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CRS Report for Congress

Copyright Law: Fair Use of Unpublished Material

Henry Cohen
Legislative Attorney
American Law Division

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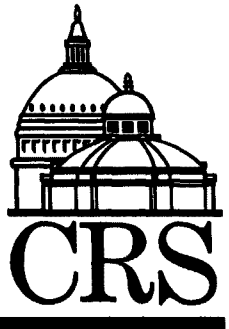

COPYRIGHT LAW: FAIR USE OF UNPUBLISHED MATERIAL

SUMMARY

Under the Copyright Act of 1976, unpublished material is automatically copyrighted from the time of its creation for the life of the author plus fifty years (or, if it had been created before January 1, 1978, from January 1, 1978 until at least December 31, 2002). This applies even to personal letters never intended for publication; merely by writing a letter, one owns a copyright to it.

If a work is copyrighted, then the owner of the copyright has the exclusive right to reproduce the work; only with the owner's authorization may anyone else reproduce it. An exception, however, is that "fair use" of a copyrighted work is permitted "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

Three recent court decisions have made it more difficult to defend quotations from unpublished material as "fair use." In the first, the Supreme Court ruled against The Nation when it quoted from former President Ford's soon-to-be-published memoirs for the purpose of news reporting. In the second, the Second Circuit enjoined publication of a biography of J.D. Salinger because of its quotations from Salinger's personal correspondence. In the third, the Second Circuit held a publisher liable for damages for publishing a biography of L. Ron Hubbard that quoted from unpublished diaries and journals.

These decisions have upset some authors and scholars, who are afraid that the decisions will make it difficult for them to use traditional methods of research. A bill has been introduced in the House and the Senate to clarify that the fair use defense applies to both unpublished and published works.

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COPYRIGHT LAW: FAIR USE OF UNPUBLISHED MATERIAL

I. COPYRIGHT LAW

A copyright, in a definition adopted by the Supreme Court, is "[t]he exclusive privilege, secured according to certain legal forms, of printing or otherwise multiplying, publishing and vending copies of certain literary or artistic productions."[1] The United States Constitution gives Congress the power to grant this exclusive privilege,[2] and the statute by which Congress currently exercises this power is the Copyright Act of 1976,[3] as amended by the Berne Convention Implementation Act of 1988,[4] and other statutes.[5]

The Constitution's grant of copyright power to Congress "is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[6] "The monopoly created by copyright thus rewards the individual author in order to benefit the public."[7] "This principle applies equally to works of fiction and nonfiction."[8]

"Prior to the enactment of the Copyright Act of 1976, there existed a dual system of copyright protection. First, unpublished works were protected, from the time of creation, by state law, common [*i.e.*, court-made] or statutory.

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[1] American Tobacco Co. v. Werckmeister, 207 U.S. 284, 290-291 (1907).

[2] Article I, section 8, clause 8 of the Constitution grants to Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[3] 17 U.S.C. §§ 101 *et seq.*

[4] Pub. L. 100-568.

[5] *E.g.*, the Computer Software Copyright Act of 1980, Pub. L. 96-517, and the Record Rental Amendment of 1984, Pub. L. 98-450.

[6] Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546 (1985).

[7] *Id.*

[8] *Id.*

Then, upon publication of the work, state protection ceased and only federal protection, that is, statutory copyright, was available thereafter."[9]

Under this dual system of copyright protection, prior to publication, "common-law copyright could endure in perpetuity."[10] Upon publication, "the duration of a copyright under prior [federal] law was for a period of 28 years from the date of first publication with a right of renewal for a further term of 28 years."[11] Certain unpublished works could also be copyrighted under the prior federal law; "[o]wners opting to obtain statutory copyright for eligible unpublished works were required to comply with the deposit and registration requirements of the Act of 1909 and, by so electing, abandoned their common-law rights."[12]

The Copyright Act of 1976 abolished the dual state and federal system. All works created on or after January 1, 1978, whether published or not, are protected exclusively under federal law. Copyright in such a work "subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death."[13] Works need not be deposited or registered to be copyrighted, as "[c]opyright automatically inheres in a work the moment it is 'created,' which is to say 'when it is fixed in a copy or phonorecord for the first time.'"[14]

Under the Copyright Act of 1976, a work created before January 1, 1978, which on that date did not have federal statutory copyright protection, either through being published or deposited and registered, automatically gained copyright protection for the life of the author plus 50 years. "In no case, however, shall the term of copyright expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027."[15] The purpose of the 2002 date was to protect works whose authors had been dead for more than 50 years on January 1, 1978; the purpose of the 2027 date was to encourage publication.[16]

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[9] 18 Am Jur 2d, Copyright and Literary Property, § 2.

[10] *Id.* at § 3.

[11] *Id.* at § 4.

[12] *Id.* at § 3.

[13] 17 U.S.C. § 302(a) (the ellipsis refers to limited exceptions).

[14] 2 NIMMER ON COPYRIGHT § 7.16[A][1] (1989), *citing* 17 U.S.C. § 101 (definition of "created").

[15] 17 U.S.C. § 303.

[16] *See* 2 NIMMER ON COPYRIGHT § 9.01[B] (1989).

When the Copyright Act of 1976 took effect, a work that had federal statutory copyright protection before January 1, 1978 remained subject to the old rule of 28 years from the date of first publication. However, if it was in its first 28-year term on January 1, 1978, then upon expiration of its first term it may be renewed for 47 years, instead of for only 28 years as under the old law.[17] If a work was in its renewal term on January 1, 1978, then its renewal term was extended by 19 years.[18] Thus, all works that had obtained federal statutory copyright protection before January 1, 1978, and that had not entered the public domain prior to that date, could be copyrighted for a total of 75 years.[19]

II. FAIR USE OF UNPUBLISHED MATERIAL

A. Introduction

Under the Copyright Act of 1976, unpublished material is automatically copyrighted from the time of its creation for the life of the author plus fifty years (or, if it had been created before January 1, 1978, from January 1, 1978 until at least December 31, 2002). This applies even to personal letters never intended for publication; merely by writing a letter, one owns a copyright to it. However, there are two important limitations to this copyright.

First, although "[t]he copyright owner owns the literary property rights, including the right to complain of infringing copy, . . . the recipient of the letter retains ownership of 'the tangible physical property of the letter itself.' . . . Having ownership of the physical document, the recipient (or his representative) is entitled to deposit it with a library and contract for the terms of access to it."[20]

Second (and this applies to all work, published or unpublished), "the copyright owner secures protection only for the expressive content of the work, not the ideas or facts contained therein, . . . a distinction fundamental to copyright law. . . ."[21] That is, words or pictures are protected by copyright, but if the ideas or facts contained therein are expressed in different words or

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[17] 17 U.S.C. § 304(a).

[18] 17 U.S.C. § 304(b).

[19] *See* 2 NIMMER ON COPYRIGHT § 9.01[C] (1989).

[20] Salinger v. Random House, Inc., 811 F.2d 90, 94-95 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

[21] *Id.* at 95; *accord*, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 547 (1985). The Copyright Act of 1976 provides that copyright protection does not extend to any "idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. § 102(b).

pictures (other than a close paraphrase[22]), there will be no copyright infringement.

If a work is copyrighted, then the owner of the copyright has the exclusive right to reproduce the work; only with the owner's authorization may anyone else reproduce it.[23] An exception, however, is that "fair use" of a copyrighted work is permitted "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[24]

How much use is "fair use"? Whether quoting from a copyrighted work constitutes "fair use" generally turns on whether "the reasonable copyright owner [would] have consented to the use."[25] "Perhaps because the fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption, . . . it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use.'"[26] However, "[i]n a given case, factors such as implied consent through *de facto* publication on performance or dissemination of a work may tip the balance of equities in favor of prepublication use."[27]

Copyright protection is provided for unpublished works whether or not publication is ultimately intended. If it is not ultimately intended, as in the case of personal letters and other confidential writings, copyright protection may be "enlisted in the service of personal privacy."[28] If publication is ultimately intended, there is an "obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation. . . ."[29] Furthermore, "[t]he author's control of first public distribution implicates not only his personal interest in creative control but

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[22] *Id.* at 97.

[23] 17 U.S.C. § 106.

[24] 17 U.S.C. § 107.

[25] Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 550 (1985). The particular copyright owner's lack of consent is irrelevant; thus, "a restrictive legend on a work prohibiting copying in whole or in part gives no greater protection than the copyright notice standing alone." 3 NIMMER ON COPYRIGHT § 13.05 (1989).

[26] 471 U.S. at 550-551.

[27] *Id.* at 551.

[28] *Id.* at 554.

[29] *Id.* at 555.

his property interest in exploitation of prepublication rights," such as selling to a magazine the right to serialize or publish excerpts from a book.[30]

B. Harper & Row, Publishers, Inc. v. Nation Enterprises

The property interest in exploiting prepublication rights was at stake in this case decided by the Supreme Court in 1985. Former President Gerald Ford had contracted with Harper & Row to publish his memoirs, which contained previously unpublished material concerning Watergate. Harper & Row sold Time magazine the right to publish an excerpt from the memoirs prior to their full publication. However, The Nation magazine got a copy of the manuscript and, prior to when Time's excerpt was scheduled to appear, published a 2,250 word article "composed of quotes, paraphrases, and facts drawn exclusively from the manuscript." As a result, Time canceled its piece and refused to pay Harper & Row, and Harper & Row sued The Nation.

Of the 2,250 words in The Nation's article, approximately 300, scattered throughout the article, were direct quotations and therefore copyrighted. The rest, being facts, were not copyrightable. The issue before the Supreme Court was whether use of the approximately 300 words constituted a permissible "fair use" under the Copyright Act of 1976. Section 107 of the statute, 17 U.S.C. § 107, provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (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.

"[N]ormally these four factors . . . govern the analysis,"[31] but they are "non-exclusive."[32] The fair use doctrine "permits courts to avoid rigid

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[30] *Id.*

[31] Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980).

[32] New Era Publications International, ApS v. Henry Holt and Company, Inc., 873 F.2d 576, 588-589 (2d Cir. 1989) (Oakes, C.J. concurring), *rehearing en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990). Section 107 states that "the four factors to be considered shall include," and § 101 states: "The terms 'including' and 'such as' are illustrative

application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[33]

Applying the four statutory factors, the Supreme Court concluded that The Nation's use had not been a fair use. As for the first factor, the purpose and character of the use, the Court found that The Nation's "general purpose" was news reporting, which is one of the examples enumerated in § 107 to "give some idea of the sort of activities the courts might regard as fair use under the circumstances."[34] However, "The Nation's stated purpose of scooping the forthcoming hardcover and Time abstracts" indicated an additional purpose "of supplanting the copyright holder's commercially valuable right of first publication."[35] "Also relevant to the 'character' of the use is the propriety of the defendant's conduct.' . . . 'Fair use presupposes "good faith" and "fair dealing."' . . . The trial court found that The Nation knowingly exploited a purloined manuscript. . . . Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification."[36]

As for the second factor, the nature of the copyrighted work, the Court acknowledged that, although "[s]ome of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts . . . , The Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression."[37] Furthermore, "[t]he fact that a work is unpublished is a critical element in its 'nature.' . . . While even substantial quotations might qualify as fair use in a review of a published work . . . , the author's right to control the first public appearance of his expression weighs against such use of the work before its release."[38]

As for the third factor, the amount and substantiality of the portion used, the Court found that the words actually quoted were an insubstantial portion of the memoirs (approximately 300 out of 200,000), but that they were "essentially the heart of the book" and played a "key role in the

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and not limitative." For a discussion of other factors that may be considered, beyond the four listed in the statute, *see* Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1125-1130 (1990) (the author was the trial judge in the Salinger and Hubbard cases, discussed *infra*); *see also*, 3 NIMMER ON COPYRIGHT § 13.05[A] (1989).

[33] Harper & Row, 471 U.S. at 550 n.3.

[34] Id. at 561.

[35] *Id.* at 562.

[36] *Id.* at 562-563.

[37] *Id.* at 563.

[38] *Id.* at 564.

infringing work."[39] Therefore, this factor also supported the conclusion that The Nation had not engaged in "fair use."

Finally, the Court noted that the last factor, the effect on the market, "is undoubtedly the single most important element of fair use."[40] This is because "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."[41] In this case, there was "an actual effect on the market. Time's cancellation of its projected serialization and its refusal to pay the $12,500 were the direct effect of the infringement."[42] Thus, its application of all four factors led the Court to hold The Nation liable for copyright infringement.

C. Salinger v. Random House, Inc.

In this case decided by a federal court of appeals in 1987 (the Supreme Court declined to hear it), novelist J.D. Salinger sued author Ian Hamilton to prevent Hamilton from using in a biography of Salinger quotations and close paraphrases from Salinger's unpublished letters. Hamilton, who had seen the letters in libraries to which they had been donated, argued that he had made "fair use" of them. The court of appeals disagreed and issued a preliminary injunction against publication of the biography.

The court of appeals, "[f]ollowing the Supreme Court's approach in *Harper & Row*, . . . place[d] special emphasis on the unpublished nature of Salinger's letters and proceed[ed] to consider each of the four statutory fair use factors."[43] The court found that the first factor, the purpose of the use of the copyrighted material, weighed in the defendants' favor, as "[t]he book may be considered 'criticism,' 'scholarship,' and 'research'" under § 107.[44] In contrast with *Harper & Row*, "[t]he proposed use is not an attempt to rush to the market just ahead of the copyright holder's imminent publication."[45] However, the court concluded that, while "the first fair use factor weighs in

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[39] *Id.* at 565-566.

[40] *Id.* at 566.

[41] *Id.* at 566-567.

[42] *Id.* at 567.

[43] 811 F.2d 90, 96 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

[44] *Id.*

[45] *Id.*

Hamilton's favor," it did not believe "that the purpose of his use entitles him to any special consideration."[46] This was because the biographer could have accomplished his purpose by copying only the factual content of letters (which are not copyrightable), rather than the actual words. The court acknowledged that this might entail "sacrificing accuracy and vividness," but "the biographer has no inherent right to copy the 'accuracy' or the 'vividness' of the letter writer's expression. Indeed 'vividness of description' is precisely an attribute of the author's expression that he is entitled to protect."[47]

As for the second factor, the nature of the copyrighted work, the court found that, "[s]ince the copyrighted letters are unpublished, the second factor weighs heavily in favor of Salinger."[48]

As for the third factor, the amount and substantiality of the portion used, the court found that "[t]he copied passages, if not the 'heart of the book,' [as in] *Harper & Row* . . . , are at least an important ingredient of the book. . . . To a large extent, they make the book worth reading. The letters are quoted or paraphrased on approximately 40 percent of the book's 192 pages."[49]

As for the fourth factor, the effect on the market, the court found that "the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."[50] There is still a potential market for them, and Salinger is entitled to protect the opportunity to sell the letters, should he change his mind. Applying the fourth factor, the court found that it "weighs slightly in Salinger's favor," because "the book would not displace the market for the letters . . . [y]et some impairment of the market seems likely."[51]

The court ruled for Salinger, since only the first factor favored Hamilton. It concluded:

> To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not . . . to interfere in any significant way with the process of

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[46] *Id.* at 97.

[47] *Id.* at 96.

[48] *Id.* at 97.

[49] *Id.* at 98-99.

[50] *Id.* at 99.

[51] *Id.* at 99.

> enhancing public knowledge of history or contemporary events. The facts may be reported.[52]

D. New Era Publications International, ApS v. Henry Holt and Company, Inc.

In this 1989 case, the court of appeals that decided *Salinger* again found that a biographer had not engaged in the "fair use" of unpublished material written by the subject of the biography, and the Supreme Court again declined to hear the case. The biography, written by Russell Miller, who was not a party to the lawsuit, was of the founder of the Church of Scientology, and was entitled *Bare-Faced Messiah: The True Story of L. Ron Hubbard.* Hubbard was dead at the time of the lawsuit, which was brought by a Danish corporation that held by license certain copyrights bequeathed by Hubbard to the Church of Scientology.[53]

The biography contained "liberal quotations" from Hubbard's work, "particularly from his unpublished early diaries and journals."[54] The biographer generally used these quotations to show that Hubbard's published accounts of his life were "exaggerated and untrue."[55] The court, in applying the four statutory fair use factors, did not consider this fact to entitle the publisher to special consideration. It saw, for example, no "significant distinction in purpose between the use of an author's words to display the distinctiveness of his writing style and the use of an author's words to make a point about his character. . . ."[56]

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[52] *Id.* at 100.

[53] The copyright holder also sued the publisher of another biography of Hubbard, entitled *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed*, by Jonathan Caven-Atack. This suit charged copyright infringement of *published* works, and therefore is not discussed in this report. A federal judge granted an injunction against publication of the book in its present form, rejecting the defendant's "fair use" defense. New Era Publications International, ApS v. Carol Publishing Group, 729 F.Supp. 992 (S.D.N.Y. 1990). The Second Circuit overturned the injunction, finding that the biography used only a small portion of Hubbard's previously published works and would have no adverse impact on the market for such works. No. 90-7181 (2d Cir. May 24, 1990); *see* N.Y. Law Journal (May 25, 1990).

[54] 873 F.2d 576, 579 (2d Cir. 1989), *rehearing en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990).

[55] *Id.*

[56] *Id.* Judge Newman, dissenting (with three other judges) from the Second Circuit's denial of rehearing en banc, thought this was a significant distinction, and quoted the Supreme Court's statement in Harper & Row that some brief quotes might be "necessary adequately to convey the facts." 884 F.2d at 663, quoting 471 U.S. at 557 (quoted at page 6 of this report).

The court of appeals found that the first fair use factor, the purpose of the use, weighed in favor of the publisher, but that the other three weighed in favor of the copyright holder. As for the first factor, the court found that, "[a]s long as a book can be classified as a work of criticism, scholarship or research, as can the book here, the factor cuts in favor of the book's publisher. . . ."[57]

As for the second factor, the nature of the copyrighted work, the court noted that "[w]here use is made of materials of an 'unpublished nature,' the second factor has yet to be applied in favor of an infringer, and we do not do so here."[58] As for the third factor, the court found a "substantial amount" of use of unpublished material, and therefore weighed this factor against the publisher.[59] As for the fourth factor, the court found that, since the publisher planned to "commission an authorized biography of Hubbard and that all Hubbard's writings, published and unpublished, would be made available for that purpose, it is difficult to conclude . . . that the book would have no effect on the market for New Era's forthcoming book."[60] Therefore, the court found that the fourth fair use factor weighed in the copyright owner's favor.

Based on its application of the four fair use factors, the court concluded that the copyright holder was entitled to damages. The copyright holder also sought an injunction against publication of the book, and the court of appeals noted that "the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use."[61]

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[57] *Id.* at 583.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 584, quoting Salinger at 96. When the Second Circuit denied a rehearing en banc, Judge Miner, the author of the panel decision in the Hubbard case, wrote a concurring opinion in which he said that the panel majority (he and Judge Altimari) proposed to amend its opinion to say that "*under ordinary circumstances* the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use [italicized words added by Judge Minor to the panel opinion]." 884 F.2d at 662. This change was meant to clarify "that injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate." *Id.* at 661. Judge Newman, the author of the Second Circuit's decision in Salinger, wrote a dissenting opinion to the denial of a rehearing en banc in the Hubbard case. He noted that when he had written in Salinger that the copying of "more than minimal amounts" of unpublished expressive material called for an injunction, he "was concerned with the issue of infringement, not the choice of remedy." *Id.* at 663 n.1. "It would have been preferable," Judge Newman added, to have said, rather than that copying more than minimal amounts of unpublished expressive material calls for an injunction, that one who copies more than such amounts "deserves to be found liable for infringement." *Id.* Since Judge Newman and Judge Minor were each joined by three other judges in their opinions on the petition for rehearing en banc, a total of eight judges expressed the view that an injunction is not automatic upon the copying of more than minimal amounts of unpublished expressive material.

However, the court refused to order an injunction here because the copyright holder had waited too long to sue. Although the copyright holder had been aware since 1986 that the book would be published in the United States, it had waited to bring legal action until 1988, when thousands of copies had already been printed and shipped, and it was "not economically feasible to reprint the book after deletion of the infringing material."[62]

Chief Judge Oakes of the Court of Appeals for the Second Circuit concurred with the majority in the Hubbard case because he agreed with the denial of an injunction. However, he took issue with the majority's application of the "fair use" standards, and believed that the case differed from *Salinger* in significant ways. He wrote:

> *Salinger* is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here by virtue of Hubbard's death. *Salinger*'s language, as here applied, confines the concept of fair use and prevents necessary flexibility in fashioning equitable remedies in copyright cases. I thought that *Salinger* might by being taken literally in another factual context come back to haunt us. This case realizes that concern.[63]

Chief Judge Oakes commented that *Salinger*'s language (quoted at page 8 of this report) that "the biographer has no inherent right to copy the 'accuracy' or the 'vividness' of the letter writer's expression" should not apply to --

> the case where the biographer or critic is using the protected expression as a fact to prove a character trait that is at odds with the public image that the subject or the subject's supporters have attempted to project. . . . [W]ords that are facts calling for comment are distinguishable from words that simply enliven text.[64]

Chief Judge Oakes also would have applied the fourth fair use factor differently. He believed that the book's use of unpublished material would not affect the market for Hubbard's writings, as it was clear that the biography was a "hostile, critical biography using fragmentary extracts to demonstrate critical conclusions. . . ."[65] Furthermore, "[t]he majority errs when it says that 'it is difficult to conclude . . . that the book published by

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[62] *Id.* at 584.

[63] *Id.* at 585 (Oakes, C.J., concurring).

[64] *Id.* at 592.

[65] *Id.* at 594.

Holt would have no effect on the market for New Era's forthcoming book.' . . . In fact, it is the effect of *Messiah*'s use of copyrighted material, not the effect of the book as a whole, that must be assessed here."[66]

Chief Judge Oakes added: "Responsible biographers and historians constantly use primary sources, letters, diaries, and memoranda. Indeed, it would be *irresponsible* to ignore such sources of information."[67]

E. Overview of the Three Cases

Although the court decisions involving The Nation, Salinger, and Hubbard all ruled that quotations from unpublished works constituted copyright infringement, the bases for the decisions should be distinguished. In *Harper & Row*, although the Supreme Court found that The Nation's general purpose was news reporting, which is one type of fair use, the Court emphasized that The Nation had exploited a purloined manuscript in order to "scoop" a work that was soon to be published. It thereby supplanted the copyright holder's right of first publication, which had direct financial consequences for the copyright holder. This effect on the market was the most important factor in finding that The Nation could not claim fair use.

By contrast, in the cases involving Salinger and Hubbard, the biographers had gained access to unpublished material through legitimate channels and had not attempted to "scoop" the copyright holder. In *Salinger*, in fact, the copyright holder had no intention of publishing his personal letters. In the Hubbard case, the copyright holder intended to allow the unpublished material to be quoted in an authorized biography, but had not yet commissioned such a biography. In both *Salinger* and the Hubbard case, the biographers had used the unpublished material in order to criticize the subjects of their books, and "criticism" is one type of fair use under § 107. However, in both cases, the Second Circuit found that the biographers could have criticized their subjects without a substantial number of direct quotations or close paraphrases.

A difference between the *Salinger* and Hubbard cases, noted by the concurring opinion in the Hubbard case, was that Salinger was alive and Hubbard was dead at the time their unpublished works were used (and at present), which meant that Salinger but not Hubbard had privacy interests in preventing publication of his unpublished material. The Second Circuit, however, ruled in favor of both.[68]

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[66] *Id.*

[67] *Id.* at 596 (emphasis in original).

[68] For an exchange on the significance of privacy to fair use, *see* Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1129-30 (1990), and Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L.Rev. 1137, 1145-1146 (1990).

F. Reactions to the Three Cases

After the Supreme Court, on February 20, 1990, declined to hear the Hubbard case, the Washington Post noted that, although the Hubbard decision is binding only in the Second Circuit (which includes Connecticut, New York, and Vermont), because New York is "the center of the publishing industry," the Hubbard case "essentially represents the last word on the state of copyright law."[69] The Post reported "alarm among publishers, historians and non-fiction writers." It quoted one writer as describing the decision as "a severe blow to history," because of the difficulty of contacting every person quoted, including representatives of those no longer living.

A publisher said that the "virtual prohibition on the quotation or paraphrase of [unpublished] material has now made it impossible for a scholar to practice his craft as it has traditionally been practiced without running a high risk of incurring an injunction and liability for money damages."[70] A lawyer representing a writers' group said that, because of the decision, "[p]ublishers must engage in the most extreme self-censorship to avoid any copyright pitfalls in using unpublished material."[71]

The Post also quoted one biographer who disagreed. Edmund Morris said:

> I'll probably be assassinated by one of my biographical brethren for this but I have the rather heretical belief that a man's words are his property, even when he's dead. In a sense, I'm on the side of the original writer.[72]

Morris added, however, that the Hubbard case "is going to make life very hard for biographers."[73]

In an article in the Wall Street Journal, Arthur Schlesinger, Jr., wrote that the Hubbard decision

> cast[s] judges in the odd role of telling authors how they should write history and biography. . . . [W]hen responsible scholars gain legitimate access to unpublished

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[69] Washington Post (Feb. 21, 1990).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

> materials, copyright should not be permitted to deny them use of quotations that help to establish historical points.[74]

Another article in the Wall Street Journal reported that "publishers and many letter writers charge that the court's rulings have effectively transformed the copyright law into a more powerful weapon than ever for public figures and their estates desiring to control or even thwart books they'd rather not see written. In many cases, the documents in question are on open and sometimes unrestricted deposit at university libraries and archives."[75]

The Nation editorialized:

> Since the [Hubbard] decision involved an interpretation of copyright law, Congress can correct the error by amending the law. Indeed, representatives of various publishing and authors' groups, including the Association of American Publishers and PEN American Center, have been working together to prepare a joint proposal to Congress to overturn the Hubbard decision. Any legislative change must take account of four separate problems produced by the *Nation*, Salinger and Hubbard line of cases:
>
> § New legislation should eliminate the distinction between published and unpublished works as far as quotation is concerned. . . .
>
> § The copyright law must be amended to eliminate the virtually automatic issuance of an injunction if copyright infringement is found. . . .
>
> § Congress should give better guidance on the amount of quotation allowed under the fair use doctrine for both published and unpublished works. . . .
>
> § The definition of "fair use" should emphasize that it is the author's function, not the courts', to determine the appropriate use of quotes, as long as the use is noncommercial.[76]

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[74] Wall Street Journal (Oct. 26, 1989).

[75] Wall Street Journal (Apr. 10, 1990).

[76] The Nation (Mar. 19, 1990) 368, 369-385.

G. Pending Legislation

A bill pending in the 101st Congress would amend § 107 of the Copyright Act "to clarify that such section applies to both published and unpublished copyrighted works." The bill was introduced by Representative Kastenmeier as H.R. 4263 and by Senator Simon as S. 2370. If the bill is enacted, then § 107 would read as follows, with the words in italics added by the bill:

> [T]he fair use of a copyrighted work, *whether published or unpublished*, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

It is already clear that § 107 applies to both published and unpublished works, although the court cases discussed above indicate that the fact that a work is unpublished weighs heavily against its quotation being "fair use." As quoted on page 10 of this report, the Second Circuit panel noted in the Hubbard case that, "[w]here use is made of materials of an 'unpublished nature,' the second factor [the nature of the copyrighted work] has yet to be applied in favor of an infringer." Nevertheless, since § 107 already applies to both published and unpublished works, the bill, if interpreted literally, might have no effect.

However, it is "a fundamental principle of statutory construction that 'effect must be given, if possible, to every word, clause and sentence of statute' . . . so that no part will be inoperative or superfluous, void or insignificant."[77] Clearly, then, the bill as a whole must not be construed to have no effect. The question is what effect it would have.

Representative Kastenmeier, in introducing H.R. 4263, said that the bill "would clarify that section 107 applies *equally* to unpublished as well as published works [emphasis added]."[78] Under this view, the fact that a work was unpublished would not provide it with greater protection under the fair use doctrine.

Senator Simon, introducing the identical bill, understood it differently. He said that S. 2370 would "direct the courts to apply the full fair use analysis to all copyrighted works, rather than peremptorily dismissing any and

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[77] In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980).

[78] 136 Cong. Rec. H 806 (daily ed. Mar. 14, 1990). Representative Kastenmeier added: "It does not mean that all uses of unpublished works will be considered fair use, just as not all uses of published works are now considered fair use." *Id.*

all citations to unpublished works as infringing."[79] He added that the bill is *not* "intended to render the unpublished nature of a work irrelevant to fair use analysis under the four statutory factors. Courts would still consider the unpublished nature of a work in assessing the nature of the work, or in determining the effect of the use upon the potential market for the work. . . . All the bill says is that the unpublished nature of a work alone should not determine whether a particular use of it is fair."[80]

Even *if* copying unpublished works as a matter of fact always results in a finding of copyright infringement, the Copyright Act does not provide that the unpublished nature of a work alone determines whether a particular use of it is fair. Senator Simon's understanding of the bill presumably would require that courts give *less* weight to the fact that a work is unpublished, but it is not clear under his view how much weight courts would be required to give to such fact. Representative Kastenmeier's understanding of the identical bill appears clear: courts could give *no* weight to the fact that a work is unpublished; published and unpublished works would be treated alike. Further clarification of intent might usefully be considered.



Henry Cohen
Legislative Attorney
American Law Division

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[79] 136 Cong. Rec. S 3549 (daily ed. Mar. 29, 1990).

[80] *Id.*