

# NOTES

## COPYRIGHT PROTECTION, PRIVACY RIGHTS, AND THE FAIR USE DOCTRINE: THE POST-SALINGER DECADE RECONSIDERED

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### INTRODUCTION

Ten years ago, in *Salinger v. Random House, Inc.*,<sup>1</sup> the Second Circuit granted J.D. Salinger an injunction barring the publication of a biography of the reclusive author. Salinger preserved his privacy by successfully asserting that an unauthorized biographer, Ian Hamilton, had infringed Salinger's copyrights by liberally quoting from unpublished letters that Salinger had written decades earlier. The *Salinger* decision, as part of a line of controversial and confusing cases involving copyright law and the fair use doctrine, sparked a barrage of criticism and activity in Congress, the legal community, publishing, and academia because of the perception that it significantly narrowed the fair use doctrine and academic freedom.<sup>2</sup> Ten years and an amendment of the federal copyright law later, the interrelationship between the ability of copyright law to protect an author's privacy and the fair use doctrine remains unresolved.

In order to "Promote the Progress of Science and the Useful Arts,"<sup>3</sup> copyright law in the United States grants authors, for a limited term, exclusive control over "any physical rendering of the fruits of [their] creative intellectual or aesthetic labor."<sup>4</sup> Copyright protection subsists in "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,"<sup>5</sup> and vests automatically at the moment of fixation. By granting authors control over their original works, copyright provides

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<sup>1</sup> 811 F.2d 90 (2d Cir. 1987).

<sup>2</sup> See *infra* Part I.C.

<sup>3</sup> U.S. Const. art I, § 8, cl. 8.

<sup>4</sup> *Goldstein v. California*, 412 U.S. 546, 561 (1973); see 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.08[B] (1991) (discussing scope of writings protected by copyright).

<sup>5</sup> Copyright Act of 1976, 17 U.S.C. § 102(a) (1994).

the incentives and protections necessary to promote the production of new works.

The control granted by the federal copyright statute, however, is neither perpetual nor absolute. Rather, the author's property interest in his or her intellectual or artistic production is balanced against the public's interest in free and immediate access to materials essential to the development of society. Subject to numerous limitations, the author receives exclusive control and the right to exploit the work for a limited time; ultimately, the public receives unfettered access when the copyright expires. Thus, although copyright enforcement reduces the store of works immediately available to the public, it preserves a delicate incentive scheme.

The fair use doctrine, perhaps the most significant limitation on copyright protection, developed out of judicial recognition that certain acts of copying are defensible when the public interest in permitting the copying far outweighs the author's interest in copyright protection.<sup>6</sup> Accordingly, fair use, an affirmative defense to copyright infringement,<sup>7</sup> reflects the limits of copyright protection and permits copying of otherwise protected expression "to such a quantitative or qualitative degree that absent a valid fair use claim, judgment for plaintiff is mandated."<sup>8</sup>

The Copyright Act of 1976 expressly provided, for the first time, statutory recognition of this judge-made rule of reason.<sup>9</sup> In enacting section 107 of the Copyright Act, Congress sought neither to change the prior law nor to inhibit its further judicial development.<sup>10</sup> In order to preserve the character of the doctrine as it existed under common

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<sup>6</sup> See *infra* Part I.A. for a more detailed discussion of the development of the fair use doctrine.

<sup>7</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (treating fair use as affirmative defense). As an affirmative defense, fair use is a privilege and not a right. See William F. Patry, *The Fair Use Privilege in Copyright Law* 413 & n.1 (2d ed. 1995).

<sup>8</sup> Patry, *supra* note 7, at 413.

<sup>9</sup> See Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified at 17 U.S.C. § 107 (1994)).

<sup>10</sup> See H.R. Rep. No. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680 ("[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."); see also Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1139 (1990) (noting that "Congress adopted three considerably inconsistent ways of doing nothing: simple reference to fair use, specification of what is fair use by illustrative examples, and prescription of nonexclusive 'factors to be considered'" (quoting 17 U.S.C. § 107 (1982))).

law, the statute is deliberately vague.<sup>11</sup> Therefore, although the section requires courts to consider the purpose and character of the otherwise infringing use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work,<sup>12</sup> Congress assigned no relative weights to the statutory factors, and courts are free to consider any additional factors.<sup>13</sup>

The application of section 107 to the alleged copyright infringement of unpublished materials has proven to be particularly prickly. The statutory factors as applied have focused on protecting the economic interests that lie at the heart of most copyright disputes; copyright disputes regarding unpublished materials, however, frequently implicate nonpecuniary concerns such as privacy, reputation, and personal autonomy. In applying the factors, courts have often failed to acknowledge the distinction between the author's economic interests and her personality-based rights, and, accordingly, their analyses are mystifying.

Close examination of the fair use doctrine after the *Salinger* decision reveals that, in spite of legislative efforts, several Supreme Court decisions, and reasoned analysis by distinguished judges and professors, the state of the law is "confusion compounded."<sup>14</sup> As Judge Pierre N. Leval, the trial judge in *Salinger*, noted,

Earlier decisions [applying the fair use doctrine] provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.<sup>15</sup>

Although Congress, courts, and commentators have grappled over the past decade with the application of the fair use doctrine to unpublished materials, the state of the law has remained murky.

The flaws in the current method of applying the fair use doctrine to disputes over copyright protection of unpublished materials are as numerous as the problems created by the confusion. The four-factor

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<sup>11</sup> See Stephen B. Thau, Copyright, Privacy, and Fair Use, 24 Hofstra L. Rev. 179, 185 (1995) (noting that "[t]he vagueness of section 107 is the result of a deliberate effort by Congress to incorporate fair use into the Copyright Act in a way that would merely preserve the common law definition of fair use as it existed at the time").

<sup>12</sup> See Copyright Act of 1976, 17 U.S.C. § 107 (1994).

<sup>13</sup> See *id.*

<sup>14</sup> Weinreb, *supra* note 10, at 1137.

<sup>15</sup> Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1105-06 (1990) (citations omitted).

judicial test mandated by the Copyright Act of 1976<sup>16</sup> is not only difficult to administer, but it often fails to address the real issues underlying the conflict. The United States traditionally has placed a heavier emphasis on protecting an author's economic interest in publication than have many other nations.<sup>17</sup> The four-factor test reflects this concern for economic rights,<sup>18</sup> relegating the nonpecuniary concerns often at the heart of disputes over unpublished materials to subtext. Thus, the recent decisions applying the statutory framework of section 107 have focused almost exclusively on economic incentives. The results reached by the courts, however, reflect greater concern for privacy and personality-based interests than either the statute or the opinions suggest.<sup>19</sup>

When courts protect privacy interests under the guise of protecting pecuniary interests, the analysis lacks both clarity and the safeguards of limiting principles. Accordingly, judges are left with little guidance, and prior decisions are of little predictive value. Perhaps more important, historians, biographers, journalists, and other researchers are forced to wander in the wilds of copyright law with only the dimmest of beacons to guide them. The resulting confusion dampens the publication of useful social inquiry out of a lack of understanding of where protection ends and infringement begins.<sup>20</sup>

This Note seeks to clarify the privacy protecting role of copyright that largely has been ignored in judicial decisions, if not in judicial decisionmaking, since the last revision of the federal copyright scheme. Thus, the Note reexamines recent jurisprudential analysis of fair use with regard to the use of unpublished materials, focusing in particular on those materials never intended for publication. It then proposes a modest but useful reform: judicial recognition of an explicit, privacy-based exception to the fair use doctrine.

Others have suggested greater recognition of privacy interests,<sup>21</sup> but this Note's proposal differs in several important respects. First,

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<sup>16</sup> See 17 U.S.C. § 107; *infra* text accompanying note 45.

<sup>17</sup> See *infra* Part II.A.

<sup>18</sup> See *infra* text accompanying notes 40-47.

<sup>19</sup> See *infra* Part I.D.2.

<sup>20</sup> See 138 Cong. Rec. H7991 (daily ed. Aug. 11, 1992) (statement of Rep. Moorhead): Evidence was presented at our hearings that reasonable attorneys because of the specter of the second circuit decisions are routinely advising publishers [not to rely] on a fair use defense when they are dealing with unpublished works. As a result, the public is being denied access to the raw materials that are the life blood of these authors.

See also *infra* text accompanying notes 86-93.

<sup>21</sup> See, e.g., Thau, *supra* note 11, at 206-21 (suggesting adoption of matrix measuring extent of privacy interests in all fair use cases); Teresa De Turrís, Note, Copyright Protection of Privacy Interests in Unpublished Works, 1994 Ann. Surv. Am. L. 277, 278 (propos-

this Note explicitly distinguishes between unpublished materials intended for publication and unpublished materials not intended for public dissemination, because privacy interests are implicated only by the latter category. Accordingly, this Note argues first that the extra protection of an exception to the fair use doctrine should only extend to an author who has acted in accordance with the privacy interests she asserts with respect to the materials allegedly infringed. Second, this Note contends that only the author of unpublished materials, not copyright owners other than the author, should be able to object to the use of the unpublished materials on privacy grounds. Third, this Note suggests that the author should only be able to object during her lifetime, because her privacy interests diminish after death. These limiting principles help ensure a proper balance, on a broad scale, between protecting the interests of authors in the fruits of their intellectual labor and the interest of the public in ultimately claiming free access to materials essential to the development of society; and, on a narrow scale, between academic freedom and respect for personal privacy.

Part I presents a closer look at the development of the controversy surrounding the fair use doctrine and the current status of the law. Part II sets forth the proposal for an exception to the fair use doctrine in greater detail and offers the arguments supporting it. Specifically, this Note proposes that fair use does not encompass the use of materials never intended for publication over the contemporaneous objection of an author who has maintained the privacy of those materials. Part III views *Salinger* and the decade of jurisprudence that followed it through the prism of the modification proposed by this Note; it observes that courts are already reaching the suggested results, but without the attendant benefits of clarity, precision, and judicial economy. Furthermore, Part III demonstrates that this proposal is not designed to supplant the traditional fair use analysis, generally speaking, but rather, to supplement the statutory framework for disputes that fall within this limited factual context.

## I

### UNPUBLISHED MATERIALS AND THE FAIR USE DOCTRINE

The Copyright Act of 1976 wrought several fundamental changes in American copyright law. Most important, the Act established a unitary federal system of copyright protection in lieu of the prior system under which federal law protected published works and state

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ing that role of copyright be expanded to protect private factual information as well as private expression).

common law governed use of unpublished materials.<sup>22</sup> In unifying copyright protection under a single standard, Congress incorporated two key elements of common law copyright protection into the scheme of federal protection: the Act recognized, for the first time, a distinct statutory right of first publication,<sup>23</sup> and it codified the doctrine of fair use, which had been a judicial creation.<sup>24</sup>

### A. *An Historical Overview of the Fair Use Doctrine*

American copyright law owes its origins to the English scheme of copyright protection, originally enacted in 1710 as the Statute of Anne.<sup>25</sup> In the century from 1740 to 1839, English judges developed a set of principles to govern the use of an author's copyrighted work by a subsequent author.<sup>26</sup> These principles developed over time into the doctrine known today as fair use. The rationale behind permitting the use in spite of the first author's valid copyright was that the second author had, "through a good faith productive use . . . created a new, original work that would itself promote the progress of science and . . . benefit the public."<sup>27</sup> The public benefit, however, was considered only in terms of the creation of new works, rather than in terms of the need for public access to particular information.<sup>28</sup>

By 1841, these principles were sufficiently developed through British case law such that Supreme Court Justice Joseph Story could "gather these principles together into a formulation of fair use which would serve as the bedrock for future American decision making and

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<sup>22</sup> The dual system bifurcating unpublished materials and published materials was created by the Copyright Act of 1909, ch. 320, §§ 1-62, 35 Stat. 1075, 1077-78 (current version in scattered sections of 17 U.S.C. (1994)).

<sup>23</sup> See Copyright Act of 1976 § 104, 17 U.S.C. § 104 (1994). This section grants authors the right to make the first public distribution of their work. The Supreme Court has noted that the right of first publication has two aspects: the personal aspect of creative control and the economic aspect of being the first to publish a work. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985). Furthermore, implicit in this right is the right not to publish at all. See *id.* at 559-60 (discussing interaction of copyright law and First Amendment right not to speak). For a discussion of the history and origins of the author's right to first publication in common law countries, see Patry, *supra* note 7, at 531-34.

<sup>24</sup> See Copyright Act of 1976 § 107, 17 U.S.C. § 107 (1994).

<sup>25</sup> See 1 *Nimmer & Nimmer*, *supra* note 4, § 1 (discussing English origins of American copyright scheme).

<sup>26</sup> See Patry, *supra* note 7, at 3-18 (discussing early English cases).

<sup>27</sup> *Id.* at 3; see also *Cary v. Kearsley*, 170 Eng. Rep. 679, 680 (1803) (arguing that individuals may make use of "another's labours for the promotion of science, and the benefit of the public"); *Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (1740) (arguing in favor of defendant's use, noting that copyright protection is intended to "secure the property of books in the authors themselves . . . as some recompence for their pains and labour in such works as may be of use to the learned world").

<sup>28</sup> See Patry, *supra* note 7, at 3.

legislation on the subject.”<sup>29</sup> Riding circuit in *Folsom v. Marsh*,<sup>30</sup> Justice Story presided over a copyright dispute between Jared Sparks, the proprietor of George Washington’s public and private letters and the author of a biography of Washington incorporating those letters in edited form, and the Reverend Charles Upham, the author of a narrative work entitled *The Life of Washington in the Form of an Autobiography*,<sup>31</sup> which relied heavily on Sparks’s book. In Upham’s book, 353 of the 866 pages corresponded exactly to passages copyrighted by Sparks.<sup>32</sup> Justice Story identified a number of factors for consideration in denying Upham’s claim that the use was fair: “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.”<sup>33</sup>

The factors articulated by Justice Story were designed to apply to previously published materials—for example, the edited versions of Washington’s letters that appeared in Sparks’s biography. Unlike recent copyright jurisprudence, common law courts in Great Britain and the United States generally refused even to consider applying the fair use doctrine when the original work was unpublished.<sup>34</sup> As long as the work remained unpublished, it was regarded as the absolute perpetual property of the owner, and the conception of ownership included not only the right to the economic exploits of first publication but also the right to determine when and if publication occurred.<sup>35</sup> The near absolute protection afforded unpublished materials by common law copyright was based in part on a conception of a natural property right that vested in the author by virtue of having created the work<sup>36</sup> and in part on a conception that personal writings and artistic

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<sup>29</sup> *Id.*

<sup>30</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

<sup>31</sup> Charles W. Upham, *The Life of Washington in the Form of an Autobiography* (1840).

<sup>32</sup> See *Folsom*, 9 F. Cas. at 344 (summarizing special master’s report).

<sup>33</sup> *Id.* at 348.

<sup>34</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-51 (1985); Patry, *supra* note 7, at 74 (noting that fair use of unpublished materials was denied “[u]nder a uniform body of case law”); see also De Turrís, *supra* note 21, at 282 (discussing traditional lack of fair use exception for unpublished works where author had maintained privacy of materials).

<sup>35</sup> See 1 Nimmer & Nimmer, *supra* note 4, § 2.02.

<sup>36</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (discussing natural right of property that ends at publication); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 Ga. L. Rev. 1, 47-49 (1988) (comparing American common law copyright and protection of *droit moral* in European countries with respect to right of first publication). For further discussion of *droit moral*, see *infra* text accompanying notes 155-56.

expression are extensions of the author's personality.<sup>37</sup> Under either theory, copyright protection of unpublished materials was immune from the public interest arguments at play in disputes over the fair use of published materials.<sup>38</sup>

Fair use exceptions to the protection afforded to unpublished works were recognized, by and large, only when an author implicitly consented to "reasonable and customary" use by releasing her work to the public.<sup>39</sup> If a work remained unpublished but was voluntarily disseminated for public consumption, fair use was permissible. Thus, prior to the Copyright Act of 1976, with regard to fair use, publication was roughly equivalent to disclosing the work to the general public. And, prior to 1976, American copyright law generally provided an exemption from the fair use doctrine for unpublished materials; the Copyright Act of 1976, however, changed this rule significantly.

### *B. The Copyright Act of 1976 and Judicial Application of Section 107 to Unpublished Materials*

In enacting section 107 and thereby codifying the fair use exception to copyright protection, Congress sought neither to change the prior law nor to inhibit its further judicial development.<sup>40</sup> However, despite protestations that section 107 would not "change, narrow, or enlarge"<sup>41</sup> the fair use doctrine in any way, Congress inadvertently effected a change: by neglecting to distinguish between unpublished materials and published materials, Congress, for the first time, subjected unpublished materials and the right of first publication to fair use considerations.<sup>42</sup>

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<sup>37</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193, 205 (1890) ("The principle which protects personal writings . . . against publication in any form, is . . . [the principle of] an inviolate personality."); see also Damich, *supra* note 36, at 75-78 (discussing theoretical basis of author's right of personality).

<sup>38</sup> See Staff of House Comm. on the Judiciary, 87th Cong., 2d Sess., *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 40* (Comm. Print 1961) ("Unpublished works under common law protection are . . . immune from limitations on the scope of statutory protection that have been imposed in the public interest.").

<sup>39</sup> See *Harper & Row*, 471 U.S. at 550; see also De Turris, *supra* note 21, at 282 (discussing author's implicit consent to fair use).

<sup>40</sup> See H.R. Rep. No. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680 ("[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. . . . Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."); see also Weinreb, *supra* note 10, at 1139-40 (discussing section 107).

<sup>41</sup> H.R. Rep. No. 94-1476, at 66.

<sup>42</sup> The current section 107 explicitly addresses unpublished materials, but only as a result of the 1992 amendment to the statute. See *infra* Part I.C.; see also Vincent H. Peppe, Note, *Fair Use of Unpublished Materials in the Second Circuit: The Letters of the Law*, 54

Although copyright protection in the United States historically has been less concerned with the nonpecuniary interests of authors than its European counterparts,<sup>43</sup> courts have used the "law of literary property" to service the law of privacy and have acknowledged that common law copyright protected an "interest in one's personality" as well as a property right.<sup>44</sup> By ignoring the role of copyright in protecting privacy-based interests, the 1976 Act caused considerable confusion.

Section 107 sets forth a list of four nonexclusive but mandatory factors to consider in determining whether use of a work is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>45</sup>

Consideration of these factors and the emphasis on protecting the economic incentives of copyright holders, appropriate in situations where the copyright owner seeks to protect her pecuniary interest in a published work, have muddled the analysis in situations where an author asserts her copyright over materials that were never intended for publication, such as personal letters and diaries.

Although the Act's legislative history indicates that the unpublished nature of the work was to remain an important factor in judicial analysis,<sup>46</sup> the privacy-protecting role of copyright is implicit at best in the statutory framework and, accordingly, "has consistently been

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Brook. L. Rev. 417, 423 (1988) (noting that 1976 Act expressly made right of first publication subject to fair use defense).

<sup>43</sup> See *infra* Part II.A. See generally Damich, *supra* note 36 (comparing American copyright tradition with French tradition); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1 (1985) (comparing copyright protection in the United States with copyright protection in civil law countries). The framework reflects the American preoccupation with the rights of the copyright owner, in contrast to the emphasis in most civil law countries on the rights of the creator of a copyrighted work.

<sup>44</sup> Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 Colum.-VLA J.L. & Arts 459, 464 (1988).

<sup>45</sup> 17 U.S.C. § 107 (1994).

<sup>46</sup> See, e.g., S. Rep. No. 473, at 61-67 (1975), reprinted in 1976 U.S.C.A.N. 5659, 5678-88 ("The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice of the copyright owner."); see also Peppe, *supra* note 42, at 423 & n.39 (discussing legislative history of Copyright Act of 1976).

subordinated in judicial opinion and commentaries to copyright's ability to provide economic incentives."<sup>47</sup>

The application of the statutory version of the fair use doctrine to copyright disputes involving unpublished materials and, in particular, to a trio of cases including the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>48</sup> and the Second Circuit opinions in *Salinger v. Random House, Inc.*<sup>49</sup> and *New Era Publications International v. Henry Holt & Co.*,<sup>50</sup> revealed the problematic nature of section 107. The 1976 Act extended the term of general copyright protection to the life of the author plus fifty years.<sup>51</sup> This extended statutory term of protection, when combined with the restrictive language of the decisions in *Harper & Row*, *Salinger*, and *New Era*, sounded an alarm that rang throughout the academic, publishing, and legal communities. Out of concern that the statutory extension of the term of protection and the sweeping language of the judicial decisions together evinced new and wide-ranging obstacles to scholarship, some went so far as to proclaim the death of history.<sup>52</sup>

### 1. Harper & Row

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>53</sup>—the Supreme Court's second interpretation of section 107 but the first to consider it with respect to unpublished materials<sup>54</sup>—the Court denied a magazine's claim of fair use of ex-President Ford's memoirs, which were en route to publication.<sup>55</sup> *The Nation* obtained purloined galleys of the memoirs and published unauthorized excerpts, usurping the right of first publication enjoyed by Ford as the author and copyright

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<sup>47</sup> Thau, *supra* note 11, at 181.

<sup>48</sup> 471 U.S. 539 (1985).

<sup>49</sup> 811 F.2d 90 (2d Cir. 1987).

<sup>50</sup> 873 F.2d 576 (2d Cir. 1989).

<sup>51</sup> See 17 U.S.C. § 302 (1994). Unpublished works protected under state law as of January 1, 1978, however, remain protected until at least December 31, 2002. See *id.* For further discussion, see 1 Nimmer & Nimmer, *supra* note 4, § 5.04.

<sup>52</sup> See Arthur Schlesinger, Jr., *The Judges of History Rule*, *Wall St. J.*, Oct. 26, 1989, at A14 (discussing effects on historical scholarship caused by recent copyright law decisions); David A. Kaplan, *The End of History?*, *Newsweek*, Dec. 25, 1989, at 80 (discussing recent shift in American copyright law favoring protection over fair use). See generally Leval, *supra* note 15 (arguing in favor of liberal interpretation of fair use for historians, biographers, and journalists).

<sup>53</sup> 471 U.S. 539 (1985).

<sup>54</sup> The first decision was *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (concluding that use of video recorders for home use did not infringe copyright of television content providers).

<sup>55</sup> See *Harper & Row*, 471 U.S. at 549.

holder.<sup>56</sup> The appearance of the excerpts in *The Nation* caused *Time*, which had previously purchased the right to print pre-publication excerpts of the book, to cancel its contract with Ford's publishers.<sup>57</sup> The cancellation cost Ford's publishers \$12,500.<sup>58</sup>

*The Nation* defended the charge of copyright infringement by asserting that its use was protected by section 107; that its use fell within the statutorily protected category of news reporting; that Ford's memoirs were factual works less deserving of protection than works of fancy; that fair use may be made of a soon-to-be-published manuscript because the author has demonstrated that he has no interest in non-publication; that an insubstantial amount of the diaries was copied; and that the impact on the market for the diaries was minimal.<sup>59</sup> The Second Circuit agreed with *The Nation* that the use was fair,<sup>60</sup> but the Supreme Court did not.<sup>61</sup>

In rejecting *The Nation's* claim that the use was fair because Ford was not protecting his right to control whether the material would be published, but only where it would be published, the Court sowed the seeds of the recent jurisprudential overemphasis on economic incentives. Although the Court explicitly acknowledged the existence of personal interests distinct from property interests<sup>62</sup> and also considered the purpose and character of the use, the nature of the copyrighted work, and the amount and substantiality of the portion used,<sup>63</sup> the Court declared that the fourth statutory factor—the effect of the use upon the potential market for or value of the copyrighted work—is “undoubtedly the single most important element of fair use.”<sup>64</sup>

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<sup>56</sup> See *id.* at 548-49 (noting that by using verbatim excerpts of Ford's unpublished memoirs, *The Nation* usurped Ford's right of first publication); see also 17 U.S.C. § 106 (1994) (providing for right of first publication).

<sup>57</sup> See *Harper & Row*, 471 U.S. at 543.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 554-69.

<sup>60</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 208 (2d Cir. 1983).

<sup>61</sup> See *Harper & Row*, 471 U.S. at 569.

<sup>62</sup> See *id.* at 555 (“The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights . . .”).

<sup>63</sup> See *id.* at 560-69 (considering each factor in turn).

<sup>64</sup> *Id.* at 566. The market impact of the use may be the most important factor where the copyright owner is seeking to protect economic interests as the publishers in *Harper & Row* undoubtedly were. The Court's emphasis, however, is not only repeated but quoted, mantra like, in a line of cases in which the economic interests of the author are, at best, secondary to personal interests. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (quoting line from *Harper & Row*, 471 U.S. at 566); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (same); *Lish v. Harper's Mag. Found.*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992) (same). For further discussion of this point, see *infra* text accompanying notes 109-22.

Of greater importance to the academic and publishing communities, the decision also declared that “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undis-seminated expression will outweigh a claim of fair use.”<sup>65</sup> As the Second Circuit subsequently extended the Court’s broad statement in *Salinger* and *New Era*, confusion grew and opposition mounted.

## 2. *Salinger*

In *Salinger v. Random House, Inc.*,<sup>66</sup> the Second Circuit enjoined the publication of Ian Hamilton’s biography of J.D. Salinger in response to Salinger’s claim of copyright infringement. Salinger argued that the biography infringed his copyright by quoting from unpublished letters written decades earlier that subsequently had been placed by their recipients in university repositories. At trial, Judge Leval found for Hamilton on each of the four statutory factors, suggesting that the damage suffered by Salinger was not from copyright infringement, but rather from the publication of a biography that trespassed on his desire for privacy,<sup>67</sup> and stated that “[t]he copyright law does not give [Salinger] protection against that form of injury.”<sup>68</sup>

The Second Circuit reversed, overturning the district court on three of the four statutory factors.<sup>69</sup> The circuit court agreed with Judge Leval that the purpose of the use, as criticism, research, and scholarship, weighed in favor of the defendants.<sup>70</sup> The amount and substantiality of the taking and the market impact of the infringement, however, cut in Salinger’s favor.<sup>71</sup> Furthermore, the circuit court devoted substantial attention to the second statutory factor—the nature of the copyrighted work<sup>72</sup>—which it felt had been given insufficient consideration by the court below.<sup>73</sup> Extending the statement in

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<sup>65</sup> *Harper & Row*, 471 U.S. at 555.

<sup>66</sup> 811 F.2d 90 (2d Cir. 1987).

<sup>67</sup> See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 426 (S.D.N.Y. 1986). Judge Leval has made it clear in other contexts that he views the protection of privacy interests as beyond the scope of American copyright law. See Leval, *supra* note 15, at 1119 (arguing that copyright law is not appropriate medium for redressing grievances based on privacy interests). This Note respectfully suggests that the protection of privacy interests was an element of common law copyright protection, has been an implicit element of recent fair use jurisprudence, and should be an explicit factor in the fair use analysis.

<sup>68</sup> *Salinger*, 650 F. Supp. at 426.

<sup>69</sup> See *Salinger*, 811 F.2d at 96-99.

<sup>70</sup> See *id.* at 96-97.

<sup>71</sup> See *id.* at 97-100. Surprisingly, the court found that the factor measuring the market impact of the infringement weighed in Salinger’s favor in spite of his avowal during testimony that he would never sell or publish the letters. See *id.* at 99.

<sup>72</sup> See *id.* at 97.

<sup>73</sup> See *id.*

*Harper & Row* that “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use,”<sup>74</sup> the court reasoned that “the tenor of the [Supreme] Court’s entire discussion of unpublished works” conveyed the idea that “such works normally enjoy complete protection against copying any protected expression.”<sup>75</sup> The court also stated that a biographer who “copies more than minimal amounts of (unpublished) expressive content . . . deserves to be enjoined.”<sup>76</sup>

### 3. New Era

In *New Era Publications International v. Henry Holt & Co.*,<sup>77</sup> the Second Circuit took the protection offered to unpublished works in *Salinger* one step further. In *New Era*, the Second Circuit resolved a copyright dispute stemming from the publication of an unflattering and unauthorized biography of L. Ron Hubbard, the founder of the Church of Scientology and author of *Dianetics*.<sup>78</sup> In an effort to contrast factual and fictional accounts of Hubbard’s life and to use Hubbard’s own words to demonstrate his dishonesty and the “bizarre quality of his ideas,”<sup>79</sup> the biography contained liberal quotations from Hubbard’s early writings, particularly from his unpublished journals and diaries.<sup>80</sup> Thus, like the dispute in *Salinger*, but unlike the dispute in *Harper & Row*, the dispute in *New Era* involved materials written without the intent of publication.

Judge Leval, again the district court judge, found the use, “under mandate of the *Salinger* opinion,”<sup>81</sup> to be infringing, but denied an injunction based on countervailing considerations of “the prohibitive expense and waste involved in republishing after deletion of infringing passages, the public’s deprivation of an important historical study and the failure of an injunction to serve any copyright interest, as well as the significant injury to free speech.”<sup>82</sup> The Second Circuit upheld the denial of the injunction because of the application of laches, but dis-

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<sup>74</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985).

<sup>75</sup> *Salinger*, 811 F.2d at 97.

<sup>76</sup> *Id.* at 96.

<sup>77</sup> 873 F.2d 576 (2d Cir. 1989).

<sup>78</sup> L. Ron Hubbard, *Dianetics: The Modern Science of Mental Health* (Bridge Publications 1985) (1950).

<sup>79</sup> *New Era*, 873 F.2d at 581.

<sup>80</sup> See *id.* at 579.

<sup>81</sup> *New Era Publications Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1524 (S.D.N.Y. 1988).

<sup>82</sup> *New Era*, 873 F.2d at 582-83 (summarizing district court opinion).

agreed "with a great deal of what [was] said" in the district court opinion.<sup>83</sup>

The circuit court rejected Judge Leval's attempt to parse the suggestion in *Salinger* that unpublished works normally enjoy complete protection with a distinction between the use of protected expression to "enliven" text and the use of protected expression to communicate "significant points."<sup>84</sup> The court stated, "We see no need for such an approach. Where use is made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here."<sup>85</sup> This decision, along with the decisions in *Harper & Row* and *Salinger*, provoked a firestorm of criticism and led to congressional action.

### C. *The Reaction to the Decisions and the Amendment of Section 107*

In response to arguments from historians, biographers, journalists, publishers, and legal commentators that the decisions in *Harper & Row*, *Salinger*, and *New Era* unduly burdened public access to useful and important social inquiry,<sup>86</sup> congressional legislation was introduced in 1990.<sup>87</sup> The legislation proposed to amend the Copyright Act in order to clarify that fair use extends to unpublished as well as published works.<sup>88</sup> Representative Robert Kastenmeier, the sponsor of the bill in the House of Representatives, suggested that the legislation was designed to clarify that "while the unpublished nature of a work is certainly relevant to the fair use analysis, it should not alone be determinative."<sup>89</sup>

Responding to the debate, the Author's Guild established the Committee to Preserve Fair Use.<sup>90</sup> Judge Leval and Judges Newman

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<sup>83</sup> Id. at 583.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> See, e.g., Leval, *supra* note 15, at 1114-19 (noting that "the *Salinger/New Era* position accords insufficient recognition to the value of accurate quotation as a necessary tool of the historian or journalist"); Kaplan, *supra* note 52, at 80 (same); Schlesinger, *supra* note 52 (discussing effects of decisions on historians and biographers).

<sup>87</sup> See H.R. 4263, 101st Cong. (1990) (addressing fair use of unpublished works); S. 2370, 101st Cong. (1990) (same); see also Karen Burke LeFevre, *The Tell-Tale "Heart": Determining "Fair" Use of Unpublished Texts*, 55 *Law & Contemp. Probs.* 153, 170 (1992) (discussing introduction of legislation).

<sup>88</sup> See H.R. 4263; S. 2370.

<sup>89</sup> Fair Use and Unpublished Works: Joint Hearing on H.R. 4263 and S. 2370 Before Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong. 3 (1990) (remarks of Rep. Kastenmeier).

<sup>90</sup> See LeFevre, *supra* note 87, at 170 (discussing committee).

and Miner—the authors of the Second Circuit opinions in *Salinger* and *New Era* respectively—and Judge Oakes, the Chief Judge of the Second Circuit, all penned influential commentaries on the state of the law.<sup>91</sup> The decisions and legislative proposals provided an army of professors and students with grist for the law review mill. Publishers were “understandably reluctant” to undertake commitments or to pay advances for biographical or historical works that called for the use of quotations from previously unpublished letters or diaries.<sup>92</sup> Researchers and authors were forced to rewrite, refocus, or abandon major works because of the restrictive signals coming from the courts and the lack of guidance about the permissible use of unpublished materials.<sup>93</sup>

Although the original legislative proposals died in committee,<sup>94</sup> Congress amended the fair use doctrine in 1992. The amendment states that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [statutory] factors.”<sup>95</sup> The Senate Report explicitly noted the legislative intent to “overrule the overly restrictive language of *Salinger* and *New Era*”<sup>96</sup> and emphasized that there should be no virtual per se ban on finding fair use of an unpublished work.<sup>97</sup> Absent from the legislative history, however, was a distinction between unpublished materials intended for publication and unpublished materials never intended for publication or any other public use. Once again, the privacy-protecting role of copyright was reduced to subtext.

#### *D. The Failure of the 1992 Amendment to Address the Shortcomings of the Current Adjudicatory Model*

In spite of legislative efforts to clarify application of the fair use doctrine, the statutory framework remains problematic with regard to copyright protection of unpublished materials for a number of reasons. First, the test is difficult to administer, and its outcome is diffi-

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<sup>91</sup> See Leval, *supra* note 15; Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. Copyright Soc’y 1 (1989); Newman, *supra* note 44; James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 38 J. Copyright Soc’y 63 (1990).

<sup>92</sup> Leval, *supra* note 15, at 1107.

<sup>93</sup> See *supra* text accompanying note 20; see also Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 Stan. L. Rev. 299, 310 & n.71 (1991) (citing examples). See generally LeFevre, *supra* note 87 (using poignant hypothetical narrative to demonstrate depth of confusion among nonlawyers with regard to boundaries of fair use).

<sup>94</sup> See LeFevre, *supra* note 87, at 170.

<sup>95</sup> Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107 (1994)).

<sup>96</sup> S. Rep. No. 102-141, at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 2553, 2558.

<sup>97</sup> See *id.*

cult to predict. Second, the four-factor balancing test becomes, in effect, a three-factor balancing test because the second factor, the nature of the copyrighted work, always favors the copyright holder if the work is unpublished; more important, it receives scant attention despite an obvious and important distinction between materials en route to publication and materials never intended for public disclosure. As a result, the test overemphasizes economic factors when applied to materials never intended for publication. Third, state privacy laws are inadequate to address the personal interests at stake in copyright disputes.

### 1. *The Difficulty of Applying the Test*

A leading treatise, *Nimmer on Copyright*, observes that the section 107 factors are "protean" and that "[w]hen combined with the emphasis on case-by-case adjudications in this area, the factors . . . tend to degenerate into *post-hoc* rationales for antecedent conclusions, rather than serving as tools for analysis."<sup>98</sup> In addition to the ability to manipulate easily each individual factor, the courts enjoy tremendous flexibility in weighing the factors against each other. Accordingly, "[e]arlier decisions provide little basis for predicting later ones,"<sup>99</sup> and "[r]eversals and divided courts are commonplace."<sup>100</sup>

Professor Weinreb suggests that the missing element of the fair use analysis is, surprisingly, fairness.<sup>101</sup> He notes that *Salinger* and *New Era* are difficult cases to understand because the statutory factor analysis pointed in one direction and at least some nonstatutory factors pointed in the other.<sup>102</sup> He observes that "[w]ithout some unifying reference to fairness, mediated through the prevailing understanding of the community, the 'weighing' of a bundle of discrete 'factors' deemed to be relevant is not likely to yield a convincing result."<sup>103</sup>

Although a fairness inquiry is a more than reasonable addition to the fair use analysis, it does not, by itself, clarify the situation. A fairness inquiry certainly affects the balance in some cases involving unpublished materials, such as those involving purloined manuscripts or letters.<sup>104</sup> In other cases, however, a fairness inquiry lends little gui-

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<sup>98</sup> 3 *Nimmer & Nimmer*, supra note 4, § 13.05[A][5].

<sup>99</sup> Leval, supra note 15, at 1106.

<sup>100</sup> *Id.* at 1106-07.

<sup>101</sup> See Weinreb, supra note 10, at 1159-60 (reviewing *Salinger* and *New Era* decisions and suggesting that most relevant inquiry, that of fairness, was lacking).

<sup>102</sup> See *id.* at 1160.

<sup>103</sup> *Id.*

<sup>104</sup> *The Nation* apparently acquired Ford's memoirs under questionable circumstances. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542-43 (1985) (describ-

dance to judges and little predictive value to outside observers affected by the legal rules established. *Salinger* provides a good example: is it fair to protect the privacy interests of a reclusive author? Yes. But Judge Leval's opinion and commentary argue persuasively that fairness protects serious literary scholarship and the responsible efforts of a respected biographer. Is the "prevailing understanding of the community" readily identifiable? J.D. Salinger and Ian Hamilton are unlikely to agree on one understanding, as are most biography subjects and their unauthorized biographers. What reference point does "prevailing understanding of the community" provide to a doctoral candidate preparing her dissertation for publication? In difficult cases, an ad hoc fairness inquiry would be as easy to manipulate as the other factors.<sup>105</sup>

## 2. *The Failure of the Test to Distinguish Between Unpublished Materials En Route to Publication and Those Implicating Privacy Concerns*

Much of the confusion stems from the application of factors that are deemed to be relevant but are not necessarily so. The four-factor test is particularly ill suited to adjudicating copyright disputes over materials never intended for publication.

In disputes over unpublished materials, the four-factor test becomes a three-factor test. As the Second Circuit noted in *Wright v. Warner Books*,<sup>106</sup> a copyright dispute involving letters and journal entries of Richard Wright, "Our precedents . . . leave little room for discussion of this [second factor, the nature of the copyrighted work,] once it has been determined that the copyrighted work is unpublished."<sup>107</sup> Although *Wright* was decided before Congress amended the fair use doctrine, factor two has continued to favor the copyright holder,<sup>108</sup> and the distinction between materials en route to publication and those not intended for publication rarely, if ever, has been

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ing how unidentified person secretly brought copy of Ford manuscript to *The Nation's* editor, who knew that his possession of manuscript was unauthorized and that it would have to be returned to source quickly to avoid discovery). On the other side, a fairness inquiry would favor the biographer embroiled in a copyright dispute with the copyright heirs of the subject solely because the heirs sought to prevent a negative but accurate portrayal of themselves that had been developed with materials acquired through legitimate means.

<sup>105</sup> See Thau, *supra* note 11, at 201-02 (discussing statutory factors' amenability to manipulation).

<sup>106</sup> 953 F.2d 731 (2d Cir. 1991).

<sup>107</sup> *Id.* at 737 (emphasis added).

<sup>108</sup> See, e.g., *Norse v. Henry Holt & Co.*, 847 F. Supp 142, 146 (N.D. Cal. 1994) (acknowledging both congressional amendment and that second factor has never been applied in favor of infringer).

drawn out. Replacing the cursory examination of this factor with an in-depth inquiry into this distinction and the interests thereby implicated, as this Note suggests, would alleviate much of the problem.

The constant judicial overemphasis on factor four—the effect of the use upon the potential market for or value of the copyrighted work—and its analysis of economic incentives is even more puzzling in disputes over materials never intended for publication than is the marginal inspection of the nature of the copyrighted work. In *Salinger*, for example, the Second Circuit emphasized this factor, measuring the effect of the use on the market for Salinger's letters despite Salinger's declaration that he had no intent to sell or publish the letters during his lifetime.<sup>109</sup> The court asserted that because section 107 refers to a "potential" market, Salinger's intentions were irrelevant.<sup>110</sup>

The court in *Lish v. Harper's Magazine Foundation*<sup>111</sup> misplaced its emphasis in the same manner. *Lish* involved a copyright dispute arising out of the publication by *Harper's* of a confidential letter, clearly marked as private, to the prospective students of a writing instructor's seminar. Lish testified that he would not have negotiated with *Harper's* with respect to the publication of the letter, and *Harper's* testified that it would not have purchased the letter from Lish.<sup>112</sup> Despite concluding that the letter had no commercial value of its own, the court emphasized the importance of the market value factor.<sup>113</sup>

As noted earlier,<sup>114</sup> the Supreme Court in *Harper & Row* declared that the analysis of the effect of the use upon the potential market for or value of the copyrighted work is "undoubtedly the single most important element of fair use."<sup>115</sup> The courts in *Salinger* and *Lish*, among others, quoted *Harper & Row* for that proposition and, at least on paper, gave great weight to the market impact of the infringement.<sup>116</sup> These courts failed to distinguish *Harper & Row* by pointing out that the materials were intended for publication and the infringement had a quantifiable market impact, though in the cases

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<sup>109</sup> See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

<sup>110</sup> See *id.*

<sup>111</sup> 807 F. Supp. 1090 (S.D.N.Y. 1992).

<sup>112</sup> See *id.* at 1104.

<sup>113</sup> See *id.*

<sup>114</sup> See *supra* text accompanying note 64.

<sup>115</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

<sup>116</sup> See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987); *Lish v. Harper's Mag. Found.*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992); see also *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991); *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994).

before them, the materials were not intended for publication and there was no actual market for the copyrighted goods because they were not for sale.<sup>117</sup>

While the statute mandates consideration of the effect of the infringement on the market for or value of the copyrighted work,<sup>118</sup> it does not mandate that such consideration be more important than every other element of the statutory test.<sup>119</sup> Judicial emphasis on the fourth factor developed in the context of a dispute in which the economic incentives protected by copyright law were the central issues at stake.<sup>120</sup> This emphasis, if appropriate in the context of *Harper & Row*, makes little sense in the context of cases like *Salinger* and *Lish*, where the authors claim copyright infringement to protect privacy interests.<sup>121</sup>

The emphasis on the fourth factor has not always led courts to the wrong result. The fact that courts have reached the right results through curious reasoning exemplifies the ad hoc, unconvincing analysis that confuses commentators and observers. As one commentator has noted, the "courts' focus on the incentive-generating aspect of copyright is both disingenuous and bad policy. . . . [C]ourts have found in favor of expansive copyright protections in cases that implicate privacy interests when narrower protections would have clearly been dictated by the underlying economics."<sup>122</sup> By emphasizing economic interests at the expense of all others, the statutory test fails to provide appropriate guidelines for considering the privacy interests that have informed recent decisions.

### 3. *The Inapplicability of State Privacy Laws to Protecting Expression and the Underappreciated, Privacy-Protecting Role of Copyright*

Judge Leval has suggested that the confusion over copyright protection of unpublished materials arises because, rather than paying too little attention to privacy concerns, recent decisions have paid too

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<sup>117</sup> In the case of *Lish*, no one was even willing to buy them. See *Lish*, 807 F. Supp. at 1104.

<sup>118</sup> See 17 U.S.C. § 107 (1994); see also supra Part I.B.

<sup>119</sup> See 17 U.S.C. § 107; see also supra Part I.B.

<sup>120</sup> See supra text accompanying notes 53-63.

<sup>121</sup> In another fair use context, the Second Circuit has already recognized that the market impact factor is not always the most important element of a fair use analysis and suggested that no one factor enjoys any primacy over the other factors. See *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (discussing fair use factors in resolving dispute over photocopying of scientific articles).

<sup>122</sup> Thau, supra note 11, at 181-82.

much attention.<sup>123</sup> He contends that the inquiry should focus on the impact of the infringement on "the advancement of the utilitarian goal of copyright—to stimulate authorship for the public edification."<sup>124</sup> Privacy concerns, he argues, are the domain of the law of privacy, rather than the domain of copyright law.<sup>125</sup>

If the scope of American copyright law is conceived this narrowly, the plaintiffs in the type of disputes discussed in this Note are left without a cup from which to drink. State privacy laws, as a body distinct from copyright law or other doctrines, protect a limited aspect of privacy: private facts. Copyright, on the other hand, protects a different, limited aspect of privacy: private expression.

States have subsumed a variety of causes of action under the broad heading of the legal right to privacy.<sup>126</sup> Dean Prosser identified four separate categories of state privacy laws later adopted by the Restatement (Second) of Torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>127</sup> These torts all implicate to varying degrees the appropriation of private facts for public use.

Because of the public interest in the free flow of factual information, private-facts torts usually offer only a narrow scope of protection, and the threshold for recovery is usually difficult to meet.<sup>128</sup> Relief is typically available only if the publicized matter would be highly offensive to a reasonable person and if no strong public interest exists in the disclosure of the facts.<sup>129</sup> Furthermore, many privacy

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<sup>123</sup> See Leval, *supra* note 15, at 1118-19.

<sup>124</sup> *Id.*

<sup>125</sup> See *id.* at 1119:

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

<sup>126</sup> See Diane L. Zimmerman, *Requiem For a Heavyweight: A Farewell to Warren & Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291, 293 n.4 (1983) (discussing state privacy laws).

<sup>127</sup> See Restatement (Second) of Torts §§ 652 A-E (1977); William Prosser, *The Right to Privacy*, 48 *Cal. L. Rev.* 383, 389 (1960).

<sup>128</sup> See Restatement (Second) of Torts §§ 652A-E (1977); Bilder, *supra* note 93, at 313 n.85 (noting limitations on use of state privacy actions); *id.* at 334-35 (noting difficulty of winning state law privacy actions against biographers).

<sup>129</sup> See Restatement (Second) of Torts § 652D (1977).

torts are unavailable to public figures,<sup>130</sup> and the public figure exception would operate both to deny recovery in cases involving previously published authors and to eviscerate the protection traditionally provided by copyright law to the right of first disclosure.<sup>131</sup> Because a copyright in private expression does not inhibit dissemination of the underlying factual information, the scope of protection offered by copyright is much broader.

The right to privacy was introduced to American jurisprudence as a tort-based cause of action in the seminal article by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*.<sup>132</sup> Drawing on common law copyright and the right of first publication, the authors sought to protect the individual's right to control the manner in which the details of her life and character are disseminated, subject to limited exceptions.<sup>133</sup> As a result of this conceptual separation of the right to privacy from common law copyright and the right of first publication, the right to privacy expanded into doctrines and was codified in state laws that had nothing to do with artistic or intellectual creativity.<sup>134</sup>

The existence of tort actions related to private facts does not implicate the viability or constitutionality of copyright's role in protecting private expression, and the existence of privacy as an independent basis for tort actions does not replace the use of common law copyright to protect private expression. As one commentator observed, recognizing privacy as an independent basis of tort actions "did not substitute for [copyright] actions based on the right of first publication . . . despite the fact that the same interest was often involved."<sup>135</sup> The availability of common law copyright to protect private expression ended only with the federal preemption of common law copyright under the 1976 Act.<sup>136</sup>

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<sup>130</sup> See *id.* § 652D cmts. e-f.

<sup>131</sup> See *Estate of Hemingway v. Random House, Inc.*, 279 N.Y.S.2d 51 (Sup. Ct.), *aff'd*, 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd* on other grounds, 296 N.Y.S.2d 771 (1968).

<sup>132</sup> 4 Harv. L. Rev. 193 (1890).

<sup>133</sup> See *id.* at 198-205 (characterizing protection of intellectual property as extension of right "to be let alone"); Zimmerman, *supra* note 126, at 307 n.70 (noting reliance on precedent in common law copyright, implied contracts, and trade secrets).

<sup>134</sup> See Damich, *supra* note 36, at 52. Professor Damich notes, "[T]he [state tort law] right of privacy has not played a major role in protecting the personal rights of authors and . . . there are serious theoretical difficulties in attempting to make it do so." *Id.* at 56.

<sup>135</sup> *Id.* at 53.

<sup>136</sup> As noted in Part I, the 1976 Act explicitly subjected unpublished materials, apparently accidentally, to the fair use doctrine for the first time. See *supra* text accompanying note 42.

The distinction between private facts and private expression often has been ignored,<sup>137</sup> especially in recent fair use cases, but it has significant implications with respect to the balance of interests underlying copyright policy. Copyright limits public access to expression, not access to information, and overprotecting private facts reduces public access to information. Privacy interests, however, are implicated by the form of the work, not just the facts contained therein.<sup>138</sup> As one court has noted, "Copyright, both common-law and statutory, rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author."<sup>139</sup>

Furthermore, unlike privacy torts, copyright contains no exceptions for public figures or for matters of overwhelming public interest. The public interest in information "is assured by the law's refusal to recognize a valid copyright in facts."<sup>140</sup> In *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*,<sup>141</sup> the Second Circuit rejected the notion that public interest in the underlying subject matter can justify infringing copyrighted expression.<sup>142</sup> In covering the 1972 Olympics, ABC used several minutes of a student film about gold medal wrestler Dan Gable without permission of the copy-

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<sup>137</sup> See, e.g., *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 426 (S.D.N.Y. 1986) (suggesting Salinger suffered damage as result of biography that trespassed on his desire for privacy, but denying relief because copyright law does not protect against "that form of injury"), rev'd, 811 F.2d 90 (2d Cir. 1987). Another commentator, while not ignoring the distinction between fact and expression, ignored the relevance of that distinction. See De Turris, supra note 21, at 304-07 (arguing that copyright laws should be used to protect both fact and expression in interest of promoting respect for personal privacy). The Supreme Court recently and forcefully foreclosed the argument that copyright can be used to protect facts, as both a constitutional and a statutory matter. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) ("That there can be no valid copyright in facts is universally understood."); see also 17 U.S.C. § 102(b) (1994) (stating basic dichotomy between idea and expression).

<sup>138</sup> See Thau, supra note 11, at 217 (arguing that primary source of privacy interest in copyright is nature of work in question).

<sup>139</sup> *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968); see Patry, supra note 7, at 78 (discussing *Meeropol v. Nizer*, 417 F. Supp. 1201, 1214-15 (S.D.N.Y. 1976)):

Plaintiffs were not seeking to protect facts; rather they were (legitimately) seeking to protect their parents' copyrighted letters, some of which were quite intimate, and all of which were an expression of personal feelings and thoughts very much within the scope of copyright protection. The court seriously erred in confusing public interest in a historical event with a copyright owner's interest in protecting his expression of his feelings with regard to that event.

<sup>140</sup> *Iowa State Univ. Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980).

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* (stating that court cannot employ fair use doctrine to justify disregarding copyright protection).

right owner. ABC argued that it was "engaged in the laudable pursuit of disseminating the life history of an important public figure involved in an event of intense public interest,"<sup>143</sup> but the circuit court denied ABC's claim of fair use, noting, "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."<sup>144</sup>

In *Harper & Row*, the Supreme Court similarly rejected the notion of a public figure exception to protection of copyrighted expression. Discussing the concept of private expression, the Court stated that "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright."<sup>145</sup>

Private expression has been and should be protected in order to preserve the incentive-providing structure of copyright law generally.<sup>146</sup> The effect of underprotecting privacy is to diminish the rate of production of some types of works that, although not themselves distributed to the public, form the basis of or influence other works created for public consumption.<sup>147</sup> Additionally, underprotecting privacy creates disincentives to produce private works that could some day enter the public domain at the expiration of the copyright term, thereby reducing the store of original works of authorship.<sup>148</sup> Accordingly, the dichotomy between facts and expression can protect authors without impeding either immediate public access to information or eventual public access to the copyrighted work.

State privacy laws are not a fruitful realm for future development of remedies to protect private expression because they give inadequate attention to the competing interests at stake, interests that are balanced in a copyright analysis.<sup>149</sup> Copyright, for example, utilizes an

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<sup>143</sup> *Id.* at 60.

<sup>144</sup> *Id.* at 61.

<sup>145</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); see also Patry, *supra* note 7, at 136 ("For copyright purposes, there is a considerable difference between expression that may have commercial value because of the status of the speaker and the ideas or facts underlying that expression. The former is subject to copyright protection, while the latter is not.")

<sup>146</sup> See *Harper & Row*, 471 U.S. at 558-60 (1985) (discussing copyright's incentive scheme and the right to control publication of private expression); *Estate of Hemingway v. Random House, Inc.*, 240 N.E.2d 250, 255 (N.Y. 1968) ("The purpose, far from being restrictive, is to encourage and protect intellectual labor.")

<sup>147</sup> For example, a journal or a series of letters that the author wishes to keep private may form the basis of a novel or a set of memoirs intended for public consumption.

<sup>148</sup> The purpose of copyright is to increase the social store of original works of authorship. See *Harper & Row*, 471 U.S. at 545-46 (stating that copyright laws are designed to ensure that creators of original works receive "fair return" for their efforts).

<sup>149</sup> See Damich, *supra* note 36, at 28-29 (urging adoption of comprehensive moral right doctrine).

incentive scheme to ensure both production of new works and eventual public access to works. State privacy laws, on the other hand, exclude certain types of factual information from public dissemination without explicitly accounting for either the effect of the exclusion on the incentive to produce works or the public interest in eventual public access to such information.<sup>150</sup> Copyright law, because of its historical privacy-protecting role and because of the flexibility of the statutory form of the fair use doctrine, is far more capable of adapting to provide adequate but not overbroad protection for private expression.

Thus, we are left with a situation in which the protection offered by state privacy laws to an author's highly personal materials is inadequate, and the protection currently offered by copyright to private expression is "disingenuous"<sup>151</sup> or "confusion compounded."<sup>152</sup> The next section proposes a solution.

## II

### A PRIVACY-BASED EXCEPTION TO THE FAIR USE DOCTRINE FOR MATERIALS NEVER INTENDED FOR PUBLICATION

As the discussion in Part I indicates and as the discussion in Part III demonstrates, courts have been protecting privacy interests, even where strict application of the explicit statutory factors suggests finding fair use. The resulting confusion can be alleviated by recognizing an explicit, privacy-based exception to the fair use doctrine for materials never intended for publication.

Some commentators have suggested that using copyright law to protect privacy interests would distort the "balance of interests achieved under our privacy law."<sup>153</sup> By incorporating limitations on copyright protection of privacy interests into the exception, the distortion is minimized, and the balance between the right to privacy and the societal interest in allowing free and immediate access to the fruits of intellectual labor is maintained. Accordingly, when an author who has maintained the privacy of materials never intended for publication contemporaneously objects to the dissemination of those materials, her copyright should supersede a claim of fair use.

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<sup>150</sup> See *supra* text accompanying notes 127-31.

<sup>151</sup> See Thau, *supra* note 11, at 181 (criticizing courts' focus on "incentive-generating aspect of copyright").

<sup>152</sup> See Weinreb, *supra* note 10, at 1137 (discussing failure of Supreme Court decisions to clarify fair use doctrine).

<sup>153</sup> Leval, *supra* note 15, at 1130; see also Peppe, *supra* note 42, at 458-59.

Part II.A. places the privacy-based exception to the fair use doctrine within the context of the limited historical recognition of personal rights in American copyright law and within the context of the increasing recognition of moral rights in the United States. Part II.B. explains the restrictions on the privacy-based exception to the fair use doctrine and discusses the problems alleviated by the proposed exception. Part II.C. concludes this section with a discussion of how the exception fits within section 107.

A. *Recognition of Personal Rights Under American Copyright Law and the Trend Toward Increased Protection*

The traditional emphasis under American copyright law on safeguarding the pecuniary interests of copyright owners contrasts sharply with the emphasis that European and other civil law countries place on protecting the author's personality-based interests.<sup>154</sup> For example, the French doctrine of *le droit moral*, adopted to varying degrees by many countries throughout the world, "is based on the theory that a work of art is, and remains, the embodiment of its creator's personality."<sup>155</sup> Accordingly, protecting the work is merely an extension of protecting the author's right to shape his or her own personality.<sup>156</sup>

This contrast between emphasizing pecuniary interests and emphasizing personality-based interests is particularly stark with respect to the publication of letters that the author wishes to keep confidential. In France, for example, confidential letters have been protected against publication without the author's consent for over a century.<sup>157</sup> French courts recognize the right to the confidentiality of one's letters as a basic right of personality.<sup>158</sup> Germany extends complete protec-

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<sup>154</sup> See generally Damich, *supra* note 36 (comparing American and French systems of copyright); Kwall, *supra* note 43 (comparing American copyright scheme with those of other countries).

<sup>155</sup> Damich, *supra* note 36, at 82.

<sup>156</sup> See *id.* The general term *droit moral* encompasses the following: (1) the right to attribution—including the right to be known as the author of one's work, the right to prevent others from falsely attributing work to one who is not in fact the author of the work, and the right to prevent others from being named as the author of a work—the right to publish anonymously or pseudonymously, and the right to prevent others from using the author's name in a way that reflects adversely on the author's professional standing; (2) the right to prevent others from making changes that deform one's work; (3) the right to publish a work or to withhold it from publication; and (4) the right to withdraw a published work from distribution. See 3 Nimmer & Nimmer, *supra* note 4, § 8D.01[A].

<sup>157</sup> See Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* 735 (Tony Weir trans., 2d ed. 1992) (noting that protection has been in place since late nineteenth century). A limited exception exists for exigencies, such as where disclosure of the letter in a criminal court is required. See *id.*

<sup>158</sup> See *id.*

tion against publication of all letters absent the author's consent.<sup>159</sup> Italian copyright law goes one step further and provides:

[L]etters, collections of letters, family and personal memoranda, and other writings of a like nature, having a confidential character or associated with the intimacy of private life, may not be published, reproduced, or in any manner brought to the knowledge of the public without the consent of the author and, in the case of letters and collections of letters, the consent *also of the addressee*.<sup>160</sup>

The legislative history of the Italian Copyright Act explicitly notes an intent "to protect privacy and family honor against indiscretion."<sup>161</sup>

Judge Leval has declared that American copyright law and recognition of *droit moral* are incompatible.<sup>162</sup> Two factors, however, support the recognition of a privacy-based exception to fair use of materials never intended for publication: the limited historical recognition of personal rights under United States copyright law, particularly the scope of protection offered by the right of first publication as it existed under common law copyright, and the clear trend toward increased protection of personal rights.

The Supreme Court noted in *Harper & Row* that the traditional right of first public disclosure had protected not only the economic advantages of publishing first, but also the personal right of creative control.<sup>163</sup> Warren and Brandeis argued that the protection offered by common law copyright extends beyond property or reputation: "The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private prop-

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<sup>159</sup> See 1 Melville B. Nimmer & Paul Edward Geller, *International Copyright Law and Practice* GER-34 (1996) (noting that rule stems from German law's "general right of personality," which encompasses, inter alia, right of privacy and protection of one's name).

<sup>160</sup> 2 Nimmer & Geller, *supra* note 159, at ITA-23 (quoting Italian Copyright Act art. 93(1)).

<sup>161</sup> *Id.*

<sup>162</sup> See Leval, *supra* note 15, at 1128. Many judicial decisions contain language supporting this view. See, e.g., *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."). In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555 (1985), the Supreme Court disagreed. See *infra* text accompanying note 163. Furthermore, such broad statements simply do not reflect the scope of American copyright law. See, e.g., 2 Nimmer & Nimmer, *supra* note 4, § 8D.02[D][1] ("Both the attribution and integrity rights are subject to numerous exceptions and qualifications . . . but at base, there is no question that each right is well-recognized within the fabric of U.S. law.").

<sup>163</sup> See *Harper & Row*, 471 U.S. at 555; see also Damich, *supra* note 36, at 41, 86 (discussing personal rights protected by right of first publication).

erty, but that of an inviolate personality."<sup>164</sup> A growing body of scholarly attention to the protection of moral rights in the United States,<sup>165</sup> recent explicit judicial recognition of personal rights in a variety of copyright settings,<sup>166</sup> and the increasing number of state and federal statutes offering protection of limited aspects of *le droit moral* indicate that, even if some aspects of moral rights protection are fundamentally incompatible with American copyright law, the recognition of a limited privacy-based exception to fair use of materials never intended for publication is not.

In addition to the Supreme Court's recognition of the personal aspect of creative control implicit in the right of first public distribution,<sup>167</sup> the Second Circuit's decision in *Gilliam v. American Broadcasting Cos.*<sup>168</sup> expressed an awareness of the need to protect moral rights. The court in *Gilliam* held that the defendant, a sublicensee of the British Broadcasting Corporation, had infringed the copyright of the members of the comedy troupe Monty Python by broadcasting heavily edited versions of their programs in the United States after they had been broadcast in England in their original form.<sup>169</sup> The court explicitly acknowledged the personality-based interests at the heart of the dispute, noting, "This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of *droit moral*, or moral right, which . . . [includes] the right of the artist to have his work attributed to him in the form in which he created it."<sup>170</sup> The court then rebuffed the argument that copyright protection of moral rights is inconsistent with the emphasis in United States copyright law on protecting economic incentives, stating that "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."<sup>171</sup>

This line of reasoning supports a privacy-based exception to fair use as well: the economic incentive for artistic and intellectual creation at the heart of American copyright law cannot be reconciled with

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<sup>164</sup> Warren & Brandeis, *supra* note 132, at 205.

<sup>165</sup> For a sampling of this body of literature, see Damich, *supra* note 36; Kwall, *supra* note 43; Margaret Jane Radin, Property and Personhood, 34 *Stan. L. Rev.* 957 (1982).

<sup>166</sup> See, e.g., *supra* text accompanying note 139; *infra* text accompanying notes 169-71.

<sup>167</sup> See *Harper & Row*, 471 U.S. at 555 (discussing author's control with respect to first public distribution).

<sup>168</sup> 538 F.2d 14 (2d Cir. 1976).

<sup>169</sup> See *id.* at 23.

<sup>170</sup> *Id.* at 24.

<sup>171</sup> *Id.*

the inability of artists to obtain relief for violations of their right to control disclosure of their works to the public on which the artists are financially dependent. Thus, although the privacy-based exception emphasizes personal rather than pecuniary rights, it remains consistent with the basic values protected by the American copyright system.

Furthermore, on both the state and the federal level, legislators are recognizing the need to provide greater statutory protection for moral rights. In addition to recognizing the right to control publication,<sup>172</sup> the federal copyright law explicitly provides a reproduction right for phonorecords in section 115.<sup>173</sup> That section prevents licensees from changing the basic melody or fundamental character of a work without the consent of the artist, a provision having little to do with economic rights.<sup>174</sup> In addition, the Lanham Act has been available for decades to protect artists and authors against false attribution.<sup>175</sup> In 1990, Congress amended the Copyright Act to provide greater protection of moral rights to certain types of artists. This amendment, the Visual Artists Rights Act of 1990,<sup>176</sup> protects visual artists with respect to the rights of attribution and integrity.<sup>177</sup> Also, a number of states have enacted legislation recognizing, in varying degrees, personal rights.<sup>178</sup>

Finally, in 1989, after decades of contentious debate on the issue, the United States finally agreed to adhere to the Berne Convention for the Protection of Literary and Artistic Works,<sup>179</sup> an international union providing for a base level of reciprocal copyright protection among the member nations. Article 6<sup>bis</sup> of the Berne Convention provides in part:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim

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<sup>172</sup> See Copyright Act of 1976, 17 U.S.C. § 106 (1994).

<sup>173</sup> See *id.* § 115(a)(2) (1994).

<sup>174</sup> See *id.*

<sup>175</sup> See Lanham Act § 43(a), 15 U.S.C. § 1125 (1994).

<sup>176</sup> Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 501(a) (1994)).

<sup>177</sup> See *id.* § 604 (codified at 17 U.S.C. § 113 (1994)).

<sup>178</sup> The states include California, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. See 3 Nimmer & Nimmer, *supra* note 4, § 8D.02[A] (discussing state law recognition of personal rights); Damich, *supra* note 36, at 35 & n.172 (identifying state statutes protecting personal rights of artists and authors).

<sup>179</sup> The Berne Convention refers to a treaty originally signed in 1886 but frequently revised over the last century. The most recent version of the treaty appears in *International Treaties on Intellectual Property 339-77* (Marshall A. Leaffer ed., 1990). For a discussion of the history of the treaty, see generally Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1986).

authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>180</sup>

While the precise requirements of the Berne Convention with respect to copyright protection and the fair use doctrine are unclear,<sup>181</sup> adherence indicates an amenity to a base level of protection for *droit moral*. The decision to join the convention portends increasing harmonization between United States copyright law and copyright regimes offering substantially greater protection of personal rights in general and the right of first disclosure in particular.<sup>182</sup>

### *B. The Salutary Effects of a Privacy-Based Exception to Fair Use of Materials Never Intended for Publication*

Recognizing a privacy-based exception to the fair use doctrine is consistent with both the scope of protection offered by common law copyright and the trends toward increased recognition of personal rights within American copyright law and toward harmonization of copyright regimes on an international scale. Adopting the exception not only will improve the current administration of the fair use doctrine, but also will alleviate a number of concerns about the extent of the doctrine that were raised by the Second Circuit's decisions in *Salinger* and *New Era*.

After the *Salinger* decision a student note proclaimed, "If *Salinger* is read to mean that personal interests may be protected through application of copyright law, the future of biographical scholarship is in mortal danger."<sup>183</sup> After the *New Era* decision, Arthur Schlesinger, Jr. declared that a blow had been struck against the whole historical enterprise.<sup>184</sup> The proposal expressed in this Note balances an author's valid privacy interest against the societal interests protected by the fair use doctrine and provides a theoretical framework in which to contain the protection offered by the language of recent decisions,

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<sup>180</sup> Article 6<sup>bis</sup> of Berne Convention for the Protection of Literary and Artistic Works, in International Treaties on Intellectual Property, supra note 179, at 346.

<sup>181</sup> See 4 Nimmer & Nimmer, supra note 4, § 17.01[B][1] ("Berne does not regulate formalities in general—it applies solely to formalities that stand as a condition to copyright protection."). It should be noted that Berne does not require the exception because the right of first publication is not one of the rights accorded mandatory protection. See 3 Nimmer & Nimmer, supra note 4, § 8D.01[B] (noting absence of Berne Convention requirement of initial dissemination right).

<sup>182</sup> See Damich, supra note 36, at 5 (discussing moral aspect of creativity).

<sup>183</sup> Peppe, supra note 42, at 459-60 (discussing *Salinger* opinion); see Kaplan, supra note 52, at 80 (discussing effect of decisions on historians).

<sup>184</sup> See Schlesinger, supra note 52.

such as *Salinger*, *New Era*, and *Lish*, denying the application of the fair use doctrine to materials never intended for publication.

One of the most pertinent concerns for historians and biographers with regard to copyright protection of unpublished materials is the duration of the copyright term.<sup>185</sup> By limiting the privacy-based exception to the life of the author, the proposed exception reduces the potential protection of copyright by fifty years when the copyright is being used to protect privacy interests rather than pecuniary interests. Protecting the privacy of the author during her lifetime, when her interests in privacy and autonomy are strongest, provides a sensible compromise between allowing immediate access to private materials and forbidding any use of such materials for the full term of copyright protection.<sup>186</sup>

The limitation on the length of protection provided by the exception combines with a second characteristic, the reservation to the author alone of the right to assert the privacy-based exception; together, the two reduce transaction costs for potential infringers. Current copyright law permits the transfer of ownership in whole or in part by any means of conveyance or by operation of law, and copyrights may be bequeathed or passed by intestate succession.<sup>187</sup> Although third party privacy interests may be implicated by fair use, and although some systems acknowledge third party interests,<sup>188</sup> the right of first disclosure protects only the author's interests. Were a privacy exception simply incorporated into the copyright with its extended term of protection and transferability as some have suggested,<sup>189</sup> the protec-

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<sup>185</sup> See LeFevre, *supra* note 87, at 167:

[T]he legal dilemma may discourage work by scholars who attempt to recover the writings of women, of minorities, of so-called "ordinary" or "marginal" people . . . because they were unfound, unread, unrecognized for their merits, or actively suppressed. It seems ironic and regrettable if, when such works are finally found, the laws that purport to protect them as property keep them hidden instead.

See also Leval, *supra* note 15, at 1118 (noting problems for historians posed by extended term of copyright duration that granted additional control to copyright heirs and executors).

<sup>186</sup> There is ample precedent for according shorter terms of protection in certain specific contexts. See, e.g., 17 U.S.C. § 302(c) (1994) (providing shorter term for anonymous works and for pseudonymous works).

<sup>187</sup> See *id.* § 201(d) (1994).

<sup>188</sup> The Italian copyright system, for example, requires both the addressee's and the author's permission in order to quote from personal letters. The legislative history of the Italian Copyright Act notes that one of the purposes of the restrictions on use of personal documents such as letters and diaries is to protect family honor. See *supra* text accompanying note 160.

<sup>189</sup> See, e.g., De Turris, *supra* note 21, at 284 (discussing possibility of using copyright law to protect privacy interests).

tion offered would be too broad, exceeding that offered by common law copyright and the right of first disclosure.

In addition to conforming more closely to the scope of protection of privacy rights provided by the right of first disclosure, these limitations reduce the possibility of market failure. Some commentators have noted the relationship between fair use and market failure, observing that the scope of fair use corresponds roughly to the unreasonably high transaction costs implicated by trying to negotiate around copyright protection in certain situations.<sup>190</sup> Other commentators, implicitly acknowledging the problem of market failure, have identified the difficulties posed by copyright laws for researchers whose subjects have died and have unknown heirs.<sup>191</sup> Critics of the current system of protection have focused on the problem of copyright heirs preventing the use of unpublished materials if the end product is not uniformly flattering.<sup>192</sup>

Reserving the right to enforce the privacy-based exception to the author alone not only reduces transaction costs in cases where the identity of the copyright owner is unknown, but also prevents third parties from interfering with publication out of concern for their own privacy interests rather than those of the author.<sup>193</sup> Any remaining inability to negotiate around copyright protection would result not from a market failure, but rather from the absence of a market at all. The absence of a market, although still problematic from the infringer's point of view, fails to present as strong an argument in favor of a court-imposed remedy as market failure does.

The remaining restriction on the scope of protection offered by the proposed exception preserves an essential element of common law

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<sup>190</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1627-46 (1982) (analyzing market approach to fair use); see also Thau, *supra* note 11, at 193-98 (discussing relationship between fair use and transaction costs).

<sup>191</sup> See, e.g., LeFevre, *supra* note 87, at 167 (noting difficulty posed by copyright law for works about subjects of historical interest who were not famous during their lifetimes, particularly women and minorities in American history); see also Bilder, *supra* note 93, at 328-29 (noting that, under current scheme, without consent of heirs—either to use of unpublished materials in biography or to publication—materials will never be used).

<sup>192</sup> See, e.g., LeFevre, *supra* note 87, at 157 (demonstrating problems posed by copyright heirs through use of hypothetical example); Leval, *supra* note 15, at 1118 (discussing “despotic” power of “widow censor”).

<sup>193</sup> See, e.g., Kaplan, *supra* note 52, at 80 (describing effect of judicial decisions on publication of Melanie Thernstrom, *The Dead Girl* (1990), book about murdered Berkeley student, after parents refused rights to letters their daughter wrote to her friend, the author); Beth Landman Keil & Deborah Mitchell, *Censored Portrait of an Artist*, N.Y. Mag., Nov. 10, 1997, at 16 (reporting refusal of estate of James Joyce to permit author Richard Zacks to quote love letter written by Joyce in 1909, and remarking on irony “that Joyce is being suppressed by his prudish grandson”).

copyright. As discussed in Part I, the perpetual right to prevent publication of unpublished works was lost once the work was disclosed to the public.<sup>194</sup> Furthermore, as noted by the Supreme Court in *Harper & Row*, the traditional, common law, "absolute" rule against publication of unpublished materials without the copyright owner's consent was, in practice, not so absolute.<sup>195</sup> The rule was tempered by courts that found an implied consent to fair use where the author had made the work available in some way.<sup>196</sup> The law should only protect the privacy of authors who, like J.D. Salinger or Gordon Lish, have preserved the privacy interests they seek to protect. Thus, the proposed exception is limited to materials never intended for publication and materials whose content has not been publicly disclosed. If the materials were intended for publication, as in *Harper & Row*, then the traditional four-factor analysis adequately protects the author's interests.<sup>197</sup>

Equally important to the substantive limitations that adoption of the proposal would impose, the privacy-based exception to fair use of materials not intended for publication would provide a brightline rule that would eliminate or at least reduce any "surprise factor." The fair use doctrine with respect to unpublished materials has been chimerical enough for legal professionals, let alone the real world actors whose behavior is determined by the rule and its constraints. One observer succinctly stated, "The rule of thumb is that there is no rule of thumb."<sup>198</sup> At a minimum, the privacy-based exception to fair use with respect to materials never intended for publication provides a rule of thumb.

The adoption of the privacy-based exception to fair use may even liberalize the permissible use of quotations from unpublished materials. Under the current system, essentially the same analytical framework applies whether a work is published or unpublished and whether the interests the copyright owner seeks to protect are pecuniary or

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<sup>194</sup> See *supra* text accompanying note 39; see also Damich, *supra* note 36, at 47-48 (discussing effect of disclosure on common law copyright).

<sup>195</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985).

<sup>196</sup> See *id.* Making materials never intended for publication available, subject to restrictions on their use (e.g., the common practice of donating letters and journals to university libraries), should not be considered a disclosure in spite of the limited availability of the materials for public viewing. In many cases the letters are not donated by the author, and their being donated often subject to explicit restrictions weighs against placing this practice beyond the scope of the suggested exception. Furthermore, placing the practice beyond the scope of protection would have a chilling effect on a practice that this author believes is socially desirable and should be encouraged.

<sup>197</sup> Or, at least, any inadequacies are beyond the scope of this Note.

<sup>198</sup> LeFevre, *supra* note 87, at 160 (quoting Irwin Karp, Authors League Symposium on Copyright, January 27, 1982, at 611, 645).

personal. As an article in *The Wall Street Journal* discussing the computer software industry's objection to fair use legislation proposed in 1990 noted, "A 'snippet' may be 'fair use' . . . to an author, but a snippet taken from an unpublished software program under fair-use doctrine could be enough to 'decompile' the entire program."<sup>199</sup> The unusual fact patterns of the Supreme Court decisions relating to fair use and the diversity of contexts in which fair use claims are contested<sup>200</sup> suggest that rules will inevitably develop that are applicable only to particular types of fair use claims. As these rules develop, judges and participants will come to realize that the restrictive holdings appropriate in particular types of disputes should not apply in others. Accordingly, the restrictive language of cases such as *Salinger* and *Lish* might not be applied to cases in which unpublished materials are quoted, but privacy interests are not implicated.<sup>201</sup>

Some commentators have suggested greater recognition of privacy interests within American copyright law,<sup>202</sup> but the privacy-based exception envisioned in this Note differs from other proposals in three important respects: the right to protect privacy interests ends with the death of the author; it does not transfer with the copyright to an owner other than the author; and it ends with disclosure of the contents of the materials in question. Furthermore, should any of these limitations come into play, this Note does not suggest that the use is automatically fair, but simply that in those cases the traditional four-factor statutory analysis should apply. By reattaching the right to privacy and the right of first disclosure, the privacy-based exception to the fair use doctrine proposed by this Note acknowledges appropriate limitations on the protection of privacy interests and preserves the fundamental balance of values struck by our copyright system.

The benefits of adopting the privacy-based exception to fair use of materials never intended for publication are clear, but a question remains: does section 107 permit its adoption? The next section demonstrates that it does.

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<sup>199</sup> James M. Perry, What Publishers Call Quoting, Computer Firms Call Piracy as Industries Face Off on Capitol Hill, *Wall St. J.*, Apr. 23, 1991, at A24.

<sup>200</sup> See Thau, *supra* note 11, at 201 (noting diversity of contexts in which fair use claims are contested).

<sup>201</sup> See, e.g., *Norse v. Henry Holt & Co.*, 847 F. Supp 142, 144 (N.D. Cal. 1994) (finding in favor of alleged infringer in dispute regarding publication of portions of previously unpublished letters). Unlike in *Salinger* and in *Lish*, privacy concerns were not central to the dispute. See *id.* For further discussion, see *infra* Part III.B.1.a.

<sup>202</sup> See generally Thau, *supra* note 11; De Turrís, *supra* note 21.

### C. *Developing the Fair Use Doctrine and Congressional Intent*

As noted in Part I, in enacting section 107, Congress sought to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”<sup>203</sup> Not only did Congress seek to adopt the judicial doctrine without modification, but Congress also sought to preserve the ability of courts to “adapt the doctrine to particular situations on a case-by-case basis.”<sup>204</sup> Section 107 neither defines “fair use” nor purports to provide a brightline rule that would determine whether any particular use is fair.<sup>205</sup> Instead, it offers a list of factors for consideration. In order to preserve judicial flexibility in applying the doctrine, section 107 explicitly provides that the statutory factors are not exclusive. Notably, however, it provides no guidance with respect to the relative weight to be accorded to each.<sup>206</sup>

Adopting a privacy-based exception to the fair use of materials never intended for publication would merely reflect explicit judicial recognition of an equitable factor that is already being applied implicitly. Fair use has never prevented the recognition of social values other than the economic incentives that copyright law traditionally has been used to protect.<sup>207</sup> Although the legislative response to the holdings in *Salinger* and *New Era* could be interpreted as a reflection of congressional hostility toward judicial rules that impose burdens on some of the favorite sons of the First Amendment, such as journalism and academic inquiry, the gentle language of the 1992 amendment suggests congressional recognition of the competing interests at stake.

The amendment merely cautions against erecting a per se bar to fair use of unpublished materials in general.<sup>208</sup> The exception proposed in this Note seeks to distinguish unpublished materials that should be subject to fair use and those that should not. A limited exception to fair use for cases where authorial interests in privacy and autonomy are at their strongest violates neither the language of section 107 nor the intent of Congress in passing or amending it.

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<sup>203</sup> H.R. Rep. No. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

<sup>204</sup> *Id.*

<sup>205</sup> See 17 U.S.C. § 107 (1994); see also 3 Nimmer & Nimmer, *supra* note 4, § 13.05[A] (describing fair use factors).

<sup>206</sup> See 17 U.S.C. § 107 (1994). Furthermore, in amending the statute in 1992, Congress merely clarified that the unpublished nature of a work did not create a per se ban on finding fair use. The statute as amended preserves this flexibility. See *id.* (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

<sup>207</sup> See Weinreb, *supra* note 10, at 1150 (“Fair use does not exclude consideration of factors not related to the utilitarian justification for copyright—other social values or, more simply, fairness.”).

<sup>208</sup> See Patry, *supra* note 7, at 395-97 (discussing limited effect of amendment).

Accordingly, a privacy-based exception to fair use of materials never intended for publication is rooted in the traditions of American copyright law, accords with the current trend toward greater explicit recognition of personal rights, is likely to yield significant benefits relative to the current scheme, and is permitted by both the language and intent of the governing statute. Perhaps the strongest argument in favor of adopting the exception is that courts are already developing its functional equivalent. Part III examines recent fair use cases involving letters and journals and observes that while explicit adoption of the exception would clarify the analysis in those cases, the results would remain, by and large, the same.

### III

#### RECENT FAIR USE CASES INVOLVING LETTERS AND JOURNALS AND APPLICATION OF THE PRIVACY-BASED EXCEPTION

The fair use doctrine, for all of its imperfections as codified and applied, is still first and foremost an equitable doctrine.<sup>209</sup> In spite of the concern provoked by the language of *Harper & Row, Salinger*, and *New Era*, courts were reaching equitable results before the statutory amendment and have continued to reach equitable results after it. Viewing recent cases involving letters and journals and fair use of the copyrighted material contained therein through the prism of the privacy-based exception proposed in Part II indicates that the exception, rather than altering the equitable results reached by courts, simply would serve to clarify the analysis and explain the results. Part III.A. analyzes two cases falling within the proposed exception in order to illustrate its application and usefulness. Part III.B.1. demonstrates the narrow scope of the proposal by discussing recent cases falling outside the proposed exception in which the allegedly infringing use was determined to be fair. Part III.B.2. demonstrates the supplemental rather than exhaustive nature of the proposal by analyzing cases beyond the scope of the exception in which fair use was and should have been denied on the basis of the traditional statutory analysis.

#### A. Cases Falling Within the Proposed Exception

##### 1. Salinger

The Second Circuit's decision in *Salinger v. Random House, Inc.*<sup>210</sup> remains the paradigmatic example of recent use of copyright law to protect privacy interests. In the opening sentences of the deci-

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<sup>209</sup> See Weinreb, *supra* note 10, at 1141.

<sup>210</sup> 811 F.2d 90 (2d Cir. 1987).

sion, the court noted that J.D. Salinger “has chosen to shun all publicity and inquiry concerning his private life.”<sup>211</sup> Salinger objected to the biography long before it was written, refusing an appeal for his cooperation and informing his biographer, Ian Hamilton, that he preferred not to have his biography written during his lifetime.<sup>212</sup> Salinger had not made the unpublished letters infringed by the biography available to the public—he learned that they had been donated to university libraries only when he received a galley set of the proofs of the original version of the biography.<sup>213</sup>

Although the court found that the purpose of the use—as criticism, scholarship, and research—weighed in favor of the defendants,<sup>214</sup> it held that the other three factors, as well as the balance, favored Salinger.<sup>215</sup> The court stated that the factor measuring the effect on the market for the copyrighted work was “the single most important element of fair use,”<sup>216</sup> even though the letters were neither for sale nor en route to publication at the time of infringement. Salinger, in fact, disavowed any intention to publish the letters during his lifetime, a consideration that the Second Circuit factored out of its explicit statutory analysis,<sup>217</sup> but one that would be particularly pertinent under the analysis proposed by this Note.

A brief examination of the facts underlying the *Salinger* decision reveals that the privacy-based exception also would yield a finding of copyright infringement: Salinger himself asserted the claims; Salinger had zealously guarded not only the privacy of the letters, but his privacy in general; and the unpublished materials in question were personal letters written decades earlier and never intended for publication. The Second Circuit, applying the traditional statutory analysis with its emphasis on economic factors, struggled to reach the same result.

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<sup>211</sup> *Id.* at 92.

<sup>212</sup> *See id.* By all accounts, Hamilton is a well respected and serious literary biographer; the refusal to cooperate was clearly part of Salinger’s vigorous desire to maintain privacy rather than fear of a vituperous and scandal-mongering exposé. Salinger did not object to either a particular use or to the nature of the infringing work. Rather, he objected to any use at all.

<sup>213</sup> *See id.* at 93.

<sup>214</sup> *See id.* at 96-97.

<sup>215</sup> *See id.* at 97-100 (examining nature of copyrighted work, amount and substantiality of portion used, and effect on market).

<sup>216</sup> *Id.* at 99 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>217</sup> *See id.* at 99 (“[T]he need to assess the effect on the market . . . is not lessened by [Salinger’s intent not to publish].”).

## 2. Lish

The court in *Lish v. Harper's Magazine Foundation*<sup>218</sup> also managed to find copyright infringement through the traditional statutory analysis, even though the court acknowledged that the previously unpublished letter underlying the dispute had no "commercial value"<sup>219</sup> and that both parties testified they would not have conducted negotiations over the letter.<sup>220</sup> As in *Salinger*, the court observed that the fourth factor, market impact, was "'undoubtedly the single most important element of fair use,'"<sup>221</sup> and found that it weighed in favor of *Harper's* because Lish had failed to prove that the infringement had any effect on the value of the letter.<sup>222</sup> Lish prevailed in the court's analysis, however, because *Harper's* use of the original material was commercial,<sup>223</sup> the amount and substantiality of the copying was "unprecedented,"<sup>224</sup> and the material taken was "creative," "expressive," and "unpublished."<sup>225</sup> After applying the statutory factors, the court rebuffed *Harper's* contention that the only rationale for copyright protection was economic, stating that "providing economic incentives for the creation of works of art is not necessarily the only value which the fair use doctrine embodies or protects."<sup>226</sup>

As in *Salinger*, the privacy-based exception would simplify the analysis by explicitly acknowledging the privacy interests at the heart of the dispute and by enabling courts to avoid a forced and unnecessary analysis of the market impact of infringing use of copyrighted materials for which there is no market. Gordon Lish is an author and writing instructor of some repute.<sup>227</sup> The letter was written to a small group of prospective students, one of whom sent the letter to *Harper's*, and *Harper's* published an edited version of the letter.<sup>228</sup> Lish himself asserted the claim. Although Lish had not shunned publicity,<sup>229</sup> he had maintained the privacy of the unpublished letter. Lish's writing class was "conducted in an atmosphere of great privacy,"<sup>230</sup> and the letter clearly expressed its confidential nature.<sup>231</sup>

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<sup>218</sup> 807 F. Supp. 1090 (S.D.N.Y. 1992).

<sup>219</sup> *Id.* at 1104.

<sup>220</sup> *See id.*

<sup>221</sup> *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>222</sup> *See id.*

<sup>223</sup> *See id.* at 1101.

<sup>224</sup> *Id.* at 1103.

<sup>225</sup> *Id.* at 1102.

<sup>226</sup> *Id.* at 1105.

<sup>227</sup> *See id.* at 1093.

<sup>228</sup> *See id.*

<sup>229</sup> *See id.* at 1094.

<sup>230</sup> *Id.*

Furthermore, although Lish testified that he might publish a collection of his letters at a future date, the letter, when written, was not intended for publication, nor was it available for publication at the time of the infringement.<sup>232</sup> As in *Salinger*, both the court's analysis and application of the proposed exception result in a finding of copyright infringement.

## B. Cases Beyond the Scope of the Proposed Exception

### 1. Cases Permitting Use

As the previous section indicates, adopting a privacy-based exception will aid judicial administration of cases in which privacy interests are at the heart of the dispute. The limitations on the scope of the exception enumerated in Part II.B. enable courts to distinguish when those interests are strong enough to deserve protection and when they are not. The following cases demonstrate that not all uses of personal documents, such as letters and diaries, implicate privacy concerns worthy of judicial recognition.

a. *Wright*. *Wright v. Warner Books, Inc.*,<sup>233</sup> decided in the time between *Salinger* and *Lish*, provides a useful counterexample to those cases. In *Wright*, the widow of Richard Wright brought a copyright infringement action against Wright's biographer, Margaret Walker, and her publisher in order to recover for Walker's use of Wright's journal entries and letters.<sup>234</sup> The Second Circuit held that the copyrights had not been infringed,<sup>235</sup> and, not surprisingly, the proposed privacy-based exception would not apply.

Although the materials were unpublished, and therefore the factor that assesses the nature of the copyrighted work favored the plaintiffs,<sup>236</sup> the court found that the other three factors favored the defendants:<sup>237</sup> the purpose and character of the use was scholarship;<sup>238</sup> the amount and substantiality of the portion used were

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<sup>231</sup> See *id.* (citing excerpt from letter to demonstrate strict confidentiality Lish imposed on his students).

<sup>232</sup> See *id.* at 1104. Furthermore, the right of first publication expressed by 17 U.S.C. § 106 encompasses "not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

<sup>233</sup> 953 F.2d 731 (2d Cir. 1991).

<sup>234</sup> See *id.* at 734.

<sup>235</sup> See *id.* at 740.

<sup>236</sup> See *id.* at 737 ("The fact that a work is unpublished is a critical element of its 'nature.'" (citing *Harper & Row*, 471 U.S. at 564)).

<sup>237</sup> See *id.* at 736-40.

<sup>238</sup> See *id.* at 736 ("Dr. Walker's book is a scholarly biography. As such, it 'fits comfortably within several of the statutory categories of uses' that Congress has indicated may be

slight,<sup>239</sup> and the biography did not pose a significant threat to the potential market for Wright's letters or journals.<sup>240</sup> "Weighing the amalgam of relevant factors," the court determined that the use was fair.<sup>241</sup>

Any privacy concerns implicated in the dispute were markedly different from the concerns at issue in *Salinger* and *Lish*. First, Wright was deceased, and the copyrights were being asserted by his widow. Second, the widow already had agreed to publish a collection of Wright's letters with Harper & Row.<sup>242</sup> Third, the plaintiff had sold Wright's journals, along with the rest of the Wright Archives, to Yale University for \$175,000.<sup>243</sup> The sale of the journals for an exorbitant sum clearly distinguishes the availability of the journals in a library from the situation presented in *Salinger*. In *Salinger*, the letters were donated to libraries without Salinger's endorsement or knowledge.<sup>244</sup> Because the author was deceased and was not the party seeking to enforce the copyrights, and because the materials were en route to publication, the copyright claim in *Wright* fails all three prongs of the proposed privacy-based exception to the fair use doctrine. Were the privacy-based exception not limited in the significant respects discussed in Part II, the rights protected would be overbroad.

*b. Norse.* Similar to *Wright*, *Norse v. Henry Holt & Co.*<sup>245</sup> demonstrates the limited nature of the proposed privacy-based exception. Moreover, *Norse* indicates the continued availability of personal letters for quotation, even when the author still holds the copyrights.

In *Norse*, Harold Norse, a "Beat Generation" poet and colleague of William Burroughs, brought a copyright infringement action against Burroughs's biographer for allegedly infringing Norse's copyrights on unpublished letters that he wrote to a friend.<sup>246</sup> Like *Salinger* and *Lish*, but unlike Richard Wright, Norse asserted the

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fair—'criticism,' 'scholarship,' and 'research.'" (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987); 17 U.S.C. § 107 (1988)); see also 17 U.S.C. § 107 (1994) (citing "scholarship" as permissible category for application of fair use doctrine).

<sup>239</sup> See *Wright*, 953 F.2d at 739-40 (characterizing use as "*de minimis*" and noting that part taken represented "only a small, unfeatured portion of the biography").

<sup>240</sup> See *id.* at 739 (reasoning that "[i]mpairment of the market for these works is unlikely" given the "marginal amounts of expressive content . . . taken from Wright's works").

<sup>241</sup> *Id.* at 740.

<sup>242</sup> See *id.* at 739. Although the project was on hold, the agreement clearly demonstrated an intent on the part of the copyright holder to publish the letters. See *id.*

<sup>243</sup> See *id.* at 740.

<sup>244</sup> See *Salinger v. Random House, Inc.*, 811 F.2d 90, 93 (2d Cir. 1987).

<sup>245</sup> 847 F. Supp. 142 (N.D. Cal. 1994).

<sup>246</sup> See *id.* at 143.

claim himself. Unlike Salinger and Lish, however, and like Wright's widow, Norse did not adequately protect the privacy of the letters. The biographer, Ted Morgan, contacted Norse in the course of conducting research for his book.<sup>247</sup> Norse provided information regarding Burroughs to Morgan and told him that his own letters were available to the public through one of the libraries at New York University, with the obvious expectation that the letters would be used by Morgan.<sup>248</sup> The initially cooperative relationship between Norse and Morgan soured after Morgan's use of the letters portrayed Norse in an unflattering manner and after Morgan broke an alleged promise to promote Norse's forthcoming autobiography.<sup>249</sup> Norse then sued Morgan for copyright infringement.<sup>250</sup>

The court, applying the statutory analysis, observed that Morgan's purpose was biographical,<sup>251</sup> that the use was not intended to supplant imminent publication or exploit the value of the infringement,<sup>252</sup> and that the copying was quantitatively minimal and qualitatively insignificant.<sup>253</sup> Citing the fourth factor, market impact, as "undoubtedly the single most important element of fair use,"<sup>254</sup> the court held that the impact was nonexistent.<sup>255</sup> The court's examination of the unpublished nature of the work was cursory, observing that the second factor has never weighed in favor of an infringer when the original work was unpublished, but noting that, after the 1992 amendments, the unpublished nature of the work did not create an absolute bar to fair use.<sup>256</sup> The court's discussion of the relationship between Morgan and Norse indicates that good faith also played a role in the decision.<sup>257</sup> Weighing the factors together, the court held that the use was fair.<sup>258</sup>

Because Norse sought to cooperate in the biography and expected Morgan to rely on the unpublished letters, the case is beyond

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<sup>247</sup> See *id.* at 144.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.* at 144, 147.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.* at 145 (describing work as scholarly biography of literary figure).

<sup>252</sup> See *id.* at 146.

<sup>253</sup> See *id.* at 146-47 (holding that copied material does not constitute "the heart" of any individual letter or letters as a whole).

<sup>254</sup> *Id.* at 147 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>255</sup> See *id.* (finding that plaintiff's declarations claiming that unpublished letters generally have greater commercial value and potential market than published letters failed to address market impact resulting from defendant's fragmentary copying).

<sup>256</sup> See *id.* at 146.

<sup>257</sup> See *id.* at 147.

<sup>258</sup> See *id.*

the scope of the proposed exception. Norse had no reasonable expectation of privacy; rather, his bone of contention was based on Morgan's unflattering portrayal and failure to uphold the perceived promise to promote Norse's autobiography. The requirement that an author protect or at least maintain the privacy of the content of the copyrighted materials prevents the proposed exception from denying fair use to the biographer, thereby demonstrating an important limitation on the application of the exception.

## 2. *Cases Denying Use*

If the copyright holder fails to meet one of the prongs of the privacy-based exception, the use is not automatically fair. Rather, as the following cases indicate, infringement must be found under the traditional statutory analysis.

a. *Craft*. *Craft v. Kobler*,<sup>259</sup> decided just months after *Salinger*, demonstrates yet another facet of the application of the privacy-based exception. *Wright* and *Norse* suggest that the exception would not unduly restrict fair use.<sup>260</sup> *Craft* illustrates that the proposed exception supplements rather than supplants the statutory framework. Adopting the proposed exception to the fair use doctrine would not prevent a finding of infringement when the exception does not apply to the facts at hand; simply, the infringement must be found under the application of the traditional statutory analysis.

In *Craft*, the owner of copyrights in the letters and journals of composer Igor Stravinsky brought an action for infringement against the author of *Firebird: A Biography of Igor Stravinsky*.<sup>261</sup> The plaintiff, the composer's personal assistant and confidant, had authored or co-authored fifteen copyrighted books on Stravinsky, including "conversation" books consisting of interviews of Stravinsky conducted by Craft and a three-volume annotated compendium of Stravinsky's correspondence.<sup>262</sup> Even though the documents underlying the dispute included personal correspondence, no privacy interests were implicated—the author of the correspondence was deceased, his copyright heir was asserting the claim, and the copyrighted materials had already been published. Accordingly, for a number of reasons, the proposed exception does not apply here.

Judge Leval, again the district court judge, granted the injunction. He found in favor of the plaintiff on each of the statutory factors,

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<sup>259</sup> 667 F. Supp. 120 (S.D.N.Y. 1987).

<sup>260</sup> See *supra* Part III.B.1.

<sup>261</sup> John Kobler, *Firebird: A Biography of Igor Stravinsky* (1988).

<sup>262</sup> See *Craft*, 667 F. Supp. at 122.

devoting almost all of his attention to the first and third factors. Judge Leval noted that "the fair use doctrine gives latitude to the biographer of an author to quote limited excerpts of published copyrighted work to illustrate the descriptive skill, wit, power, vividness, and originality of the author's writing,"<sup>263</sup> but held that the takings were "far too numerous and with too little instructional justification to support the conclusion of fair use."<sup>264</sup> Accordingly, *Craft* illustrates that the exception's lack of application does not prevent a court from finding copyright infringement on other grounds by utilizing the traditional four-factor test.

b. *New Era*. In *New Era Publications International v. Henry Holt & Co.*,<sup>265</sup> the Second Circuit refused to enjoin the publication of a biography of Church of Scientology founder, L. Ron Hubbard, but only because it applied the doctrine of laches. The court went to some length to clarify, however, that were it not for laches, the injunction would have been granted.<sup>266</sup>

The biographer sought to expose Hubbard as a liar and a fraud and liberally quoted from Hubbard's unpublished early letters and journals in order to demonstrate the manner in which they conflict with Hubbard's later public accounts of his life.<sup>267</sup> Reversing the district court, the circuit court found in favor of the copyright owner on three of the four statutory factors. The court found that as a work of criticism, scholarship, or research, the purpose weighed in favor of finding fair use.<sup>268</sup> The unpublished nature of the original material, the substantiality of the taking, and the market impact of the use cut in favor of *New Era*.<sup>269</sup>

The exception would not have applied here either, because Hubbard had died and the copyright was being asserted by *New Era*, the publishing arm of the Church of Scientology and Hubbard's copyright heir. *New Era*, furthermore, asserted its intention to publish a

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<sup>263</sup> *Id.* at 128. It is worth noting that here Judge Leval limited his point to published materials.

<sup>264</sup> *Id.* at 129. With regard to the second and fourth factors, the discussion was limited to "[t]he remaining statutory factors [that] direct attention to 'the nature of the copyrighted work' and 'the effect of the [alleged infringer's] use upon the potential market for or value of the copyrighted work.' I find these factors also favor the plaintiff." *Id.* (quoting 17 U.S.C. §§ 107(2), (4) (1982)).

<sup>265</sup> 873 F.2d 576 (2d Cir. 1989).

<sup>266</sup> See *id.* at 583-85 (invoking bar of laches as result of prejudice suffered by *Holt* because of *New Era*'s unreasonable and inexcusable delay in bringing action, despite court's finding that three statutory fair use factors favored *New Era*).

<sup>267</sup> See *id.* at 578-79.

<sup>268</sup> See *id.* at 583.

<sup>269</sup> See *id.*

collection of Hubbard's letters, and thus the materials could be considered as having been en route to publication.

*New Era* presents the appropriate case upon which to end this discussion for two reasons. First, Chief Judge Oakes's concurring opinion offers the most explicit acknowledgment that courts, at least to some extent, have been implicitly applying the exception: "*Salinger* is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here by virtue of Hubbard's death."<sup>270</sup> Second, the concurrence acknowledges the beneficial effect that the exception might have not only by providing privacy protection, but by limiting it: "I thought that *Salinger* might by being taken literally in another factual context come back to haunt us. This case realizes that concern."<sup>271</sup>

### CONCLUSION

Recent jurisprudence regarding copyright infringement and the fair use of materials never intended for publication has been contentious and confused. Much of the obfuscation stems from an unwillingness to alter explicitly the basic statutory analysis of the fair use doctrine depending on the factual context of the dispute. As a result, rules developed in a context with one set of policy implications are subsequently applied in contexts with very different concerns.

Congress has neither enumerated an exhaustive list of factors for consideration nor mandated a particular method of applying those factors. Accordingly, judges have been able to find that copyrights have been infringed in cases where a strict application of the statutory factors would point to a finding that the use of copyrighted materials was fair. This Note suggests the explicit adoption of a limited, privacy-based exception to fair use, not only because such an exception would clarify the court's analysis, but also because such an exception provides a sensible theoretical framework for further development of the fair use doctrine.

The proposed exception applies to a discrete factual context: where the materials were never intended for publication, where the author herself asserts the copyright, and where the author has sought to maintain the privacy interests compromised by the infringement. Even where the proposed exception does apply, it seeks to supplement, rather than supplant, the statutory analysis, and, as such, the outcome would continue to be affected by other equitable considerations such as a de minimis infringement, good faith, and any counter-

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<sup>270</sup> *Id.* at 585 (Oakes, C.J., concurring).

<sup>271</sup> *Id.*

vailing public interest. The fair use analysis itself, however, would provide greater guidance to courts, practitioners, and lay persons, and a more nuanced appreciation of the competing interests at stake in disputes regarding materials never intended for publication.