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# COPYRIGHT INFRINGEMENT: INFRINGER'S BAD FAITH CONDUCT AND COMMERCIAL GAIN NEGATES FAIR USE

On November 2, 1976, Jimmy Carter was elected President of the United States.<sup>1</sup> The election signaled an end to years of upheaval caused by the Watergate crisis and the subsequent Nixon pardon. Harper & Row Publishers knew that former President Gerald Ford had a story to tell and contracted with him to write his memoirs about those tumultuous years. Before Harper & Row published Mr. Ford's memoirs, *The Nation*, a political commentary magazine, used direct quotes and paraphrases from the unpublished manuscript in one of its own articles. In *Harper & Row Publishers v. Nation Enterprises*,<sup>2</sup> ("Harper & Row") the United States Supreme Court held that the unauthorized use of quotes from the unpublished memoirs of a public figure which infringed the copyright holder's right to first publication was not a "fair use" under section 107 of the Copyright Act of 1976 ("Act").<sup>3</sup>

## I. STATEMENT OF THE CASE

In February 1977, after President Ford left office, Harper & Row and the Reader's Digest Association (hereinafter collectively referred to

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1. Los Angeles Times, Nov. 3, 1976, at 1, col. 6.

2. 471 U.S. 539, 105 S. Ct. 2218 (1985), *rev'g* 723 F.2d 195 (2d Cir. 1983), *rev'g* 557 F. Supp. 1067 (S.D.N.Y. 1983). Justice O'Connor delivered the opinion of the Court. Justice Brennan wrote the dissent, joined by Justices White and Marshall.

3. The 1976 Act provides that: "[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work . . . ."

17 U.S.C. § 106 (1982).

Further, the 1976 Act codified the doctrine of fair use:

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 education 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).

as "Harper & Row") agreed to publish Mr. Ford's memoirs "concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon, and 'Mr. Ford's reflection on this period of history, and the morality and personalities involved.'" <sup>4</sup> The manuscript was to include matters which were not previously published. <sup>5</sup> Furthermore, the contract provided that the memoirs would be published in book form and that Harper & Row would have the exclusive rights to prepublication excerpts. <sup>6</sup>

Two years after entering into the contract, Mr. Ford's memoirs were nearly completed. <sup>7</sup> Harper & Row entered into an agreement with *Time*, a weekly magazine for Harper & Row's prepublication excerpt rights. *Time's* prepublication rights only extended to the use of 7,500 words which concerned the Nixon pardon from the unpublished manuscript. *Time* paid \$12,500 in advance and contingently agreed to pay an additional \$12,500 upon *Time's* publication of the excerpts. <sup>8</sup>

Under the contract, *Time* retained the right to renegotiate the second payment if the excerpts were published elsewhere prior to the *Time's* release. <sup>9</sup> As a result, Harper & Row instituted measures to protect the unpublished manuscript from unauthorized release. However, two to three weeks before the *Time* article was to be released, Victor Navasky, editor of *The Nation*, obtained an unauthorized copy of Mr. Ford's manuscript. <sup>10</sup>

Mr. Navasky was fully aware that the manuscript was unauthorized since he knew that it must be promptly returned. Immediately, he wrote an article entitled "The Ford Memoirs: Behind The Nixon Pardon," which appeared in *The Nation* on April 3, 1979. Mr. Navasky's article was comprised of quotes, paraphrases and facts from the unpublished Ford manuscript. He did no additional research nor did he make any additional commentary because he wanted *The Nation* article to appear prior to Harper & Row's publication of the book. As a result, *Time* can-

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4. *Harper & Row*, 105 S. Ct. at 2221. The unpublished manuscript was entitled "A Time to Heal: The Autobiography of Gerald R. Ford." *Id.* [Official reporter was unavailable at the time of publication; therefore, all cites to *Harper & Row* are to unofficial reporter.]

5. *Id.*

6. *Id.* at 2221-22. Exclusive rights of prepublication excerpts are also known as first serial rights. *Id.* at 2222.

7. Trevor Armbrister, a professional writer and senior editor for *Reader's Digest*, aided Mr. Ford in writing his memoirs. *Harper & Row v. Nation Enters.*, 557 F. Supp. 1067, 1069 (S.D.N.Y. 1983) ["*Harper & Row II*"].

8. *Harper & Row*, 105 S. Ct. at 2222. The Ford memoirs also included references to his childhood, career in Congress, family, and insights concerning various public figures Harper & Row v. *Nation Enters.*, 723 F.2d 195, 198 (2d Cir. 1983) ["*Harper & Row III*"].

9. *Harper & Row*, 105 S. Ct. at 2222.

10. *Id.* The identity of Mr. Navasky's source is unknown. *Id.*

celled its article scheduled to be published in the April 23, 1979 issue and refused to make the second payment to Harper & Row.<sup>11</sup>

Harper & Row subsequently filed suit in the United States District Court of the Southern District of New York against Nation Enterprises.<sup>12</sup> The suit alleged copyright infringement and state law violations for conversion and tortious interference with contract.

### A. *The District Court Opinion*

The United States District Court for the Southern District of New York held that *The Nation* infringed Harper & Row's copyright and that the use was not protected by the doctrine of fair use. Before trial, the district court determined that Harper & Row's state law claims were preempted by the Act and dismissed the claims for conversion and tortious interference with contract.

Initially, the district court granted Nation Enterprises' ("Nation") motion to dismiss Harper & Row's pendent state law claims of conversion and tortious interference with contract.<sup>13</sup> The court interpreted that the legislative intent of the Copyright Act, specifically section 301, " 'is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works within the scope of the Federal copyright law.' "<sup>14</sup>

The district court applied a two-part test for determining whether preemption of state law exists. First, the district court considered whether the nature of the manuscript in which rights were claimed came

11. *Id.*

12. *Harper & Row II*, 557 F. Supp. at 1067. This is the reported decision concerning the copyright infringement claim.

13. *Harper & Row Publishers v. Nation Enters.*, 501 F. Supp. 848 (S.D.N.Y. 1980) [*"Harper & Row I"*]. This is the reported decision concerning dismissal of state law claims.

14. *Id.* at 850, (citing H.R. No. 1476, 94th Cong., 2d Sess. 130 (1976)).

Section 301 of the Copyright Act provides the statutory basis for preemption:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to— . . .

3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 301 (1982).

within the subject matter of the Act defined in sections 102 and 103.<sup>15</sup> Second, the court analyzed whether the state law claims, which were asserted, were the equivalent of any exclusive right protected by the Act under section 106.<sup>16</sup>

Copyright protection under the Act subsists for works of authorship in a fixed tangible medium of expression.<sup>17</sup> The court concluded that the unpublished manuscript came within the protection of the Act.<sup>18</sup> Moreover, it was unnecessary to prove for preemption purposes that the work had "sufficient originality to qualify for copyright protection under Section 102."<sup>19</sup>

Next, the district court considered whether Harper & Row's state law claims were equivalent to the exclusive rights of copyright holders specified in section 106 of the Act. In order for the state law claims to stand, they must be qualitatively different from the enumerated rights. First, the district court determined that the conversion claim was equivalent to Harper & Row's exclusive right to reproduce and distribute a copyrighted work under the Act.<sup>20</sup> Second, the court found that the tortious interference with contract claim was analogous to Harper & Row's "exclusive right to 'prepare derivative works based on the copyrighted work' . . . and 'to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership.'"<sup>21</sup> Consequently, the court held that the state law claims were preempted by the Act.

Nation asserted that its use of the unpublished manuscript was not an infringement of Harper & Row's prepublication rights. Nation presented three arguments to support its use of Ford's unpublished

15. See *infra* note 17. The Act provides that:

(a) The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103 (1982).

16. *Harper & Row I*, 501 F. Supp. at 850.

17. The 1976 Act provides that "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . ." 17 U.S.C. § 102 (1982).

18. *Harper & Row I*, 501 F. Supp. at 850-51.

19. *Id.* at 851.

20. *Id.* at 852.

21. *Id.* at 853, (citing 17 U.S.C. § 106 (1982)).

memoirs: (1) the use of the memoirs by Nation was protected by the First Amendment;<sup>22</sup> (2) the use of the unpublished manuscript by Nation was a fair use under section 107 of the Act;<sup>23</sup> and, (3) the Ford manuscript was not protected by the Act.<sup>24</sup>

The district court summarily dismissed Nation's assertion that its use was protected by the First Amendment. The court determined that the First Amendment, in this instance, did not provide Nation with any greater protection than the fair use doctrine. As a result, the district court limited its analysis to the applicability of the fair use doctrine.<sup>25</sup>

Nation contended also that the Ford memoirs were "news" and that any information about the Nixon pardon was "hot news."<sup>26</sup> According to Nation, any use of the Ford manuscript was a fair use and not an infringement of the copyright owner's rights. The district court looked to the guidelines for fair use set out in section 107 of the Act in order to determine whether Nation's article was *news reporting* and permissible under the fair use doctrine.<sup>27</sup> The district court pointed out that "hot news" concerning the Nixon pardon was previously disclosed by Mr. Ford in his 1974 testimony before the Congressional Committee. In fact, the testimony was fully covered by the press.<sup>28</sup> The court concluded that the information taken by Nation from the Ford memoirs regarding the Nixon pardon was not "hot news" which would have permitted its use of the copyrighted materials.<sup>29</sup>

In addition to making other findings,<sup>30</sup> the district court agreed with Nation that the historical facts and memoranda presented by Mr. Ford were not *per se* copyrightable. But, the court determined that the unpublished manuscript was copyrightable based upon the "totality" of Ford's work. The court viewed the facts and memoranda as integral parts of Ford's memoirs together with his reflections. The district court held that when viewed in its totality instead of its component parts, Ford's manu-

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22. *Harper & Row II*, 557 F. Supp. at 1070 n.4.

23. *Id.* at 1072.

24. *Id.* at 1070.

25. *Id.* at 1070 n.4.

26. *Id.* at 1070. The court opinion does not distinguish between the terms "news" and "hot news."

27. *Id.*

28. *Id.* at 1071.

29. *Id.* at 1072.

30. The district court made further determinations: (1) Nation purloined the manuscript and used it for its own profit; (2) Nation used information from a manuscript which was soon to be published; (3) Nation took the heart of the material which was subject to the *Time* prepublication agreement; and, (4) The effect of Nation's publication caused *Time* to rescind its contract with Harper & Row. *Id.*

script was protected by the Act.<sup>31</sup>

### B. *The Court of Appeals Decision*

On appeal, the Second Circuit Court of Appeals affirmed the dismissal of Harper & Row's state law claims and reversed the lower court's decision concerning copyright infringement.<sup>32</sup>

In affirming the dismissal of the state law claims, the appellate court stated that the unauthorized temporary taking of the manuscript did not give rise to a claim of conversion. "Merely removing one of a number of copies of a manuscript (with or without permission) for a short time, copying parts of it and returning it undamaged, constitutes far too insubstantial an interference with property rights to demonstrate conversion."<sup>33</sup> Further, the appellate court found that the claim of tortious interference with contractual relations was not qualitatively different from the claim of copyright infringement.<sup>34</sup>

The appellate court determined that the purpose of the Copyright Act was not to "impede that harvest of knowledge so necessary to a democratic state."<sup>35</sup> The threshold issue considered by the court was whether the purloined material was a proper subject matter to be afforded copyright protection.<sup>36</sup> In order for a manuscript to be protected by the Act, it must be an original work of authorship.<sup>37</sup> Even though

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31. *Id.* at 1073.

32. *Harper & Row III*, 723 F.2d at 195. Judge Kaufman wrote the opinion of the court in the 2-1 decision.

In his dissent, Judge Meskill agreed with the lower court's finding that the Copyright Act protects the entire manuscript. Even though the facts presented were not copyrightable, the Act protected the author's original expression and presentation. *Id.* at 213. Nation could have used the facts contained in the memoirs without infringing Harper & Row's rights. However, Nation "did no more than appropriate the same quotes, expressions, selection of language, events, corroboration and recreations that were present in the Ford memoirs and that added nothing original of its own." *Id.* at 214.

However, the dissent did agree with the majority's determination that *The Nation* article was a "news" article. *The Nation* could have written a news article describing the book or disclosing facts contained therein but instead, Nation stepped beyond reasonable and fair use. The article lacked sufficient originality. Nation's use of Ford's original expressions was unreasonable and excessive. The dissent concluded that Nation's use of the Ford memoirs did not come within the doctrine of fair use. *Id.* at 216.

33. *Id.* at 201.

34. "[T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim, goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated." *Id.*

35. *Id.* at 197.

36. *Id.* at 202.

37. *Id.*

historical facts are not protected, the Act does extend to an author's arrangement of the facts.<sup>38</sup> The appellate court determined that Nation's use of "scattered parts" from Ford's manuscript did not infringe those original portions which were the subject matter of the Act.<sup>39</sup> The appellate court rejected the lower court's analysis that the totality of the manuscript was protected by the Act.

The Second Circuit espoused additional reasons for finding the manuscript to be outside the scope of copyrightable material. It balanced the interests of the copyright holder against the public's need for information and determined that the Act "was not intended to provide . . . a private monopoly of fact at the expense of the public's need to be informed."<sup>40</sup> Furthermore, the appellate court pointed out that much of the information taken from Ford's memoirs had been previously made public by Mr. Ford's testimony in 1974 before the Congressional Committee which had been printed in the *Congressional Record*.<sup>41</sup> The appellate court concluded that the information was not subject matter protected by the Act.<sup>42</sup> Finally, the appellate court decided that conversations attributable to other parties which were included in the manuscript were not Mr. Ford's original work. Accordingly, the appellate court concluded that once the "uncopyrighted material was stripped away, *The Nation* contain[ed], at most, approximately 300 words that [were] copyrighted."<sup>43</sup>

Finally, the appellate court rejected the lower court's determination that Nation's taking of portions of the manuscript was not a fair use. In rejecting the lower court's decision, the appellate court analyzed whether Nation's use of approximately 300 words of copyrighted material was a fair use, thereby limiting its fair use analysis to the 300 words which it had previously determined to be copyrightable.<sup>44</sup>

The appellate court examined the case in light of the fair use guidelines set out in section 107 of the Act and determined that the lower court's analysis was faulty. First, the appellate court emphasized that

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38. *Id.* at 202-03.

39. *Id.* at 203.

40. *Id.* at 205.

41. In 1974, President Ford testified before the Hungate Committee which was a Subcommittee on Criminal Justice for the House Committee on the Judiciary investigating the Watergate fiasco. *Id.*

42. *Id.*

43. *Id.* at 206. "They include a short segment of Ford's conversations with Henry Kissinger and several other individuals. Ford's impressionistic depictions of Nixon, ill with plebitis after the resignation and pardon, and of Nixon's character, constitute the major portion of this material. It is these parts of the magazine piece on which we must focus in our examination of the question whether there was a 'fair use' of copyrighted matter." *Id.*

44. *Id.*



even though the “purpose and character” of Nation’s use might have been for profit, without additional evidence, that fact is “legally irrelevant where the work in which the use appears offers some benefit to the public.”<sup>45</sup>

Secondly, the “nature of the copyrighted work” was essentially factual. The appellate court stressed that courts should narrowly construe copyright protection for factual books and that the district court erred by extending copyright protection to the “totality” of the memoirs.<sup>46</sup>

Thirdly, the appellate court decided that most portions of the Ford manuscript that were taken by Nation were not copyrighted. The court reasoned that the approximately 300 words used by Nation were insubstantial in relation to the entire 2,250 word *Nation* article. Moreover, the brief passages and short descriptions taken by Nation from the memoirs were not superfluous nor excessive but informative.<sup>47</sup>

The appellate court reasoned that Nation’s use of the Ford manuscript was minimal. Additionally, the fact that Nation had borrowed the manuscript had “dubious” economic impact on the copyright holder. In reaching this conclusion, the appellate court expressed concern that the Act might interfere with the public’s knowledge of vital and historical facts. As a result, the appellate court held that Nation’s taking was a fair use.<sup>48</sup>

## II. THE SUPREME COURT DECISION

### A. Justice O’Connor’s Opinion

The Supreme Court, in a 6-3 decision, reversed and found that Nation’s unauthorized use of Ford’s memoirs was not permitted as a fair use. In general, the Court found that Nation’s use was not excused because the public had an interest in Nixon’s pardon. Also, Nation’s use of the unpublished manuscript resulted in economic damage to Harper & Row. Finally, the use made by Nation was not sanctioned by the doctrine of fair use. Section 107 was not designed to give infringers free access to unpublished, copyrighted memoirs of public figures.<sup>49</sup>

#### 1. Harper & Row’s Right to First Publication

The Supreme Court determined that Nation’s unauthorized taking

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45. *Id.* at 207-08.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Harper & Row*, 105 S. Ct. at 2235.

claimed to itself Harper & Row's right to first publication. According to the Court, Nation did not dispute that verbatim copying of excerpts constituted infringement unless excused as fair use. Thus, the Court did not concern itself with the copyrightability of the manuscript.<sup>50</sup>

The Court examined the legislative history behind the judicially created doctrine of fair use which was codified in section 107. Initially, the Court emphasized the importance of the fact that the manuscript was unpublished at the time of Nation's use. Under common law copyright, a work belonged to an author until the author published or parted with the work. Additionally, courts could find that the author impliedly consented to the use of the work by others once it was published.<sup>51</sup> The Court cited references to the legislative history behind section 107 showing that the unpublished nature of a work was a key factor in negating a defense of fair use.<sup>52</sup>

The Act gave an author's work statutory protection at the time of creation. A work is "created" when it is fixed in a tangible medium<sup>53</sup> such as when it is typewritten on a sheet of paper. One of the rights which the Act confers is the right to first publication. The copyright holder has control of the first public distribution of the copyrighted work.<sup>54</sup> The author's control of the first public dissemination gives the author creative control as well as enabling the author to exploit prepublication rights. It is a valuable right which, under ordinary circumstances, supersedes a claim of fair use.<sup>55</sup>

Nation contended that the First Amendment permits use of information of high public concern. It asserted that the public's interest in the

50. *Id.* at 2224-25. However, the Court did indicate the copyrightability issue was an unsettled area of law:

Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole. Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.

*Id.* at 2224.

51. *Id.* at 2226.

52. *Id.* at 2227. In illustrating that the unpublished nature of a work figures prominently in negating fair use the Court quoted from the Senate Report on the Copyright Law Revision:

A key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential use . . . . The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner . . . .

*Id.*, (citing S. REP. NO. 473, 94th Cong., 1st Sess., 64).

53. 17 U.S.C. § 102 (1982).

54. *Harper & Row*, 105 S. Ct. at 2226-27.

55. *Id.* at 2228.

information contained in Ford's memoirs outweighed the author's right to first publication. In response, the Supreme Court stated that First Amendment protections were built into the Act.<sup>56</sup> The Act offers protection to the original expression of the ideas, but not to the ideas themselves. Absent such a rule, a public figure would have little incentive to create memoirs. As a result, the public would be denied an important source of significant historical information.<sup>57</sup> Furthermore, to accept Nation's argument would be tantamount to holding that memoirs of public figures were not protected by the Act.<sup>58</sup>

## 2. The Doctrine of Fair Use

Section 107 prescribes four non-exclusive factors to consider on a case-by-case basis in determining what is fair use of copyrighted works: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect on the potential market for or value of the copyrighted work."<sup>59</sup> The doctrine was enacted as an equitable rule of reason which was developed by earlier case law. In accordance with the judge-made doctrine, no general applicable definition of fair use was enacted to insure that it was determined on a case-by-case basis.<sup>60</sup>

The Supreme Court agreed with the appellate court that the infringement of copyrighted material for the purpose of news reporting was one factor tending to show fair use. Moreover, Nation acted properly in seeking to be the first to publish the information. However, Nation did more than merely report on the uncopyrightable information contained in the memoirs. Nation "actively sought to exploit the headline value of its infringement, making a 'news event' out of its unauthorized first publication of a noted figure's copyrighted expression."<sup>61</sup>

Another factor weighing against fair use was Nation's profit from the unauthorized publication of the Ford memoirs. The Supreme Court found that unauthorized commercial use of copyrighted material was presumptively unfair to a copyright holder. It was not important

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56. *Id.* at 2230.

57. *Id.* at 2228. "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 2230.

58. *Id.* at 2230.

59. *Id.* at 2231.

60. *Id.*

61. *Id.*

whether profit was the infringer's motive, but whether the user might have profited from the unauthorized exploitation of the copyrighted material.<sup>62</sup>

In conclusion, the Supreme Court decided that Nation's stated purpose for using the memoirs was to "scoop" *Time's* and Harper & Row's publications. Fair use presupposes that a user acts in good faith with fair dealing. Nation could have sought publication rights from Harper & Row, in the same manner that *Time* did. The factors that negated fair use outweighed the "news" value of Nation's article.

At the time of Nation's use, Ford's memoirs could have been described as an unpublished historical narrative or autobiography. Generally, a policy exists in favor of disseminating factual works to the public. But, Nation used more of the copyrighted material than was necessary. The facts contained in the Nation article could have been conveyed without using Ford's subjectively descriptive passages and portraits of public figures.<sup>63</sup>

The unpublished status of the work was a key factor of its "nature" which tended to weigh against fair use. "The scope of fair use is narrower with respect to unpublished works."<sup>64</sup> Mr. Ford and Harper & Row attempted to keep the manuscript confidential. Also, Nation knew that the copy of the manuscript which it received was not authorized. On this issue, the Court determined Nation's use was unfair.<sup>65</sup>

Next, the Supreme Court examined the amount and substantiality of the portion used by Nation in relation to the entire Ford manuscript. The Court rejected the Second Circuit's determination that the amount taken was insubstantial. Instead, the portions used were among the most powerful passages in the memoirs.

Approximately thirteen percent of Nation's article came from the memoirs. The statutory language of the Act indicated that the use is not excused when the taking is substantial in comparison with the infringing work. The test for determining the substantiality of the portions used is a comparison of the copyrighted material used and the entire copyrighted work. Since Nation stripped verbatim quotes from the heart of chapters relating the Nixon pardon, Nation's use was not fair.<sup>66</sup>

Effect-on-the-market "is undoubtedly the single most important ele-

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62. *Id.*

63. *Id.* at 2232.

64. *Id.*

65. *Id.* at 2233.

66. *Id.* at 2233-34.

ment of fair use."<sup>67</sup> The Supreme Court found that clear-cut evidence existed that Nation's unauthorized publication led to *Time's* cancellation of the contract. Harper & Row suffered a loss of \$12,500 because Nation infringed its right to first publication; thus, Harper & Row incurred economic damages.

The Court emphasized the effect-on-the-market factor because "if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"<sup>68</sup> Once the copyright holder establishes a *prima facie* case that the infringer has caused damage, the burden of proof shifts to the infringer. The infringer must then rebut by showing that the damages would have occurred regardless of the use by the infringer. Nation did not rebut the evidence that Harper & Row's damages were caused by Nation's article.<sup>69</sup>

### B. *The Dissent*

In his dissent, Justice Brennan feared that the majority's goal of protecting the creative incentives of copyright holders would stifle the broad dissemination of ideas. Justice Brennan rejected the narrow interpretation of fair use. He argued that the public is "ill served by this constricted reading of the fair use doctrine."<sup>70</sup> He contended that the arena of public debate and informed citizenry is the essence of self-government.<sup>71</sup>

First, Justice Brennan asserted that *information qua information* is not copyrightable. In order for Nation to be liable for infringement, Nation's article must have been too close to Ford's original expression.<sup>72</sup> The linguistic similarities between Nation's article and Ford's manuscript were insufficient to constitute infringement.<sup>73</sup> Much of the material used by Nation was not copyrighted. Merely paraphrasing copyrighted material does not constitute infringement since infringement "requires far more close and substantial a tracking of the original language than occurred in this case."<sup>74</sup> Moreover, Nation's article did not copy the structure of Ford's memoirs. Rather, the article did no more

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67. *Id.* at 2234. See also, *supra* note 55.

68. *Id.* at 2234-35, (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984)) ["*Sony*"] (Emphasis in original).

69. *Harper & Row*, 105 S. Ct. at 2234.

70. *Id.* at 2240.

71. *Id.* at 2242.

72. *Id.* at 2243.

73. *Id.* at 2244.

74. *Id.*

than chronicle the facts of history.<sup>75</sup>

Second, Justice Brennan agreed with the appellate court's determination that only 300 words of copyrighted material appeared in Nation's article. He applied section 107's statutory guidelines and argued that Nation's appropriation was a fair use. The reason that Nation quoted 300 words was for the purpose of news reporting which is considered a prime example of fair use.<sup>76</sup> Nation's dissemination of the copyrighted information was also in the public interest.<sup>77</sup> Justice Brennan considered this to be a key factor in finding fair use.

He disagreed with the majority's finding that the commercial nature of Nation's use was a factor weighing against fair use. Instead, he asserted that Congress was aware that news reporting was generally for profit when it enunciated news reporting as an example of fair use.

Third, Justice Brennan asserted that fair use is given a broader interpretation for historical and factual works. A greater need exists to disseminate such works than for fictional works.<sup>78</sup> He was not concerned with the unpublished nature of the memoirs. The manuscript was on the eve of publication. According to Justice Brennan, Nation's article did not interfere with Harper & Row's control of the manuscript. Instead, Nation's publication might only have infringed the economic value of Harper & Row's initial publication.

Fourth, Justice Brennan contended that, even though Nation may have used the most valuable portion of the manuscript, this was "irrelevant to copyright analysis because copyright does not preclude a second author's use of information and ideas."<sup>79</sup> He conceded that Nation appropriated some of Mr. Ford's copyrighted literary form. However, the amount used was not excessive nor inappropriate to Nation's news reporting purpose.<sup>80</sup>

Finally, Justice Brennan agreed with the majority's finding that the effect-on-the-market is the single most important element in fair use. He also agreed that Nation's article precipitated *Time's* cancellation of the contract. But, if it were the non-copyrighted portions of the Ford memoirs used by Nation which caused cancellation, then Nation's activity was legal. The evidence was not clear whether the use of the non-copyrighted or copyrighted material from Ford's memoirs caused *Time*

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75. *Id.*

76. *Id.* at 2246.

77. *Id.* at 2247.

78. *Id.* at 2248.

79. *Id.* at 2251.

80. *Id.* at 2252.

to cancel its contract. Nation had the right to be the first to publish the non-copyrighted information.<sup>81</sup> On this basis, Harper & Row failed to carry its burden of showing that it was damaged by Nation's infringement.

### III. LEGISLATIVE HISTORY

The doctrine of fair use developed at common law and was finally codified in the 1976 Act.<sup>82</sup> In 1955, Congress funded and authorized<sup>83</sup> the Copyright Office to undertake a comprehensive research project to revise the 1909 Copyright Act. The efforts resulted in thirty-five published studies and recommendations regarding copyright law revisions.<sup>84</sup> The Copyright Office commissioned Professor Alan Latman to study fair use of copyrighted works.<sup>85</sup> He asserted that the theoretical basis of fair use stems from the idea that the copyright holder impliedly consents to reasonable uses.<sup>86</sup> The reasonableness of the use is based upon various criteria. Some examples of proper uses include review and criticism,<sup>87</sup> parody and burlesque,<sup>88</sup> scholarly works and compilations,<sup>89</sup> or news reporting.<sup>90</sup>

As a result of the research project, the Register of Copyrights issued a report in 1961 which recommended that the revised Act include a fair use statute. The 1961 Report described the scope of the proposed statute. The Register stated that examples of permitted uses were "excerpts in a review or criticism for purposes of illustration or comment; . . . short passages in a scholarly or technical work, for illustration or clarification of the author's observations; . . . summary of an address or article, with brief quotations, in news reports. . . ."<sup>91</sup> The Register also stated that fair

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81. *Id.* at 2252-53.

82. H.R. REP. NO. 1476, 94th Cong., 2d Sess., 47 reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, 5660 ["H.R. REP. NO. 1476"].

83. Congress has the constitutionally granted power to make copyright law: "The Congress shall have Power . . . to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." U.S. CONST. art. I, § 8.

84. H.R. REP. NO. 1476, *supra* note 82, at 47.

85. A. LATMAN, FAIR USE OF COPYRIGHTED WORKS, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS & COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 14, 86th Cong., 2d. Sess., 1 (H. Judiciary Comm. Print 1960).

86. *Id.* at 7.

87. *Id.* at 8.

88. *Id.* at 9.

89. *Id.* at 10.

90. *Id.* at 12.

91. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE

use of copyrighted material was dependent on four factors: "(1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work."<sup>92</sup> Significantly, the Register indicated that "the competitive character of the use . . . is often the most decisive."<sup>93</sup>

From 1961 through 1964, the Copyright Office held numerous meetings and discussions in which commentators and other interest groups participated. From the earliest discussions concerning a fair use statute, commentators and other interested persons debated whether fair use should be codified. For example, the Authors League of America asserted that fair use should not be included in the revised Act because determination of fair use was a function of the courts.<sup>94</sup> Also, Melville Nimmer cautioned that "an attempt to define 'fair use,' even . . . loosely . . . may lead to trouble."<sup>95</sup> But, he ultimately endorsed the codification of fair use.<sup>96</sup>

In 1964, a preliminary draft of the revised Act that was presented to Congress included a fair use statute. The statute was similar to the one that was finally codified in 1976 except that the draft did not include reference to the commercial nor competitive nature of the infringer's use. However, the 1964 bill did consider the potential effect that the use might have on the market for the copyrighted work.<sup>97</sup>

U.S. COPYRIGHT LAW, 87th Cong., 1st Sess., COPYRIGHT LAW REVISION, 24 (H. Judiciary Comm. Print 1961).

92. *Id.*

93. *Id.* at 24-25.

94. FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 4 316 (H. Judiciary Comm. Print 1964).

Authors League also warned that if fair use was codified, then "[t]o make it clear that a court is not bound—in a given instance—by any one of the cited factors, would require more language—in fact a small treatise on fair use." *Id.*

95. 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 5 315 (H. Judiciary Print 1965).

96. He suggested that the wording for the fair use statute be: "Notwithstanding the provisions of Section 5 [now section 106], the fair use of a copyrighted work, as such phrase has heretofore been judicially defined and recognized, is not an infringement of copyright." *Id.* at 316.

97. The 1964 Revision Bill prescribed that:

[T]he fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, 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;



The proposed fair use statute underwent several revisions before it was adopted. The drafters of section 107 were faced with a dilemma in determining the breadth of the statute. As the legislative history indicates, fair use was an equitable rule of reason developed by the courts. However, "no real definition of the concept [had] ever emerged."<sup>98</sup> Accordingly, no definition of fair use was developed by the courts which could have been incorporated into section 107. However, the courts did "evolve a set of criteria which, though in no case . . . determinative, provide[d] some guage [sic] for balancing the equities."<sup>99</sup> The criteria mirror those suggested in the 1961 Report. These criteria are relevant, but not exclusive, in determining fair use.<sup>100</sup> The construction of section 107 was a product of the discussions and hearings leading to the 1976 Act.<sup>101</sup> In its final form, section 107 was purposefully made broad and open-ended which allows a court to apply fair use in a case-by-case manner.<sup>102</sup>

#### IV. ANALYSIS

"The doctrine of fair use has been called . . . the most troublesome in the whole law of copyright."<sup>103</sup> Section 107, as a codification of the judge-made doctrine of fair use, adopted the equity principles present in case law.<sup>104</sup> Because of that, the Supreme Court in *Harper & Row* balanced the hardships to the copyright holder against the benefits to public.<sup>105</sup> In rendering its decision, the Court was concerned with: (1) the commercial nature of Nation's use;<sup>106</sup> (2) the effect of Nation's use on the

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- (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* at 5.

98. H.R. No. 1476 at 65, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5679.

99. *Id.*

100. *Id.*

101. See *supra* note 3. The factors listed in section 107 are the judicially created guidelines.

102. H.R. No. 1476 at 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680.

103. *Sony*, 464 U.S. at 475.

104. "[T]he doctrine of fair use is a 'rule of reason' fashioned by judges to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT LAW SYMPOSIUM 43, 51 (1971).

105. "Fair use balances the public interest in the free flow of ideas and information with the copyright holder's interest in exclusive proprietary control of his work." *Roy Export Co. v. Columbia Broadcast System*, 672 F.2d 1095, 1099 (2d Cir. 1982).

106. *Harper & Row*, 105 S. Ct. at 2231.

potential market for Ford's memoirs;<sup>107</sup> (3) Nation's article as news reporting,<sup>108</sup> and, (4) the bad faith of Nation's actions.<sup>109</sup>

### A. Commercial Gain

The Supreme Court decided that the commercial nature of Nation's use was a significant factor that weighed against fair use. The Court's decision was proper on both statutory and case law grounds. After many years of discussions, commercial gain was included as a fair use factor. The 1961 Report recommended that commercialism, as a factor against fair use, should be included in the statute. Section 107 expressly states that the commercial nature of the use must be considered.<sup>110</sup>

Courts have analyzed the commercial nature of use in cases before and after the codification of the fair use doctrine. But, courts have not always agreed that commercial gain was a factor in the fair use analysis. In *Rosemont Enterprises v. Random House* ("Rosemont"),<sup>111</sup> Rosemont Enterprises alleged that its copyright in a series of articles on Howard Hughes, which were published in *Look* magazine, was infringed upon by Random House's biography on Howard Hughes. The Random House biography was based, in part, on the *Look* articles. Moreover, portions of the articles were copied. Before publication of the biography, Rosemont Enterprises filed suit for a preliminary injunction. Random House asserted that its use of the *Look* articles was fair use.<sup>112</sup> The Second Circuit upheld Random House's use based upon the grounds of public interest and the lack of damages to copyright holders. The court found that "whether an author or publisher has a commercial motive . . . is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use."<sup>113</sup>

However, in *Time, Inc. v. Bernard Geis Associates* ("Time"),<sup>114</sup> a district court based its fair use determination, in part, on the commercial gain factor. Abraham Zapruder was taking a motion picture of the Presidential motorcade in Dallas on November 22, 1963. Coincidentally, the assassination of President John F. Kennedy occurred within his camera range. *Life* magazine, published by Time, Inc., bought the film from Za-

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107. *Id.* at 2234-35.

108. *Id.* at 2231.

109. *Id.* at 2232.

110. See *supra* note 3.

111. 366 F.2d 303 (2d Cir. 1966).

112. *Id.* at 304-06.

113. *Id.* at 307.

114. 293 F. Supp. 130 (S.D.N.Y. 1968).

pruder, and printed several frames in various issues of the magazine. *Life* obtained a copyright in the film and the magazine issues. Subsequently, Geis Associates sought permission from *Life* to use frames from the film to include in a new book. But, when *Life* would not consent, Geis Associates hired an artist to make drawings based upon the Zapruder pictures that appeared in *Life*.<sup>115</sup>

The United States District Court for the Southern District of New York held that Geis Associates infringed the copyrighted work, but determined that the use was fair.<sup>116</sup> The district court stated that “[t]he Book [was] not bought because it contained the Zapruder pictures; the Book [was] bought because of the theory of the [authors] and its explanation, supported by Zapruder pictures.”<sup>117</sup> In so holding, the court found a lack of commercial incentive on the part of the infringer.

*Rosemont* is distinguishable from *Harper & Row* in that the *Random House* article contained independent research beyond the infringed *Look* article. In *Rosemont*, the infringing article consisted of copyrighted material, but also included original commentary based upon independent research.<sup>118</sup> However, *Nation's* article was based entirely on the Ford memoirs. *Nation* did not include original research or commentary.

Conversely, *Time* is not unlike *Harper & Row*. Both *Time* and *Harper & Row* involved incidents of high public concern. However, *Harper & Row* is distinguishable because *Nation's* use was no more than a taking of the copyrighted work. *The Nation* article was merely a compilation of quotes and paraphrases from the unpublished memoirs. Neither additional research nor commentary by its author was included. *Nation* stood to commercially benefit from the use of the memoirs.<sup>119</sup>

A more recent case upon which the Court relied, *Sony Corp. v. Universal Studios*<sup>120</sup> (“*Sony*”), also grappled with the commercial gain issue. In *Sony*, the holders of copyrights in recorded programs alleged that the sale of video tape recorders (“VTRs”) infringed their rights in the recorded programs.<sup>121</sup> The crux of the issue was whether or not a viewer's use of a VTR was fair use. In dictum, the Supreme Court stated that

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115. *Id.* at 131.

116. *Id.* at 144, 146.

117. *Id.* at 146.

118. *Rosemont*, 366 F.2d at 306.

119. An interesting counter-argument could be made. The Ford article in *The Nation* was only one article in the particular issue. Arguably, like the *Time* case, readers bought *The Nation* for its other articles and not strictly because of the Ford article. Accordingly, *Nation* did not benefit directly from the use of the Ford memoirs.

120. *Sony*, 464 U.S. at 417.

121. *Id.* at 420.

“every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . .”<sup>122</sup> The Court held that a VTR owner’s use was non-profit and non-commercial because the purpose of the use was for home time-shifting so that programs might be viewed at more convenient times.<sup>123</sup> Therefore, the Court determined that the use of VTRs is fair use.<sup>124</sup> Unlike the VTR owners, Nation’s use of a copyrighted work was for commercial use. Consistent with *Sony*, the *Harper & Row* court properly found Nation’s commercial use was a significant factor which weighed against a determination of fair use.

### B. Potential Market Effect

“Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”<sup>125</sup> In order for the copyright holder to prevail on the issue of potential market effect, the copyright holder needs to show “by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.”<sup>126</sup> Moreover, if the intended use is for commercial gain, then the court presumes that future harm exists.<sup>127</sup>

Since the *Harper & Row* court determined that Nation’s article was for commercial gain, then potential damages did not have to be shown. Only in situations of non-commercial use does the burden rest on the copyright holder to prove that the infringed work effected the marketability of the copyrighted work. Regardless, the Supreme Court in *Harper & Row* found that the copyright holder was damaged in the amount of *Time’s* cancelled payment.<sup>128</sup>

Once the copyright holder has sustained its burden of showing potential market effect, the burden shifts to the infringer. In order for the infringer to prevail on this issue, the infringer must show that damages to the copyright holder would have occurred even without the infringer’s use.<sup>129</sup> Nation’s only arguments to negate the market effect factor were that the information in the Ford memoirs were facts and that Nation’s article was news reporting.

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122. *Id.* at 451.

123. *Id.*

124. *Id.* at 454-55.

125. *Harper & Row*, 105 S. Ct. at 2234 (citing 1 M. NIMMER, NIMMER ON COPYRIGHT 1.10(D) at 1.10[D] (1985)).

126. *Sony*, 464 U.S. at 451 (Emphasis in the original).

127. *Id.*

128. *Harper & Row*, 105 S. Ct. at 2234.

129. *Id.*

### C. Nation's Article as News Reporting

Prior to *Harper & Row*, courts confronted the issue of what constituted news reporting within the meaning of the fair use doctrine. In *Time*, Zapruder's film of the Kennedy assassination was undoubtedly news,<sup>130</sup> and a "news event may not be copyrighted . . . . *Life* claims no copyright in the news element of the event but only in the particular form of record made by Zapruder."<sup>131</sup> Moreover, according to legislative history, in determining whether matters are news, "it is important to differentiate between the substance of the information contained . . . , *i.e.* the event itself, and 'the particular form or collocation of words in which the writer has communicated it.'"<sup>132</sup> The manner of presentation, expression, analysis and interpretations of events are protected by the Act.<sup>133</sup> *Harper & Row* is consistent with *Time* and the legislative history. The Supreme Court determined that the news events and historical facts contained in the Ford memoirs were not protected. Even though the Ford memoirs contained news events and historical facts, Mr. Ford's manner of expression was copyrighted. By taking the original manner of expression and not limiting its use to facts contained in the memoirs, *Nation* infringed upon the *Harper & Row* copyright.

### D. Nation's Bad Faith Conduct

Section 107 does not expressly state that an infringer's bad faith is an element weighing against fair use. However, case law makes bad faith a factor that should be considered in fair use analysis. In *Time*, the district court declared that "fair use presupposes good faith and fair dealing."<sup>134</sup> The doctrine of fair use is based upon good faith and common sense.<sup>135</sup>

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130. In order for something to be "new" as in news reporting, Black's Law Dictionary states that it is "an element in numerous compound terms and phrases of law, this word may denote . . . the condition of being previously unknown or of recent or fresh origin . . . ." BLACK'S LAW DICTIONARY (5th ed. 1979).

131. *Time*, 293 F. Supp. at 143. The Zapruder pictures reflected creativity on the part of the photographer. He "selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated." *Id.*

132. *Wainwright Sec. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977) (citing *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)).

133. *Id.* at 95-96.

134. *Time*, 293 F. Supp. at 146 (citing Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968)). See also *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983).

135. *Hearings Before the Subcommittee No. 3 of the Committee on the Judiciary House of*

[T]he rule may make a distinction between a true scholar and a chiseler who infringes a work for personal profit. It can distinguish between a mere quotation and the theft of an essential portion of a literary work, and can differentiate between the infringer who seeks to reap where he has not sown and the scholar who is motivated solely by the desire to add to the common reservoir of ideas and information.<sup>136</sup>

The essence of fair use is a balance between a copyright holder's exclusive rights and absolute rights.<sup>137</sup> The doctrine is "based on good faith, and most problems may be answered by recourse to the Golden Rule: 'Do unto others as you would have them do unto you.'"<sup>138</sup>

In *Harper & Row*, Nation knowingly purloined Ford's manuscript. The character and propriety of Nation's conduct was one of bad faith. Multiple facts weighed against Nation in the fair use analysis. Nation knew that the Ford manuscript was unpublished at the time of its taking and use. Moreover, Nation was aware that *Time* intended to publish the excerpts within the coming weeks. In fact, Nation's stated purpose was to "scoop" the *Time* publication.<sup>139</sup> Nation took portions of the manuscript either literally or by close paraphrase and did no analysis of its own. Nation's bad faith and unfair dealings with Harper & Row and *Time* magazine mitigates against any fair use.

## V. CONCLUSION

In the recent case of *Fisher v. Dees*,<sup>140</sup> the Ninth Circuit Court of Appeals affirmed the district court's granting of summary judgment in favor of the infringer. The appellate court held that disc jockey Rick Dees's twenty-nine-second long parody, "When Sonny Sniffs Glue," was a fair use of Johnny Mathis's song "When Sunny Gets Blue."<sup>141</sup> In its analysis, the appellate court based its opinion upon the four guidelines in section 107 and the *Harper & Row* decision. It determined that: (1) the infringer's conduct was not "sufficiently blameworthy" to constitute bad faith;<sup>142</sup> and, (2) even though the parody was a commercial use, the in-

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Representatives on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Part 3, 89th Cong., 1st Sess. 1706. ["Hearings on H.R. 4347"].

136. *Id.*

137. *Id.* at 1707.

138. *Id.* at 1706.

139. *Harper & Row*, 105 S. Ct. at 2232.

140. 794 F.2d 432 (9th Cir. 1986).

141. *Id.* at 434.

142. *Id.* at 437.

fringer rebutted any economic effect on the copyright holder.<sup>143</sup> It is apparent that the infringer's bad faith conduct and commercial use are important factors in the present interpretation of fair use.

In sum, the fair use doctrine in section 107 is a broad open-ended statute. Despite its codification in 1976, no exact formula for application of the fair use doctrine exists. The purpose of section 107 is merely to codify existing case law without enlarging, narrowing or modifying the doctrine. By creating a broad statute, the drafters were successful in meeting these goals.

Courts in the future are free to apply section 107 in different ways. As the legislative history forewarns, "the doctrine of fair use derives its vitality from its adaptability to conditions not only as they exist today but to new conditions which result from technological and other developments."<sup>144</sup> The doctrine of fair use, if made more specific, "would destroy its vitality and its ability to accomodate itself to all conditions and to those as yet unforeseen."<sup>145</sup>

*Judith Thais Gibson*

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143. *Id.* at 438.

144. *Hearings on H.R. 4347* at 1706.

145. *Id.*