore, if she has infringed upon a copyright, morally reprehensible conduct may influence the remedy, including the availability of both an injunction and additional damages for willfulness. [FN93]

This false morality factor derives from two misunderstandings of early precedent. The first results from the use of words like “piracy”' and the Latin phrase “animus furandi”' in early decisions. In rejecting the defense of fair use, courts sometimes characterized the offending secondary work as having been written animo furandi (with intention of stealing). Although this characterization seemed to imply that fair ***1127** use requires honest intentions, the courts reasoned in the opposite direction. The decisions did not explore the mental state of the secondary user to determine whether fair use was shown. They examined the secondary text to determine whether it made a productive transformative use or merely restated the original. If they found no productive use justifying the taking, judges adorned the conclusion of infringement with words like piracy or animus furandi. [FN94] The morality of the secondary user's conduct played no role in the decision. The irrelevance of the morality of the secondary user's conduct was underlined in decisions like Folsom v. Marsh. [FN95] There Justice Story emphasized not only the good faith and “meritorious labors”' of the defendants, but also the usefulness of their work. Finding no “bona fide abridgement”' [FN96] (what I have described as a transformative use), Justice Story nonetheless concluded with “regret”' that good faith could not save the secondary work from being “deemed in law a piracy.”' [FN97]

A second misleading assumption is that fair use is a creature of equity. [FN98] From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically this notion is incorrect. Litigation under the Statute of Anne began in the law courts. [FN99] Although plaintiffs who sought injunctions could sue, and did, in the courts of equity, [FN100] which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.

The temptation to determine fair use by reference to morality also can lead to examination of the conduct and intentions of the plaintiff ***1128** copyright holder in bringing the suit. The secondary user may contend that the copyright holder is disingenuously invoking copyright remedies as a device to suppress criticism or protect secrecy. [FN101] Such considerations are also false leads.

Like a proprietor of land or an owner of contract rights, the copyright owner may sue to protect what he owns, regardless of his motivation. His rights, however, extend only to the limits of the copyright. As fair use is not an infringement, he has no power over it. Whether the secondary use is within the protection of the doctrine depends on factors pertinent to the objectives of the copyright law and not on the morality or motives of either the secondary user or the copyright-owning plaintiff.

(b) Artistic Integrity.-There are many who deplore our law's failure to protect artistic integrity. French law enforces the concept of the droit moral d'artiste, which covers among other things a right of paternity (the right to be acknowledged as author of the work), the right to preserve a work from mutilation or change, the right to withdraw or modify a work already made public, and the right to determine whether or not a work shall be published. [FN102]

Those who would adopt similar rules in United States law seek a place for them in the copyright law, which is understandable in view of the absence of other niches. I do not oppose our adoption of such rights for artists. I do, however, oppose converting our copyright law, by a wave of a judicial magic wand, into an American droit moral. To do so would generate much unintended mischief. Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the droit moral.

As the copyright privilege belongs not only to Ernest Hemingway but to anyone who has drafted an interoffice memo or dunning letter or designed a computer program, it would be preposterous to permit all of them to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. If we wish to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of ***1129** art. [FN103] Those difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.

(c) Privacy.-The occasional attempt to read protection of privacy into the copyright is also mistaken. [FN104] This trend derives primarily from an aberrational British case of the mid-nineteenth century in which there had been no replication of copyrighted material.

Queen Victoria and Prince Albert had made etchings which were exhibited privately to friends. The defendant Strange, a publisher, obtained copies surreptitiously. Strange wrote descriptions of the etchings and sought to publish his descriptions. Prince Albert brought suit to enjoin this intolerable intrusion. The Lord Chancellor, expressing concern for the privacy of the royal family and disapproval of the surreptitious manner by which the defendant had obtained copies of the etchings, affirmed the grant of an injunction. [FN105]

Prince Albert's case is noteworthy as the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren. [FN106] But it should not be considered a meaningful precedent for our copyright law. The decision reflects circumstances that distinguish British law from ours- particularly the absence from British law of two of our doctrines. First, although British society placed a higher value on privacy than we do, English law did not have a right of privacy. [FN107] In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication. [FN108] Second, ***1130** British law did not include a strong commitment to the protection of free speech. [FN109] American law, in contrast, maintains a powerful constitutional policy that sharply disfavors muzzling speech.

Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy in-

terests. First, it will destroy the delicate balance of interests achieved under our privacy law. For example, the judgment that, in the public interest, the privacy right should terminate at death would be overcome by the additional fifty years tacked onto copyright protection. Such a change would destroy the policy judgment developed under privacy law denying its benefits to persons who have successfully sought public attention. In addition, as a result of the preemption provisions of the federal copyright statute, [FN110] construing the copyright law to encompass privacy might nullify state privacy laws.

Moreover, the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect the privacy interest involved. [FN111] Because the copyright generally cannot be enforced without a public filing in the Library of Congress, the very act required to preserve privacy would ensure its violation. Finally, incorporating privacy concerns into copyright would burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal. Privacy and concealment are antithetical to the utilitarian goals of copyright.

C. Injunction

One of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily ***1131** implicates the grant of an injunction. Many commentators have disparaged the overly automatic tendency of courts to grant injunctive relief. [FN112] The copyright statute and its predecessors express no preference for injunctive relief. The 1976 Act states only that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."' [FN113] Moreover, the tendency toward the automatic injunction can harm the interests of plaintiff copyright owners, as well as the interests of the public and the secondary user. Courts may instinctively shy away from a justified finding of infringement if they perceive an unjustified injunction as the inevitable consequence. [FN114]

***1132** Legal rhetoric has dulled thought on the injunction remedy. It is a venerable maxim that irreparable injury is "presumed"' in a case of copyright infringement. [FN115] Injunction thus follows as a matter of course upon a finding of infringement. In the vast majority of cases, this remedy is justified because most infringements are simple piracy. Successful fabric designs, fashion accessories, toys, and videos instantly spawn parasitic industries selling cheap copies. These infringers incur no development cost, no advertising expense, and little risk. They free-ride on the copyright owner's publicity, undercut the market, and deprive the copyright owner of the rewards of his creation. Allowing this practice to flourish destroys the incentive to create and thus deprives the public of the benefits copyright was designed to secure. It is easy to justify enjoining such activity. In fact, the presumption of irreparable harm is probably unnecessary. It merely simplifies and reduces the cost of proving what could be shown without a presumption.

Such cases are worlds apart from many of those raising reasonable contentions of fair use. Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work. And the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found.

In such cases, should we indulge a presumption of irreparable harm and grant injunctions as a matter of

course? According to the Salinger opinion, "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined . . . ."' [FN116] Judge Miner's majority opinion in New Era extended this ***1133** proposition, expressly rejecting the idea that the public interest in publication of an informative biography could outweigh the copyright owner's preference for an injunction. [FN117] Upon application for rehearing en banc, Judge Newman, author of the Salinger opinion but not a part of the New Era panel, writing in favor of rehearing of New Era, retracted Salinger's seminal assertion. Judge Newman explained that his phrase "'deserves to be enjoined"' had meant nothing more than "deserves to be found liable for infringement."' [FN118] He pointed out that in Salinger there had been no dispute over the appropriateness of injunctive relief. Because at the time of the lawsuit the book was in prepublication copy, the infringing passages could be easily excised or altered without destroying the book. Thus there was no good reason to deny the injunction. Judge Newman's New Era opinion goes on to argue convincingly that the public interest is always relevant to the decision whether to grant an injunction. [FN119]

The customary bias in favor of the injunctive remedy in conventional cases of copyright infringement has no proper application to the type of case here discussed. When a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits. [FN120] The court should grant or deny the injunction for reasons, and not simply as a mechanical reflex to a finding of infringement. Plaintiffs should be required to demonstrate irreparable harm and inadequacy of compensation in damages. [FN121] As Chief Judge Oakes noted in his separate opinion in New Era, "Enjoining publication of a book is not ***1134** to be done lightly. . . . [T]he grant or denial of an injunction remains an open question, to be determined by carefully balancing the appropriate factors."' [FN122]

As with other issues arising in connection with a fair use defense, analysis of this issue should reflect the underlying goals of the copyright law to stimulate the creation and publication of edifying matter. In considering whether the plaintiff would suffer irreparable harm, the court should focus on harm to the plaintiff's interest as copyright owner. A public figure may suffer irreparable injury to his reputation if publication of extracts from his private papers reveals him to be dishonest, cruel, or greedy. An individual suffers irreparable harm by the revelation of facts he would prefer to keep secret. But those are not the types of harms against which the copyright law protects; despite irreparability, they should not justify an injunction based on copyright infringement. Only injuries to the interest in authorship are the copyright's legitimate concern.

Critics of these views express concern that obstacles to injunctive relief may undermine the incentives of authorship for which copyright law was created. If the grant or denial of injunction is informed by the concerns of copyright law, such a worry will prove groundless. If the infringement is of a type likely to diminish creative incentives, the court should favor an injunction. In a case like the Nation, where the infringement deprives the author of significant monetary and non-monetary rewards of authorship, and where, as the Supreme Court found, such infringement diminishes the incentive to public figures to write valuable memoirs, an injunction would be justified. If, on the other hand, the original document had been created for purely private purposes and not as a work of authorship for the public benefit, denial of an injunction would not adversely affect creative incentives. For reasons similar to those discussed under the second factor, courts should more readily grant an injunction where the original is a work of authorship created with a view to publication (or is on its way to publication) than in the case of private communicative documents created for reasons that are not the concerns of copyright law. [FN123]

***1135** In my argument against automatically granting injunctive relief, I have deliberately refrained from invoking the support of the first amendment's opposition to prior restraints. I have excluded such arguments not

because they are irrelevant but because they are unnecessary and risk importing confusion. Although copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment. “[T]he Framers intended copyright . . . to be the engine of free expression.”' [FN124] It “is intended to increase and not to impede the harvest of knowledge”'; [FN125] “[t]o promote the Progress of Science and the useful Arts”'; [FN126] to encourage “Learned [writers] to compose and write useful Books.”' [FN127] It was never intended to serve the goals of secrecy and concealment. Thus, the copyright law on its own terms, and not merely in deference to the first amendment, demands caution in awarding oppressive injunctions.

III. CONCLUSION

A question to consider in conclusion is whether imprecision-the absence of a clear standard-in the fair use doctrine is a strength or a weakness. The case that it is a weakness is easy to make. Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct. The contrary argument is more abstract. Perhaps the abundance of disagreement reflects the difficulty of the problem. As Justice Story wrote in 1841, it is not easy “to lay down any general principles applicable to all cases.”' [FN128] A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. We should not adopt a bright-line standard unless it were a good one-and we do not have a good one.

We can nonetheless gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright-and by resisting the impulse to import extraneous policies. Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law. ***1136** The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly. But it depends equally on the recognition that the monopoly must have limits. Those limits include the public dedication of facts (notwithstanding the author's efforts in uncovering them); the public dedication of ideas (notwithstanding the author's creation); and the public dedication of the right to make fair use of material covered by the copyright.

[FNa] Judge, United States District Court for the Southern District of New York.

[FN1]. See Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987); New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp. 1493 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989).

[FN2]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN3]. See, e.g., Gyles v. Wilcox, 26 Eng.Rep. 489, 2 Atk. 141 (1740) (No. 130). See generally W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17 (1985).

[FN4]. 17 U.S.C. § 107 (1982).

[FN5]. 9 F.Cas. 342 (C.C.D.Mass.1841) (No. 4901).

[FN6]. Id. at 348.

[FN7]. The statute states:
Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the 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).
[FN8]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

[FN9]. Five of the recent leading cases were reversed at every stage of review. In Rosemont Enterprises, Inc. v. Random House, Inc., 256 F.Supp. 55 (S.D.N.Y.), rev'd, 366 F.2d 303 (2d Cir.1966), cert. denied, 385 U.S. 1009 (1967)-the Howard Hughes case-the Second Circuit reversed a district court injunction. In Universal City Studios, Inc. v. Sony Corp. of America, 480 F.Supp. 429 (C.D.Cal.1979), rev'd, 659 F.2d 963 (9th Cir.1981), rev'd, 464 U.S. 417 (1984), the court of appeals reversed the district court's finding for the defendant, and was in turn reversed by the Supreme Court. In Harper & Row, Publishers, Inc. v. Nation Enterprises, 557 F.Supp. 1067 (S.D.N.Y.), modified, 723 F.2d 195 (2d Cir.1983), rev'd, 471 U.S. 539 (1985), the district court's damage award was reversed by the court of appeals, which in turn was reversed by the Supreme Court. In Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987), and in New Era Publications International v. Henry Holt & Co., 695 F.Supp. 1493 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989), my findings of fair use were rejected on appeal.

[FN10]. In its first two encounters with fair use, the Supreme Court split 4-4 and thus failed to resolve anything. See Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958). The Court decided Sony by a 5-4 majority, see Sony, 464 U.S. 417, and Nation by a 6-3 majority, see Nation, 471 U.S. 539. In New Era, the Second Circuit voted 7-5 to deny en banc review to alter the panel's dicta on fair use. Four judges joined in a concurring opinion, see New Era, 884 F.2d at 660 (Miner, J., concurring), and four in a dissenting opinion, see id. at 662 (Newman, J., dissenting).

[FN11]. See New Era, 873 F.2d 576; Salinger, 811 F.2d 90.

[FN12]. Nation, 471 U.S. at 545-46 (citation omitted) (quoting Sony, 464 U.S. at 429; and id. at 477 (Blackmun, J., dissenting)). In numerous prior decisions, the Supreme Court has explained copyright in similar terms. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."'); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[FN13]. U.S. CONST. art. I, § 8, cl. 8.

[FN14]. In The Federalist No. 43, Madison observes: "The utility of [the power conferred by the patent and copyright clause] will scarcely be questioned. . . . The public good fully coincides in both cases with the claims

of individuals.'" THE FEDERALIST NO. 43, at 186 (J. Madison) (C. Beard ed.1959).

[FN15]. "That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it.'" Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

[FN16]. Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124. See LATMAN'S THE COPYRIGHT LAW 6 (W. Patry 6th ed.1986). The original copyright term was but a tiny fraction of the duration of protection under the new 1976 Act-extending 50 years after death-which, in the case of youthful letters of an octogenarian, could easily exceed 100 years. See 17 U.S.C. § 302(a) (1982).

[FN17]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN18]. Id. The duration was the once-renewable fourteen-year term later adopted for the United States in the 1790 enactment. See supra text accompanying note 16.

[FN19]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN20]. Id.

[FN21]. See Chafee, Reflections on the Law of Copyright, 45 COLUM.L.REV. 503, 511 (1945). "'The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book . . . ."' Id.

[FN22]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985); New York Times Co. v. United States, 403 U.S. 713, 726 n. * (1971) (Brennan, J., concurring); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir.1960) (L. Hand, J.); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.1936)(L. Hand, J.); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir.1930) (L. Hand, J.); 17 U.S.C. § 102(b) (1982).

[FN23]. See Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980).

[FN24]. Cary v. Kearsley, 170 Eng.Rep. 679, 681, 4 Esp. 168, 170 (1803).

[FN25]. 17 U.S.C. § 107 (1982).

[FN26]. Id.

[FN27]. See id.

[FN28]. See id. § 107(1).

[FN29]. See Cary v. Kearsley, 170 Eng.Rep. 679, 681-82, 4 Esp. 168, 170-71 (1802). In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), the dissenters approved this approach, see id. at 480 (Blackmun, J., dissenting), but the majority of the Supreme Court rejected it, see 464 U.S. at 448-51.

[FN30]. See Folsom v. Marsh, 9 F.Cas. 342, 345 (C.C.D.Mass.1841) (No. 4901).

[FN31]. But cf. Fisher, Reconstructing the Fair Use Doctrine, 101 HARV.L.REV. 1659, 1768-69 (1988) (using the term “transformative”' in a somewhat different sense).

[FN32]. 26 Eng.Rep. 489, 2 Atk. 141 (1740) (No. 130).

[FN33]. Id. at 490, 2 Atk. at 143.

[FN34]. 9 F.Cas. at 344-45.

[FN35]. See Craft v. Kobler, 667 F.Supp. 120 (S.D.N.Y.1987).

[FN36]. See Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

[FN37]. Salinger, 811 F.2d at 97.

[FN38]. See New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir.1989).

[FN39]. See New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp. 1493, 1508-19 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989). The district court opinion found approximately twenty categories of justifications under the first factor. Personal qualities of the subject that the biographer sought to demonstrate through quotations included dishonesty, boastfulness, pomposity, pretension, paranoia, snobbery, bigotry, dislike of Asians and of the Orient, cruelty, disloyalty, aggressiveness, vicious scheming tactics, cynicism, and mental derangement. Other uses included the exposition of a false mythology built up around the personage of L. Ron Hubbard, of his self-image as revealed in early diaries, and of his teenage writing style. Some passages were quoted to ensure an accurate rendition of an idea.

Early drafts of this Commentary included samples of these quotations to illustrate the point here argued about fair use justifications under the first factor. I believed that such quotation in a law review article to further the discussion of a disputed point of law would be a fair use. Reconsideration of the standards declared by the court of appeals in Salinger and New Era suggests that no such tolerance exists. I have accordingly deleted the illustrative quotations. Interested readers are referred to the district court opinion, which sets forth numerous examples.

[FN40]. New Era, 873 F.2d at 583.

[FN41]. Salinger, 811 F.2d at 96; see also New Era, 873 F.2d at 584.

[FN42]. Salinger, 811 F.2d at 100 (emphasis added).

[FN43]. Sometimes, in the permitted exercise of reporting the facts that are set forth in a letter, a historical writer will inevitably use similar (or identical) language, especially if the original conveyed the fact by simple direct assertion. Consider a biographer whose information about her subject comes largely from letters. One such letter reported to an old college friend, “‘In July I married Lynn Jones, from San Francisco. We have rented a house on the beach in Malibu and spend most of our free time sunbathing.”’ The biographer, seeking to report these facts writes, “We learn from X's letter to a college friend that in July 1952 he married a San Franciscan named Lynn Jones, that they rented a house on the beach in Malibu and spent most of their free time sunbathing.”' (This example parallels many instances raised by Salinger.) Is this infringement? Notwithstanding virtually identical language, I contend it is not. Where the secondary writer's purpose is to report the facts revealed

in the original, and not to appropriate the personal expressive style of the original, she is surely not required-as the Second Circuit's Salinger opinion seems to suggest, see Salinger, 811 F.2d at 96-97-to seek refuge in altered language merely to avoid using the same words as the original. Where a simple direct statement of the facts calls for use of the original language, the need to report the fact justifies such use.

[FN44]. See New Era, 873 F.2d at 592 (Oakes, C.J., concurring).

[FN45]. I. HAMILTON, IN SEARCH OF J.D. SALINGER 53 (1988).

[FN46]. Id. at 56.

[FN47]. Richler, Rises at Dawn, Writes, Then Retires, N.Y. Times, June 5, 1988, (Book Review) § 7, at 7.

[FN48]. See New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir.1989) (Newman, J., dissenting).

[FN49]. Id.

[FN50]. Id.

[FN51]. In an illuminating article to be published in the next edition of the Journal of the Copyright Society, see Newman, Not the End of History: The Second Circuit Struggles with Fair Use, 37 J. COPYRIGHT SOC'Y 1 (1990), Judge Newman substantially clarifies the issue. He now espouses the propriety of such quotation in limited quantity when necessary to demonstrate facts. After my changes of position and his, the gulf between us in Salinger has significantly narrowed. See infra note 119 and accompanying text.

[FN52]. Nonetheless, every trivial taking of copyrighted material that fails to demonstrate a compelling justification is not necessarily an infringement. Because copyright is a pragmatic doctrine concerned ultimately with public benefit, under the de minimis rule negligible takings will not support a cause of action. The justifications of the de minimis exemption, however, are quite different from those sanctioning fair use. They should not be confused. See, e.g., Funkhouser v. Loew's, Inc., 208 F.2d 185 (8th Cir.1953), cert. denied, 348 U.S. 843 (1954); Suid v. Newsweek Magazine, 503 F.Supp. 146, 148 (D.D.C.1980); McMahon v. Prentice-Hall, Inc., 486 F.Supp. 1296, 1303 (E.D.Mo.1980); Greenbie v. Noble, 151 F.Supp. 45, 70 (S.D.N.Y.1957); Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155 (S.D.N.Y.1978).

[FN53]. The interpretation of the first factor is complicated by the mention in the statute of a distinction based on "whether such use is of a commercial nature or is for nonprofit educational purposes."' 17 U.S.C. § 107(1) (1982). One should not exaggerate the importance of this distinction. It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses. Nor can it mean that books produced by a commercial publisher are excluded from eligibility for fair use. A historian is not barred from making fair use merely because she will receive royalty compensation. This clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.

[FN54]. See 17 U.S.C. § 102(a) (1982).

[FN55]. The latter examples of writing are not ordinarily considered "work,"' the term used in Factor Two.

[FN56]. Although Pope v. Curl, 26 Eng.Rep. 608, 2 Atk. 342 (1741), answered in the affirmative soon after the passage of the Statute of Anne, Perceval v. Phipps, 35 Eng.Rep. 225, 2 Ves. & Bea. 19 (1813), suggested the contrary:

> [T]hough the Form of familiar Letters might not prevent their approaching the Character of a literary Work, every private Letter, upon any Subject, to any Person, is not to be described as a literary Work, to be protected upon the Principle of Copyright. The ordinary Use of Correspondence by Letters is to carry on the Intercourse of Life between Persons at a Distance from each other, in the Prosecution of Commercial, or other, Business; which it would be very extraordinary to describe as a literary Work, in which the Writers have a Copyright.

Id. at 229, 2 Ves. & Bea. at 28.

[FN57]. Folsom v. Marsh, 9 F.Cas. 342, 344 (C.C.D.Mass.1841) (No. 4901).

[FN58]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

[FN59]. Id. at 551.

[FN60]. Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

[FN61]. See Nation, 471 U.S. at 552-55.

[FN62]. See id. at 559.

[FN63]. See id. at 552; 17 U.S.C. § 106(3) (1982).

[FN64]. Counsel to a major publisher advised me that the majority of nonfiction books in publication today present legal problems that did not exist prior to the Salinger opinion. Telephone conversation with Harriette Dorsen, counsel of Bantam-Doubleday-Dell Publishing (Dec. 1989); see also Kaplan, The End of History?, NEWSWEEK, Dec. 25, 1989, at 80 (discussing the hesitancy of publishers to publish books quoting from unpublished sources).

[FN65]. See supra pp. 1108-10.

[FN66]. See infra pp. 1129-30.

[FN67]. Professor Weinreb argues it is “counterintuitive”' that matter intended to be kept private should be more subject to exposure than what was created for others to see. See Weinreb, Fair's Fair, 103 HARV.L.REV. 1137, 1145-46 (1990). Indeed, it is. For this reason, one who wishes to keep private matters secret possesses various legal remedies, including civil and criminal actions for trespass and conversion, as well as an action to enforce the right of privacy.

My observations here in no way suggest that courts should deprive a person seeking privacy of legal remedies designed to protect privacy. My concern is solely with the understanding of the copyright law-a body of law conceived to encourage publication for the public edification. Construing its rules as more solicitous of an intention to conceal than to publish contravenes its purposes. See infra pp. 1129-30.

[FN68]. It was an anomaly of the original drafting that the literal terms of the Statute of Anne provided no prepublication protection. It measured the limited period of protection as fourteen years running not from the time of authorship but from the date of publication. This problematic drafting formulation no doubt resulted from the

fact that the antecedents of the Statute of Anne were acts that conferred monopoly printing franchises upon printers under royal license. See B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3-9 (1967); LATMAN'S THE COPYRIGHT LAW, supra note 16, at 2-4.

Construing the statute in accordance with its literal terms would have left authors unprotected at the time of their greatest exposure to piracy-the time before the act of publication made public the author's entitlement to protection. Thus, an author who showed an unpublished manuscript to a friend, critic, or prospective publisher would have had no protection had the latter pirated the work and published it without authorization. The British courts, however, cured the problem by construing the Statute to confer protection prior to publication. See Pope v. Curl, 26 Eng.Rep. 608, 2 Atk. 342 (1741).

[FN69]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543 (1985).

[FN70]. See id.

[FN71]. See id. at 569.

[FN72]. See id. at 554-55.

[FN73]. See id. at 557.

[FN74]. A recent New Yorker cartoon by David Jacobson imagines James Joyce's to-do list posted on his refrigerator. It reads:

> TO DO:
>
> 1. Call Bank.
>
> 2. Dry Cleaner.
>
> 3. Forge in the smithy of my soul the uncreated conscience of my race.
>
> 4. Call Mom.

NEW YORKER, Sept. 25, 1989, at 100.

[FN75]. Professor Fisher suggests a per se rule barring fair use of material that the original author considered unfinished, on the grounds of injury to the creative process resulting from premature divulgence and absence of benefit. His discussion assumes, however, that the original author's work was created, and is destined, for publication. His reasoning does not apply to a biographer's quotation of an unfinished and abandoned love letter, an extortion demand, or a shopping list. See Fisher, supra note 31, at 1780.

[FN76]. I therefore question the validity of Chief Judge Oakes' interpretation of Salinger in his opinion in New Era: "quotation used merely to demonstrate writing style may not qualify for the fair use defense."' New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 592 (2d Cir.1989) (Oakes, C.J., concurring).

[FN77]. William Patry has expressed readiness, based on these arguments, to amend his previous positions as outlined in THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, cited above in note 3.

> [He] confesses to mechanically reciting the adage "there is no fair use of unpublished works,"' thereby failing to adequately take into account the different types of unpublished works and uses thereof . . . [as well as to] mechanically recit[ing that] "harm is presumed when a prima facie case of infringement

has been made out"' thereby inviting . . . confusion between substantive law and remedy . . . .

Editor's Note, 36 J. COPYRIGHT SOC'Y, note 3 (Apr. 1989).
[FN78]. 17 U.S.C. § 107(3) (1982).

[FN79]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 557 F.Supp. 1067, 1072 (S.D.N.Y.1983)).

[FN80]. See supra text accompanying note 55.

[FN81]. 17 U.S.C. § 107(4) (1982).

[FN82]. Nation, 471 U.S. at 566.

[FN83]. This reasoning assumes that the author created the copyrighted matter with the hope of generating rewards. It has no bearing on materials written for personal reasons, independent of the hope of commanding a market.

[FN84]. An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the first factor, it should be considered an infringement, regardless of the absence of market impairment.

Because the fourth factor focuses on the "potential"' market, see Nation, 471 U.S. at 568 (emphasis in original), perhaps such a case should be considered an impairment, despite the bonanza. The taking of the tune for the movie forecloses its eligibility for use in another film.

[FN85]. It does not necessarily follow that the fair use doctrine diminishes the revenues of copyright holders. If a royalty obligation attached to every secondary use, many would simply forgo use of the primary material in favor of free substitutes.

[FN86]. Cf. Fisher, supra note 31, at 1671-72.

[FN87]. Nation, 471 U.S. at 566.

[FN88]. Although the Salinger opinion acknowledged that the biography "would not displace the market for the letters,"' it counted this factor in the plaintiff's favor because "some impairment of the market seem[ed] likely."' Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir.), cert. denied, 484 U.S. 890 (1987). This potential impairment, furthermore, resulted not from the copying of Salinger's words but from the readers' mistaken belief, based on the biographer's use of phrases such as "he wrote,"' "said Salinger,"' and "Salinger declares,"' that they had read Salinger's words. See id. The New Era opinion also awarded this factor to the plaintiff on a speculative assessment of slight market impairment. See New Era, 873 F.2d at 583. I believe the criterion requires a more substantial injury. See Fisher, supra note 31, at 1671-72.

[FN89]. See Salinger, 650 F.Supp. at 425.

[FN90]. Folsom v. Marsh, 9 F.Cas. 342, 345 (C.C.D.Mass.1841) (No. 4901).

[FN91]. The statute states that "the factors to be considered shall include"' the four factors. See 17 U.S.C. § 107

(1982). "'The terms 'including' and 'such as' are illustrative and not limitative.'" Id. § 101.

[FN92]. See Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130, 146 (S.D.N.Y.1968); W. PATRY, supra note 3, at 121.

[FN93]. See 17 U.S.C. § 504(c)(2) (1982) (providing for additional damages if a willful infringement is found).

[FN94]. See, e.g., Cary v. Kearsley, 170 Eng.Rep. 679, 4 Esp. 168 (1802); Jarrold v. Houlston, 69 Eng.Rep. 1294, 1298, 3 K. & J. 708, 716-17 (1857); see also Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir.1983) ("[F]air use presupposes that the defendant has acted fairly and in good faith . . . ."); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 62 (2d Cir.1980) (noting the relevance of conduct to fair use).

[FN95]. 9 F.Cas. 342 (C.C.D.Mass.1841) (No. 4901).

[FN96]. Id. at 349.

[FN97]. Id. at 345; see also Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir.1962) (stating that a lack of intent to infringe does not entitle a defendant to the protections of the fair use doctrine); Reed v. Holliday, 19 F. 325, 327 (C.C.W.D.Pa.1884) ("Intention . . . is . . . of no moment if infringement otherwise appears."'); Scott v. Stanford, 3 L.R.-Eq. 718, 723 (1867) (holding that the honest intentions of a defendant are immaterial if the resulting work infringes plaintiff's copyright).

[FN98]. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason"'); see also S.REP. NO. 473, 94th Cong., 1st Sess. 62 (1975) ("[S]ince the doctrine is an equitable rule of reason, no . . . applicable definition is possible . . . ."'); H.R.REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976).

[FN99]. See W. PATRY, supra note 3, at 3-5.

[FN100]. See, e.g., Dodsley v. Kinnersley, 27 Eng.Rep. 270 (1761) (seeking an injunction to prevent further publication of a novel abstract).

[FN101]. See, e.g., Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir.1966) (Lumbard, C.J., concurring), cert. denied, 385 U.S. 1009 (1967); New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp. 1493, 1526 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989).

[FN102]. See DaSilva, Droit Moral and the Amoral Copyright, 28 BULL. COPYRIGHT SOC'Y 1, 3-4 (1980). See generally Ginsburg, French Copyright Law: A Comparative Overview, 36 J. COPYRIGHT SOC'Y 269 (1989).

[FN103]. See Berne Convention Implementation Act of 1988, Pub.L. No. 100-568, 102 Stat. 2853 (to be codified in scattered sections of 17 U.S.C.).

[FN104]. See, e.g., Newman, Copyright Law and the Protection of Privacy, 12 COLUM.-VLA J.L. & ARTS 459 (1988).

[FN105]. See Prince Albert v. Strange, 41 Eng.Rep. 1171, 1171-72, 1178-79, 1180, 1 Mac. & G. 25, 25-27, 40,

44-45, 48 (1849), aff'g 64 Eng.Rep. 293, 2 DeG. & Sm. 652 (1849).

[FN106]. See Warren & Brandeis, The Right to Privacy, 4 HARV.L.REV. 193 (1890).

[FN107]. See generally, REPORT OF THE COMMITTEE ON PRIVACY Command Papers 5, No. 5012, at 5-12, 202-07 (1972) (recommending against the creation of a statutory general right of privacy).

[FN108]. The RESTATEMENT (SECOND) OF TORTS § 652A (1977) formulates a cause of action for invasion of privacy, which may arise from unwarranted publication of private facts. Numerous states recognize such a privacy action. Relief is typically available if the publicized matter would be highly offensive to a reasonable person and if no strong public interest exists in the disclosure of the facts. See, e.g., Reed v. Real Detective Publishing Co., 63 Ariz. 294, 304-05, 162 P.2d 133, 138 (1945); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128, 448 A.2d 1317, 1329 (1982); Florida Publishing Co. v. Fletcher, 340 So.2d 914, 919 (Fla.1976) (Sundberg, J., dissenting) (discussing the absence of an invasion of privacy action when publishing matters of legitimate public interest), cert. denied, 431 U.S. 930 (1977); Midwest Glass Co. v. Stanford Dev. Co., 34 Ill.App.3d 130, 133, 339 N.E.2d 274, 277 (1975); Beaumont v. Brown, 401 Mich. 80, 96, 257 N.W.2d 522, 527 (1977) (discussing invasion of privacy based on public disclosure of embarrassing private facts); Deaton v. Delta Democrat Publishing Co., 326 So.2d 471 (Miss.1976) (holding that plaintiff alleged facts sufficient to establish an invasion of privacy claim); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo.1983); Commonwealth v. Hayes, 489 Pa. 419, 432-33, 414 A.2d 318, 324-25, cert. denied, 449 U.S. 992 (1980); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex.1976) (discussing Prosser's categorization of an invasion of privacy action into four distinct torts), cert. denied, 430 U.S. 931 (1977); see also RESTATEMENT (SECOND) OF TORTS § 652E (1977) (discussing "false light"' invasion of privacy). Some commentators have argued for change in the doctrine. See, e.g., Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort, 68 CORNELL L.REV. 291 (1983) (arguing for a shift in focus away from the amount of publicity given to private information).

[FN109]. Cf. E. BARENDT, FREEDOM OF SPEECH 304-07 (1985) (arguing that British law does not protect freedom of speech as fully as American or German law and recommending the adoption of a "free speech clause"' for Britain); Lee, Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights?, 49 U.PITT.L.REV. 777, 811-15 (1988) (discussing the Spycatcher incident as having provoked the adoption of a bill of rights to protect free speech more adequately).

[FN110]. See 17 U.S.C. § 301 (1982).

[FN111]. See id. § 102(b); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

[FN112]. Benjamin Kaplan chided courts for "sometimes forg[etting] that an injunction does not go of course; the interest in dissemination of a work may justify a confinement of the remedy to a money recovery."' B. KAPLAN, supra note 68, at 73. Professor Nimmer, noting judicial authority requiring an injunction, cautions that "where great public injury would be worked by an injunction, the courts might follow cases in other areas of property law, and award damages or a continuing royalty instead of an injunction in such special circumstances."' 3 M. NIMMER, THE COPYRIGHT LAW § 14.06[B], at 14-56 (1989). The remedial standard suggested by the Restatement (Second) of Torts would allow courts to award a plaintiff damages when countervailing interests, including free speech, disfavor an injunction. See RESTATEMENT (SECOND) OF TORTS § 951 comment a (1979); id. § 942 comment e; see also Abrams, First Amendment and Copyright, 35 J. COPYRIGHT SOC'Y 1, 3, 12 (1987) (urging that first amendment values should be viewed as a basis for making copyright

law more responsive to the shared values of the nation); Goldstein, Copyright and the First Amendment, 70 COLUM.L.REV. 983, 1030 (1970) (arguing that one way to accommodate copyright property with the public interest in access is to prefer an award of damages to an injunctive remedy); Wishingrad, First Amendment "Fair Use,"' N.Y.L.J., May 22, 1989, at 2, cols. 3-5 (arguing that courts should select other remedies to avoid infringing the first amendment).

[FN113]. 17 U.S.C. § 502(a) (1982).

[FN114]. An example of such confusion, I confess, may be my own opinion in Salinger. With hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification.

I believe Professor Weinreb's analysis could similarly deprive copyright owners of their lawful entitlements. Professor Weinreb argues that fair use should not be understood as a part of copyright law, designed exclusively to help achieve its objectives, but as a limitation on copyright based also on other social policies including fairness. It is incorrect, he argues, to restrict fair uses to those that make creative use of the copyrighted material. In some cases, concerns for the public interest will demand that the secondary user's presentation be exempt from the copyright owner's rights, notwithstanding unproductive copying. As an example he cites the finding of fair use involving an unauthorized publication of a copy of a spectator's film of President Kennedy's assassination. See Weinreb, supra note 67, at 1143 (citing Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130 (S.D.N.Y.1968)).

Let us explore Professor Weinreb's example. Assume as our plaintiff a gifted news photographer who, through a combination of diligence, preparedness, rapidity, imagination, instinct, skill, sense of composition, and other undefinable artistic gifts, manages again and again to take captivating photographs of cataclysmic or historic occurrences. According to Professor Weinreb's analysis, the more successful he is in the practice of his creative art, the less copyright protection he has. When there is a sufficiently great public interest in seeing his documentary recordings, he loses his right to receive compensation for them. In the public interest, the newspapers, news magazines, and television networks may simply take and republish his photographs without payment. That is fair use.

I think Professor Weinreb's example proves the contrary of his point. He confuses the author's copyright with the questions of remedy. It makes no sense that an "author,"' whose art and livelihood are to make news photographs that the public will desperately need to see, loses his right to compensation for his labors because he succeeds in his endeavors. On the other hand, the public interest disfavors an injunction barring the dissemination of such a work. The conflict is not difficult to reconcile. The taking of the author's photographs for public display is not fair use; the copyright holder may sue for compensation for the unauthorized republication of his work. The public interest may nevertheless override the right he otherwise would have had to bar distribution. He will be denied an injunction, but will recover damages. Both the copyright law and the public interest will thus be vindicated.

[FN115]. See LATMAN'S THE COPYRIGHT LAW, supra note 16, at 278 & n. 105.

[FN116]. Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), cert. denied, 480 U.S. 890 (1987).

[FN117]. See New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir.1989).

[FN118]. New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 663 n. 1 (2d Cir.1989) (Newman, J., dissenting) (advocating rehearing en banc).

[FN119]. See id. at 664. In his new article, Judge Newman emphasizes the importance of the public interest in determining the availability of an injunction. See Newman, supra note 51.

[FN120]. See supra note 77.

[FN121]. The appropriate measure of damages will raise questions because of the vagueness of the statutory standard. 17 U.S.C. § 504(b) grants the copyright owner his "actual damages suffered . . . and any profits of the infringer that are attributable to the infringement."' Id. He is permitted, however, to elect instead "statutory damages"' of $500 to $20,000 per work infringed. If the infringement was "committed willfully,"' this statutory award may be increased to $100,000. It may be reduced to $200 if infringers in certain narrow categories believed on reasonable grounds that fair use had been made. See 17 U.S.C.A. § 504(c) (West Supp.1989). A court has wide discretion in setting the award.

It is altogether proper for courts to distinguish in fixing damages between bad faith appropriation and a good faith miscalculation of the permissible scope of fair use. Unquestionably in some circumstances damages should be set to punish and deter. In other instances, no punitive content would be appropriate; fairness would rather suggest reasonable compensation for the use of literary property-a kind of compulsory license.

Where a court has found infringement but denied an injunction, a defendant may limit the risk of catastrophic liability for further distribution of the infringing work by counterclaiming for a declaratory judgment fixing the measure of damages.

[FN122]. New Era, 873 F.2d at 596 (Oakes, C.J., concurring).

[FN123]. Furthermore, although the change of approach to remedy suggested here may sound substantial, I believe based on my experience adjudicating copyright cases in federal court that it would have no significant statistical effect on the grant of injunctions. Of the 150-200 copyright cases that have come before me (by random distribution) in 12 years on the bench, the vast majority involved unmistakable copying without claim of fair use and resulted in injunctions; additional cases presented disputes over performance of the terms of licensing agreements; a few involved overambitious claims, where the similarity was attributable to coincidence or to the fact that both the plaintiff and defendant were copying the same conventional model; in some, the similarity related to unprotected elements such as facts, styles, or ideas. None of those cases are affected by the suggested approach to injunctions. Fewer than ten have involved colorable claims of fair use. Half of these were in the area of advertising; fair use was rejected and an injunction appropriately granted. Only in three or four cases, or approximately two percent, could differing views conceivably have affected the standard. I can think of only one where my grant or denial of an injunction would turn on whether the traditional or the suggested approach were followed. If my experience is representative, this approach to the injunction remedy would not undermine the incentives that the copyright seeks to foster.

[FN124]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[FN125]. Id. at 545.

[FN126]. U.S. CONST. art. I, § 8, cl. 8.

[FN127]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN128]. Folsom v. Marsh, 9 F.Cas. 342, 344 (C.C.D.Mass.1841) (No. 4901).
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