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Exploiting Stolen Text: Fair Use or Foul Play?

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Before presenting my views on a somewhat controversial subject in the field of intellectual property, I would like to share with you some thoughts on the communication crisis in the legal profession.

If communication is defined as expression that is clearly and easily understood, much of the written and oral expression of the legal profession simply fails to measure up to the definition. Inability to communicate afflicts all segments of the profession and is now pervasive enough to be classified as a crisis. It deserves your attention because the effective transmission of information, thoughts, ideas and knowledge is just as essential to the efficient operation of our legal system as it is to progress in the arts and sciences. Ineffective expression in legal discourse diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth and, ultimately, undermines the rule of law. The expressive deficiencies of lawyers must be recognized as a serious and growing problem. The problem does not seem to be as widespread among the members of the Intellectual Property Bar. Perhaps that is because of the nature of your work. This is not to say that communication problems are entirely unknown among you, however.
In one sense, the legal profession merely reflects a communication crisis in the society at large. We are surrounded by doubletalk. Consider these examples, collected from recent newspaper reports:

- Doctors at a Philadelphia hospital described a patient's death as a "diagnostic misadventure of a high magnitude."
- Five thousand workers at a Chrysler plant found out that a new "career alternative enhancement program" meant their plant was closing and they were out of jobs.
- A stockbroker described the October 13th stock market crash as a "fourth quarter equity retreat."
- A United States Senator referred to capital punishment as "our society's recognition of the sanctity of human life."

What I do not understand is why lawyers tolerate doubletalk and inarticulateness in speech and writing. Twenty years ago, the National District Attorneys Association, of which I was then a member, held its annual conference in New York City. During the conference, we had a luncheon speaker who was introduced as a member of the United Nations legal staff specializing in criminal matters. I recognized him as a local comedian and doubletalk artist. About ten minutes into his meaningless spiel, a prosecutor from Georgia sitting next to me leaned over and said: "Ah cain't understand a lot of what thet ol' boy is sayin'." I replied: "You can't understand anything of what he is saying, because he is speaking doubletalk." "Isn't that somethin'?" he said, "Ah just tho't he had a real bad New York accent."
Consider these facts: failure to communicate is near the top of the list of complaints made by clients about their lawyers. Law firms have begun to hire public relations counsel to speak to the public for them and to advise them on how to communicate with the press. The employers of newly admitted lawyers have found it necessary to provide them with teachers of English grammar, style and usage. Lawyer-to-lawyer and lawyer-to-client communication often is incomprehensible. Lawyer communication in the trial courtroom frequently is silly, and I am here to tell you that appellate argument and briefing on too many occasions is just terrible. By way of illustration, I offer some exchanges that actually have occurred in trial courtrooms:

Q. Doctor, did you say he was shot in the woods?  
A. No, I said he was shot in the lumbar region.

Q. Now, Mrs. Johnson, how was your first marriage terminated?  
A. By death.  
Q. And by whose death was it terminated?  

Q. What is your name?  
A. Ernestine McDowell.  
Q. And what is your marital status?  
A. Fair.

Q. What happened then?  
A. He told me, he says, "I have to kill you because you can identify me."  
Q. Did he kill you?  
A. No.  

Q. Are you married?  
A. No, I am divorced.  
Q. What did your husband do before you divorced him?  
A. A lot of things that I didn't know about.

Q. At the time you first saw Dr. McCarty, had you ever seen him prior to that time?
Q. Now I am going to show you what has been marked as State's Exhibit No. 2 and ask if you recognize the picture.
A. John Fletcher.

Q. That's you?
A. Yes, sir.
Q. And you were present when the picture was taken, right?
Q. Mr. Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?
A. No. This is how I dress when I go to work.
Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?
A. Oral.
Q. How old are you?
A. Oral.

As for appellate advocacy, it is the rare briefwriter, in my experience, who seizes the opportunity to employ the clarity, simplicity and directness of expression necessary to endow a brief with maximum persuasive force. I often think of the pro se litigant who referred to himself throughout his brief and in his oral argument before us as "your despondent." He was the petitioner, actually, and we were despondent. I bring this message on communications to you as a matter of self-defense. I hope that it will encourage those of you who brief and argue appeals to bear in mind that your object is persuasion and your only means to achieve that goal is communication.

I turn now to my proposal for a change in the law of fair use. Regardless of what I would like to law to be, I am bound by statute and precedent to apply the law as it is. My remarks should not be taken in any other way.
The doctrine of fair use in copyright law presently permits the exploitation of unpublished, copyrighted text stolen from an author or one in lawful possession. This anomaly in the law is a creature of the Copyright Act¹ and should be eliminated by appropriate statutory amendment. The outright theft of intellectual property ought not to be condoned by Congress. In any case where an author has not published or publicly disseminated his or her copyrighted material, there simply is no reason to allow the use of that material without the author's consent.

In his Commentaries on the Laws of England, Sir William Blackstone described the rights of authors in their original compositions as a "species of property grounded in labour and invention."² The rule in 1766 England, according to Blackstone, was that

[w]hen a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.³

Copyright was recognized in the common law as well as by the Statute of Anne,⁴ which, according to Blackstone, provided
"additional penalties"⁵ to protect the property of authors and their assigns for a term of years. On the equity side, courts of chancery granted injunctions prohibiting the invasion of authors' property rights.⁶ It is interesting to note that Blackstone, in examining the law of larceny, found that "when property is established, ... any violation of that property is subject to be punished by the laws of society."⁷

The right to make some reasonable use of published, copyrighted material long has been recognized in the English cases. "Fair abridgement," as it then was called, was permitted early on, despite the difficulties experienced by courts in coping with the concept.⁸ However, the common law rights of authors to control first publication always were considered separate and distinct from any rules pertaining to statutory copyright, including the doctrine of fair use. In affirming an injunction against the publication of a catalogue of etchings made by Prince Albert and Queen Victoria and obtained without their consent, the Lord Chancellor held that "abridgements, translations, extracts, and criticisms of public works .... all depend upon the extent of right[s] under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions, which depend entirely upon the common-law right of property."⁹
In the United States, Congress first exercised its constitutional authority to "secr[e] for limited Times to Authors ... the exclusive Right to their respective Writings" when it enacted the first copyright statute in 1790. In Folsom v. Marsh, Justice Story formulated the first definitive statement on fair use in American copyright law. The case involved a claim of infringement in the copying of certain letters of George Washington in a two-volume work on Washington written by Rev. Charles Upham. The letters were copied from the twelve-volume work of Jared Sparks, who originally edited, copyrighted and published them. Sparks and Chief Justice Marshall had obtained the letters from Justice Bushrod Washington, nephew of the first president. In his opinion, Justice Story discussed the justifiable uses of copyrighted works and developed some factors to be considered in determining whether there has been an infringement. Those factors—the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work—were to be echoed in the Copyright Act of 1976.

The distinction between common law and statutory copyright protection was carried over to American law from the law of England. Common law copyright attached to a work from creation
to publication or dissemination, and was enforceable in the state
courts.16 As was true under British law, the defense of fair use
was not considered applicable to unpublished material.17 The
1976 Copyright Act changed all that. Or so it seemed. Common
law copyright, often referred to as the right of first
publication, was preempted by the new statute.18 The doctrine of
fair use was codified and made applicable for the first time to
all copyrighted work, published and unpublished, without
distinction. According to the Act, "fair use of a copyrighted
work . . . for purposes such as criticism, comment, news
reporting, teaching . . . , scholarship, or research, is not an
infringement of copyright."19 In determining whether the use
made of a work in a particular case is fair, courts are
constrained to consider four factors: purpose and character of
the use; nature of the copyrighted work; amount and
substantiality of the portion used; and effect of the use on the
potential market for the copyrighted work.20

A persuasive case is made in the leading treatise on fair
use for the proposition "that Congress intended to continue the
common law prohibition against fair use of unpublished but not
voluntarily disseminated works."21 There is, of course, no
specific statutory language supporting the proposition, which is
found in a review of the legislative history of the 1976 Act.
The legislative history referred to is derived from the reports
of several committees of Congress, including one expressing a congressional intent to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." The treatise refers to this and other evidence as providing support for the notion that the fair use doctrine is intended to apply only to unpublished works that are publicly disseminated, the same as at common law. Apparently, public dissemination is thought to involve a deliberate choice to make a work available to others, short of actual publication. The public performance of unpublished plays and an author's delivery of an unpublished manuscript to a critic are given as examples of voluntary dissemination. Publication is defined by statute as "the distribution of copies . . . of a work to the public" as well as "[t]he offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display . . . . A public performance or display of a work does not of itself constitute publication." The distinction between publication and public dissemination is very slight indeed.

In Harper & Row, Publishers, Inc. v. Nation Enterprises, the Supreme Court was presented with a clear opportunity to eliminate unpublished works from the reach of fair use. That it did not do so was attributable solely to the language of the Copyright Act. Unquestioned in Harper & Row was the trial
court's finding that the defendant "knowingly exploited a purloined manuscript." The manuscript in question was, of course, the memoirs of President Ford. Excerpts of the memoirs were scheduled to appear in *Time* magazine one week before the full-length book was to be distributed by the plaintiff publishing house. Before either scheduled event transpired, simple theft allowed the defendant to print and distribute the words of President Ford, describing the pardon of Richard Nixon, in its publication. In reversing the Second Circuit Court of Appeals and holding the plaintiff entitled to damages, the Court concluded "that the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use." Although the Court analyzed the facts of the case in terms of the four statutory fair use factors, it held that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use." I suggest that the vague and undefined phrase, "under ordinary circumstances," leaves open a window that should be closed by Congress. The window is open only because the Copyright Act presently makes no distinction for fair use purposes between copyrighted material that is published or disseminated and copyrighted material that is unpublished or undissemminated. It is a window through which a thief may enter.
In the wake of *Harper & Row*, the courts have been faced with some thorny problems in deciding whether various uses of unpublished, copyrighted material were used fairly within the intendment of the Copyright Act. For example, in *Salinger v. Random House, Inc.*,\(^{30}\) a case involving the copying of letters of J.D. Salinger by a biographer who gained access to the letters by promising not to copy them, the appeals court panel puzzled over the "ambiguity arising from the Supreme Court's observation that 'the scope of fair use is narrower with respect to unpublished works.'"\(^{31}\) The conclusion was that the Court meant it was less likely that fair use would apply to unpublished than published matter, and not merely that a lesser quantity of material may be copied in the case of unpublished matter. It is interesting to note that at least some of the biographer's copying was motivated by a desire to avoid writing what he called "pedestrian sentence[s]."\(^{32}\) If you can lift the word images and stylistic devices of J.D. Salinger, why bother creating your own?

The extensive use of an unpublished paper "purloined from the Princeton library"\(^{33}\) presented a District Judge with yet another twist in the defense of fair use. A copy of the paper, dealing with the Pahlevi restoration in Iran, arrived at the library as part of the files of Allen Dulles, to whom it was sent by the author. Researchers at the library were afforded notice of possible liability for copyright infringement and agreed that
permission to reproduce was required. The user claimed that he was entitled to copy large parts of the author's paper in order to provide his book with an "air of authenticity" and "full flavor." He contended also that the "ordinary circumstances" rule did not apply because the paper copied was fact rather than fiction, the author of the paper had given copies to certain persons, and the paper and the book were designed to serve different purposes. The district court rejected all these contentions, applied the statutory fair use factors and found the user liable for infringement.

An action to enjoin the publication of the biography of L. Ron Hubbard, deceased founder of the Church of Scientology, presented another occasion for an attempt to define further the imprecise parameters of the doctrine of fair use as it pertains to unpublished material. The material was the product of the pen of Hubbard himself, and the unpublished writings in question, a certain diary in particular, were almost certainly acquired from the Church of Scientology by misappropriation or conversion. Although the district court ultimately decided to award damages for infringement, it accepted the infringer's contention that there is greater justification in using unpublished work to make a point about the character of the work's author (as was the case in the Hubbard biography) than to display the distinctiveness of a writing style (as was the case in the Salinger biography).
In dictum, the panel majority of the appeals court found the distinction between use to enliven text and use to communicate certain traits of character "unnecessary and unwarranted:" the biography clearly was a work of criticism, scholarship or research, the purpose of use factor therefore weighed in favor of the copier, and this distinction was considered superfluous.\(^{37}\)

The dissent from denial of in banc consideration in the case found significance in the fact that the Supreme Court never has expressly rejected the "distinction between copying expression to enliven the copier's prose and doing so where necessary to report a fact accurately and fairly."\(^{38}\) As the author of the panel majority opinion and the opinion concurring in the denial of rehearing in banc, I continue to "question whether judges, rather than literary critics, should decide whether literary material is used to enliven text or demonstrate truth."\(^{39}\) In my opinion, "[i]t is far too easy for one author to use another author's work on the pretext it is copied for the latter purpose rather than the former."\(^{40}\) The issue is not yet definitely resolved in the Second Circuit because affirmance of the judgment of the district court in the case, New Era Publications v. Henry Holt & Co., was based on laches, rather than on the type of use to which the converted material was put.\(^{41}\)

Certain elements of the intellectual property bar hold the firm belief that the window of fair use should be opened even
wider than permitted by Harper & Row for access to unpublished and undisseminated material. These elements apparently are not at all offended by the notion of exploiting a manuscript pilfered by a burglar from an author's locked desk drawer, provided the exploitation furthers a just and worthy cause. That federal judges are intended to decide what causes are good and just should be a matter of some concern. Many critics base their positions on First Amendment arguments. One commentator has written that "[t]he nature of the accommodation [sic] between copyright principles and First Amendment principles remains to be drafted."\textsuperscript{42} Yet the Supreme Court in Harper & Row noted "that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"\textsuperscript{43} The commentator merely chooses to disregard the accommodation already identified by the Supreme Court.

The authors of an article describing the doctrine of fair use as "the biographer's bane" condemn the severe limitations on copying unpublished works protected by copyright as a "dangerous rule of interpretation."\textsuperscript{44} They refer to language in Salinger -- "unpublished works . . . normally enjoy complete protection against copying any protected expression"\textsuperscript{45} -- as an "overstatement."\textsuperscript{46} of the Harper & Row standard: "[u]nder
ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."\textsuperscript{47} It is difficult to discern how the language in \textit{Salinger} is anything other than a restatement of the standard in \textit{Harper \& Row}. The same authors find much to criticize in \textit{New Era}, finding that it "ignore[s] the explicit congressional mandate that the equities must be flexibly balanced case by case"\textsuperscript{48} in favor of elevating the single fact of unpublished status "to an almost insurmountable obstacle to a successful fair use defense."\textsuperscript{49} But there is nothing in \textit{New Era} to indicate that the congressional mandate to apply the fair use factors in the case of unpublished works is to be ignored. There is merely a reiteration of the principle that the unpublished nature of a work is to weigh heavily in the balance and a faithful adherence to the "under ordinary circumstances" language employed by the Supreme Court.

\textit{It is surely an exaggeration to say, as does one commentator, that "[b]iographers are now virtually precluded from publishing convincing, critical portraits backed up by limited use of the subject's unpublished writings to rebut a too polished public persona."\textsuperscript{50} It simply is an incorrect statement of law to say, as does the same commentator, that we have come to a point "where property rights -- albeit intellectual property rights -- embodied in the Copyright Act, which protects the manner of}
expression of ideas or facts, takes precedence over the First Amendment, which prevents the monopolization or privatization of facts or ideas.⁵¹ The Supreme Court has held specifically that the protections of the First Amendment are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas."⁵² As to the fair use doctrine in particular, the commentator candidly concedes as accurate the statement that the "'doctrine encompasses all claims of first amendment in the copyright field,'"⁵³ but disagrees with it. Even so, it is difficult to know why he considers that a "chill wind now blows through . . . editorial offices,"⁵⁴ in view of the unlimited right to use facts and ideas, published and unpublished, copyrighted and uncopyrighted; the limited right to use copyrighted, published material, and the severely limited right to use copyrighted, unpublished material. My thesis is that the delicate balance between the public interest and private rights should be restored by a return to earlier law through the total elimination of the right to the fair use of material that is unpublished or undissemintated.

An understanding of this thesis requires an examination of the policy underlying copyright law and the doctrine of fair use. The Supreme Court teaches that the purpose of copyright is to stimulate creativity for the public good through the incentive of a fair return for an author's labor.⁵⁵ The concept of advancing
the public welfare by encouraging individual effort through personal gain is said to drive the Patents and Copyrights clause of the Constitution. The Supreme Court reminds us "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." The fair use doctrine, described as an "equitable rule of reason," was developed by the courts to provide some elasticity in situations where the copyright law might tend to inhibit authors from creating new works by building on older works. Strict application of copyright in such situations would defeat incremental progress, to the detriment of the public good. My colleague, Judge Posner, suggests that Shakespeare, who was known to borrow plot, character and actual language from existing works, might be stifled by our copyright law. Positing a return to the theory of creative imitation of Shakespeare's day, Judge Posner notes that the extensive expansion of fair use that would be required not only would be difficult to define but would very adversely affect the author whose work was used. Although he finds thriving literature before there was such a thing as copyright, the reasons he gives for the phenomenon -- the low cost of writing, non-monetary rewards, and the high cost of copying -- have little relevance to modern times.
It is difficult to understand how the expansion of fair use of unpublished works that some espouse would serve the purpose of present-day copyright law. Not unexpectedly, an editorial in The Nation recently advocated that "Congress should indicate its displeasure with and disapproval of the recent rulings, beginning with the Nation case, which deviate so far from the way politics and history are and necessarily ought to be written." The Nation's specific proposal was to amend the Copyright Act to provide that "unpublished material shall be treated the same way as published works have heretofore been treated" for fair use purposes. Apparently, it would make no difference to The Nation whether or not the unpublished material was stolen. The statutory amendment proposed in the editorial, contrary to its purported goal, would not serve the public purpose because it would not encourage the efforts of authors. That an unpublished, undisseminated, copyrighted work is of historical significance and "deserving of unfettered public discussion" does not mean that the public may take from that work whatever it will.

As has been demonstrated, the present "open window" for fair use of unpublished material has given rise to much uncertainty. It allows for the exploitation of stolen text. It has spawned proposals for fair use analysis under market theory guidelines, redevelopment of the fair use doctrine predicated in part on a utopian theory, and evaluation of the unpublished nature of
the work on a fact/fiction scale. A rule that would disallow the exploitation of purloined work, dispel the uncertainty attributable to the open window, and eliminate the need to revise the doctrine of fair use as applied to unpublished works is a rule that prohibits absolutely any copying of unpublished or undisseminated works.

It cannot be gainsaid that an author should have the right and the opportunity to hone, polish, refine, revise or discard his or her work prior to publication. The author should also have the right to withhold the work from public dissemination, just as long as he or she deems it proper to do so. Implicated in these rights are notions of privacy, freedom to refrain from speaking, and an author's control of his or her own material. If information can be considered property under certain circumstances, an unpublished and undisseminated manuscript, duly copyrighted, should be considered the property of the author and subject to the protection of the law.

To the argument that the copying of unpublished material must be allowed for reasons of public health, safety or welfare, the short response is that copyright protection does not extend to any fact or idea embodied in a copyrighted work. To the assertion that the retention of unpublished, copyrighted papers for 50 to 100 years, immune from fair use, is at "cross-purposes" with the Copyright Clause of the Constitution, the
answer is the same. The freedom of access to facts and ideas is the history of democracy. The right of ownership in intellectual property is quite another thing. Interestingly enough, it appears that an author whose work is protected under the recently-ratified Berne Convention is entitled to protection from any use of an unpublished work. The Convention provides that:

\[
\text{[i]t \text{ shall be permissible to make quotations from a work which already has been made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose...}]
\]

Unpublished material would seem to be excluded from "fair practice," and a violation of "moral rights" may be implicated in any use of such material.

My thesis accounts for the concern of scholars that a denial of fair use for unpublished works would be "most inappropriate for the great majority of letters and memorabilia whose authors are no longer alive." It does so by allowing use of the factual content of letters and memorabilia. It also does so by deeming letters to be voluntarily disseminated to the public when they are received by the addressees. The generally accepted concept that the author of the letter retains the ownership of the intellectual property, while the recipient acquires ownership of the physical property, allows public display of the letter by the recipient. There is no great leap in logic to consider
that, in writing and sending letters, authors have agreed to a dissemination of their correspondence to the public. Voluntary public dissemination was, of course, the same as publication for the purpose of losing the common law copyright protection that applied to unpublished matter under the old dual system of copyright. Historians, as well as authors, scholars, journalists and researchers should have no quarrel with a rule that permits the fair use of copyrighted letters, wherever such letters are found, to the same extent that they are afforded fair use of published or publicly disseminated matter.

The Framers of our Constitution long ago foresaw the need to maintain balances in the republic they created: the balance between individual rights and public needs; the balance of authority between state and national governments; and the balance entailed in the separation of powers in the federal government. In the area of intellectual property, they foresaw a need to maintain a balance between the rights of authors and inventors and the rights of society. They therefore empowered the Congress to establish and maintain that balance by assuring that writers and inventors have exclusive rights, but only for a limited time, in their writings and discoveries. The balance contemplated cannot be established or maintained unless Congress affords to authors the assurance that their copyrighted work cannot be used in any manner whatsoever prior to publication or voluntary and public dissemination.
FOOTNOTES

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2. 2 W. Blackstone, Commentaries *405.
3. Id. *405-06.
4. The Statute of Anne, 8 Anne c. 19, cited in 2 W. Blackstone, Commentaries *407. This was the original copyright statute. W. Patry, The Fair Use Privilege in Copyright Law 4-5 (1985).
5. 2 W. Blackstone, Commentaries *407.
6. Id.
7. 4 W. Blackstone, Commentaries *230.
8. W. Patry, supra note 4, at 6-9.
13. Id. at 348.
15. W. Patry, supra note 4, at 439.
16. Id. at 440.
20. Id. § 107(1)-(4).
21. W. Patry, supra note 4, at 441-47.
23. See supra note 21.
24. W. Patry, supra note 4, at 442; see also 2 Nimmer, supra note 18, § 8.11[A], at 8-120.2 to 8-120.3.
27. Id. at 563.
28. Id. at 554 (quoting S. Rep. No. 473, 94th Cong., 1st Sess. 64 (1975)).
29. Id. at 555.
31. Id. at 97 (quoting Harper & Row, 471 U.S. at 564, and adding emphasis).
32. Id. at 96.
34. Id. at 1133.
35. Id. at 1134.
37. New Era, 873 F.2d at 383.
38. New Era, 884 F.2d at ___, No. 88-7095, slip op. 5287, 5295 (2d Cir. Aug. 29, 1989) (denial of rehearing in banc).
39. Id. at ___, slip op. at 5290.
40. Id. at ___, slip op. at 5290.
41. 873 F.2d at 584-85.


45. Salinger, 811 F.2d at 97.

46. Goldberg & Bernstein, supra note 44, at 3, col. 3.


48. Goldberg & Bernstein, supra note 44, at 7, col. 3.

49. Id. at 7, cols. 2-3.


51. Id. at 2, col. 3.


53. Wishingrad, supra note 50, at 2, col. 4 (quoting New Era, 873 F.2d at 584).

54. Id. at 2, col. 3.

55. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1978).


60. Id. at 351.

61. Id. at 339.


63. Id.


66. See Fisher, supra note 11, at 1780.


72. See, e.g., MacGregor v. Watts, 254 A.D. 904, 5 N.Y.S.2d 525 (2d Dep't 1938) (manuscripts of plays, at least one of which was copyrighted, held subject to conversion).

73. Goroff, supra note 17, at 348.


American Historical Association), quoted in W. Patry, supra note 4, at 444-45.


83. 1 Nimmer, supra note 18, § 5.04.


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2
In the United States, Congress first exercised its constitutional authority to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings" when it enacted the first copyright statute in 1790. In *Folsom v. Marsh*, Justice Story formulated the first definitive statement on fair use in American copyright law. The case involved a claim of infringement in the copying of certain letters of George Washington in a two-volume work on Washington written by Rev. Charles Upham. The letters were copied from the twelve-volume work of Jared Sparks, who originally edited, copyrighted and published them. Sparks and Chief Justice Marshall had obtained the letters from Justice Bushrod Washington, nephew of the first president. In his opinion, Justice Story discussed the justifiable uses of copyrighted works and developed some factors to be considered in determining whether there has been an infringement. Those factors -- the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work -- were to be echoed in the Copyright Act of 1976.

The distinction between common law and statutory copyright protection was carried over to American law from the law of England. Common law copyright attached to a work from creation
to publication or dissemination, and was enforceable in the state courts. As was true under British law, the defense of fair use was not considered applicable to unpublished material. The 1976 Copyright Act changed all that. Or so it seemed. Common law copyright, often referred to as the right of first publication, was preempted by the new statute. The doctrine of fair use was codified and made applicable for the first time to all copyrighted work, published and unpublished, without distinction. According to the Act, "fair use of a copyrighted work . . . for purposes 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 a particular case is fair, courts are constrained to consider four factors: purpose and character of the use; nature of the copyrighted work; amount and substantiality of the portion used; and effect of the use on the potential market for the copyrighted work.

A persuasive case is made in the leading treatise on fair use for the proposition "that Congress intended to continue the common law prohibition against fair use of unpublished but not voluntarily disseminated works." There is, of course, no specific statutory language supporting the proposition, which is founded in a review of the legislative history of the 1976 Act. The legislative history referred to is derived from the reports.
of several committees of Congress, including one expressing a congressional intent to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." The treatise refers to this and other evidence as providing support for the notion that the fair use doctrine is intended to apply only to unpublished works that are publicly disseminated, the same as at common law. Apparently, public dissemination is thought to involve a deliberate choice to make a work available to others, short of actual publication. The public performance of unpublished plays and an author's delivery of an unpublished manuscript to a critic are given as examples of voluntary dissemination. Publication is defined by statute as "the distribution of copies . . . of a work to the public" as well as "[t]he offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display . . . . A public performance or display of a work does not of itself constitute publication." The distinction between publication and public dissemination is very slight indeed.

In Harper & Row, Publishers, Inc. v. Nation Enterprises, the Supreme Court was presented with a clear opportunity to eliminate unpublished works from the reach of fair use. That it did not do so was attributable solely to the language of the Copyright Act. Unquestioned in Harper & Row was the trial
court's finding that the defendant "knowingly exploited a purloined manuscript." The manuscript in question was, of course, the memoirs of President Ford. Excerpts of the memoirs were scheduled to appear in *Time* magazine one week before the full length book was to be distributed by the plaintiff publishing house. Before either scheduled event transpired, simple theft allowed the defendant to print and distribute the words of President Ford, describing the pardon of Richard Nixon, in its publication. In reversing the Second Circuit Court of Appeals and holding the plaintiff entitled to damages, the Court concluded "that the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use." Although the Court analyzed the facts of the case in terms of the four statutory fair use factors, it held that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." I suggest that the vague and undefined phrase, "under ordinary circumstances," leaves open a window that should be closed by Congress. The window is open only because the Copyright Act presently makes no distinction for fair use purposes between copyrighted material that is published or disseminated and copyrighted material that is unpublished or undissemintated. It is a window through which a thief may enter.
In the wake of Harper & Row, the courts have been faced with some thorny problems in deciding whether various uses of unpublished, copyrighted material were used fairly within the intendment of the Copyright Act. For example, in Salinger v. Random House, Inc., a case involving the copying of letters of J.D. Salinger by a biographer who gained access to the letters by promising not to copy them, the appeals court panel puzzled over the "ambiguity arising from the Supreme Court's observation that 'the scope of fair use is narrower with respect to unpublished works.'" The conclusion was that the Court meant it was less likely that fair use would apply to unpublished than published matter, and not merely that a lesser quantity of material may be copied in the case of unpublished matter. It is interesting to note that at least some of the biographer's copying was motivated by a desire to avoid writing what he called "pedestrian sentence[s]." If you can lift the word images and stylistic devices of J.D. Salinger, why bother creating your own?

The extensive use of an unpublished paper "purloined from the Princeton library" presented a District Judge with yet another twist in the defense of fair use. A copy of the paper, dealing with the Pahlevi restoration in Iran, arrived at the library as part of the files of Allen Dulles, to whom it was sent by the author. Researchers at the library were afforded notice of possible liability for copyright infringement and agreed that
permission to reproduce was required. The user claimed that he was entitled to copy large parts of the author's paper in order to provide his book with an "air of authenticity" and "full flavor." He contended also that the "ordinary circumstances" rule did not apply because the paper copied was fact rather than fiction, the author of the paper had given copies to certain persons, and the paper and the book were designed to serve different purposes. The district court rejected all these contentions, applied the statutory fair use factors and found the user liable for infringement.

An action to enjoin the publication of the biography of L. Ron Hubbard, deceased founder of the Church of Scientology, presented another occasion for an attempt to define further the imprecise parameters of the doctrine of fair use as it pertains to unpublished material. The material was the product of the pen of Hubbard himself, and the unpublished writings in question, a certain diary in particular, were almost certainly acquired from the Church of Scientology by misappropriation or conversion. Although the district court ultimately decided to award damages for infringement, it accepted the infringer's contention that there is greater justification in using unpublished work to make a point about the character of the work's author (as was the case in the Hubbard biography) than to display the distinctiveness of a writing style (as was the case in the Salinger biography).
In dictum, the panel majority of the appeals court found the distinction between use to enliven text and use to communicate certain traits of character "unnecessary and unwarranted:" the biography clearly was a work of criticism, scholarship or research, the purpose of use factor therefore weighed in favor of the copier, and this distinction was considered superfluous.\(^{37}\) The dissent from denial of in banc consideration in the case found significance in the fact that the Supreme Court never has expressly rejected the "distinction between copying expression to enliven the copier’s prose and doing so where necessary to report a fact accurately and fairly."\(^{38}\) As the author of the panel majority opinion and the opinion concurring in the denial of rehearing in banc, I continue to "question whether judges, rather than literary critics, should decide whether literary material is used to enliven text or demonstrate truth."\(^{39}\) In my opinion, "[i]t is far too easy for one author to use another author’s work on the pretext it is copied for the latter purpose rather than the former."\(^{40}\) The issue is not yet definitely resolved in the Second Circuit because affirmance of the judgment of the district court in the case, *New Era Publications v. Henry Holt & Co.*, was based on laches, rather than on the type of use to which the converted material was put.\(^{41}\)

Certain elements of the intellectual property bar hold the firm belief that the window of fair use should be opened even
wider than permitted by Harper & Row for access to unpublished and undisseminated material. These elements apparently are not at all offended by the notion of exploiting a manuscript pilfered by a burglar from an author's locked desk drawer, provided the exploitation furthers a just and worthy cause. That federal judges are intended to decide what causes are good and just should be a matter of some concern. Many critics base their positions on First Amendment arguments. One commentator has written that "[t]he nature of the accommodation [sic] between copyright principles and First Amendment principles remains to be drafted." Yet the Supreme Court in Harper & Row noted "that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" The commentator merely chooses to disregard the accommodation already identified by the Supreme Court.

The authors of an article describing the doctrine of fair use as "the biographer's bane" condemn the severe limitations on copying unpublished works protected by copyright as a "dangerous rule of interpretation." They refer to language in Salinger -- "unpublished works . . . normally enjoy complete protection against copying any protected expression" -- as an "overstatement" of the Harper & Row standard: "[u]nder
ordinary circumstances, the author's right to control the first public appearance of his undiseminated expression will outweigh a claim of fair use." It is difficult to discern how the language in Salinger is anything other than a restatement of the standard in Harper & Row. The same authors find much to criticize in New Era, finding that it "ignore[s] the explicit congressional mandate that the equities must be flexibly balanced case by case" in favor of elevating the single fact of unpublished status "to an almost insurmountable obstacle to a successful fair use defense." But there is nothing in New Era to indicate that the congressional mandate to apply the fair use factors in the case of unpublished works is to be ignored. There is merely a reiteration of the principle that the unpublished nature of a work is to weigh heavily in the balance and a faithful adherence to the "under ordinary circumstances" language employed by the Supreme Court.

It is surely an exaggeration to say, as does one commentator, that "[b]iographers are now virtually precluded from publishing convincing, critical portraits backed up by limited use of the subject's unpublished writings to rebut a too polished public persona." It simply is an incorrect statement of law to say, as does the same commentator, that we have come to a point "where property rights -- albeit intellectual property rights -- embodied in the Copyright Act, which protects the manner of
expression of ideas or facts, takes precedence over the First Amendment, which prevents the monopolization or privatization of facts or ideas." When the Supreme Court has held specifically that the protections of the First Amendment are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas." As to the fair use doctrine in particular, the commentator candidly concedes as accurate the statement that the "'doctrine encompasses all claims of first amendment in the copyright field,'" but disagrees with it. Even so, it is difficult to know why he considers that a "chill wind now blows through . . . editorial offices," in view of the unlimited right to use facts and ideas, published and unpublished, copyrighted and uncopyrighted; the limited right to use copyrighted, published material, and the severely limited right to use copyrighted, unpublished material. My thesis is that the delicate balance between the public interest and private rights should be restored by a return to earlier law through the total elimination of the right to the fair use of material that is unpublished or undissemiuated.

An understanding of this thesis requires an examination of the policy underlying copyright law and the doctrine of fair use. The Supreme Court teaches that the purpose of copyright is to stimulate creativity for the public good through the incentive of a fair return for an author's labor. The concept of advancing
the public welfare by encouraging individual effort through personal gain is said to drive the Patents and Copyrights clause of the Constitution.\textsuperscript{56} The Supreme Court reminds us "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."\textsuperscript{57} The fair use doctrine, described as an "equitable rule of reason,"\textsuperscript{58} was developed by the courts to provide some elasticity in situations where the copyright law might tend to inhibit authors from creating new works by building on older works. Strict application of copyright in such situations would defeat incremental progress, to the detriment of the public good. My colleague, Judge Posner, suggests that Shakespeare, who was known to borrow plot, character and actual language from existing works, might be stifled by our copyright law.\textsuperscript{59} Positing a return to the theory of creative imitation of Shakespeare's day, Judge Posner notes that the extensive expansion of fair use that would be required not only would be difficult to define but would very adversely affect the author whose work was used.\textsuperscript{60} Although he finds thriving literature before there was such a thing as copyright, the reasons he gives for the phenomenon -- the low cost of writing, non-monetary rewards, and the high cost of copying -- have little relevance to modern times.\textsuperscript{61}
It is difficult to understand how the expansion of fair use of unpublished works that some espouse would serve the purpose of present-day copyright law. Not unexpectedly, an editorial in The Nation recently advocated that "Congress should indicate its displeasure with and disapproval of the recent rulings, beginning with the Nation case, which deviate so far from the way politics and history are and necessarily ought to be written." The Nation's specific proposal was to amend the Copyright Act to provide that "unpublished material shall be treated the same way as published works have heretofore been treated" for fair use purposes. Apparently, it would make no difference to The Nation whether or not the unpublished material was stolen. The statutory amendment proposed in the editorial, contrary to its purported goal, would not serve the public purpose because it would not encourage the efforts of authors. That an unpublished, undisseminted, copyrighted work is of historical significance and "deserving of unfettered public discussion" does not mean that the public may take from that work whatever it will.

As has been demonstrated, the present "open window" for fair use of unpublished material has given rise to much uncertainty. It allows for the exploitation of stolen text. It has spawned proposals for fair use analysis under market theory guidelines, redevelopment of the fair use doctrine predicated in part on a utopian theory, and evaluation of the unpublished nature of
the work on a fact/fiction scale. A rule that would disallow the exploitation of purloined work, dispel the uncertainty attributable to the open window, and eliminate the need to revise the doctrine of fair use as applied to unpublished works is a rule that prohibits absolutely any copying of unpublished or undisseminated works.

It cannot be gainsaid that an author should have the right and the opportunity to hone, polish, refine, revise or discard his or her work prior to publication. The author should also have the right to withhold the work from public dissemination just as long as he or she deems it proper to do so. Implicated in these rights are notions of privacy, freedom to refrain from speaking, and an author's control of his or her own material. If information can be considered property under certain circumstances, an unpublished and undisseminated manuscript, duly copyrighted, should be considered the property of the author and subject to the protection of the law.

To the argument that the copying of unpublished material must be allowed for reasons of public health, safety or welfare, the short response is that copyright protection does not extend to any fact or idea embodied in a copyrighted work. To the assertion that the retention of unpublished, copyrighted papers for 50 to 100 years, immune from fair use, is at "cross-purposes" with the Copyright Clause of the Constitution, the
answer is the same. The freedom of access to facts and ideas is the history of democracy. The right of ownership in intellectual property is quite another thing. Interestingly enough, it appears that an author whose work is protected under the recently-ratified Berne Convention is entitled to protection from any use of an unpublished work. The Convention provides that:

\[
\text{[i]t shall be permissible to make quotations from a work which already has been made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose . . . .}
\]

Unpublished material would seem to be excluded from "fair practice," and a violation of "moral rights" may be implicated in any use of such material.

My thesis accounts for the concern of scholars that a denial of fair use for unpublished works would be "most inappropriate for the great majority of letters and memorabilia whose authors are no longer alive." It does so by allowing use of the factual content of letters and memorabilia. It also does so by deeming letters to be voluntarily disseminated to the public when they are received by the addressees. The generally accepted concept that the author of the letter retains the ownership of the intellectual property, while the recipient acquires ownership of the physical property, allows public display of the letter by the recipient. There is no great leap in logic to consider
that, in writing and sending letters, authors have agreed to a dissemination of their correspondence to the public. Voluntary public dissemination was, of course, the same as publication for the purpose of losing the common law copyright protection that applied to unpublished matter under the old dual system of copyright. 84 Historians, as well as authors, scholars, journalists and researchers should have no quarrel 85 with a rule that permits the fair use of copyrighted letters, wherever such letters are found, to the same extent that they are afforded fair use of published or publicly disseminated matter.

The Framers of our Constitution long ago foresaw the need to maintain balances in the republic they created: the balance between individual rights and public needs; the balance of authority between state and national governments; and the balance entailed in the separation of powers in the federal government. In the area of intellectual property, they foresaw a need to maintain a balance between the rights of authors and inventors and the rights of society. 86 They therefore empowered the Congress to establish and maintain that balance by assuring that writers and inventors have exclusive rights, but only for a limited time, in their writings and discoveries. The balance contemplated cannot be established or maintained unless Congress affords to authors the assurance that their copyrighted work cannot be used in any manner whatsoever prior to publication or voluntary and public dissemination.
FOOTNOTES

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2. 2 W. Blackstone, Commentaries *405.

3. Id. *405-06.

4. The Statute of Anne, 8 Anne c. 19, cited in 2 W. Blackstone, Commentaries *407. This was the original copyright statute. W. Patry, The Fair Use Privilege in Copyright Law 4-5 (1985).

5. 2 W. Blackstone, Commentaries *407.

6. Id.

7. 4 W. Blackstone, Commentaries *230.

8. W. Patry, supra note 4, at 6-9.


13. Id. at 348.


15. W. Patry, supra note 4, at 439.

16. Id. at 440.


20. Id. § 107(1)-(4).

21. W. Patry, supra note 4, at 441-47.


23. See supra note 21.

24. W. Patry, supra note 4, at 442; see also 2 Nimmer, supra note 18, § 8.11[A], at 8-120.2 to 8-120.3.


27. Id. at 563.

28. Id. at 554 (quoting S. Rep. No. 473, 94th Cong., 1st Sess. 64 (1975)).

29. Id. at 555.


31. Id. at 97 (quoting Harper & Row, 471 U.S. at 564, and adding emphasis).

32. Id. at 96.


34. Id. at 1133.

35. Id. at 1134.


37. New Era, 873 F.2d at 383.

38. New Era, 884 F.2d at ____, No. 88-7095, slip op. 5287, 5295 (2d Cir. Aug. 29, 1989) (denial of rehearing in banc).

39. Id. at ____, slip op. at 5290.

40. Id. at ____, slip op. at 5290.

41. 873 F.2d at 584-85.


45. Salinger, 811 F.2d at 97.

46. Goldberg & Bernstein, supra note 44, at 3, col. 3.


48. Goldberg & Bernstein, supra note 44, at 7, col. 3.

49. Id. at 7, cols. 2-3.


51. Id. at 2, col. 3.


53. Wishingrad, supra note 50, at 2, col. 4 (quoting New Era, 873 F.2d at 584).

54. Id. at 2, col. 3.

55. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1978).


60. Id. at 351.

61. Id. at 339.


63. Id.


66. See Fisher, supra note 11, at 1780.


72. See, e.g., MacGregor v. Watts, 254 A.D. 904, 5 N.Y.S.2d 525 (2d Dep’t 1938) (manuscripts of plays, at least one of which was copyrighted, held subject to conversion).

73. Goroff, supra note 17, at 348.


American Historical Association), quoted in W. Patry, supra note 4, at 444-45.


83. 1 Nimmer, supra note 18, § 5.04.

