

Fair Use: An Amendment to the Doctrine

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LEGISLATIVE UPDATES

FAIR USE: AN AMENDMENT TO THE DOCTRINE

INTRODUCTION

On October 24, 1992, former President Bush signed H.R. 4412 which has now become Public Law No. 102-492.¹ This legislation adds a single sentence to the end of Section 107 of the Copyright Act of 1976, which sets out the factors a court can consider when determining fair use of a copyrighted work. This amendment to Section 107 unequivocally states that the unpublished nature of a work is not enough to prevent a finding of fair use.² Instead, it is only one factor out of many which must be considered by a court in evaluating the defense of fair use. This amendment has a direct impact on copyright analysis because prior to this amendment, there was some uncertainty as to the application of the fair use defense to unpublished works.

This Update will explore the background of the fair use amendment; specifically, it will discuss two Second Circuit Court of Appeals opinions and a Supreme Court opinion which have caused concern among those in the literary community and the congressional response to this concern. The substance of the amendment will be examined along with its potential impact on the literary community and their audience. The Update concludes that the fair use amendment is consistent with the goals of copyright law and will have a beneficial effect on both the literary community and the general public.

BACKGROUND

The Copyright Clause of the United States Constitution empowers Congress to enact legislation which protects authors' rights to their works.³ Hence, Congress enacted the Copyright Act of 1976 which grants the author certain exclusive rights in his or her work.⁴ The underlying premise of granting such exclusive rights is to give authors and inventors an incentive to create, which will thus benefit society through a contribution to the progress of arts and sciences.⁵ Thus, the primary purpose of copyright is to benefit the public rather than to reward the author.⁶

Authors' exclusive rights, however, are subject to certain limitations,⁷ one of which is the doctrine of fair use.⁸ The fair use doctrine is an affirmative defense to a copyright owner's claim of infringement.⁹

The doctrine balances the copyright owner's exclusive rights to his work¹⁰ with the need of others to use the copyrighted works for reasonable purposes, such as comment, criticism, and teaching.¹¹ The purpose of fair use is to allow someone, other than the original author, to make secondary use of a copyrighted work to produce a new work, thereby fulfilling the constitutional mandate of promoting the progress of arts and sciences.¹²

The common law fair use doctrine was codified by Congress in the Copyright Act of 1976 and provides that "notwithstanding the provisions of section 106, the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research, is not an infringement of copyright."¹³ Section 107 directs courts to make case-by-case fair use determinations based on the following factors: (1) the purpose and character of the use, including whether such a 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.¹⁴ While all four factors are to be considered in each fair use case, the list is nonexclusive and additional factors may be considered at the court's discretion.¹⁵ For example, a court may consider equitable principles such as the defendant's good or bad faith.¹⁶

For a number of years, controversy and confusion existed in the legal and literary communities regarding the fair use doctrine and its application to unpublished works. The recent controversy over unpublished works began in 1985 with the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*.¹⁷ In that case, former President Gerald Ford had written his memoirs which recounted his pardon of former President Nixon, and sold the rights to Harper & Row.¹⁸ Harper & Row, in turn, sold excerpts to *Time Magazine*.¹⁹ However, before *Time* published the memoirs, *The Nation* magazine, in an effort to "scoop" the story, gained unauthorized access to President Ford's manuscripts and published excerpts.²⁰ As a result, *Time* canceled its article and refused to pay Harper & Row the remaining money owed.²¹ Harper & Row then brought suit in Federal District Court for the Southern District of New York against the publication of *The Nation*, alleging copyright infringement.²² The District Court held that the Ford memoirs were protected by copyright at the time of *The Nation's* publication and that the use of the material thus constituted copyright infringement

under the Copyright Act.²³ The Court of Appeals for the Second Circuit reversed, holding that *The Nation's* publication constituted fair use under §107 of the Copyright Act of 1976.²⁴

Upon granting certiorari, the Supreme Court reversed, finding that *The Nation's* article did not constitute fair use.²⁵ The Court concluded that “the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.”²⁶ The Court further reasoned that the scope of fair use is narrower with respect to unpublished works.²⁷ Significantly, the Court did not impose a per se rule against the application of the fair use doctrine to unpublished works.²⁸ Instead, the court considered all four statutory factors before concluding that the quotations went beyond fair use.²⁹

In the aftermath of *Harper & Row*, two Second Circuit decisions, *Salinger v. Random House* and *New Era Publ. Int'l v. Henry Holt & Co.*, cast a chilling uncertainty over the publishing community with respect to the fair use of unpublished works.³⁰ In *Salinger*, J.D. Salinger, the novelist and short-story writer, sued Random House and writer Ian Hamilton for infringement of the copyright in Salinger's unpublished letters, which Hamilton had quoted and paraphrased in a biography to be published by Random House.³¹ Interpreting *Harper & Row* to mean that unpublished works “normally enjoy complete protection,” the Second Circuit ordered the District Court to enjoin publication of the biography in the form in which it was written.³²

Two years later, the Second Circuit reaffirmed the reasoning of *Salinger* in *New Era Publ. Int'l v. Henry Holt & Co.* New Era Publications, the plaintiff, is related to the Church of Scientology and was found to hold the copyrights of the deceased L. Ron Hubbard, founder of the Church of Scientology.³³ The defendant, Henry Holt & Co., intended to publish a biography on Hubbard which included numerous quotations from Hubbard's unpublished writings which the biographer used to illustrate Hubbard's character.³⁴ New Era Publications sued to enjoin publication of the book on the ground that the biographer infringed on Hubbard's copyrights.³⁵ Henry Holt & Co. relied on the doctrine of fair use as a defense. The District Court found that the defendant's use of quotes to demonstrate facts constituted a compelling fair use purpose.³⁶ The Second Circuit, however, rejected that reasoning and reiterated *Salinger's* formulation that unpublished works normally enjoy complete protection.³⁷ The court also stated that “the copying of more than minimal amounts of unpublished expressive material calls for an injunction barring the unauthorized use.”³⁸

As a result of *Salinger* and *New Era*, the scope of the fair use doctrine as applied to unpublished materials was considerably narrowed as the focus of their analysis was placed on the unpublished nature of the

work.³⁹ These cases threatened to formulate a per se rule against the finding of fair use of any unpublished materials such as letters or diaries.⁴⁰

Since the majority of the nation's publishing takes place in New York, within the Second Circuit's jurisdiction, the effect of *Salinger* and *New Era* has been significant.⁴¹ The publishing community was in a state of apprehension because they feared copyright infringement suits when an author quoted from unpublished texts. In the wake of these two decisions, copyright counsel for historians, biographers, and other authors advised their clients that virtually any unauthorized use of unpublished materials would subject them to the risk of copyright infringement liability.⁴² This apprehension dissuaded authors, historians, and their advisors from citing primary sources, as their profession demands.⁴³ As a result, publishers and editors started to refrain from publishing works containing quotes from such unpublished materials.⁴⁴ Author J. Anthony Lukas, whose opinion is representative of other authors, stated that “if *New Era* is permitted to stand as the guiding precedent in this area, the people of America will increasingly find fewer works of compelling history and biography available on their bookshelves and eventually in their libraries.”⁴⁵ It was within this context that H.R. 4412 was proposed.

THE LEGISLATIVE RESPONSE

Due to the uncertainty regarding the application of the fair use doctrine to unpublished works, an amendment to the fair use statutory provision was proposed and later enacted. Public Law No. 102-492 amends the original fair use provision⁴⁶ to clarify that there is no per se rule against a finding of fair use of unpublished works. This section will discuss the substance of this amendment as well as its impact on the literary community and public.

A. Public Law 102-492: Fair Use Amendment

On March 5, 1992, Representative William J. Hughes of New Jersey introduced H.R. 4412 which was eventually signed by former President Bush on October 24, 1992, becoming Public Law No. 492.47 This new law amends Section 107 of the Copyright Act of 1976 adding a new sentence to the end of that section: “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.”⁴⁸

The aim of the legislation is clear. It is designed to remedy the confusion caused by the restrictive standards adopted in *Salinger* and *New Era* and to reject the notion that there is a per se rule against a finding of fair use with regard to unpublished works.⁴⁹ By rejecting a per se rule, Public Law No. 102-492 reaffirms the standard set forth in *Harper & Row* which demands a *complete* look at the statutory fac-

tors as well as any other factors the court finds relevant.⁵¹ As the underlying House Report stated, “[t]he Committee agrees with the Copyright Office that the Second Circuit in *Salinger* went astray in its treatment of the unpublished nature of the work as leading to a diminished likelihood that the fair use defense, as a whole, will in every case not be available.”⁵¹ Instead, an explicit goal of Congress is to return to the status quo of *Harper & Row*, whereby the “unpublished nature of a work is key, though not necessarily determinative” to a determination of fair use.⁵²

The language of the legislation accomplishes Congress’ intent in two ways. First, the word “itself” makes it clear that the courts are not to employ a per se rule which would bar a finding of the fair use of unpublished works.⁵³ Instead, the court is to consider all four statutory factors, as well as any other relevant factors, for each claim of fair use of unpublished works. Second, this intent is again manifested through the concluding phrase “all the above factors.”⁵⁴ This language straightforwardly tells courts they have the discretion to consider other relevant factors, such as a defendant’s good or bad faith, in addition to those included in Section 107, when making their fair use determinations. The legislation does not direct the courts as to how much weight to give each factor.

Thus, under Public Law No. 102-492, a finding of fair use will be based on the four statutory factors in addition to other factors the court finds relevant. Importantly, the fact that the work being used is unpublished shall not bar such a finding. For example, if a magazine appropriates portions of a poet’s copyrighted but unpublished poems, the magazine will not be automatically barred from asserting a fair use defense against the poet’s copyright infringement claim. Instead, the unpublished nature will be one of many relevant factors to be considered.

B. Potential Impact of the Fair Use Amendment

Public Law No. 102-492 will have an impact on those in the literary community who choose to cite from unpublished materials, as well as affecting copyright owners, and the public in general. The uncertainty that has flooded the literary community for the past few years should be resolved as a result of Public Law No. 102-492. The legislation should deem the Second Circuit decisions, *Salinger* and *New Era*, as no longer being “good law” with regard to the published/unpublished work dichotomy the cases fostered. In addition, the amendment should aid the courts in exercising a more consistent methodology when determining the fair use of unpublished works.

As a result, publishers, historians, and authors should feel more at ease in exercising their First Amendment right to free speech when citing from primary sources that are unpublished. Owners of such unpublished primary sources, on the other hand, may

feel less secure in the protection of their works as they had in the past. Nevertheless, the public will benefit from the fair use amendment because new works will be created. Protecting unpublished materials from a fair use defense, as it had been in the *Salinger* and *New Era* era, would only lead to further suppression of information. Many useful and intellectually stimulating materials may never have been introduced to the public. Such protection of unpublished works arguably conflicts with the aims of copyright law which seeks to encourage creativity and provide public access to copyrighted works. Instead, this protection would only promote concealment of valuable works instead of the public illumination that would result otherwise.⁵⁵ Thus, as a result of the fair use amendment, the public will benefit by the increased access to unpublished copyrighted works as well as a greater access to a wider variety of works.

Public Law No. 102-492 also allows academics in this field to pursue their careers in a meaningful way that is beneficial to society at large. As stated by author Taylor Branch, “[t]he quotation, in modest and appropriate amounts, of source materials is crucial to providing intimacy, immediacy, ambience, and re-creation of motives and values that history requires and readers need.”⁵⁶ Thus, the direct impact of the fair use amendment will have a beneficial impact on literary community as well as the public.

CONCLUSION

The fair use amendment, embodied in Public Law No. 102-492, will alleviate the recent uncertainty that existed in the legal and literary communities with regard to the fair use of unpublished works. The confusion began in *Harper & Row*, *New Era*, and *Salinger* where a per se rule against a finding of fair use of unpublished works emerged. A per se rule against fair use of unpublished materials will no longer be intact; rather, the unpublished nature of the work will merely be one consideration along with other statutory and discretionary factors. This will leave historians, authors, and publishers who use appropriate portions of unpublished, copyrighted materials with more protection from copyright infringement liability. Most importantly, readers will have access to more works of history and biography on the bookshelves and in their libraries.

Lisanne M. Pigato

1. Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (West Supp. 1992)).

2. *Id.*

3. The Copyright Clause of the United States Constitution provides: The Congress shall have Power... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. U.S. CONST. art. I, § 8, cl. 8.

4. 17 U.S.C. §§ 101-914 (1982).

5. *Mazer v. Stein*, 347 U.S. 210, 218 (1954). See also