AUTHOR, USER, SCHOLAR, THIEF: FAIR USE AND UNPUBLISHED WORKS

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I. INTRODUCTION

The fair use doctrine is one of the principal mechanisms by which copyright law limits the exclusive monopoly of copyright holders and ensures that the ultimate goal of the law—"the Progress of Science and useful Arts"[1]—is served. Developed by the courts and now codified in section 107 of the Copyright Act of 1976 ("1976 Act"),[2] the doctrine represents a recognition that there are times when it is legitimate to copy an author's protected expression. The need for this defense to claims of infringement is generally unchallenged, but the question of its proper scope remains unresolved. Faced with the necessity of applying the defense in widely varying contexts, the courts have refrained from defining its boundaries with precision, calling it an equitable rule of reason[3] and insisting that it must be applied on a case-by-case basis.[4] Similarly, Congress has built flexibility into section 107 by creating a nonexclusive list of the purposes for which one author can fairly quote another.[5] In the last few years, however, the Supreme Court has sharpened the contours of fair use by creat-

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1 U.S. CONST. art. I, § 8, cl. 8.

2 17 U.S.C. § 107 (1988).

3 *E.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (citing H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5679 ("*[S]ince the doctrine is an equitable rule of reason*, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."). As William Patry observes, the Supreme Court, in adopting this terminology, "did not undertake any review of its own to determine the accuracy of the characterization." W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 4 n.5 (1985) [hereinafter PATRY]. Patry points out that the fair use doctrine was historically applied by the courts of both law and equity and that there is disagreement over the role the latter played in developing the doctrine. *Id.* at 3-5. Nevertheless, the Court cites the same House Report in Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985), *rev'g* 723 F.2d 195 (2d Cir.), *rev'g in part, aff'g in part* 557 F. Supp. 1067 (S.D.N.Y. 1983).

4 *See, e.g.*, *Harper & Row*, 471 U.S. at 549, 552-53, 560, 561.

5 Section 107 reads in pertinent part: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes *such as* criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."

ing two presumptions against it. Addressing the issue for the first time, the Court held in *Sony Corp. of America v. Universal City Studios, Inc.*, decided in 1984, that the commercial use of a copyrighted work is presumptively unfair.[6] The following year, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court created a presumption against fair use in cases in which the copyrighted work is unpublished.[7]

It is the latter presumption that has created the greatest stir among those who have a stake in the scope of the fair use doctrine, not so much because of the *Harper & Row* decision itself but rather because of its particular application and refinement by the United States Court of Appeals for the Second Circuit in two cases involving biographers' use of their subjects' unpublished works. In *Salinger v. Random House, Inc.*,[8] the court interpreted the *Harper & Row* decision to mean that unpublished works "normally enjoy complete protection"[9] and found that biographer Ian Hamilton's quotation and paraphrasing of J.D. Salinger's unpublished letters constituted copyright infringement.[10] In *New Era Publications International, ApS v. Henry Holt and Co.*,[11] the Second Circuit applied *Salinger* to deny the defense of fair use to the publisher of *Bare-Faced Messiah: The True Story of L. Ron Hubbard* ("*Bare-Faced Messiah*"),[12] a critical biography of the founder of the Church of Scientology, which quoted his unpublished letters, diaries, and other documents.

The *New Era* decision in particular galvanized a concerted reaction of protest on the part of scholars and publishers.[13] *New Era* is notable not for the Second Circuit's holding—it denied New Era Publications, the owner of the copyright in the quoted Hubbard works, a permanent injunction for laches[14]—but for its dicta forcefully rejecting the reasoning of Judge Leval, who heard

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17 U.S.C. § 107 (1988) (emphasis added). The phrase "such as" clearly establishes that the list of purposes enumerated is not exclusive.

6 464 U.S. 417, 451 (1984).

7 *Harper & Row*, 471 U.S. at 555.

8 811 F.2d 90 (2d Cir. 1987), *rev'g* 650 F. Supp. 413 (S.D.N.Y. 1986) (Leval, J.) (denying preliminary injunction), *reh'g denied per curiam*, 818 F.2d 252 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

9 *Salinger*, 811 F.2d at 97.

10 *Id.* at 98-99.

11 873 F.2d 576 (2d Cir. 1989), *aff'g on other grounds*, 695 F. Supp. 1493 (S.D.N.Y. 1988) (Leval, J.) (denying permanent injunction), *reh'g en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert denied*, 110 S. Ct. 1168 (1990).

12 R. MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD (1987).

13 *See infra* notes 27-29 and accompanying text.

14 *See New Era*, 873 F.2d at 577, 584.

the case in the district court.[15] According to Judge Leval, defendant Henry Holt had shown a "powerfully compelling fair use purpose"[16] for most of biographer Russell Miller's quotations of Hubbard's unpublished works. The quotations of Hubbard were necessary, Judge Leval found, because Miller was attempting to expose negative character traits which he claimed Hubbard had hidden from the world and serious biographers and critics can not fairly accuse their subjects of such traits as paranoia and bigotry without quoting examples of the statements that demonstrate these traits.[17] Recognizing that under *Salinger* not all of Miller's quotations of unpublished works could be excused on the ground of fair use,[18] Judge Leval declared that this was a case in which copyright law conflicted with the first amendment.[19] To avoid depriving the public of a book which he considered a valuable contribution to its knowledge of history and thus injuring its interest in free speech, he denied New Era a permanent injunction and limited its remedy to damages.[20]

Concluding that the only ground for denying a permanent injunction was laches, the Second Circuit dismissed the idea that Miller's use of Hubbard's works brought copyright law into conflict with the first amendment.[21] The court insisted that "the fair use doctrine encompasses all claims of first amendment in the copyright field"[22] and even went so far as to opine that an injunction would not necessarily result in keeping from the public a work of value but rather "only . . . an infringing one."[23]

Even though Holt succeeded on the issue of a permanent injunction, it petitioned the court for a rehearing *en banc*, which was denied.[24] It then petitioned the Supreme Court for a writ of *certiorari*, arguing that the Second Circuit's narrowing of fair use was contributing to the suppression of biography and history by

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15 *Id.* at 583-85.

16 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1523 (S.D.N.Y. 1988).

17 *Id.* at 1524.

18 Given the restriction of fair use imposed by *Salinger*, Judge Leval concluded that forty-four passages were infringements of New Era's copyright. *Id.* at 1524-25.

19 *See id.* at 1525.

20 In denying a permanent injunction, Judge Leval also cited the waste that would be involved in deleting infringing passages from a book that was already printed. *See id.* at 1528.

21 New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F.2d 576, 584 (2d Cir. 1989).

22 *Id.*

23 *Id.*

24 New Era Publications Int'l, ApS v. Henry Holt and Co., 884 F.2d 659 (2d Cir. 1989).

encouraging copyright holders to threaten litigation and provoking self-censorship on the part of fearful publishers.[25] Holt claimed that the Second Circuit had improperly increased the weight given to the unpublished status of copyrighted works beyond what was consonant with the 1976 Act, the copyright clause, the first amendment, and *Harper & Row*.[26]

A number of organizations representing publishers, writers, and scholars submitted *amicus* briefs in support of Holt's petition and endeavored to convince the Court that the *New Era* decision would greatly restrict biographers and historians in the practice of their craft.[27] These organizations argued that in the wake of *Salinger* and *New Era* biographers and historians would be prohibited from uncovering and analyzing the raw materials of history and thereby increasing the public's understanding of important figures and events. Under *New Era*, these writers would not only be hindered in their attempts to present lively portrayals of people and events, but would also be prevented from citing documents in support of their accounts. The Supreme Court, however, denied Holt's petition, letting stand the strictures of *Salinger* and *New Era*.[28]

Meanwhile, scholars, editorialists, and other writers have continued to protest the Second Circuit's rulings, and stories of censorship attributable to the *Salinger* and *New Era* decisions have multiplied in the press.[29] During the last session of Congress, identical bills were also introduced in the House of Representatives and the Senate that, if passed, would have amended section

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25 Attacking both *Salinger* and *New Era* for lending "talismanic immunity from fair use" to unpublished works, Holt claimed that the two decisions had already provoked "an alarming pattern of censorship by copyright." Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 48, 33, Henry Holt and Co. v. New Era Publications Int'l, ApS, 873 F.2d 576 (2d Cir. 1989) (No. 89-869) [hereinafter Petition].

26 *See id.* at 30-54.

27 Brief *Amicus Curiae* of the Association of American Publishers, Inc., in Support of Petition for a Writ of Certiorari, Henry Holt and Co. v. New Era Publications Int'l, ApS, 873 F.2d 576 (2d Cir. 1989) (No. 89-869); Brief *Amicus Curiae* of PEN American Center and the Authors Guild, Inc., in Support of Petition for a Writ of Certiorari [hereinafter Brief of PEN American Center]; Brief *Amicus Curiae* of American Council of Learned Societies, American Historical Association, American Political Science Association, Modern Language Association of America, and Organization of American Historians, in Support of Petition for a Writ of Certiorari [hereinafter Brief of American Council of Learned Societies].

28 New Era Publications Int'l, ApS v. Henry Holt and Co., 110 S. Ct. 1168, 1168 (1990).

29 The many articles expressing alarm over the decisions include not only commentaries by historians such as Anthony Lukas and Arthur Schlesinger and columnists such as Jonathan Yardley, but also articles in magazines of general interest like *Newsweek*. *See, e.g.*, Lukas, *A Ruling That Hobbles Historians*, N.Y. Times, July 27, 1990, at A27, col. 2; Schlesinger, *The Judges of History Rule*, Wall St. J., Oct. 26, 1989, at A16, col. 3; Yardley,

107 of the 1976 Act to make fair use explicitly applicable to unpublished works.[30] It is not clear, however, what the impact of this amendment to section 107 would have been, beyond generally allaying fears that the courts had created an absolute prohibition against the fair use of unpublished works. What is clear from both the subcommittee hearing on the bills as well as the numerous articles that have been written about the *Harper & Row*, *Salinger*, and *New Era* cases, including several by judges of the Second Circuit,[31] is that more debate on the application of fair use to unpublished works is both necessary and inevitable. A collective rethinking of the issue is under way.

As the debate proceeds, the courts and Congress need to be aware of certain fundamental attitudes about authorship that have informed both the Supreme Court's and the Second Circuit's approach to fair use in the context of unpublished works. Henry Holt and the organizations that supported its petition for *certiorari* in *New Era* have argued that in *Salinger* and *New Era* the Second Circuit distorted the holding of *Harper & Row*. These three decisions against users of unpublished works are, however, philosophically consistent. All three are animated by a largely unspoken yet powerful belief that some kinds of authorship are more valuable than others. Theoretically, the courts subscribe to the principle that copyright protection is not based on the aesthetic merits or pretensions of a work.[32] Yet the opinions dealing with the issue of fair use and unpublished works reflect a hierarchical view of authorship that influences much of the courts'

Fair Use and a Chill Wind, Wash. Post, Feb. 12, 1990, at B2, col. 1; Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80.

For examples of censorship attributable to the Second Circuit decisions, see *infra* notes 156-59 and accompanying text.

30 The phrase "whether published or unpublished" would have been inserted after "fair use of a copyrighted work." H.R. 4263, 101st Cong., 2d Sess., 136 CONG. REC. 805-07 (1990); S. 2370, 101st Cong., 2d Sess., 136 CONG. REC. 3549-50 (1990). According to former Congressman Robert Kastenmeier, who introduced the bill in the House, both bills were intended "to clarify that, while the unpublished nature of a work is certainly relevant to the fair use analysis, it should not alone be determinative." *Fair Use and Unpublished Works: Joint Hearing on H.R. 4263 and S. 2370, Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Comm. and the Senate Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 101st Cong., 2d Sess. (1990) [hereinafter *Joint Hearing on H.R. 4263 and S. 2370*] (opening remarks of Robert W. Kastenmeier, Chairman, House Subcomm. on Courts).

These bills, however, were never brought to a vote. According to the *New York Times*, the opposition of the computer industry, which was concerned about the effect of the proposed legislation on the protection of computer programs, was what seems to have doomed the bills. Cohen, *Software Issue Kills Liberal Amendment to Copyright Laws*, N.Y. Times, Oct. 13, 1990, at A1, col. 1.

31 *See infra* notes 161-65, 183-92 and accompanying text.

32 *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

thinking about so-called original authors on the one hand and copiers or users on the other.

The purpose of this Article is to examine the ways in which the courts' hierarchical view of authorship has driven their treatment of fair use in the context of unpublished works. Focusing on three types of hierarchy identified below and their role in the *Harper & Row*, *Salinger*, and *New Era* cases, I will investigate the connections between them and the courts' conceptualization of the incentive structure of the copyright scheme, the right of first publication, and first amendment values. My point in doing so is not to examine the courts' treatment of unpublished works and the right of first publication in historical context, nor to present a detailed discussion of the relationship between copyright and the first amendment—subjects which have by no means been exhausted—but rather to illuminate the covert hierarchical attitudes toward different types of authorship that underlie the courts' reasoning about unpublished works.

Part II of this Article defines three types of hierarchical thinking that underlie the courts' approach to authorship and preliminarily discusses the problems they pose for certain categories of writers. Part III analyzes the Supreme Court's decision in *Harper & Row* and its overvaluation of the original author. Part IV examines the Second Circuit's decision in *Salinger* and its devaluation of biography. Part V considers *New Era* and the Second Circuit's rejection of all grounds for copying unpublished works. Finally, Part VI discusses the impact of these cases and some of their possible implications for the future. My primary concern throughout is the fair use claims of biographers, for it is their use of unpublished works that has been the subject of litigation in the Second Circuit thus far. However, the legal treatment of biographers' fair use claims has important implications for other writers, including historians, journalists, and other analysts of contemporary events as well as writers of literary criticism.

II. The Courts' Hierarchical Approach to Authorship

The courts' hierarchical thinking takes three forms. First, the opinions tend to divide authors into two opposing camps: the producers and the users. Although such labels may have some significance when applied to the two litigants of a specific infringement case, it is highly questionable whether any meaningful distinction exists between author-producers and author-users beyond the limited context of litigation. But the courts do invest

the producer/user dichotomy with meaning, viewing some authors as original geniuses whose works spring, Athena-like, fully formed from their creative brows, and others as scavengers who piece together works by appropriating the creative labors of the more talented. The notion that the true author is a genius, drawing inspiration solely from within, has dominated popular thinking since the Romantics developed it in the nineteenth century.[33] Although it has lost favor within academic circles of literary criticism, particularly structuralism and poststructuralism,[34] this Romantic view has retained a strong grip on our culture. This vision ignores, of course, an important element of the nature of creativity: that all authors are users. We may know this is true, but we have found the myth of the genius more appealing. Thus, the courts have tended to view the producer/user dichotomy in close to absolute terms, elevating the importance of the author-producer and devaluing the author-user.

The second manifestation of the courts' hierarchical thinking is their tendency to value certain categories of works over others. This tendency is related to the producer/user dichotomy in that the genres that are valued most highly are those which are considered to be the work of original creative geniuses, such as novels, while those that are devalued are perceived as "using" genres—biography, history, journalism. Within this view, creativity is the province of certain genres, and writing becomes divided into "creative writing" and more prosaic, noncreative writing. What this distinction ignores is that all types of writing involve creativity, just as they all involve using. The creative process is one of using and transforming the work of others.

The difference between the novel and biography is not that one genre is more creative than the other, or that one uses and the other does not. The difference between them—and this has great significance for copyright law—is that biography uses more overtly than the novel and it uses language. A novel's plot may be a reworking of the plots of earlier works, its characters may be drawn from well-established types, and even its individual scenes may be based on those created by other writers. Copyright law sees nothing wrong with this, so long as one work does not

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[33] *See* Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

[34] Critics belonging to these schools theorize that all writing is intertextual. According to Roland Barthes: "[A] text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations . . . ." R. BARTHES, *The Death of the Author*, in IMAGE/MUSIC/TEXT 146 (1977).

reproduce in too much detail the pattern of another—in other words, so long as the taken elements are sufficiently transformed and rearranged when they are embedded in the using work. The novel's covert uses of earlier works are thus approved by copyright law because they are considered takings of "ideas," not "expression."[35] Biography, on the other hand, uses earlier works directly and overtly; it quotes the language of its subjects in order to bring them to life for the reader. Its aim is creative in the sense that it attempts to produce a new interpretation of the life of its subject, but it does not seek to transform the subject's language; on the contrary, it calls attention to its quotation of the subject's expression. Copyright law accommodates such use primarily through the fair use doctrine. Biographers, as well as historians and journalists, therefore rely on the doctrine to a far greater extent than novelists and playwrights.

The third expression of hierarchy to be found in these opinions might be called the scholar/chiseler distinction. There is a long tradition in copyright law of viewing the author-user with suspicion, as one who is attempting to profit from the work of others. In the nineteenth century, a defendant who was found to have the intent to use the plaintiff's work in order to save labor—a motivation known as *animus furandi*—could not put forward a successful defense of fair use.[36] Although copyright law theoretically does not protect an author's labor, courts often attempt to provide such protection, viewing with disapproval the user who saves time and effort by drawing on the work of others. The result has been not only decisions that have improperly protected labor, but also the creation of a dichotomy that is largely meaningless and unworkable, the dichotomy between the "true scholar" and the "thief."[37] The former is characterized as a disinterested seeker of truth, while the latter is an unprincipled

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[35] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (Judge Learned Hand's "abstractions" test), *cert. denied*, 282 U.S. 902 (1931); Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513-14 (1945) ("pattern" test).

[36] PATRY, *supra* note 3, at 11.

[37] This particular terminology was used in the course of hearings before the House Committee on the Judiciary in 1966, when Congress was working on the revision of copyright law that would become the 1976 Act. The assertion made was that the fair use doctrine differentiates between "a true scholar and a chiseler who infringes a work for personal profit." HEARINGS BEFORE SUBCOMM. NO. 3 OF THE HOUSE COMM. ON THE JUDICIARY ON H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 89th Cong., 1st Sess. 1706 (appendix to the statement of John Schulman), *reprinted in* 1965 COPYRIGHT L. REVISION 1706 (Comm. Print 1965). The Second Circuit cited this statement in Wainwright Secs. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), and the Supreme Court subsequently made use of it in *Harper & Row*. *See infra* text accompanying notes 52-53.

profiteer. Again, this distinction ignores the transformative nature of creativity and scholarship. Moreover, it works together with the producer/user dichotomy to reinforce the devaluation of the user. The author-user becomes associated with the role of the chiseler and is, in subtle but persistent ways, considered morally suspect.

A word should be said here about terminology. In copyright parlance, the term "user" often denotes the ultimate user of a work, that is, the public audience. In this Article, I am using the term as it applies to a mediate user, the author who uses the work of another. This difference in usage underscores an important point. Courts tend to describe their task in fair use cases as one of balancing the original author's interest against that of the public, in other words, the copyright holder's interest against that of the ultimate user. The mediate user—the author claiming the fair use defense—has no place in this equation. The tacit assumption underlying its formulation is that the public is interested only in the work of the original author and the mediate user is no more than a conduit from that author to the public. It is true that the mediate user can be a mere conduit, fulfilling a purely distributive function. But biographers and historians play a much more creative role, offering to the public new interpretations of important lives and events. That this creative role is not represented in the courts' balancing of interests is a significant reflection of the devaluation of the mediate user.

The courts' hierarchical thinking in *Harper & Row*, *Salinger*, and *New Era* poses dangers for biographers, historians, and other writers who depend on the fair use doctrine. Because their use of others' work tends to be undervalued, it is insufficiently tolerated. The underestimation of their contribution to the public carries with it, in turn, a discounting of the public interest itself. Because the biographer's or historian's creative use of an original author's expression is given little or no recognition as an interest of the public, the original author's interest in his or her copyright monopoly can easily outweigh the public interest in the courts' analysis. It is this sort of skewed balancing that produced *Harper & Row*'s presumption against the application of fair use to unpublished works and led the Second Circuit to adopt its extreme version of the presumption.

The problems created by the courts' hierarchical thinking are particularly acute in the context of unpublished works. Biographers and historians have a special interest in using unpublished writings because of their value as the basis upon which

fresh interpretations of lives and events can be built. Writers of biography and history turn to such material as a source of not only raw data but also revealing commentaries made by important cultural and historical figures. They seek out what has not been published in order to discover what has been unknown, or even hidden. They quote language in order to bring to the reader the distinctive features of their subjects' views and thought processes as well as to forge their own new interpretations of them. Moreover, they sometimes need to quote expression as documentary proof of their account of events.

When the courts elevate the original author's interest above that of both the author-user and the public, however, they find little value in such uses of unpublished works. What they have done is emphasize the importance of protecting the original author's right of first publication—not only as an economic interest but also as a personal interest and a free speech value—and simultaneously deemphasize the potential public benefit to be derived from the use of unpublished works by biographers, historians, and journalists. The result, particularly in the Second Circuit, has been a disturbing restriction on the availability of the fair use defense to these authors—the nature of whose work requires that they quote the expression of their subjects—as well as a very problematic limitation on the public's access to information. A certain demystification is in order: we need to acknowledge that the distinction between producers and users is largely artificial, that all genres are creative, and that certain authors' overt use of the language of others may have more to do with the nature of the genre in which they write than it does with profiteering.

Since *Harper & Row*, *Salinger*, and *New Era* were decided, there have been encouraging indications that the creativity of author-users and the value of their contribution to human knowledge are beginning to receive more recognition. The concern that members of Congress have expressed about the possibility that scholars and others will be deterred from bringing forth important new works is one such indication.[38] Among members of the judiciary, Judge Leval in particular has focused attention on the fact that "all intellectual creative activity is in part derivative"[39] and has also spoken out about the need to acknowledge

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[38] *See Joint Hearing on H.R. 4263 and S. 2370*, *supra* note 30.

[39] Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) [hereinafter Leval].

the "explicitly referential"[40] nature of certain fields of scholarship. Others have noted the importance of taking account of the "productivity" of author-users in their analyses of the fair use doctrine.[41]

It is by no means certain, however, that our legal institutions are moving toward an adequate recognition of the value of the author-users of the world and the importance of providing them with an incentive to produce new works. An understanding of the transformative character of creativity is not widely shared, and the worth of author-users tends to be acknowledged by a tokenism that is dismissive in its effect. This state of affairs is not likely to change unless the hierarchical attitudes toward authorship that have impelled the courts' reasoning about fair use and unpublished works are acknowledged and examined.[42]

III. *HARPER & ROW*: THE OVERVALUATION OF THE ORIGINAL AUTHOR

In 1977, Harper & Row, Publishers, Inc., along with Reader's Digest, contracted with former President Ford to pub-

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[40] *Id.* Judge Leval made the same points previously in a lecture given at New York University Law Center. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC'Y 167, 169 (1989). *See infra* text accompanying notes 189-92 for his recent proposal that fair use inquiries should focus on the extent to which the use at issue is transformative.

Other commentators have pointed out the Second Circuit's failure to appreciate the creative nature of biography and the importance of allowing biographers to use quotation. *See, e.g.*, Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPYRIGHT SOC'Y 1, 7-9 (1987); Note, *The Chilling Effect of Overprotecting Factual Narrative Works*, 11 HASTINGS COMM/ENT L.J. 75, 88-91 (1988) (noting courts' implicit use of different copyrightability standard for highly esteemed authors); Note, Salinger v. Random House: *A Biographer's Dilemma*, 34 ST. LOUIS U.L.J. 149, 166-67 (1989).

[41] William W. Fisher III, for example, notes in his economic analysis of fair use that "transformative uses of copyrighted material are as likely to be 'public goods' as works created out of whole cloth. Holding such uses unfair reduces the rewards available to persons who engage in them, and thus in the long run may prevent the creation of intellectual products worth more to consumers than the costs of producing them." Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1743 (1988). According to Fisher, "The most dramatic change wrought by *Sony* and *Harper & Row* in the fair use doctrine was the subordination of the idea of productivity." *Id.* at 1684. In both his economic and his "utopian" analysis of fair use, he argues that the question of whether a use is productive—historically an important inquiry—should be revived by the courts. *Id.* at 1743, 1782 n.526.

[42] In a forthcoming article, Peter Jaszi explores the crucial role the construct of authorship has played in the development of copyright doctrine throughout the history of Anglo-American copyright law. Demonstrating how the Romantic conception of authorship has been strategically manipulated at various points in the development of the law, he points out that the validity of this construct has never been overtly questioned by judges and lawyers—even when it was being suppressed—and that it continues to exercise a critical influence on their thinking. Jaszi, *Theorizing Copyright Doctrine: Some Uses of "Authorship"*, 1991 DUKE L.J. —.

lish his memoirs.[43] Harper & Row then sold to the magazine *Time* the exclusive right to print 7,500 words of the memoirs, including formerly unpublished commentary on the pardon of former President Nixon, one week prior to the release of the book. *Time* was to pay Harper & Row $12,500 in advance and $12,500 upon publication.[44] Approximately two weeks prior to *Time*'s anticipated publication date, *The Nation* obtained a copy of the Ford manuscript without Harper & Row's permission and published its own article. This article not only took facts directly from the manuscript, but also quoted and paraphrased it. *Time* reacted by cancelling the publication of its article and refused to pay Harper & Row the $12,500 owed on the contract.[45]

Harper & Row sued *The Nation* for copyright infringement and the case eventually reached the Supreme Court. The Court held that *The Nation*'s copying of Ford's memoirs was not fair use under the 1976 Act.[46]

A. *Two Types of Hierarchy: The Producer/User and Scholar/Chiseler Dichotomies*

In the reasoning presented in *Harper & Row*, the producer/user and scholar/chiseler dichotomies are particularly in evidence. The original author is held up as one who brings to life an important new work, while the author-user is continually relegated to the position of a nonproductive interloper. After summarizing the reasoning of the Second Circuit, which concluded that *The Nation*'s quotations of President Ford's memoirs were excused as fair use, Justice O'Connor writes for the majority:

> We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the [1976] Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.[47]

From the outset of the Court's analysis, original works of copyright holders are viewed as not only the "seed" but also the "substance" of the harvest of knowledge. Author-users are excluded

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43 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985).
44 *Id.* at 542-43.
45 *Id.* at 543.
46 *Id.* at 549.
47 *Id.* at 545-46.

from those recognized as "contributors to the store of knowledge."[48] The Court at one point in the opinion acknowledges that users can have a beneficial role to play, when it cites Horace Ball for the proposition that the fair use doctrine is necessary "since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained."[49] Beyond making this token acknowledgment, however, the Court fails to consider how author-users contribute to the ultimate goal of copyright. Its dismissive treatment of author-users, as well as its view of them as simple conduits that convey the original work to the end user, is typified by Justice O'Connor's observation that "[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work."[50]

In its fair use analysis, the Court makes much of the fact that *The Nation* published excerpts of a manuscript which its editor knew had been taken without permission from Harper & Row.[51] Quoting the Second Circuit's opinion in *Wainwright Securities Inc. v. Wall Street Transcript Corp.*[52] for the proposition that "[f]air use distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit,' "[53] the Court invests this distinction with a significance that goes beyond the difference between one who borrows in good faith and one who does not. Paraphrasing the Second Circuit's opinion in *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*,[54] the Court writes:

> [Respondent] possessed an unfettered right to use any factual information revealed in [the memoirs] for the purpose of enlightening its audience, but it can claim no need to 'bodily appropriate' [Mr. Ford's] 'expression' of that information by utilizing portions of the actual [manuscript]. The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft . . . .[55]

The message here is that the true scholar takes facts but one who

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48 *Id.* at 546.

49 *Id.* at 549 (citing H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

50 *Id.* at 569.

51 *See, e.g., id.* at 542, 543.

52 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

53 *Harper & Row*, 471 U.S. at 563. *See supra* note 37 for the origin of this statement.

54 621 F.2d 57, 61 (2d Cir. 1980).

55 *Harper & Row*, 471 U.S. at 557-58 (paraphrasing Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980) (citations omitted)).

takes more is a thief. Later in the opinion, discussing the fact that *The Nation* quoted certain passages because of the distinctiveness of their language, the Court again associates taking expression with thievery: "As Judge Learned Hand cogently remarked, 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.' "[56] The Court ostensibly cites Judge Hand in order to make the point that the amount and substantiality of the expression taken must be judged qualitatively as well as quantitatively, but in doing so it characterizes as plagiarism what was in fact openly acknowledged quotation. By its particular use of these citations, the Court implicitly suggests that all author-users belong in one of two absolutely distinct categories—scholars and thieves—and that those who take expression fall irretrievably into the latter. Moreover, by its repeated references to the "purloined" Ford manuscript and the theme of piracy, the Court continually reinforces the association between the chiseler and the author who uses another's language.[57]

B. *The Supreme Court's Conceptualization of the Copyright Scheme and Its Protection of the Original Author as an Ultimate Goal*

The Court's elevation of the producer of the original work and its concomitant devaluation of the author who seeks to use that work's language drives its conceptualization of the incentive-based structure of copyright. In *Sony Corp. of America v. Universal City Studios, Inc.*,[58] Justice Stevens, writing for the majority, stressed the primacy of the law's goal—the benefit that inures to the public when works are created—and the secondary nature of the means by which that goal is achieved—the assurance given to authors of an economic incentive to create. Using the term "difficult balance"[59] to describe the competing interests of public and author, Justice Stevens made it clear that the scheme of copyright does not involve two equally weighted interests held in equilibrium, but rather a primary interest and a secondary interest, and that the latter must be given just the right weight for it to operate properly as a support to the former.[60]

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[56] *Id.* at 565 (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936)).

[57] *See, e.g.*, *id.* at 542, 556, 559, 562-63.

[58] 464 U.S. 417 (1984).

[59] *Id.* at 429.

[60] In *Sony*, Justice Stevens cites Justice Stewart's well-known statement stressing the fact that the public benefit is the primary goal of copyright. It reads in relevant part: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Id.* at 432 (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)). Justice O'Connor also cites this passage in *Harper & Row*, but

In *Harper & Row*, Justice Brennan also stresses the ultimate public goal of copyright, but he does so writing for the dissent.[61] Justice O'Connor, writing for the majority, emphasizes instead the importance of the means by which the end is achieved. Stressing the need to assure authors of "original works" a "fair return"[62] for their creative labor in order to stimulate creativity, she places such heavy emphasis on the protection of the economic interest of original authors that it becomes in her analysis the only means of achieving that goal. Thus, the copyright scheme is reduced in the majority's view to the protection of original works. The means and the end are collapsed into one.

The Court's narrow view of the original author as the sole source of creativity within the copyright scheme causes it to place enormous importance on the protection of the right of first publication. While it recognizes that section 107 of the 1976 Act explicitly makes all the rights defined in section 106 subject to fair use, it nonetheless elevates the right of first publication above the others. Justice O'Connor writes:

> First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.[63]

The Court expresses great concern that economic damage resulting from the courts' failure to protect the right of first publication will destroy the incentive of original authors and their publishers to bring forth new works. It was, of course, faced with a situation in which such damage was tangible. Harper & Row had sold the first serial rights to President Ford's memoirs to *Time* for $25,000, and *Time* had refused to pay the full contract price because it had been scooped by *The Nation*. Considering such facts, the Court stresses the special commercial value of the right of first publication.

Rejecting *The Nation*'s argument that the public interest in having access to news outweighs the author's right of first publication, the Court places marketability from the author's standpoint above

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she disregards its subordination of the protection of the author to the promotion of the public good. *Harper & Row*, 471 U.S. at 558.

61 *See Harper & Row*, 471 U.S. at 580 (Brennan, J., dissenting).

62 *Id.* at 546.

63 *Id.* at 553.

what in its terminology might be called "newsworthiness" from the public's perspective. The Court's finding that *The Nation* had shown no "necessity for circumventing the copyright scheme with respect to the types of works and users at issue"[64] is arguably correct. Bringing President Ford's account of his pardon of former President Nixon to its readers two weeks earlier than they would have been able to read it in *Time*, *The Nation* conferred a relatively small benefit on the public. The Court's low estimation of the public interest in the author-user's work, however, is not limited by the particular circumstances of the case. Instead, the majority generalizes about the low value to be placed on newsworthiness in comparison with the author's right to marketability. According to the Court, "The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication."[65]

Newsworthiness is, of course, but one term for the value readers find in the knowledge a work imparts. The Court finds that it is not an independent justification for copying, but it is in fact the ultimate rationale for the fair use doctrine. All of the purposes listed in section 107, for which copying is not an infringement of copyright,[66] share the common factor of newsworthiness; their primary goal is to bring valuable information to the public. By ignoring this, the Court significantly undercuts the fair use doctrine's role in contributing toward that end. This is particularly so because the Court formulates its presumption against fair use in such general terms: "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[67]

Although it justifies its elevation of the right of first publication

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64 *Id.* at 557.

65 *Id.*

66 [T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1988).

67 *Harper & Row*, 471 U.S. at 555.

by identifying that right with the public interest, the Court accomplishes a significant devaluation of the public interest by setting marketability against newsworthiness and discussing the furtherance of the original author's interest in marketability as though it were the only means of achieving an increase in the store of knowledge. "In our haste to disseminate news," the Court writes, "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[68] The Court thus expresses the view that protection of the original author's interest in marketability is the sole driving force of creativity and, by implication, the engine of free expression as well.

C. *Rationales for According Special Status to the Right of First Publication: The Evocation of Moral Rights and the Original Author's Right Not to Speak*

Throughout most of the *Harper & Row* opinion, the Court presents its elevation of the right of first publication as being necessary to the incentive scheme of copyright. Even when the Court discusses the protection of the right as a noneconomic interest, it asserts the rationale of the ultimate public interest. Underscoring the importance of protecting the author's "personal interest in creative control,"[69] the Court points to the "obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation."[70]

There is, however, language in the opinion that suggests that the Court may be protecting the right of first publication for reasons other than simply maintaining the incentive to create. While it does not make much of the traditional connection between the right of first publication and the protection of privacy—a concern that becomes important in *Salinger*[71]—the Court at one point describes the right in terms that evoke the moral rights approach to copyright. Analyzing the four factors bearing

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68 *Id.* at 558.

69 *Id.* at 555.

70 *Id.*

71 *See* Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987). A privacy-based claim would of course not have worked for Harper & Row, since, as *The Nation* argued, President Ford was not interested in preventing publication of his memoirs. The Court minimizes the importance of the privacy issue here where it cuts against the original author, *Harper & Row*, 471 U.S. at 554-55, but the Second Circuit takes privacy into account in *Salinger*, where it works in favor of the original author. *See infra* text accompanying notes 117-23.

on fair use decisions enumerated in section 107,[72] Justice O'Connor explains why the fact that a work is unpublished is a "critical element"[73] of its nature: "The right of first publication 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."[74] In this section of the opinion, the Court no longer presents first publication as a right to be protected in furtherance of a scheme designed to benefit the public. Rather, the right justifies itself as a protection of the author's personal and creative choices. The *Harper & Row* opinion does not use moral rights reasoning overtly or extensively, but it suggests that the protection of the personal interest of original authors in total control of their works is an end in itself.

This suggestion becomes more apparent in the Court's analysis of first amendment interests. Rejecting *The Nation*'s argument that copying unpublished expression may be excused on the ground of the public's first amendment right to receive information,[75] the Court expresses great concern for the protection of the original author's right not to speak.[76] The right not to speak is irrelevant to the case before the Court because Harper & Row had no interest in asserting it. The Court, however, uses this right as yet another rationale for protecting the right of first publication, which it says serves the right to refrain from speaking. In its discussion of this right, the Court not only places a greater value on the free speech interest of the original author than it does on that of the public, but it also ceases to justify its protection of the original author by its instrumental role in the incentive structure of copyright. By endowing the original author's rights with not only a statutory but also a constitutional charac-

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72 For the four factors of the fair use defense, see *supra* note 66.

73 *Harper & Row*, 471 U.S. at 564. The Court cites a Comment from the St. John's Law Review in support of its assertion that the unpublished state of a work constitutes a "critical element" of its nature. However, this Comment, written after the Second Circuit issued its decision in *Harper & Row*, is concerned entirely with the application of fair use to works being prepared for publication. The author's thesis is that the Second Circuit "failed to give appropriate weight to the fact that the copyrighted work in question was about to be published." Comment, *The Stage of Publication as a "Fair Use" Factor*: Harper & Row, Publishers, Inc. v. Nation Enterprises, 58 ST. JOHN'S L. REV. 597, 602 (1984).

74 *Harper & Row*, 471 U.S. at 564.

75 *Id.* at 555-58. The Court gives so little weight to the public's rights under the first amendment that it does not even discuss the nature of those rights.

76 *Id.* at 559-60. Here the Court cites the authority of Wooley v. Maynard, 430 U.S. 705, 714 (1977), which held that the first amendment protects the right not to speak. *Wooley* involved Jehovah's Witnesses who were prosecuted in New Hampshire for taping over the motto "Live Free or Die" on their license plates.

ter, the Court reinforces the implication that the protection of the original author is an end that justifies itself.

D. *The Use of the Idea/Expression Dichotomy to Dispense With the Public Interest Under the First Amendment*

The Court in *Harper & Row* maintains that its approach to the fair use doctrine poses no threat to the public's first amendment interest in receiving information because copyright does not protect ideas or facts;[77] the user is free to take as many of these from the original author as he or she wants to. Courts have on numerous occasions cited the idea/expression dichotomy as functioning to prevent copyright law from conflicting with the first amendment, enabling them to avoid the potential incompatibility of two constitutional provisions and maintain the fiction that the idea/expression dichotomy works successfully to ensure the public's access to information. In *Harper & Row*, the Court subscribes uncritically to this notion, thereby avoiding any suggestion that there might be a need to apply the fair use doctrine to unpublished expression in order to adequately serve the public interest.[78] Interestingly, while the majority fails to utilize the idea/expression dichotomy to resolve the threshold issue of the copyrightability of the material copied—an analysis that leads the dissent, as it did the court of appeals, to find that *The Nation* had taken mostly uncopyrightable information[79]—it nonetheless calls the dichotomy into service in its discussion of the first amendment as though it indisputably decides the question in favor of Harper & Row.

It is well recognized that the distinction between ideas and expression is not always clear. As Judge Learned Hand remarked sixty years ago, "Nobody has ever been able to fix that boundary, and nobody ever can."[80] The *Harper & Row* majority cites Professor Nimmer for the proposition that the idea/expression dichotomy precludes conflict between copyright law and the first

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77 *Harper & Row*, 471 U.S. at 556.

78 *See id.*

79 *See generally id.* at 599-604 (Brennan, J., dissenting); Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 205-06 (2d Cir. 1983). *See also* Gary Francione's critique of both the district court's "totality" approach to copyrightability, which results in the protection of ideas, and the Supreme Court's adoption of the district court's findings. Francione, *Facing* The Nation: *The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986).

80 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

amendment.[81] Professor Nimmer, however, recognizes that the dichotomy does not perfectly harmonize the concerns of the two bodies of law, and he cites the news photograph as an example of expression that is inseparable from idea.[82] According to Nimmer, it is sometimes important for the user to reproduce the photograph itself in order to establish the credibility of his or her assertions.[83] The solution Nimmer proposes for the problem of using news photographs is a compulsory license scheme, which he would apply to not only published but also unpublished photographs. His rationale for such a scheme is the importance of the public interest in viewing newsworthy photographs:

> Note that the compulsory license need not be triggered by an initial consensual publication of the photograph, though without this, practical problems of access to the prints and negatives might arise. Nevertheless, it is intolerable that a photographer's prerogative may cut off entirely from public access a photograph which by hypothesis is one of which the public should be aware.[84]

In the absence of legislation creating a compulsory licensing scheme, Professor Nimmer suggests that the first amendment should limit the remedy available in cases involving the unexcused use of news photographs to an award of actual damages. This was Judge Leval's solution to the first amendment problem of *New Era*,[85] which the Second Circuit denounced.[86] In relation to the *Harper & Row* opinion, it is particularly important to note that in Professor Nimmer's view an original author's interest in the marketability of unpublished works could properly be encroached upon by an author-user serving the public interest.[87] In contrast, the Court in *Harper & Row* both upholds the value of protecting marketability over newsworthiness as a general proposition and perpetuates the

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81 *Harper & Row*, 471 U.S. at 556 (citing 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10[B][2] (1984)).

82 M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.05[C][2][c][ii] (1984) [hereinafter NIMMER ON FREEDOM OF SPEECH].

83 *Id.*

84 *Id.*

85 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1527 (S.D.N.Y. 1988).

86 New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F.2d 576, 584 (2d Cir. 1989).

87 Professor Nimmer differentiates between the fair use defense and the privilege of using another's expression grounded in the first amendment. He maintains that fair use may be found only when the copying of the author-user "does not materially impair the marketability" of the original work, while the privilege to use based on the first amendment "may be invoked despite the fact that the marketability of the copied work is thereby impaired." NIMMER ON FREEDOM OF SPEECH, *supra* note 82, § 2.05[C][2][d].

fiction that there is never any need to allow an impairment of marketability in order to promote the public interest.

The *Harper & Row* majority's position on a number of questions can be explained by the facts of the particular case. It is regrettable, however, that the Court's reasoning is not limited to those facts. Justice O'Connor's initial framing of the issue before the Court is appropriately narrow: "[T]o what extent [section 107 of the 1976 Act] sanctions the unauthorized use of quotations from a public figure's unpublished manuscript."[88] In this formulation, the Court presumes the existence of a manuscript, and therefore a plan on the part of the original author to publish the work at issue. But the Court's holding is not limited to works being prepared for publication, encompassing instead the much broader category of unpublished works. Moreover, its reasoning generalizes about original authors, author-users, and the public interest in ways that go beyond the merits of the case before it.[89] It is not surprising that, faced with *Harper & Row*'s general presumption against applying fair use to unpublished works, the absence of any limiting standards, and the opinion's unconditional and overly broad emphasis on the value of the original author, the Second Circuit in *Salinger* concluded that "the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression."[90] While there are those who have argued that the Second Circuit's interpretation of *Harper & Row*'s presumption is wrong,[91] its assessment of the "tenor" of the *Harper & Row* opinion is in fact exactly right.[92] Its own elevation of the original author, devaluation of the author-user,

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88 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 541-42 (1985).

89 Lloyd Weinreb, who argues that fair use determinations are necessarily "fact-specific and resistant to generalization," has commented apropos of *Sony* and *Harper & Row* that the Supreme Court's "error in both was its effort to justify its decision by principles that, removed from the specific factual context, make no sense." Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990) [hereinafter Weinreb].

90 Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987).

91 Holt, in its petition for *certiorari*, and those groups that filed supporting *amicus* briefs did not argue against *Harper & Row* but instead contended that the Second Circuit misinterpreted it. Petition, *supra* note 25, at 48. *See supra* notes 25-28 and accompanying text.

92 Floyd Abrams, who represented *The Nation* in the suit filed against it by Harper & Row, argued during the hearing on H.R. 4263 and S. 2370 that the *Harper & Row* presumption should be undone. "The problem," he said, "lies with the presumption itself, not with any particular judicial application of it." *Joint Hearing on H.R. 4263 and S. 2370*, *supra* note 30 (statement of Floyd Abrams of Cahill, Gordon & Reindel).

See also Note, *When "Fair Is Foul": A Narrow Reading of the Fair Use Doctrine in* Harper & Row, Publishers, Inc. v. Nation Enterprises, 72 CORNELL L. REV. 218 (1986) (arguing against presumptions that limit fair use doctrine's accommodation of first amendment principles).

and underestimation of the beneficial relationship between the author-user and the public have been, indeed, but elaborations of the example set by *Harper & Row*.

IV. *SALINGER*: THE DEVALUATION OF THE AUTHOR-USER

The *Salinger* opinion carries the hierarchical approach to authorship even farther than *Harper & Row*, not only favoring the original author over the author-user but also engaging in a serious denigration of the genre of biography. The defendant Ian Hamilton had written a biography of novelist and short story writer J.D. Salinger, both quoting and paraphrasing letters written by Salinger that had been donated by their recipients to various university libraries but never published. Salinger sued for copyright infringement.[93] In the district court, Judge Leval denied Salinger a preliminary injunction because he found Hamilton's copying of copyrighted expression "too minimal to subject Salinger to any serious harm."[94] The Second Circuit disagreed and ordered the lower court to issue a preliminary injunction against publication of the biography in the form in which it was written.[95]

A. *The Second Circuit's Failure to Distinguish* Harper & Row

The facts of *Salinger* are entirely different from those of *Harper & Row*. Ian Hamilton was not preempting a publication of the letters by their original author, for Salinger had no intention of publishing them. There was, then, no injury to the copyright holder's market as there had been in *Harper & Row*. Moreover, Hamilton was attempting to increase the public's knowledge about an important literary figure in which readers have over the

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[93] In addition to claiming copyright infringement, Salinger initially brought suit against Hamilton and Random House for unfair competition and breach of contract. Under the latter theory, Salinger argued that he was a third-party beneficiary of the form agreements Hamilton had signed when he viewed the letters at the libraries of Harvard, Princeton, and the University of Texas and that these agreements contained various restrictions on the use of the documents. Judge Leval dismissed the contract action, because he found that the agreements prohibited only quotations *"that infringe copyright."* Salinger v. Random House, Inc., 650 F. Supp. 413, 427 (S.D.N.Y. 1986) (emphasis in original).

Holt in *New Era* has argued that many of the Hubbard documents cited by Russell Miller are "technically unpublished but publicly disseminated," Petition, *supra* note 25, at 7-8, and therefore should be subject to fair use as the primary sources of biographers and historians traditionally have been. The same argument would have been applicable to the Salinger letters because they were available to the public in libraries. See *infra* text accompanying notes 163-65 regarding Judge Miner's subsequent proposal along the same lines.

[94] *Salinger*, 650 F. Supp. at 428.

[95] Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987).

years manifested great interest. Unlike *The Nation*'s article about President Ford, Hamilton's book was to bring information to the public of which it would otherwise have been deprived—both the actual content of Salinger's letters and Hamilton's interpretation of them.[96] Furthermore, as the Second Circuit noted, Hamilton had not taken the "heart" of an original work as the Supreme Court found that *The Nation* had done.[97] Nonetheless, Judge Newman, writing for the court, paid almost no attention to these crucial distinctions between the two cases and concluded that "our guidance must now be taken from . . . *Harper & Row*."[98] Thus, while it could have easily distinguished *Harper & Row* on its facts, the Second Circuit failed to do so.

B. *The Third Type of Hierarchy: Creative vs. Noncreative Writing*

The *Salinger* opinion is pervaded by the court's admiration of Salinger as an original creative genius and its comparatively low regard for the biographer Hamilton. Its admiration of Salinger is made clear from the first sentence of the opinion, in which Judge Newman states the issue before the court as "whether the biographer of a renowned author has made 'fair use' of his subject's unpublished letters."[99] Salinger's renown is immaterial to the question of whether his work has been infringed, but the court's use of adjectives such as "renowned" and "highly regarded"[100] to describe him reveals where its sympathies lie. The court at one point refers to Hamilton as "well-respected,"[101] but otherwise takes pains to indicate that it is thoroughly unimpressed by his work. In his discussion of the effect of Hamilton's biography on the potential market for Salinger's letters, for example, Judge Newman indulges in this observation: "Perhaps few readers of the biography would refrain from purchasing a published collection of the letters if they appreciated how inadequately Hamilton's paraphrasing has rendered Salinger's chosen form of expression."[102]

By denigrating Hamilton as an individual author, the court

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96 Technically the content of Salinger's letters may have already been available to the public, but as a practical matter only to those people able to make the trip to the university libraries where the letters are housed. Hamilton's book would therefore have played a distributive role, although its main function was to be interpretive.

97 *Salinger*, 811 F.2d at 98-99.

98 *Id.* at 95.

99 *Id.* at 92.

100 *Id.*

101 *Id.*

102 *Id.* at 99. *See id.* at 99 nn.4 & 5.

also disparages the author-user and devalues biography. At no time does the court acknowledge that Hamilton may have used the Salinger letters in such a way as to enlighten the public about the distinctive nature of an important writer's life and thought. Taking the view that it is the letters themselves that "[t]o a large extent . . . make the book worth reading,"[103] the court sees Hamilton as a simple conduit for the transfer of the letters from the original author to the public. It does not recognize the biographer's crucial contribution as interpreter of a subject's life and thought.

The court's lack of sensitivity to the art of biography is particularly striking in its rejection of Judge Leval's formulation of the biographer's "dilemma,"[104] which he described in the following manner: "To the extent [the biographer] quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description."[105] Judge Newman rejects this characterization:

> This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing. On the other hand, the biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he "distorts" the expressive content, he deserves to be criticized for "sacrificing accuracy and vividness." But the biographer has no inherent right to copy the "accuracy" or the "vividness" of the letter writer's expression. Indeed, "vividness of description" is precisely an attribute of the author's expression that he is entitled to protect. . . . But when dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a "pedestrian" sentence. The copier is not at liberty to avoid "pedestrian" reportage by appropriating his subject's literary devices.[106]

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[103] *Id.* at 99.
[104] Salinger v. Random House, Inc., 650 F. Supp. 413, 424 (S.D.N.Y. 1986).
[105] *Id.*
[106] *Salinger*, 811 F.2d at 96-97. Hamilton had in fact provided a basis for the view of

The court here makes use of an extremely naive conception of biography. In its view, the biographer's job is to report facts, and it assumes an easy distinction between facts and expression. Facts are "what [the biographer's] subject did,"[107] that is, actions, and they can be handily related in the biographer's own words with no danger of distortion. According to the court, only the biographer who wants to wrongfully take another's expression confronts the "unpleasant choice" of an injunction or a loss of accuracy and vividness. And, the court implies, the only reason a biographer might want to take expression is because his or her own prose is too ordinary.

The court's condescending approach to biography involves both a complete disregard of the important uses it makes of quotation as well as an utter failure to recognize that in biography, as in other genres, the line between fact and expression is blurred. On the simplest level, what the subject of a biography has said is fact. Moreover, the biographer's task includes discovering and analyzing emotions and attitudes as well as tracing intellectual development—in short, contributing to the reader's understanding of the mental processes underlying the subject's actions. The biographer seeks not merely to recite what the subject did, but to propose to the reader an interpretation of the subject's life and thought. Without quoting the subject, the biographer will often be unable to make a convincing presentation. Moreover, the subject of the biography will tend to remain an abstraction for the reader, failing to come alive. The difficulty for the biographer who is not allowed to quote the subject's language is not that his or her prose will be "pedestrian," but rather that readers will not be able to fully appreciate or evaluate the significance of the life being presented to them.

The Second Circuit's analysis of biography assumes that there is a clear distinction between copying expression in order to achieve vividness of description and doing so in order to convey facts. The former is unacceptable, while the latter may be permitted. The court thus applies *Harper & Row*'s necessity test, finding that Hamilton's use of protected expression "exceeds that necessary to disseminate the facts."[108] The *Salinger* court subscribes in effect to a distinction that will be more explicitly elaborated in *New Era*, that of

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the biographer's work expressed here by testifying in the district court that he did not want to merely describe Salinger's ironic tone because "[t]hat would make a pedestrian sentence I didn't wish to put my name to." *Id.* at 96.

107 *Id.* at 97.

108 *Id.* at 98 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985)).

the author-user's copying for the purpose of "enlivening"[109] his or her text and copying for the purpose of making factual points. This dichotomy, employed by Judge Leval in *New Era* to distinguish the case from *Salinger*,[110] is premised on a distinction between the text and the subject of the biography that is largely illusory, and a legal distinction built upon it is unworkable.

The main point to be made here is that this distinction betrays a point of view that makes of biography an essentially noncreative form of authorship. This point of view does not consider that biographers not only take but also transform their subjects' language, using it as an integral part of a wholly new work that constitutes a fresh contribution to intellectual discourse. In other words, this point of view does not take into account that the biographer's taking of expression is integral to a creative process, but sees it instead as the superficial embellishment of humdrum prose which dull minds resort to. Although the *Salinger* court does not explicitly refer to the scholar/chiseler dichotomy of *Harper & Row*, its observation that the "copier is not at liberty to avoid 'pedestrian' reportage by appropriating his subject's literary devices"[111] suggests that the biographer who copies expression is attempting to profit from another's creative labor.

C. *The Underestimation of the Public Interest and the Elevation of the Original Author's Personal Interests: The Protection of Privacy*

Even though the biographer Hamilton was endeavoring to bring new information to the public to which it would otherwise not have access, the Second Circuit in *Salinger* refuses to acknowledge that the public interest would be served by granting his fair use claim. According to Judge Newman:

> To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and Hamilton is entirely free to fashion a biography that reports these facts. But Salinger has a right to protect the expressive content of his unpublished

[109] New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1524 (S.D.N.Y. 1988).
[110] *Id.*
[111] Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987).

> writings for the term of his copyright, and that right prevails over a claim of fair use under "ordinary circumstances." Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright . . . .[112]

Again there is the implication that the public has no interest in what the author-user has to say about the original author, but cares only about access to the latter's work.

In *Salinger*, however, the court does not balance the public interest in knowing against the original author's interest in the marketability of his work, as did the Supreme Court in *Harper & Row*. Balancing the public interest against Salinger's obviously nonexistent interest in marketability would be a decidedly unconvincing exercise. To support its conclusion that the four factors of section 107 favor a finding of copyright infringement, the court engages instead in a strained analysis of the using work's effect on the market for the original, which *Harper & Row* identified as "the single most important element of fair use."[113] Judge Newman uses the language of the statute—"effect of the use upon the *potential* market"[114]—as a basis for speculating, first, that Salinger might change his mind about publishing his letters and, second, that some readers would not buy Salinger's own collection of letters because they would mistakenly believe that they had already read them by reading Hamilton's paraphrasing. Judge Newman states:

> Hamilton frequently laces his paraphrasing with phrases such as "he wrote," "said Salinger," "he speaks of," "Salinger declares," "he says," and "he said." For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals.[115]

This is an argument which Salinger made in the district court in connection with his claim of unfair competition.[116] In the context of marketability, it is inconsistent with his intention not to publish his

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[112] *Id.* at 100 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985)).

[113] *Id.* at 99 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

[114] 17 U.S.C. § 107(4) (1988) (emphasis added).

[115] *Salinger*, 811 F.2d at 99 (footnote omitted).

[116] Salinger v. Random House, Inc., 650 F. Supp. 413, 426-27 (S.D.N.Y. 1986). Salinger's claim of unfair competition was not pursued on appeal.

letters himself. But the Second Circuit adopts the argument as part of its opinion, giving Salinger the benefit of the doubt.

The Second Circuit's analysis of the using work's effect on the market for the original is so strained that it is difficult to conclude that the court is genuinely concerned with the protection of marketability. Instead, the court seems to balance the public interest against Salinger's interest in privacy. Although the *Salinger* opinion contains no discussion of this balancing as such, privacy is, as Chief Judge Oakes has pointed out, one of the "latent" issues of the case.[117] The court, in fact, calls attention to privacy at the beginning of the opinion, saying of Salinger, "He has not published since 1965 and he has chosen to shun all publicity and inquiry concerning his private life."[118] The court also repeatedly refers to Salinger's right to protect the "expressive content"[119] of his letters. This phrase may be taken as an implicit recognition of the overlap between ideas and expression; the court uses it, however, not to openly acknowledge this overlap—something which might work in Hamilton's favor—but to expand the protection of Salinger's personal writings. "Expressive content," as the court conceives of it, is opposed to "factual content," and it can potentially encompass a great deal, including "the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words and the emphasis he gives to particular developments."[120] By characterizing factual content as "what [he] did"[121] and setting it against the expansive term "expressive content," the court also seems to use the latter as a code term for "emotional content." When it concludes that "[p]ublic awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright,"[122] one is left with the distinct impression that the court is not protecting literary form, but rather the private emotional life of a highly valued author.

The *Salinger* court not only minimizes the public interest—as did the Supreme Court in *Harper & Row*—but it also implicitly adds its support to the proposition that the personal interests of the orig-

117 New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F.2d 576, 585 (2d Cir. 1989) (Oakes, C.J., concurring). *See also* Note, *A New Era for Copyright Law: Reconstituting the Fair Use Doctrine*, 34 N.Y.L. SCH. L. REV. 267, 290 (1989) [hereinafter *A New Era for Copyright Law*] (commenting on Salinger's motivation to protect privacy).

118 *Salinger*, 811 F.2d at 92.

119 *Id.* at 96, 100.

120 *Id.* at 98 (quoting Wainwright Secs. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

121 *Id.* at 97.

122 *Id.* at 100.

inal author are ends deserving protection for their own sake. As the Supreme Court suggested that the original author's interest in complete creative control over a work and his or her right to refrain from speaking are goals that justify themselves, the Second Circuit implies—less overtly, to be sure—that the original author's right to privacy is also such an end. Under American law, authors are entitled to no special claim to privacy. Within the moral rights tradition, they are; their very status as authors confers on them a variety of legal protections against violations of the personality, which include functional equivalents of our right to privacy.[123] By protecting Salinger's privacy, the Second Circuit has in effect lent its support to a moral rights approach to the protection of unpublished works. In so doing, it is helping copyright holders use the law in a way that has nothing to do with the constitutionally created incentive-based structure of American copyright law.

V. *New Era*: The Mechanical Application of Hierarchical Thinking

The Second Circuit's *New Era* opinion presents an extremely rigid application of *Harper & Row* and *Salinger* and a singularly unappreciative view of biography. Although the court does not elevate L. Ron Hubbard's importance as an original author, it refuses to credit the biographer Russell Miller's work with any worth. Judge Miner's remark that "[t]he public would not necessarily be deprived of an 'interesting and valuable historical study' "[124] if an injunction were issued, is but the most openly inhospitable observation about Miller's work in an opinion that otherwise gives defendant Holt's claims a cool reception. The hierarchical thinking that informs *Salinger* is also operative in *New Era*, as the court's reasoning effects the same overvaluation of the original author and undervaluation of the author-user.

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[123] Under French law, for example, the *droit de divulgation* constitutes an absolute right on the part of authors to refuse to disclose their work. As Henri Desbois indicates, this right arises upon the creation of a work, but it attaches to the person of the author and its aim is the protection of the personality. *See* H. Desbois, Le Droit d'Auteur en France 469-70 (1978). *See also* DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 Bull. Copyright Soc'y U.S.A. 1 (1980) [hereinafter DaSilva].

[124] New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F.2d 576, 584 (2d Cir. 1989) (citing New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1528 (S.D.N.Y. 1988)).

A. *The Second Circuit's Categorical Rejection of All Grounds for Copying Unpublished Expression*

Of the fair use claimants under consideration, Holt may be thought to have the strongest argument in favor of allowing copying of unpublished works. Miller was not attempting to beat the copyright holder into print. Furthermore, he did not use passages of Hubbard's letters and diaries merely to achieve a more vivid portrait. The central argument supporting Holt's fair use claim is, rather, that Miller quoted Hubbard in order to demonstrate the truth of his charges against him.[125] In *Bare-Faced Messiah*, Miller sought to prove that Hubbard had misrepresented himself to the world and that his real character was completely at odds with his public persona. He quoted Hubbard's Asia Diaries, for example, to show that Hubbard was a bigot who made derogatory remarks about the Chinese. Similarly, Miller quoted letters and bulletins written by Hubbard to prove that he was paranoid and vicious in his attacks against "perceived enemies."[126]

Judge Leval at the district court level, considering Miller's book to be "responsible historical criticism,"[127] found the fair use purpose of using a subject's own words to demonstrate negative character traits to be "compelling."[128] "It is incompatible with the ends of fair research and criticism," said Judge Leval, "to accuse of dishonesty without being permitted to specify what were the dishonest words."[129] Not only is it unfair to both the subject and the biographer to force the latter to make unsupported accusations, but such an approach renders intelligent commentary on important figures and events impossible. As Professor Nimmer points out in his discussion of news photographs, a description of events is sometimes insufficient if the public is to be truly informed about them.[130] There are cases in which the occurrence of events may be denied and the only way the public may know whether they transpired as described is to be shown a photograph. Here the quotation of Hubbard's works is like the copying of a photograph; it is a taking of expression that is necessary for the reader to be able to judge whether Hubbard had the traits with which he is charged.

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125 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1528 (S.D.N.Y. 1988).

126 *Id.* at 1512-13.

127 *Id.* at 1507.

128 *Id.* at 1520.

129 *Id.* at 1510.

130 *See* NIMMER ON FREEDOM OF SPEECH, *supra* note 82, § [C][2][c][ii].

It may at first seem surprising that the Second Circuit was so completely unmoved by Judge Leval's reasoning and Holt's arguments. Surely it would seem that the quotations of Hubbard's letters and diaries that served to demonstrate hidden character traits would pass the *Harper & Row* necessity test. But the court's dismissal of this argument is in keeping with the logic of *Salinger*, which bestowed on the original author of unpublished works "complete protection"[131] and which relegated the genre of biography to an inferior status, treating it as nothing more than an unimaginative recital of facts.

Rejecting Holt's argument that the use of Hubbard's expression was justified because it would have been virtually impossible to convey the reality of his personality without quoting him, the Second Circuit also dismisses Judge Leval's effort to distinguish the case from *Salinger*. In Judge Leval's view, Hamilton's use of Salinger's expression was impermissible because his purpose was to display the vividness of his subject's writing style.[132] He distinguished the use made of Hubbard's expression from the use made of Salinger's by observing that Miller's purpose in quoting Hubbard was to expose negative character traits which he claimed the latter had hidden from the world, whereas Hamilton had merely been "enlivening" the text of his biography by appropriating "Salinger's expressive genius."[133] While Judge Leval recognized in *New Era* that a reviewer or critic may legitimately quote brief passages of an author's work in order to illustrate an analysis of writing style,[134] he described a biographer's "display"[135] of his or her subject's writing as "taking precisely what the copyright is designed to protect."[136] Thus, as of the time he wrote his opinion in *New Era*, Judge Leval deemed the line between excused and unexcused takings of unpublished expression by a biographer to be based on the distinction between uses "reasonably necessary to the communication and demonstration of significant points being made about the subject"[137] and those made "simply to enliven her text by appropriating her subject's lively expression."[138]

The Second Circuit's *New Era* opinion categorically dis-

131 Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987).
132 *See New Era*, 695 F. Supp. at 1507.
133 *Id.* at 1524.
134 *Id.* at 1519.
135 *Id.* at 1507.
136 *Id.* (citation omitted).
137 *Id.* at 1504.
138 *Id.*

misses Judge Leval's distinction, whether formulated as the difference between displaying a subject's writing style and making points about his or her character, or as the difference between enlivening the biographer's text and making such points.[139] According to the court, if a book qualifies as "criticism, scholarship or research," the first factor of section 107—purpose of the use—favors its publisher, and there is no need for any further analysis.[140] Similarly, under the second statutory factor—nature of the copyrighted work—the court says: "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."[141]

The court is right to dismiss the distinction here because, although it may have some legitimacy, it does not adequately describe the difference between *Salinger* and *New Era*. Hamilton was not merely embellishing his own prose when he quoted Salinger to show how the writer adopted an ironic tone when describing certain people or how he exhibited other attitudes. He was, rather, making Salinger come alive for the reader. No less than Miller, Hamilton was attempting to uncover the reality of his subject's personality as he understood it. Even though Hamilton was not attempting to disprove an account Salinger had given of himself—as Miller was trying to disprove L. Ron Hubbard's—he was nonetheless attempting to prove his own particular reading of Salinger's emotional life.

The problem, then, is not that the Second Circuit rejects the lower court's distinction between quotation for the purpose of enlivening text and that done to prove points about character, but rather that it refuses to allow "more than minimal"[142] copying of unpublished works for any purpose. Even though it recognizes that under section 107 copying for the purpose of scholarship and criticism weighs in favor of the fair use claimant, the significance of this factor is obliterated by the overwhelming importance the court now gives to the fact of the copyrighted work being unpublished. As others have argued, the court has in effect made the four-part test of section 107 a "one-part test."[143]

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139 New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F. 2d 576, 583 (2d Cir. 1989).

140 *See id.*

141 *Id.*

142 *Id.* at 584 (quoting Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987)).

143 Brief of PEN American Center, *supra* note 27, at 8.

B. *The Conclusory Treatment of First Amendment and Copyright Interests*

The Second Circuit's categorical refusal in *New Era* to consider any justification for copying unpublished material reflects a serious discounting of the public interest in receiving information. Judge Leval denied New Era a permanent injunction because he found that, even though Holt had infringed the copyright in Hubbard's unpublished works, an injunction would deprive the public of an "interesting and valuable study."[144] The Second Circuit summarily rejects this reasoning, insisting, again, that "more than minimal" copying of unpublished expression automatically entitles the copyright holder to an injunction.[145] The court says: "We are not persuaded . . . that any first amendment concerns not accommodated by the [1976] Copyright Act are implicated in this action. Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field never has been repudiated."[146] Remarking as well that the public's "right to know" does not encompass expression,[147] the court thus dispenses with the first amendment issue.

The court does not consider that the public might be deprived of anything of value in *New Era*, insisting that a " 'significant copyright interest' certainly would be served by an injunction."[148] In a conclusory opinion that is very short on analysis, Judge Miner fails to discuss what copyright interest is being promoted or how the public interest is being protected. Presumably, the right of first publication is being upheld in order to maintain the incentive of original authors to produce new works. As Holt pointed out in its petition for *certiorari*, however, the economic incentive to create provided by copyright does not in fact inspire such "works" as Hubbard's application to the Veterans Administration for benefits, nor is it an important inducement to the authors of most letters.[149] The notion that prohibiting all quotation of unpublished works of any variety encourages the

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144 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1528 (S.D.N.Y. 1988).

145 *New Era Publications Int'l, ApS v. Henry Holt and Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (citing Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987)).

146 *Id.* (citing Roy Export Co. Establishment v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095, 1099-100 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982)).

147 *Id.*

148 *Id.* (quoting *New Era*, 695 F. Supp. at 1528).

149 Petition, *supra* note 25, at 38 n.8. *See also* Zissu, *Salinger and Random House: Good News and Bad News*, 35 J. COPYRIGHT SOC'Y 13, 15 (1987) (distinguishing letters from other types of unpublished works).

production of and eventual publication of new works simply has no basis in reality.

The court's assessment of the effect of Miller's biography on the market for Hubbard's unpublished works is also unrealistic and perfunctory. Because the district court found that New Era would commission a biography of Hubbard and would make Hubbard's works available for the writing of this biography, the Second Circuit concludes—mechanically repeating the language of *Salinger*—that "some impairment of the market seems likely."[150] A meaningful analysis of the fourth fair use factor would recognize, as Judge Leval did, that the quotation of expression in a critical biography does not necessarily reduce the interest in an author's original works;[151] indeed, it might even stimulate such interest. Moreover, it is not certain that Miller's biography would injure the market for a biography of Hubbard authorized by New Era, which presumably would be more positive in character.[152] Even if there were some injury, the court should acknowledge that the reading public has an interest in the presentation of different evaluations of the same person and that biographies are not fungible. The court, however, ignores the realities of the marketplace as well as the public interest.

The *New Era* opinion not only fails to acknowledge the author-user's contribution to the public, but also omits any discussion of the need to balance the public interest against that of the original author. *New Era* takes the devaluation of the public interest even a step further than *Harper & Row* and *Salinger* because the court no longer appears to feel a need to justify its dismissal of that interest. The court mechanically extends "complete protection" to the original author and conclusorily finds the public interest adequately taken into account as though any further discussion of its approach to fair use and unpublished works as established in *Salinger* is henceforth unnecessary.

VI. Recent Developments and Future Dangers

A. *The Impact of* Salinger *and* New Era

Chief Judge Oakes's concurring opinion in *New Era* expressed the fear that the granting of an injunction in the case

150 *New Era*, 873 F.2d at 583 (quoting Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987)).

151 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1523 (S.D.N.Y. 1988).

152 *See New Era*, 873 F.2d at 583.

would "discourage writers and publishers who might otherwise undertake critical biographies of powerful people."[153] Judge Newman and the three judges who joined his dissent from the denial of Holt's petition for rehearing *en banc* (they include Judge Oakes) also expressed concern that authors and publishers would be deterred from bringing forth scholarly and journalistic works by a fear of litigation inspired by the dicta of *New Era*.[154] In his dissenting opinion, Judge Newman states:

> Normally, the appearance of language beyond the holding would . . . be no occasion for rehearing. In most contexts, the clarification and refinement of such language and the extent to which it will affect future holdings may safely await future litigation. But many authors and publishers are understandably reluctant to risk litigation. Many important works of authorship command a limited readership. The cost of defending a copyright infringement suit, even if the prospect of success is high, will frequently be a powerful deterrent to inclusion of passages that approach but do not exceed the limits of permissible fair use.[155]

It is evident that the judges' concerns were not baseless. In its petition for *certiorari*, Holt cites several instances in which, since *Salinger* and *New Era*, a copyright holder has either threatened or actually filed a lawsuit claiming infringement of unpublished materials.[156] One of these involved a threat by the grandson of James Joyce to file a claim based on the quotation of "innocuous"[157] letters in a biography in order to force its author to take out a chapter that quoted no copyrighted materials at all.[158]

What this incident shows is that virtually any time an author-user quotes unpublished material, the copyright holder may attempt to use copyright law to prevent the publication of not only unfavorable material taken from unpublished works—as Holt has charged New Era with doing—but also unfavorable material that has no connection with the unpublished works being quoted. Where copyright holders cannot successfully use the law of libel because they cannot prove either falseness or malice, and where they cannot use the law of privacy because the biographical subject has died, they may use

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153 *Id.* at 596-97 (Oakes, C.J., concurring).

154 New Era Publications Int'l, ApS v. Henry Holt and Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting).

155 *Id.*

156 Petition, *supra* note 25, at 34 n.7.

157 James, *The Fate of Joyce Family Letters Causes Angry Literary Debate*, N.Y. Times, Aug. 15, 1988, at C11, col. 1.

158 *Id.*

copyright law to suppress material they do not want disseminated.[159] Even if a publisher will risk litigation when it believes a biography warrants it, a preliminary injunction issued on the basis of *Salinger* and *New Era* may easily doom the book to oblivion by disrupting its distribution. This is in fact what Holt says happened to *Bare-Faced Messiah*. According to its petition for *certiorari*, the book's publication was held up for eleven months, interrupting publicity and sales campaigns.[160] It does not take a permanent injunction to suppress a book.

Perceiving the intensity of the reaction to the court's decisions denying fair use to the users of unpublished works, individual members of the Second Circuit have labored to convince scholars and publishers that the decisions were not that restrictive. Judge Newman, writing that "some critics of these decisions have overreacted and reached the hasty and incorrect conclusion that our Court has set its face against all use of unpublished writings,"[161] has advised copyright lawyers to ignore all but the holdings of the cases. In doing so, he has urged a narrower reading of the *Harper & Row* holding than the one he seems to have applied in *Salinger*. Judge Newman writes: "The holding seems clear enough: A copier infringes when it prints more than minimal excerpts of the expressive content of unpublished writings that are *about to be published*."[162] Judge Miner, too, has expressed the opinion that commentators have overstated the effects of *Salinger* and *New Era*,[163] and to meet their concerns he has suggested that unpublished works which are "publicly disseminated" should be subject to fair use.[164] He would include letters in this category.[165]

Finally, the Second Circuit may also have been sending a reassuring signal to fair use claimants in the more recent *New Era Publi-*

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159 For a discussion that makes this point as part of an argument for giving greater weight to the first amendment in fair use analyses, see *A New Era for Copyright Law*, *supra* note 117, at 296.

More recently, the *Chicago Tribune* reported that Saul Bellow had succeeded in forcing St. Martin's Press to "recall" a biography of him after proofs had already been sent to reviewers. According to the *Tribune*, Bellow "apparently threatened to sue" and St. Martin's delayed publication of the biography at least in part because of the *Salinger* decision. Blades, *Bellow's Clout Delays Biography*, Chicago Tribune, Apr. 18, 1990, Tempo, at 1.

160 Petition, *supra* note 25, at 26.

161 Newman, *Not the End of History: The Second Circuit Struggles With Fair Use*, 37 J. COPYRIGHT SOC'Y 12, 12 (1989) [hereinafter Newman].

162 *Id.* at 13 (emphasis added).

163 Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC'Y 1, 7 (1989).

164 *Id.* at 3.

165 *Id.* at 11.

cations Int'l, ApS v. Carol Publishing Group,[166] a case involving the publication of an unflattering biography of L. Ron Hubbard by a former member of the Church of Scientology. The biographer in *Carol* quoted published works only, and the significance of the case in the context of unpublished works should therefore not be assumed to be too great. It is notable, however, that the *Carol* court does not follow the example of *New Era* when it assesses the injury to the potential market for the works quoted. Instead, the court refuses to conclude that one biography will necessarily deter the public from buying another one written from a different point of view and, after a thoughtful discussion, finds that the market factor favors the fair use claimant.[167] In addition, the court specifically affirms that copying in order to "convey the author's perception"[168] of the subject's character is "entirely legitimate,"[169] and it adopts a very liberal view of what may fall under the rubric of showing character.[170] As Ralph Oman, the Register of Copyrights, has remarked, the *Carol* case may well be "evidence . . . of a more favorable attitude toward fair use generally."[171]

In spite of these signs that the Second Circuit is backing away from the extreme rigidity of its opinion in *New Era*, the dangers posed by the courts' hierarchical approach to authorship have not disappeared. Indeed, the ongoing debate over fair use and unpublished works reveals that author-users are still very much at risk of being undervalued in a variety of ways.

B. *The Possible Revival of the Distinction Between "Enlivening" Text and Demonstrating Facts: Implications for Author-Users*

A revival of Judge Leval's distinction between the quotation of expression for the purpose of enlivening the author-user's text and that done for the purpose of proving significant facts seems to be a distinct possibility, as it appears to be favored by at least five of the judges of the Second Circuit.[172] Judge Oakes in his

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166 904 F.2d 152 (2d Cir. 1990). The case was heard by Circuit Judges Feinberg, Pratt, and Walker.

167 *Id.* at 159-60.

168 *Id.* at 156.

169 *Id.*

170 The court explicitly states that the biographer's use of expression "to enrich" his work is fair use because he is showing his subject's character. *Id.* By doing so, it comes very close to placing its stamp of approval on the biographer's "enlivening" of his work. Moreover, the court allows the biographer to use seventeen "topic quotations" to open his chapters because he juxtaposes the "grandiose expression of the quotations with the banal (to the author) material contained in the body of the chapter." *Id.*

171 *Joint Hearing on H.R. 4263 and S. 2370*, *supra* note 30 (statement of Ralph Oman, Register of Copyrights).

172 The five judges are Chief Judge Oakes and Circuit Judges Kearse, Newman,

New Era concurrence criticizes the majority for rejecting this distinction, stating that he agrees with Judge Leval in most respects.[173] Observing that words "themselves may be facts to be proven,"[174] Judge Oakes asserts that the author of *Bare-Faced Messiah*, by quoting Hubbard, was seeking to report "only the fact of what [Hubbard] did."[175] He then cites two of the hypotheticals Judge Leval used to illustrate how an admired public figure may have a hidden malevolent side which can be exposed only by quoting unpublished writings. The first involves a popular mayor who sends memoranda to adversaries containing threats to "bust your kneecaps,"[176] and the second features a religious leader who is believed to be selfless but whose letters and journals reveal to be greedy and bigoted.[177] Judge Oakes disagrees only with Judge Leval's view of quoting to demonstrate writing style. In Judge Oakes's opinion, *Salinger* unequivocally establishes that quoting unpublished works for such a purpose cannot be considered fair use.[178]

Judge Newman also lends his support to Judge Leval's distinction.[179] In his dissent from the denial of Holt's petition for rehearing *en banc*, Judge Newman explains that neither *Harper & Row* nor *Salinger* prohibits copying of unpublished expression that is necessary to fairness and accuracy.[180] Emphasizing the element of necessity, he argues that *Harper & Row* recognizes the difference between enlivening the copier's prose and reporting facts accurately as a legal distinction that applies to unpublished works.[181] This distinction is evident, he says, in the fact that the Supreme Court refused to allow copying of expression on the

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Walker, and Winter. Judge Walker, sitting as a district judge in the recent Wright v. Warner Books, Inc., 748 F. Supp. 105 (S.D.N.Y. 1990), ruled that Margaret Walker's use of both published and unpublished works in her biography of Richard Wright constituted fair use. He used the distinction to distinguish the case from *Salinger*. *Wright*, 748 F. Supp. at 109. It should be noted that in the *Wright* opinion Judge Walker articulated an understanding of the biographer's task that is much more sympathetic than the view expressed in *Salinger* and *New Era*.

173 New Era Publications Int'l, ApS v. Henry Holt and Co., 873 F.2d 576, 592 (2d Cir. 1989) (Oakes, C.J., concurring).

174 *Id.*

175 *Id.* (quoting Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987) (brackets added in *New Era*)).

176 *Id.* (citing New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1502 (S.D.N.Y. 1988)).

177 *Id.* (citing New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. at 1502).

178 *Id.*

179 *See* New Era Publications Int'l, ApS v. Henry Holt and Co., 884 F.2d 659, 663 (2d Cir. 1989) (Newman, J., dissenting).

180 *Id.* at 662-63.

181 *Id.* at 663.

ground of newsworthiness but said it would permit brief quotations that are "necessary adequately to convey the facts."[182]

Judge Newman, in his published comments, has continued to define the issue facing the courts in terms of what is justified to report facts accurately. Writing in the *Journal of the Copyright Society*, he concludes: "[T]he precise issue of concern to biographers turns out, upon examination, to be extremely narrow: May the biographer quote more than minimal amounts of the expressive content of unpublished writings in order accurately and fairly to report factual information?"[183]

The distinction between merely adding stylistic flair to one's own text and demonstrating facts can have a certain validity. There is a real danger, however, of this distinction being applied in ways that reflect hierarchical attitudes toward authorship and that will work to the disadvantage of many author-users. Judge Leval's attempt to distinguish *New Era* from *Salinger* is illustrative of this danger. In *New Era*, he states that "[m]any of the takings of Salinger's expression were for the purpose of enlivening that text with Salinger's expressive genius. That is not the case here."[184] Judge Leval fails to appreciate that Hamilton was not merely enlivening his own prose, but was bringing Salinger to life for the reader. The biographical subject lives in the biographer's text and is, indeed, indistinguishable from it. The biographer's text is not a report *about* a biographical subject; it is an incarnation of that subject as understood from the biographer's perspective. Any distinction between text and biographical subject is, therefore, largely artificial and tends to denigrate the biographer's work. To the extent that vividness of portrait is recognized as one of the biographer's goals, the courts tend to consider it as embellishment of text and unworthy of justifying the quotation of expression.

The enlivening text/proving facts distinction, as articulated by the courts thus far, imposes a kind of legal model on biographers. Only those biographers who need to quote their subject in order to sustain a certain burden of proof are recognized as presenting adequate justification for quotation. That Hamilton was not considered to be proving anything is apparent from Judge Leval's comment: "Salinger's biographer had no need to

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182 *Id.* (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985)).

183 Newman, *supra* note 161, at 14-15.

184 New Era Publications Int'l, ApS v. Henry Holt and Co., 695 F. Supp. 1493, 1524 (S.D.N.Y. 1988).

prove that in a particular letter Salinger employed an ironic tone. The original writing was quoted to make the biography more vivid—to avoid a 'pedestrian' sentence."[185] This remark reflects a very narrow understanding of need and proof. As Judge Leval's hypotheticals illustrate, these elements are found only in situations in which the biographer is endeavoring to confute his or her subject's public image.

Even in the formulation of this issue advanced by Judge Newman, who uses the terms "reporting" or "conveying" rather than "proving" facts, the heavy emphasis on "factual information"[186] is dangerous for author-users. The *Salinger* opinion is an indication that Judge Newman's definition of facts in any given case is likely to be restrictive, allowing little room for quotation for the purpose of giving the reader a concrete sense of the personality or emotional life of a biographical subject.

The distinction between demonstrating or reporting facts and enlivening prose, as formulated by Judge Leval in his *New Era* opinion or Judge Newman in his commentary, misconceives the nature of biography and reinforces the devaluation of the genre. As already noted, the difference between the Salinger and the Hubbard biographies is superficial: the objective of Hubbard's biographer was to correct a specific public persona of the founder of Scientology, whereas Salinger's biographer was attempting to dispel the obscurity surrounding the reclusive writer's life. Both of these enterprises were fundamentally alike. They were both attempts at discovering and exposing a life, both attempts at proving an interpretation of a life. As Jacques Barzun puts it, "Every biography is something like a detective story."[187] In other words, every biographer's task is to bring to the reader's attention an aspect of a life that was previously hidden or unknown. Copyright law that limits the biographer to merely reporting facts, and allows quotation of expression only when proof in the legal sense of the word is required, will make it impossible for biographers to bring new understandings of important lives to the public. Pursuing his analogy between biography and the detective story, Barzun asks:

> [M]ust [we] simply record what we can of a man's life, shaking our head over its mystery, and letting the facts speak for them-

185 *Id.* at 1503.

186 Newman, *supra* note 161, at 15.

187 J. BARZUN, *Truth in Biography: Berlioz*, in BIOGRAPHY AS AN ART: SELECTED CRITICISM 1560-1960, at 155 (J.L. Clifford ed. 1962).

> selves? . . . The facts obviously do not speak for themselves. They remain dumb and meaningless until they are organized and interpreted. We must remember Sherlock Holmes and our detective analogy. Watson sees everything that Holmes sees, but only Holmes understands. This means using not only creative ability but standards of judgement.[188]

The enlivening text/demonstrating facts distinction tends to ignore the creative, interpretive nature of biography generally. This distinction assumes that if the biographer reports the facts to us, we will both see and understand. It also tends to assume that all biographers who are not proving facts in the legal sense are quoting expression in order to take advantage of another's expressive gifts. Thus it devalues the biographical enterprise and threatens all author-users with restrictions that misconstrue and render impossible their efforts to create new works.

In his most recent published comment, Judge Leval adopts a broader view of justifiable copying by a biographer, contrasting impermissible embellishment now with a variety of "transformative uses."[189] Arguing that "Factor One [of section 107 of the 1976 Act] is the soul of fair use,"[190] he suggests that the purpose and character of the use must be sufficiently transformative to justify copying.[191] He explains that "[t]ransformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses."[192]

There is promise in these recent observations by Judge Leval, who has shown considerable sensitivity to the needs and objectives of biographers and others who, by the nature of the genre in which they write, depend on the fair use doctrine. But even if his view of "transformative uses" were adopted by the courts, the danger that this view would be applied in ways that undervalue the author-user would not disappear. Judge Leval's own characterization of the biographer Hamilton's work is but one indication of this.

C. *The Spectre of Privacy and Moral Rights*

Recent debate has shown that the use of copyright to protect the privacy and other personal interests of original authors is by

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188 *Id.* at 158.
189 Leval, *supra* note 39, at 1111.
190 *Id.* at 1116.
191 *Id.*
192 *Id.* at 1111.

no means a practice that is universally disfavored, and this poses a threat to fair use claimants.[193] The more courts tend to take into account the privacy of copyright holders in fair use cases, the less tolerant they will be of copying, particularly in cases in which a biographer is building an interpretation of the emotional quality of his or her subject's life. Judges, as they decide such cases, need to be conscious of the fact that the more they value an original author, the more they may be tempted to use copyright law inappropriately to protect that author's privacy.

The claim of a privacy interest may also be misused. In its petition for *certiorari* in *New Era*, Holt argued that there is a difference between using copyright to protect privacy and using it to suppress unflattering information, attempting to distinguish *New Era* from *Salinger* on this basis.[194] According to Holt, New Era's motivation in bringing suit was the suppression of information,[195] but it could not make a claim based on the right of privacy because Hubbard was dead and because many of the works in issue were part of the public record.[196] It is unfortunate that Holt conceded that protecting personal privacy is a legitimate use of copyright law.[197] The difference between guarding privacy and suppressing information to sustain a false image in the public eye will not always be clear, and it should not form the basis of a legal distinction. Moreover, allowing copyright law to perform either function is equally dangerous to the interests of both author-users and the public.

Given the courts' hierarchical attitudes toward authorship,[198] there is a danger that the courts will increasingly apply what is tantamount to a moral rights philosophy to the protection of unpublished works. In what may easily become a circular process, the overvaluation of the original author will serve to legitimize protecting interests that are part of the constellation of moral rights—the interest in privacy and personality, as well as the right to total artistic control—and the concern with these rights will in turn reinforce the overvaluation of the original author. The United States' compliance with the Berne Convention and its

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193 Lloyd Weinreb, for example, argues that fair use determinations should take privacy and other personal interests into account and that fair use should not necessarily function to promote the incentive-based structure of copyright. *See* Weinreb, *supra* note 89, at 1140-41.

194 *See* Petition, *supra* note 25, at 54.

195 *Id.* at 7, 55-56.

196 *Id.* at 54-55.

197 *Id.* at 27.

198 *See supra* notes 33-42 and accompanying text.

moral rights provisions may supply the courts with added impetus to move in this direction.[199]

John Kernochan favors the adoption of a moral rights approach to unpublished works within American copyright law. In his view, the right of first publication is not only "one of the most critical aspects in the protection of the creative process,"[200] but also a fundamental right of the writer as an individual. "Making public use of an author's deliberately unpublished work," he says, "is an interference with what Warren and Brandeis called in 1890 his/her right of 'inviolate personality.' "[201] Copyright law's constitutional mission is, however, neither to protect privacy nor to give authors total artistic control. It is, rather, to increase public knowledge. This is a communal mission, not one centered merely on individual rights.[202] The courts should not lose sight of this fact when they make decisions affecting the public interest in information.

D. *The Danger of Further Hierarchical Categories of Authorship*

A final danger inherent in the courts' continued application of hierarchical thinking to copyright law is that, in addition to those hierarchies which are already in place, further hierarchies may be developed. The Second Circuit's refusal in *New Era* to acknowledge Miller's work as valuable and interesting and its unwillingness to entertain Holt's fair use claim suggest that, beyond valuing one genre over another, the courts may also create hierarchies within genres. They may, for example, consider the more scholarly form of biography to be of greater worth than the more popular. A book such as Miller's may then run the risk of being treated as nothing more than a popular exposé, written purely to exploit a commercial market. Given the Supreme Court's disap-

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199 Article 6*bis* of the Berne Convention, which the United States joined in 1989, mandates the protection of two moral rights: the right of paternity (*droit à la paternité*) and the right to respect for the work (*droit au respect de l'œuvre*). *See* C. MASOUYE, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971), at 41-44 (1978).

Although the Berne Convention does not require protection of the right of first publication or the *droit de divulgation*, its inclusion of moral rights provisions is broadly influencing American thinking.

200 Kernochan, *Protection of Unpublished Works in the United States Before and After the* Nation *Case*, 33 J. COPYRIGHT SOC'Y 322, 327 (1986).

201 *Id.* (quoting Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

202 Other writers who advocate incorporating elements of the French *droit moral* into American law recognize that the profound philosophical differences between French and American copyright law make such incorporation very difficult. Russell J. DaSilva, for example, acknowledges that *droit moral* disregards the public interest in knowledge. *See* DaSilva, *supra* note 123, at 58.

proval of applying fair use to commercial works, popular interest in the book could in fact work against it.

It is not unrealistic to think that the courts may adopt such an approach. Judge Newman, in discussing *New Era*'s potential deterrence of scholarly and journalistic works, has, in fact, identified works of "limited readership"[203] as a focus of his concern. In an era in which television docudramas based on the private lives of often reluctant subjects have proliferated, journalistic exposés are common, and biographies of people of fleeting interest are produced practically overnight, it is not unusual to view biographies about newsworthy figures as nothing more than a form of commercial exploitation. It would therefore not be surprising if, to use a first amendment concept, the courts took the position that many such works have little social value and that their authors merit little protection. Biographers may indeed find themselves in a double bind. If their subject is highly valued as an original genius, the courts will be overprotective and chary of allowing fair use of his or her expression. If, on the other hand, their subject is not a highly valued original genius, but merely a figure of some ephemeral fame or notoriety, the courts may consider the purpose of quotation to have too little merit to qualify for fair use.

VII. Conclusion

The courts need to become cognizant of the hierarchical views operative in their decisions denying fair use to authors who have quoted unpublished works. The courts' elevation of the original author as the sole producer of creative new works, their devaluation of the author-user as a mere disseminator of the original author's work, and their general lack of appreciation for those genres that depend upon being able to use overtly the language of others have all contributed to the disturbing restrictions being imposed on biographers and others by the Second Circuit. The courts' view of taking expression as a form of misappropriation of creative labor has also played an important role in creating the unfortunate legal situation in which author-users now find themselves.

The courts should also reevaluate the *Harper & Row* presumption against applying fair use to unpublished works, taking into account both the desirability of creating an incentive for au-

[203] New Era Publications Int'l, ApS v. Henry Holt and Co., 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting).

thor-users to produce new works and the role fair use can play in providing that incentive. *Harper & Row* should be confined to those cases in which the original author is actually planning the publication of his or her as yet unpublished work. It should not be applied to cases in which author-users quote or paraphrase documents such as letters and diaries—traditionally the primary sources of biography and history—when such materials are still in their raw state, that is, not collected or organized for eventual publication. There is often little public benefit to be gained by protecting the original author's economic interest in such works, while much may be lost by overprotecting the original author and discouraging the creative efforts of author-users.

As a variety of professional groups emphasized in their *amicus* briefs supporting Holt's petition for *certiorari* in *New Era*, the Second Circuit's drastic limitation of the fair use doctrine is "totally at odds with the actual practice of historians, biographers and political scientists. The canons of scholarly research require responsible biographers, historians and political scientists to draw upon and quote from unpublished primary source materials . . . ."[204] The *amicus* brief of PEN American Center and the Authors Guild calls attention to recent Pulitzer Prize-winning works of biography and history which make use of unpublished expression and which "could not have been written in the same way had the decision below been in force at an earlier time."[205] These works include Taylor Branch's *Parting the Waters*,[206] which made use of the papers of Martin Luther King and Ralph Abernathy, and W.A. Swanberg's *Luce and His Empire*,[207] which used those of Henry Luce.

Biographers and historians cannot be expected to present their readers with new information and ideas about important lives and events without documenting their theories and quoting the unpublished record by way of illustration and proof. The same reasoning applies to literary scholars, who cannot offer the public valuable assessments of the style and vision of poets, novelists, and playwrights without quoting their words, and sometimes—particularly when the scholar is tracing an author's development as a writer—those words will be unpublished. It is essential, therefore, that the courts acknowledge that author-users who write biography, history, literary criticism, and analy-

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204 Brief of American Council of Learned Societies, *supra* note 27, at 7-8.
205 Brief of PEN American Center, *supra* note 27, at 19.
206 T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988).
207 W.A. SWANBERG, LUCE AND HIS EMPIRE (1972).

ses of contemporary events make highly valuable uses of original authors' unpublished expression. If copyright law is to continue to promote the development of knowledge and creativity as its primary goal, the fair use doctrine must remain flexible enough to make room for these valuable uses.