COPYRIGHT—THE UNAUTHORIZED USE OF VERBATIM QUOTES FROM A PUBLIC FIGURE'S MANUSCRIPT PRIOR TO ITS PUBLICATION FOR USE IN A NEWS STORY CONSTITUTED AN APPROPRIATION OF THE RIGHT OF FIRST PUBLICATION AND IS NOT PROTECTED BY THE FAIR USE PRIVILEGE OF THE COPYRIGHT ACT.—*Harper & Row Publishers, Inc. v. Nation Enterprises* (U. S. Sup. Ct. 1985).

Shortly after leaving the presidency in 1977 Gerald Ford signed an agreement with Harper & Row and Reader's Digest, granting them exclusive rights to publish his as yet unwritten memoirs.[1] Soon after the first draft was completed in February 1979, the publishers granted *Time* magazine exclusive rights to publish excerpts in their issue of April 23rd for which *Time* paid $12,500 in advance and agreed to pay another $12,500 when its edition was complete.[2] Before *Time's* scheduled publication date, however, an anonymous source gave a copy of the Ford manuscript to Victor Navasky, editor of *The Nation*, and Navasky used the manuscript to prepare an article for his magazine concerning Ford's pardon of former President Nixon and other events.[3] *The Nation's* article, containing quotes from the Ford manuscript, appeared on April 3, 1979.[4] Shortly thereafter *Time* cancelled its proposed article and refused to pay the remaining $12,500.[5]

Harper & Row and Reader's Digest brought action in federal district court against *The Nation* for infringement of copyright and state law violations.[6] The district court dismissed the pendant actions of conversion and interference with contract,[7] but ruled that the use of the Ford memoirs by *The Nation* constituted an infringement of copyright,[8] and that the use of

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1. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2221 (1985).

2. Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 198 (2d Cir. 1983).

3. *Id.* The article, *The Ford Memoirs: Behind the Nixon Pardon*, was reprinted as an appendix to all of the decisions. Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. 1067, 1073 (S.D.N.Y. 1983); 723 F.2d at 209; 105 S. Ct. at 2236.

4. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2222.

5. *Id.*

6. *Id.*

7. Harper & Row Publishers, Inc. v. Nation Enterprises, 501 F. Supp. 848, 854 (S.D.N.Y. 1980). The court based its ruling on the ground that the pendant actions were preempted by section 301 of the Copyright Act, which states in part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright. . .are governed exclusively by this title [17 U.S.C.]. . . .[N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a) (1982). *See also*, 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1] (1985) [hereinafter cited as COPYRIGHT].

8. Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. at 1073. The district court noted that while historical facts and memoranda are not copyrightable per se the

the copyrighted material could not be justified under the doctrine of fair use under 17 U.S.C. section 107.[9] On appeal, the Court of Appeals for the Second Circuit affirmed in part and reversed in part.[10] The court held that the use of the copyrighted material was privileged under the fair use doctrine.[11] The case was brought to the Supreme Court on a petition for certiorari.[12] The United States Supreme Court *held*, reversed and remanded.[13] *The Nation's* use of verbatim quotes from the Ford manuscript constituted an appropriation of the right of first publication and was not privileged by "fair use." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218 (1985).

The Court's decision in *Nation Enterprises* was the second in a little over a year examining the doctrine of fair use of copyrighted material.[14] In

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totality of the facts, together with Ford's reflections, were protected by copyright. *Id.* at 1072.

The view that fact and expression could merge to form a protected totality was also approved by the dissenting judge for the court of appeals. Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d at 214 (Meskill, J., dissenting). In its decision the Supreme Court left this question unsettled, but Justice Brennan was strongly critical of the idea in his dissent. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2243 n.7 (Brennan, J., dissenting). *See infra* notes 64-66 and accompanying text.

9. 17 U.S.C. section 107 sets forth the statutory considerations for the fair use doctrine. It provides in part:

> Notwithstanding the provisions of section 106, the 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. . .is fair use the factors to be considered shall include—
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> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982).

10. Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d at 209. The court of appeals affirmed the district court's dismissal of the actions for conversion and tortious interference with contract. *Id.* at 201.

11. *Id.* at 208.

12. The Court granted certiorari on May 29, 1984. Harper & Row Publishers, Inc. v. Nation Enterprises, 104 S. Ct. 2655 (1984).

13. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2235. Justice O'Connor delivered the opinion of the Court. *Id.* at 2221. Justice Brennan, joined by Justice White and Justice Marshall, dissented. *Id.* at 2240 (Brennan, J., dissenting).

14. The prior case was *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The *Sony* Court dealt with the rapidly growing use of home video recorders to record copyrighted programs off the public airways. *Id.* at 419-20. In *Sony* the owners of copyrighted material brought action against Sony Corporation, a leading manufacturer of home video recorders, charging the company was liable for any copyright infringement committed by its customers. *Id.* at 422.

Writing for the majority, Justice Stevens stated that any individual may reproduce a copy-

its decision, the Court stated that the right of a copyright holder to control the first appearance of his expression is not necessarily subject to unrestricted fair use, even if the expression is a matter of public concern.[15] In his dissent, Justice Brennan stated his belief that the Court went too far in narrowly construing the fair use provision of the copyright law to create a benefit for the copyright holder at the expense of the public's right to ideas and information necessary to robust public debate.[16] Justice Brennan wrote that any restriction on the free flow of ideas and information was inconsistent with previous Court decisions stressing the importance of first amendment values.[17]

Both the majority opinion and the dissent in *Nation Enterprises* recognized policy goals in the copyright law of fairly rewarding authors of original works on the one hand, and benefiting the welfare of society through the publishing of newsworthy events on the other.[18] The majority placed greater

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righted work for a fair use. *Id.* at 433. Moreover, he noted that manufacture and sale of copying equipment does not impose a vicarious liability for copyright infringement if the equipment is widely used for legitimate purposes. *Id.* at 442. Accordingly, private non-commercial use of video recorders to "time shift" copyrighted material is a non-infringing use protected as a fair use. *Id.* at 454-55. Justice Blackmun, joined by Justice Marshall, Justice Powell, and Justice Rehnquist, dissented. *Id.* at 457 (Blackmun, J., dissenting).

The equitable doctrine of fair use affords a privilege to use copyrighted material in a reasonable way without the consent of the copyright holder. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (quoting BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944)). "Though technically an infringement of copyright . . . [fair use] is allowed by law on the ground that the appropriation is reasonable and customary." Holdredge v. Knight Publishing Corp., 214 F. Supp. 921, 924 (S.D. Cal. 1963). It has been called "the most troublesome in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

The fair use doctrine was first articulated in America by Justice Story, sitting in circuit, in Folsom v. Marsh, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901). "[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism." *Id.* at 344.

The current statutory guideline for fair use, 17 U.S.C. section 107, codified the concept for the first time in an attempt to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680.

*See generally*, COPYRIGHT *supra* note 7, at § 13.05 (1985); W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985); Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968); Annot., 23 A.L.R.3d 139 (1969).

15. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2230.

16. *Id.* at 2240 (Brennan, J., dissenting).

17. *Id.* at 2242 (Brennan, J., dissenting). *See* Lee v. Runge, 404 U.S. 887, 893 (1971) ("The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treaties and thus obtain a monopoly on the ideas they contained") (Douglas, J., dissenting); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self government"); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[A] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open").

18. *Compare* Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2223

emphasis on the economic benefits an author may obtain by controlling the first publication of a work,[19] while the dissent placed greater emphasis on the benefits to society created by copyright.[20] These contrasting values formed the basis for the conflict between the Court's majority and the dissenters.

The *Nation Enterprises* case is significant for several reasons. The Court's application of the fair use factors outlined in the statute effectively narrowed the latitude given to fair use.[21] Additionally, the Court recognized that a copyrighted work's stage of publication should be regarded as an important consideration in a fair use analysis, finding that the use of material before its publication will normally weigh against fair use.[22] Finally, the Court made clear that while news reporting is protected by the fair use doctrine, newsworthiness does not necessarily overcome a presumption against fair use.[23] The Court, in creating a presumption against fair use of unpublished material, did not attempt to define the circumstances that could overcome the presumption, leaving future courts to deal with language that strongly discourages fair use of unpublished materials.[24]

Copyright does not protect facts or ideas, but only the author's original expression.[25] Drawing the line between "idea" and "expression" is not easy,

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*with id.* at 2241 (Brennan, J., dissenting).

19. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2228. "But copyright assures those who write and publish factual narratives. . .that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment." *Id.* at 2229. *See also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. at 477 ("The monopoly created by copyright thus rewards the individual author in order to benefit the public"). (Blackmun, J., dissenting).

20. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2241 (Brennan, J., dissenting). *Cf.* Sony Corp. v. Universal City Studios, 464 U.S. at 429 ("The monopoly privileges the Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes the reward to the owner a secondary consideration"); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors").

21. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2231-35.

22. *Id.* at 2222.

23. *Id.* at 2228-30.

24. *Id.* at 2227-28.

25. The relevant part of 17 U.S.C. section 102 provides:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship . . . .

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form . . . .

but it may be said that expression is the particular way an author arranges his or her ideas.[26] Accordingly, to infringe copyright, *The Nation's* use of the Ford manuscript had to constitute a taking of Ford's "expression."[27]

The Court did not choose to address the question of whether *The Nation's* article infringed on Ford's expression since *The Nation* did not copy Ford's narrative expression verbatim, but only used between 300 and 400 words of the manuscript.[28] The Court admitted that:

> [C]opyright does not prevent subsequent users from copying a prior author's work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions.[29]

Instead, the Court focused on *The Nation's* use of verbatim quotes from the Ford manuscript as effectively arrogating "to itself the right of first publication, an important marketable subsidiary right."[30]

Before examining the circumstances of the case in light of the statutory fair use factors, the Court made some preliminary observations concerning fair use.[31] First, the Court stated its reasons for determining that the unpublished nature of the work tends to negate the fair use defense.[32] The Court stated that a use that supersedes the original author's use should not be considered fair use unless a reasonable copyright owner would have consented to the use.[33] The Court noted that at common law, fair use was not

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17 U.S.C. § 102 (1982).

26. *See* COPYRIGHT, *supra* note 7, at § 1.10[B][2] (1985).

27. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2243 (Brennan, J., dissenting). *Cf.* Mazer v. Stein, 347 U.S. 201, 217 (1954) ("[P]rotection is given only to the expression of an idea—not the idea itself"); Baker v. Selden, 101 U.S. 99, 103 (1879) ("[Communication] of knowledge would be frustrated if knowledge could not be used without incurring the guilt of piracy of the work"); Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984) ("The copyright law protects expression of unprotectable ideas only insofar as is possible without protecting the ideas themselves"); Warner Bros., Inc. v. American Broadcasting Cos., Inc., 654 F.2d 204, 209 (2d Cir. 1981) ("[A] copyright never extends to the 'idea' of the 'work' but only to its 'expression' and . . . no one infringes unless he descends so far into what is concrete as to invade that 'expression' ") (quoting National Comics Publication, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 600 (2d Cir. 1951) (emphasis omitted); Perma Greetings, Inc. v. Russ Berrie & Co., Inc., 598 F. Supp. 445, 447 (E.D. Mo. 1984) ("The substantial similarity . . . required for infringement, must be substantial similarity of expression, not. . .ideas"); Streeter v. Rolfe, 491 F. Supp. 416, 420 (W.D. La. 1980) ("[O]thers can utilize the idea as long as they do not plagiarize its expression").

28. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2224-25.

29. *Id.* at 2224 (quoting COPYRIGHT, *supra* note 7, at § 2.11[B] (1984)).

30. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2225.

31. *Id.* at 2225-31.

32. *Id.* at 2225-28.

33. *Id.* at 2225-26. The Court also found a prohibition against fair use that supersedes the copyright owner's use in Justice Story's opinion in *Folsom v. Marsh:*

> On the other hand, it is as clear, that if he [the reviewer] thus cites the most impor-

recognized as a defense to prepublication infringement because the author should have absolute control over his work until he allows it to be published.[34] The *Nation Enterprises* Court suggested that Congress intended to keep the common law distinction between published and unpublished works under statutory fair use.[35]

According to the Court, coupled with the distinction given to unpublished works is the right of the author to control the first publication of his work.[36] This is one of the rights set forth under section 106 of the Copyright Law.[37] Even though these rights are subject to the fair use doctrine as set forth in 17 U.S.C. section 107, the Court could not accept the supremacy of fair use over these rights in all cases.[38] Instead the Court noted that all fair use analysis should be conducted on an *ad hoc* basis.[39] The Court stated that the right to control the first publication "is inherently different from other section 106 rights in that only one person can be the first publisher," and the right to control the first publication has significant impact on the economic value of the work.[40]

Second, the Court indicated that it makes no difference that the author intended his work to be published eventually because an author's right to control publication deserves protection.[41] The right to control the first pub-

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> tant parts of the work, with a view, not to criticize, [sic] but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Folsom v. Marsh, 9 F. Cas. at 344-45. *See supra* note 14 and accompanying text.

34. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2226. The Court cited no case law to support this contention relying instead on observations by authors of treatises. *Id.* at n.4. *See also*, Comment, *The Stage of Publication as a "Fair Use" Factor: Harper & Row Publishers, Inc. v. The Nation Enterprises*, 58 ST. JOHN'S L. REV. 597 (1984). This student comment, cited in the Court's opinion, disapproved of the court of appeals' decision and urged that the stage of publication be coinsidered as a fair use factor. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2226.

35. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2226. The Court based its finding on two points. First, a Senate Report stated that the application of fair use to unpublished material should be narrowly limited since this is a choice by the copyright owner. *Id.* at 2227. Even though this passage was left out of the final report by the House, the House Report seems to approve the Senate Report's analysis of fair use. *Id. See also* S. Rep. No. 473, 94th Cong., 1st Sess. 64, *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 116 (1977); H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 67, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5680. Second, the Court believes that since the distinction between published and unpublished works was recognized at common law it was preserved by Congress when it stated that the codification of fair use was a "restatement" and not meant to "change, narrow, or enlarge it in any way." Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2227 (quoting H.R. Rep. No. 94-1476 at 66). *See infra* note 87.

36. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2228.

37. 17 U.S.C. § 106(3) (1982).

38. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2227.

39. *Id.*

40. *Id.*

41. *Id.* at 2228.

lication guarantees authors the necessary time to develop their ideas without fear of a taking for a short term news value.[42] Because this is a property interest, as well as an interest in creative control, a copyright holder should be able to exploit this interest for his maximum benefit.[43] With this reasoning the Court concluded that under most circumstances the benefits to be enjoyed by the author in controlling the first publication will outweigh a fair use defense.[44]

Against this background, the Court declined to grant an exception to this principle based on newsworthy works.[45] The Court clearly stated that news per se is not copyrightable, but that a factual narrative like the Ford manuscript must still enjoy the law's protection to market the author's expression.[46] The Court also rejected any idea of giving fair use greater weight for works written by public officials.[47] The Court said it believed such an exception would defeat the incentive a public figure has to produce a work of public importance.[48] In summary, the right of a public figure to control the first publication of his work, and to realize benefits from it, should not be restricted because it may be considered newsworthy.[49] The Court emphasized that "[I]n 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."[50]

Thus, the Court added the non-statutory test of a work's stage of publication as a factor in determining fair use, while refusing to expand fair use for works of public concern.[51] In order to determine if the use of verbatim quotes from a public figure's manuscript was permitted by fair use, the case "must be judged according to the traditional equities of fair use."[52] The majority concluded that *The Nation's* use of the Ford manuscript should be judged according to the factors set forth in section 107.[53]

In his dissent, Justice Brennan addressed what he called the "threshold

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 2228-30.
46. *Id.* at 2228-29. In noting that news is not copyrightable per se the Court quoted from an earlier case, that "the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day." *Id.* at 2229 (quoting International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918)).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2230.
51. *Id.* at 2227-30.
52. *Id.* at 2231.
53. *Compare id. with id.* at 2245 (Brennan, J., dissenting).

of copyrightability question," which was ignored by the majority.[54] This question concerned whether *"The Nation's* use of material from the Ford manuscript in forms other than direct quotation from that manuscript infringed Harper & Row's copyright."[55] Justice Brennan proceeded with a two-step analysis.[56] According to Brennan it was necessary to determine first, *how closely The Nation's* article tracked Ford's "particular language and structure of presentation," and second, *how much* of Ford's language and structure *The Nation* appropriated.[57] Since *The Nation's* article was, aside from the quotations, an indirect recounting of a factual narrative which cannot be copyrighted, infringement would lie in a "too close and substantial a tracking of Mr. Ford's expression of this information."[58] Although *The Nation* had used language that closely resembled Ford's, Justice Brennan opined that it did not constitute infringement for three reasons:

> First, some leeway must be given to subsequent authors seeking to convey facts because those "wishing to express the ideas contained in a factual work often can choose only from a narrow range of expression." [citation omitted] Second, much of what *The Nation* paraphrased was material in which Harper & Row could claim no copyright. Third, *The Nation* paraphrased nothing approximating the totality of a single paragraph, much less a chapter or the work as a whole.[59]

Finally, in addressing the threshold of the copyrightability question, Justice Brennan noted that the article had not copied Ford's structure, except that in some instances it presented facts in chronological order, much as Ford had done.[60] Justice Brennan concluded, as the majority had, that *The Nation* had violated copyright only if the 300 to 400 words of quotations used had infringed on any of Harper & Row's rights under the Copyright Act.[61]

In his dissent, Justice Brennan prefaced his examination of the fair use factors by emphasizing the distinction between protected literary form and unprotected information and ideas, and that fair use should only be evalu-

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54. *Id.* at 2241 (Brennan, J., dissenting).
55. *Id.* (Brennan, J., dissenting).
56. *Id.* at 2242-45 (Brennan, J., dissenting).
57. *Id.* at 2242-43 (Brennan, J., dissenting).
58. *Id.* at 2243 (Brennan, J., dissenting).
59. *Id.* at 2244 (Brennan, J., dissenting).
60. *Id.* at 2243 (Brennan, J., dissenting).
61. *Id.* at 2245 (Brennan, J., dissenting). 17 U.S.C. section 106 provides in part:

> Subject to sections 107 through 118, the 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 . . . ;
> (2) To prepare derivative works based upon the copyrighted work;
> (3) To distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership . . . .

17 U.S.C. § 106 (1982).

ated regarding the author's literary form and not the information and ideas expressed.[62] In Justice Brennan's opinion, the Court failed to draw a clear distinction between facts and literary expression and fell to the temptation of providing, "compensation for the appropriation of information from a work of history," that led to the wrong result in this case.[63]

The lower courts had addressed the issue of facts combining with expression to form a protected totality.[64] The Supreme Court deliberately avoided the subject, preferring to leave this point of law unsettled.[65] Justice Brennan, however, squarely rejected the idea that facts could combine with the author's expression to form a protected totality.[66]

The majority and the dissent analyzed *The Nation's* actions under the four factors set out in the statute: (1) the purpose or nature of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[67] This list of factors is in no way meant to be exclusive, but "normally these four factors . . . govern the analysis."[68]

In evaluating the first factor, the purpose and character of the use, the majority noted that the purpose of *The Nation's* use of the Ford quotes was that of news reporting, one of the purposes for fair use outlined in section 107.[69] News reporting, however, is just one factor to be considered in fair use analysis.[70] Here, the Court found that *The Nation* went beyond mere reporting, "and actively sought to exploit the headline value of its infringe-

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62. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2245 (Brennan, J., dissenting). Justice Brennan stated that since copyright protects only expression or literary form, a fair use analysis must look to how the original author's literary form or expression was used. *Id.* (Brennan, J., dissenting). Since fair use only applies to use of literary form or expression and not facts or ideas, the distinction must be made in every analysis. *Id.* (Brennan, J., dissenting).

63. *Id.* at 2246 (Brennan, J., dissenting).

64. Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. at 1072; 723 F.2d at 214 (Meskill, J., dissenting). *See supra* note 8.

65. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2224-25. It is difficult to speculate why the Court did not address this issue. Perhaps it was left untouched in order to maintain a coalition for a majority opinion.

66. *Id.* at 2243 n.7 (Brennan, J., dissenting). Justice Brennan noted:

> Most works of history or biography blend factual narrative and reflections or speculative commentary in this way . . . . The core purposes of copyright would be thwarted and serious First Amendment concerns would arise. An author could obtain a monopoly on narration of historical events simply by being the first to discuss them in a reflective or analytical manner.

*Id.*

67. 17 U.S.C. § 107 (1982).

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

69. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2231; *see supra* note 9.

70. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2231.

ment, making a 'news event' out of its unauthorized first publication of a noted figure's copyrighted expression."[71] The Court also noted that *The Nation* was a commercial publication as opposed to a non-profit one, and that this factor weighs against fair use.[72] *The Nation's* use was for more than monetary gain; it was an attempt to "scoop" the competition, as its intended purpose was to deprive the rightful copyright holders of their valuable right to control the first publication.[73] Finally, *The Nation's* bad faith in knowingly exploiting a "purloined" manuscript must weigh against fair use.[74]

The dissent's examination of the purpose of the use emphasized that *The Nation's* use was for news reporting, a factor explicitly endorsed by Congress in section 107.[75] Furthermore, the nature of the news business sometimes requires the use of unpublished material.[76] Justice Brennan also discounted the view that use by a commercial publication tends to weigh against fair use, a viewpoint the majority opinion heavily relied upon, instead noting that the vast majority of the news reporting in this country is carried on by commercial interests.[77] Justice Brennan stated that it is inappropriate for the Court to negate a fair use argument simply on the ground that the news reporting is being done for profit.[78] The dissent viewed the Court's language as undermining the approval given to news reporting as a valid fair use factor because the Court failed to understand how the news business operates.[79] Justice Brennan, while stressing the distinction between literary form and information, noted that *The Nation's* use of the Ford manuscript was an attempt to get newsworthy information to the public as soon as possible, and by rejecting this premise the Court showed its own

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71. *Id.*

72. *Id.*

73. *Id.* at 2232.

74. *Id.*

75. *Id.* at 2246-47 (Brennan, J., dissenting).

76. *Id.* at 2246 (Brennan, J., dissenting). Justice Brennan gave examples of such use in footnote 14 of his dissent. *Id.* at n.14 (Brennan, J., dissenting). They include *New York Times* stories concerning forthcoming revelations in books by John Ehrlichman, John Dean, and Richard Nixon. *Id.* (Brennan, J., dissenting). These examples were discounted by the majority as not being a proper subject for the Court's notice since the court of appeals had stricken these exhibits for failure of proof at trial. *Id.* at 2232 n.7.

77. *Id.* at 2247 (Brennan, J., dissenting).

78. *Id.* Such a statement seems to ignore the language of the statute which reads, "[t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . ." 17 U.S.C. § 107(1) (1982).

79. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2247 (Brennan, J., dissenting). Justice Brennan pointed out that the highly competitive business of news reporting earns its readership through prompt publication, and through "scooping" rivals. *Id.* (Brennan, J., dissenting). The dissent also viewed the use in the context of the time. *Id.* (Brennan, J., dissenting). In 1979 when the article was published both Mr. Ford and Alexander Haig, who is featured prominently in Ford's memoirs, were considered likely candidates for the presidency. *Id.* at 2246 (Brennan, J., dissenting).

distaste for the practice of being first with the news.[80] In summary, Justice Brennan found that the news purpose, "strongly favors a finding of fair use in this case."[81]

In analyzing the second factor, the nature of the copyrighted work, the majority again expressed the belief that *The Nation* did not stop at using isolated phrases from an historical narrative, but also used expression beyond the means necessary to convey the facts.[82] Furthermore, the Court again emphasized the element of the unpublished manuscript as being an important part of the work's nature.[83] *The Nation's* article, published as it was, infringed on the copyright holder's interest in maintaining confidentiality to which the copyright holder was contractually bound.[84]

In contrast, Justice Brennan's dissent found that the nature of the copyrighted work favored a finding of fair use.[85] Justice Brennan maintained that a work of informational character, such as the Ford manuscript, should be given less protection than literary expression.[86] The dissent challenged the majority's conclusion that pre-publication use is a factor that negates fair use as, "unwarranted on its own terms and unfaithful to Congressional intent."[87] The dissent chastised the majority for applying a quick "litmus

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80. *Id.* at 2248 (Brennan, J., dissenting). Ironically much of what President Ford said in his manuscript was already a matter of public record before *The Nation* published it. Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. at 1071. In 1974 President Ford testified before a congressional committee on his pardon of former President Nixon, and his testimony was published in the CONGRESSIONAL RECORD. *Id.* The district court found that because of this *The Nation's* article could not be considered news so as to permit fair use. *Id.* The Supreme Court declined to pass judgment whether or not the article was newsworthy. *Id.*

81. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2248 (Brennan, J., dissenting).

82. *Id.* at 2232.

83. *Id.*

84. *Id.* at 2233.

85. *Id.* at 2248 (Brennan, J., dissenting).

86. *Id.* (Brennan, J., dissenting).

87. *Id.* at 2249 (Brennan, J., dissenting). Justice Brennan believed the majority's claim of Congressional intent in distinguishing between published and unpublished works fails for three reasons:

> First, the face of the statute clearly allows for pre-publication fair use. The right of first publication . . . is explicitly made "subject to section 107," the statutory fair use provision . . . .
>
> Second, . . . the Senate Report on which the Court relies so heavily . . . simply will not bear the weight the Court places on it . . . . [P]re-publication photocopying will not generally constitute fair use when the author has an interest in the confidentiality of the unpublished work . . . . Given that the face of § 106 specifically allows for pre-publication fair use, it would be unfaithful to the intent of Congress to draw from this circumscribed suggestion in the Senate Report a blanket presumption against any amount of pre-publication fair use . . . .
>
> Third, . . . . the common law did not set up the monolithic barrier to pre-publication fair use that the Court wishes it did . . . . The statements of general principle the Court cites to support its contrary representation of the common law. . .are

test" of pre-prepublication, and for failing to balance the interest.[88] In concluding his analysis of the second factor, Justice Brennan noted in his dissent that the majority had recognized the copyright owner's interest in getting the full economic benefit of the initial release as an element in determining the "nature" of the work.[89] Justice Brennan stated, however, that the interest a copyright holder has in this benefit is best considered under the fourth factor which addresses the effect of the use on the market.[90]

The third factor that the Court considered is the amount and substantiality of the portion used, which is both a quantitative and a qualitative standard.[91] In its majority opinion the Court admitted that the words actually quoted were an insubstantial portion of the Ford manuscript.[92] The Court held, however, that the district court was correct in finding that, "*[T]he Nation* took what was essentially the heart of the book,"[93] and that the court of appeals erred in overruling this finding.[94]

In his dissent Justice Brennan agreed that the actual number of words used was insubstantial, and that the portions used would have to be judged according to a qualitative standard.[95] While most of the quotes were not, "rich in expressive content," several quotes concerning Mr. Ford's attitude toward former President Nixon were strongly expressive.[96] Justice Brennan believed the district court erred in determining the article had taken the "heart" of the book, because the district court judge had confused literary form with fact and had considered the two as a whole.[97] According to Brennan, even though the use of these quotes constituted a taking of, "some literary form of substantial quality,"[98] the substantiality was not excessive or inappropriate to the purpose of reporting news.[99] Justice Brennan noted that if the quoted portions had appeared in a book review there would be no

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themselves unsupported by reference to substantial judicial authority . . . .

*Id.* n.19 (Brennan, J., dissenting).

88. *Id.* at 2249-50 (Brennan, J., dissenting).

89. *Id.* at 2250 (Brennan, J., dissenting).

90. *Id.* (Brennan, J., dissenting).

91. COPYRIGHT *supra* note 7, at § 13.05[A][3] (1985).

92. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2233.

93. *Id.* (quoting Harper & Row Publishers, Inc. v. Nation Enterprises, 557 F. Supp. at 1072).

94. *Id.* The court of appeals found that the article consisted of approximately 13% quotes from the Ford manuscript, which it characterized as an infinitesimal amount. Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d at 209.

95. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2250 (Brennan, J., dissenting).

96. *Id.* at 2250-51 (Brennan, J., dissenting). The quotes Justice Brennan referred to were included in footnote 22 of the dissent. *Id.* (Brennan, J., dissenting).

97. *Id.* at 2251 (Brennan, J., dissenting).

98. *Id.* at 2252 (Brennan, J., dissenting).

99. *Id.* (Brennan, J., dissenting).

question that the use was fair, news reporting should not be treated any differently.[100] Justice Brennan believed that the majority would probably agree with this opinion but for the fact that *The Nation's* article appeared prior to its scheduled publication.[101]

The fourth factor that the Court relied upon is the effect the use has on the market or potential market for the copyrighted work, which of the four factors enumerated by the statute many consider to be the most important.[102] In its opinion the Court noted that there was an actual effect on the market in that *Time*, subsequent to the publication of *The Nation's* article, refused to go ahead with its own article and did not pay the remaining $12,500 payment.[103] The cancellation by *Time* was direct result of the infringement.[104] Despite what the court of appeals held, the causal connection was clear.[105] The Court noted that once the causal connection is shown the burden shifts to the infringer to show how the damage would have occurred had there been no taking, and this *The Nation* failed to do.[106]

Justice Brennan's dissent also acknowledged that the effect upon the market was the most important factor in determining fair use. His dissent, however, disagreed with the Court in applying this factor, as Justice Brennan found that the Court failed, "to distinguish between the use of information and the appropriation of literary form," and as a result the Court's analysis was "badly skewed."[107] Justice Brennan stated that if *Time* and *The Nation* compete for a market share in information rather than literary forms, the activity was legitimate and any damage was caused by legitimate means.[108] Information, not literary form, forms the real value of the work, and the contract between Ford and Harper & Row clearly stated the publisher intended, "to benefit substantially from monopolizing the initial revelation of information . . . ."[109] According to Justice Brennan *The Nation's*

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100. *Id.* (Brennan, J., dissenting).

101. *Id.* (Brennan, J., dissenting).

102. COPYRIGHT, *supra* note 7, at § 13.05[A][4] (1985). Professor Nimmer believes that the test is whether the unrestricted and widespread conduct engaged in, "would result in a substantially adverse impact on the potential market." *Id.*

103. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2234.

104. *Id.*

105. *Id.* In its decision the court of appeals found the record did not support the causal connection. Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d at 208. At the trial it was shown that when *The Nation's* article appeared *Time* asked Harper & Row for permission to move the publication of its own article up one week. When Harper & Row refused, *Time* cancelled the agreement. *Id.* at 199.

106. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2234.

107. *Id.* at 2252 (Brennan, J., dissenting).

108. *Id.* at 2252-53 (Brennan, J., dissenting).

109. *Id.* at 2253 (Brennan, J., dissenting). A portion of the contract between Ford and Harper & Row was set out in the dissent:

> Author acknowledges that the value of the rights granted to publisher hereunder would be substantially diminished by Author's public discussion of the unique infor-

article may have taken something of value to the publisher, but the publisher should not have the right to use copyright as a shield from competition, because copyright does not protect information.[110]

In its consideration of this case, the Court's majority found first, that the use of the quotes from the Ford manuscript by *The Nation* was a taking of the copyrightholder's right to control the first publication, which is a valuable right.[111] Second, the Court found the right of the author to control the first appearance of his work will normally outweigh any claim to fair use.[112] Third, the Court that there is no justifiable reason for creating a public figure exception to copyright.[113]

Finally, in considering the four fair use factors set out in the statute, the Court found that *The Nation* went beyond reporting news to exploit the value of an unauthorized manuscript in its possession.[114] The Court noted that *The Nation's* use effectively took the heart of the book, as well as Mr. Ford's distinctive expression.[115] *The Nation's* use directly affected the market by causing *Time* to cancel its agreement with the publisher.[116] In evaluating all these findings the majority concluded *The Nation's* actions were not sanctioned by the traditional doctrine of fair use.[117]

Justice Brennan's dissent first focused on whether or not the use of the material, other than direct quotes, from the Ford manuscript infringed on Harper & Row's copyright. Because the material was informational rather than literary form,[118] and since *The Nation's* article had not closely tracked Ford's original expression[119] or a substantial amount of the manuscript,[120] there was no infringement.

In considering the four factors of fair use Justice Brennan found that *The Nation's* purpose in news reporting is specifically sanctioned by the statute as fair use.[121] The Ford manuscript, being informational in character, is not entitled to as much protection as that afforded to literary form, and it makes no difference that the work was unpublished when the use was

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mation not previously disclosed about the Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the work hereunder.

*Id.* (Brennan, J., dissenting).

110. *Id.* (Brennan, J., dissenting).
111. *Id.* at 2225.
112. *Id.* at 2228.
113. *Id.* at 2230.
114. *Id.* at 2231.
115. *Id.* at 2233.
116. *Id.* at 2234.
117. *Id.* at 2235.
118. *Id.* at 2242 (Brennan, J., dissenting).
119. *Id.* at 2244 (Brennan, J., dissenting).
120. *Id.* (Brennan, J., dissenting).
121. *Id.* at 2247 (Brennan, J., dissenting).

made.[122] Third, even though *The Nation's* use did make use of highly expressive material, such a use was not unjustified in the reporting of news.[123] Finally, Justice Brennan found that the loss in market value cased by *The Nation's* use was for a legitimate end, and copyright should not be employed as a shield against competition.[124] In balancing the interests of free flow of information with the economic interests of the copyrightholder, Justice Brennan found that *The Nation's* use was fair use.[125] He feared, however, that the majority opinion would lead to restrictions on the flow of facts and ideas in order to ensure a reward for copyrightholders.[126]

Of all the issues considered in the *Nation Enterprises* case, perhaps the central one concerns the fair use of unpublished materials. Had *The Nation* not run its article until after the first release by *Time* there undoubtedly would have been no action. If *The Nation's* article, however, had run after *Time's* article, whatever news value the information had would have been substantially reduced. Despite the obvious value to *The Nation* in scooping the competition with the information, the Court has stated it will not sustain such a use as fair use.[127]

The statutory provision for fair use makes no reference to the stage of publication as a fair use factor.[128] Until this decision pre-publication as a fair use factor was an unsettled point of law.[129] Commentators, however, have suggested that the stage of publication should be considered in a fair use analysis, and the Court accepted this suggestion.[130] The dissent charged that the general principle of no fair use for unpublished material was adopted by the Court without any substantial judicial authority.[131] Furthermore, in an attempt to determine Congressional intent as to fair use of unpublished material, both the majority and dissent looked to the same legislative history, yet arrived at opposite conclusions.[132]

In recognizing the stage of publication as a fair use factor, the Court has effectively added a new factor to the four already existing under 17 U.S.C. section 107. Absent Congressional action, or an unlikely Court reversal, fu-

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122. *Id.* at 2248-49 (Brennan, J., dissenting).
123. *Id.* at 2252 (Brennan, J., dissenting).
124. *Id.* at 2253 (Brennan, J., dissenting).
125. *Id.* (Brennan, J., dissenting).
126. *Id.* at 2254 (Brennan, J., dissenting).
127. *Id.* at 2229-30.
128. *See* 17 U.S.C. § 107 (1982).
129. *See* Comment, 58 ST. JOHN'S L. REV. 597, 599 (1984); Note, *Copyright and Privacy Protection of Unpublished Works—the Author's Dilemma,* 13 COLUM. J.L. & SOC. PROBS. 351, 377 (1977).
130. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2227-28.
131. *Id.* at 2249 n.19 (Brennan, J., dissenting). Justice Brennan cites only one case as offering a contrary view, Estate of Hemingway v. Random House Inc., 53 Misc. 2d 462, 279 N.Y.S.2d 51 (N.Y. Sup. Ct. 1967), *aff'd,* 20 A.D.2d 633, 285 N.Y.S.2d 568 (1967), *aff'd on other grounds,* 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). *Id.* (Brennan, J., dissenting).
132. *See supra* notes 35 and 87.

ture courts concerning fair use will have to consider whether the work used was published or not.

The Court, however, went beyond merely requiring the stage of publication as a consideration. By its language, the Court has made it clear that the use of material before its publication will tend to negate a finding of fair use.[133] Justice Brennan is correct in labeling this as a "quick litmus test."[134] From this point on, a defendant in a copyright action who seeks to use fair use as a defense has an additional burden to bear if the use was from a work not yet published. The Court has given no guidelines as to what circumstances may overcome the presumption against fair use of unpublished material.

The ultimate effect of the Court's decision remains to be seen. *Nation Enterprises* is a unique case that turns on a unique series of events. Standing alone, the *Nation Enterprises* case shows the Court's intolerance for a commercial publication's unauthorized use of a manuscript to prepare an article, *provided* the article is intended to appear prior to the manuscript's publication. The Court makes clear that such a use for news will not be excused if the use has interfered with the original copyright owner's right to control the first publication and the derivative economic benefits.[135] The Court did not show much sympathy for *The Nation's* position, finding instead that the manuscript was "purloined," and that the magazine sought to "exploit the headline value of its infringement."[136] Indeed, even one who feels strongly about the importance of being first in reporting a news story can hardly say that the public would have suffered a great loss had *The Nation* never printed the article.

The ultimate significance of this case, however, is in the way that courts in the future will apply the language of *Nation Enterprises*. In its desire to punish *The Nation* for its use of the Ford manuscript the Court has added a new factor to future fair use considerations, and has made it clear that the right of the copyright owner to control the first publication must be given paramount consideration. "Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, *no legitimate aim is served by preempting the right of first publication.*"[137]

Application of fair use requires a balancing of interests, and whether or not a use of an unpublished work was fair use will depend greatly upon the circumstances in each case. By adding more weight to tip the balance against fair use, the Court may have given comfort to those who would seek

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133. Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. at 2227-28.
134. *Id.* at 2249 (Brennan, J., dissenting).
135. *Id.* at 2229.
136. *Id.* at 2231.
137. *Id.* at 2229 (emphasis added).

to use the Copyright Law to impede, rather than encourage, the flow of information.

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