

Guardian of the Public Interest: An Alternative Application of the Fair Use Doctrine in *Salinger v. Random House, Inc.*

Catherine A. Diviney

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COMMENTS

GUARDIAN OF THE PUBLIC INTEREST: AN ALTERNATIVE APPLICATION OF THE FAIR USE DOCTRINE IN *SALINGER* *v. RANDOM HOUSE, INC.*

The Constitution empowers Congress to enact copyright laws¹ in order to provide individuals with an economic incentive to further the development of new and creative ideas.² The economic in-

¹ U.S. CONST. art. I, § 8, cl. 8. The Constitution provides for copyright protection in order "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." *Id.*

The first copyright laws were developed in England, as a result of an attempt by the Crown to control the newly invented printing press. *See* B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3 (1967). "Control" was given to the stationer in the form of an exclusive right to print certain books for an unlimited period of time. *See* A. LATMAN, *THE COPYRIGHT LAW* 2-3 (5th ed. 1979). In 1710, the Statute of Anne was enacted in an effort to limit the duration of the period of exclusivity, *see* B. KAPLAN, *supra*, at 7, as well as recognize the rights of authors in their works. *See* A. LATMAN, *supra*, at 3. This statute served as the basis of subsequent copyright legislation enacted in England and America. *See id.*

America's first copyright statute was passed in 1790 "for the encouragement of learning, by securing the copies of maps, charts and books to the authors . . . during the times therein mentioned." Act of May 31, 1790, ch. 15, 1 Stat. 124. After numerous amendments to the copyright laws, a comprehensive revision was undertaken which resulted in the passage of the Copyright Act of 1909. *See* Goldstein v. California, 412 U.S. 546, 562-63 n.17 (1973). The present copyright statute is codified at Title 17 of the United States Code. *See* 17 U.S.C. §§ 101-810 (1982). For a discussion of the history of copyright laws, *see* generally H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* §§ 3-5, at 16-37 (1944) (outlining history of English and American statutes); L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 3-19 (1968) (overview of emergence of copyright); F. SKONE JAMES & E. SKONE JAMES, *COPINGER AND SKONE JAMES ON THE LAW OF COPYRIGHT* 5-15 (9th ed. 1958) (historical view of copyright laws); Brittin, *Constitutional Fair Use*, 28 *COPYRIGHT L. SYMP. (ASCAP)* 141, 146-50 (1982) (discussing history and purpose of copyrights).

² *See* MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); H.R. REP. NO. 2222, 60th Cong., 2d Sess. 4-7 (1909). Early American copyright development recognized several purposes underlying the protection afforded an author's work. *See* L. PATTERSON, *supra* note 1, at 180-202. Congress, in amending and consolidating prior copyright legislation, has urged that:

centive given to an author is the exclusive right to publish and distribute his writings.³ This right has been somewhat limited by a concern for the public dissemination of new ideas.⁴ The fair use

A copyright is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909).

In construing copyright legislation, the Supreme Court has asserted that a copyright is "the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("ultimate aim [in enacting copyright laws] is . . . to stimulate artistic creativity for the general public good"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (rationale underlying copyright lies in benefits derived by the public); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (goal of copyright laws is to provide incentives for creative work). See also 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-31 to -32.2 (1986) (discussing Supreme Court interpretations of purpose of copyright legislation). But see *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1498-99 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). "We agree that the Constitution allows Congress to create copyright laws only if they benefit society as a whole rather than authors alone. . . . But this does not mean that every copyright holder *must* offer benefits to society, for the copyright is an incentive rather than a command." *Id.* (emphasis added).

³ 17 U.S.C. § 106 (1982). Section 106 of the Copyright Act provides that:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public

. . . ;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

- (5) . . . to display the copyrighted work publicly.

Id. Other provisions of the Act provide the copyright owner with a remedy for infringement of these "exclusive rights." See 17 U.S.C. §§ 501-10 (1982).

The Supreme Court has indicated that rewarding the author with exclusive rights invites him to release his "creative genius" to the public. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). The Second Circuit has reinforced this point by acknowledging that the aim of copyright laws is to stimulate artistic creativity for the public by compensating the artist or author with financial motivation. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981). See also Chafee, *Reflections on the Law of Copyright* (pt. 1), 45 COLUM. L. REV. 503, 508 (1945) (due to the "agreeable aimlessness" of authors, the economic benefit of a copyright to their family will "blast" authors to work). Cf. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (AS-CAP) 43, 79 (1971) (public better served by strong copyright laws).

⁴ See *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); see also 17 U.S.C. § 106 (1982). While section 106 provides an author with certain exclusive rights in his works, "[t]he monopoly privileges that

doctrine⁵ attempts to strike a balance between the public's interest

Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Congress has imposed restrictions on these rights in order to balance the rights of an author in his work against the rights of the public to dissemination of that work. *See* 17 U.S.C. §§ 107-18 (1982).

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5674 [hereinafter HOUSE REPORT].

Lord Mansfield's eloquent statement made in *Sayre v. Moore* almost 200 years ago appropriately describes the balance that must be achieved by the copyright laws.

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Aiken, 422 U.S. at 156 n.6 (quoting *Cary v. Longman*, 1 East * 358, 362 n.(b), 102 Eng. Rep. 138, 140 n.(b) (1801)). *See also* *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.) (sometimes copyrighter's financial interest must be subrogated to public good), *cert. denied*, 379 U.S. 822 (1964).

⁵ Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541, 2546 (1976) (codified at 17 U.S.C. § 107 (1982)). The fair use statute reads:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. This section, along with the majority of the Copyright Act of 1976, became effective on January 1, 1978. *See* Pub. L. No. 94-553, tit. I, § 102, 90 Stat. 2541, 2598 (1976). Section 107 represents the first statutory codification of the common-law fair use doctrine. *See* HOUSE REPORT, *supra* note 4, at 65, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678. However, these four factors are not the exclusive criteria upon which a fair use determination is to be made. As a result, the legislative intent that the doctrine be flexible in its application is achieved. *See id.* at 65-66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678-79.

Indeed, since 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

and the copyright holder's interest by permitting restricted use of protected works without compensation to the author when the public's interest in the circulation of new ideas outweighs the creator's financial interest.⁶ However, public use of unpublished works denies an author his most powerful economic benefit—the right of first publication.⁷ Recently, in *Salinger v. Random House, Inc.*,⁸

own facts. . . . [T]he courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities.

Id. The legislative materials as well as judicial interpretations indicate that a case-by-case approach is favored when applying the fair use doctrine. *Id.* at 66, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680. See also *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977) (fair use cannot be determined by "arbitrary rules or fixed criteria"), *cert. denied*, 434 U.S. 1013 (1978); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.) (no principal can be set in copyright cases; use ad hoc method), *cert. denied*, 429 U.S. 980 (1976). Commentators have also advocated the use of alternative criteria. See generally Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979) (examines first amendment implications instead of fair use); Goldwag, *Copyright Infringement and the First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1, 8-14 (1983) (first amendment's effect upon application of fair use doctrine); Comment, *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) (public interest balancing analysis); Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984) (necessity of the use test more appropriate than public interest).

For a comprehensive historical account of both English and American common law fair use development, see J. LAWRENCE & B. TIMBERG, FAIR USE AND FREE INQUIRY 9-12 (1980) (brief overview of 1976 Act fair use doctrine); W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT 6-64 (1985).

⁶ See H. BALL, *supra* note 1, at 260. "Fair use may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." *Id.* (footnote omitted). The constitutional policies of promoting science and useful arts has made the creator's consent to reasonable use of his copyrighted works an implied prerequisite. See *id.* See also *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) (fair use permits avoidance of rigid application of copyright laws which would stifle creativity it is intended to protect); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977) (fair use offers means of balancing interest of public and copyright holder), *cert. denied*, 434 U.S. 1013 (1978); *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (same), *cert. denied*, 434 U.S. 1014 (1978).

⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985). "Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works." *Id.* (emphasis added) (footnote omitted). "First publication is inherently different from other § 106 rights in that only one person can be the first publisher . . ." *Id.* at 553. Therefore, because the potential damage to the author is substantial, the balance of equities in evaluating a claim of fair use would shift. *Id.* The Act of 1976 "recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works." *Id.* at 552. The *Harper & Row* Court observed that this right of first publication is "expressly made subject to the fair use provision of § 107 . . ." *Id.* Professor Nimmer has

the Court of Appeals for the Second Circuit held that a biographer's use of an author's unpublished letters was not fair use.⁹

In *Salinger*, Ian Hamilton, a prominent literary figure,¹⁰ prepared a biography of J.D. Salinger¹¹ without the assistance or cooperation of the reclusive Salinger.¹² In his first draft, Hamilton quoted liberally from unpublished letters written by Salinger¹³ which had been uncovered in the libraries of Harvard, Princeton and the University of Texas.¹⁴ Upon learning from this draft that his letters had been donated to these libraries, Salinger registered his copyright and protested Hamilton's use of these letters.¹⁵ Hamilton paraphrased most of the objectional material in his second draft, and furnished a copy to Salinger.¹⁶ Thereafter, Salinger sought a preliminary injunction against publication of the revised biography on the grounds of copyright infringement.¹⁷ After granting a temporary restraining order, the District Court for the Southern District of New York denied the preliminary injunction¹⁸ on the grounds that Hamilton had made fair use of the limited amount of protected material he had incorporated into the biography.¹⁹ However, a limited stay against publication of the book was granted pending an expedited appeal.²⁰

On appeal, the Second Circuit reversed, granting Salinger the

stated that "a categorical presumption against pre-publication fair use cannot harmonize with the statutory scheme." 3 M. NIMMER, *supra* note 2, § 13.05[A], at 13-75 n.28.1e (1986).

⁹ 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987).

¹⁰ *Id.* at 100.

¹¹ *Id.* at 92. Hamilton is a respected biographer of literary figures and is also a literary critic for *The London Sunday Times*. *See id.*

¹² *Id.* The biography is entitled *J.D. Salinger: A Writing Life*. *Id.*

¹³ *Id.* Salinger has maintained reclusive privacy for over thirty years. *See Salinger v. Random House, Inc.*, 650 F. Supp. 413, 416 (S.D.N.Y. 1986).

¹⁴ *Salinger*, 650 F. Supp. at 417, 426.

¹⁵ *See Salinger*, 811 F.2d at 93. According to the district court, Hamilton "had little success until his discovery" of the letters. *See Salinger*, 650 F. Supp. at 416. Most of the letters were written to Salinger's friends, including Judge Learned Hand and Ernest Hemingway. *Salinger*, 811 F.2d at 92-93. Before reviewing the letters, Hamilton executed form agreements with the libraries limiting his use of the letters. *Id.* at 93.

¹⁶ *Salinger*, 811 F.2d at 93. He registered the copyright to seventy-nine of his unpublished letters. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 94.

¹⁹ *Id.* at 92.

²⁰ *Salinger*, 650 F. Supp. at 426. The court reasoned that Salinger would suffer "minimal" harm as a result of the use of his unpublished letters since the amount of copyright protected material used by Hamilton was insubstantial. *See id.* at 423.

²¹ *Salinger*, 811 F.2d at 94.

preliminary injunction.²¹ Writing for the court, Judge Newman noted that the author of unpublished letters is entitled to a copyright in those letters.²² Notwithstanding protection under the Copyright Act, unpublished letters are subject to the defense of fair use²³ yet, according to the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,²⁴ fair use is to be narrowly construed when the copyrighted work is unpublished.²⁵ Pursuant to the Supreme Court's approach in *Harper & Row*, the *Salinger* court considered the four statutory factors comprising the fair use defense. Although Hamilton's use of the copyrighted letters to "enrich his scholarly biography" was appropriate,²⁶ the *Salinger* court stated that in light of the unpublished status of the letters, such use is unlikely to be deemed "fair."²⁷ Additionally, the amount of quoted and closely paraphrased protected "expressive content" copied in the second draft was considered a "very substantial appropriation."²⁸ Finally, the court found that the biography did not pre-empt the market for the letters, but its publication would impair their economic potential to some extent.²⁹ While

²¹ *Id.* at 100.

²² *Id.* at 94.

²³ *Id.* at 95.

²⁴ 471 U.S. 539 (1985). In *Harper & Row*, the Supreme Court denied a finding of fair use when the defendant, Nation Enterprises, used President Ford's unpublished memoirs without the consent of plaintiff, Harper & Row, owner of the copyright, in a "news" story one week before Harper & Row had scheduled publication. The Court placed much emphasis on the unpublished nature of the memoirs. *Id.* at 564.

²⁵ See *Salinger*, 811 F.2d at 95-97. The district court had merely established the fact that unpublished works were subject to fair use. *Salinger*, 650 F. Supp. at 421-22.

²⁶ *Salinger*, 811 F.2d at 96.

²⁷ *Id.* The court relied exclusively on the *Harper & Row* decision. See *supra* note 24.

²⁸ *Id.* at 96, 98. The district court, on the other hand, found the use "minimal and insubstantial." See *Salinger*, 650 F. Supp. at 423. The district court's finding was based upon the fact that "[a]lthough a large amount of information [was] taken from the letters, and [was] of vital importance to the book, the information is not protected by the copyright." *Id.* (emphasis in original). The district court found only thirty instances where "protected material" was used and they were subsequently held to be "fair use." *Id.* The district court applied the idea/expression dichotomy of copyright law, which establishes that only the expression of the author and *not* the idea can be copyrighted, and found that very little of the material used by Hamilton was in fact protected by Salinger's copyright. See *id.* at 418. Moreover, most of the information used from the unpublished letters was considered not to be expression and thus unprotected. In contrast, the Second Circuit stated, even applying the idea/expression dichotomy, that the use was substantial because both quotes and close paraphrasing constitute infringement. *Salinger*, 811 F.2d at 98.

²⁹ See *Salinger*, 811 F.2d at 99. In contrast, because the district court found the use of protected material to be insignificant, it held that the use by Hamilton would have no significant impact on the market. *Salinger*, 650 F. Supp. at 425.

Hamilton would be permitted to report the facts contained in the letters thereby preventing significant interference with the public's interest in Salinger's life, Salinger had the right to protect the "expression" contained in his letters.³⁰ The court held that the unpublished nature of the letters, the amount of protected material copied and the effect on the "potential market" precluded a finding of fair use notwithstanding the acceptable purpose of the use.³¹

The Second Circuit's denial of fair use in *Salinger* effectively puts unpublished copyrighted works beyond the reach of the fair use doctrine. Through unyielding adherence to judicially created presumptions and without sufficiently pliable application of the factors of fair use, it is submitted that the Second Circuit circumvented the purpose of copyright protection³² by prohibiting the public dissemination of Hamilton's scholarly biography. This Comment will evaluate each of the factors of fair use and will suggest alternative rationales that may be utilized as a more flexible approach in determining fair use.

THE FAIR USE FACTORS ANALYZED

When faced with a fair use defense, the court is not without guidance, as it is statutorily instructed to consider the following factors: the purpose of the use; the unpublished nature of the work; the amount and substantiality of the portion used and the effect of publication on the market.³³ Moreover, the court must attempt to categorize the use as one of ideas or expression because under the idea/expression dichotomy, only the latter is within the ambit of copyright protection.³⁴

Purpose of Use

The Second Circuit held that Hamilton's "purpose of use" was clearly within the ambit of fair use.³⁵ However, contrary to the dis-

³⁰ *Salinger*, 811 F.2d at 100.

³¹ *Id.*

³² See *supra* note 2 and accompanying text.

³³ See *supra* note 5 for a detailed discussion of these factors.

³⁴ See *supra* note 28 and *infra* note 53 and accompanying text.

³⁵ *Salinger*, 811 F.2d at 96. See 17 U.S.C. § 107 (1982). "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." *Id.* The legislative history supports this finding. "The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of

strict court's opinion, this use did not warrant "special consideration."³⁶ It is submitted that special consideration was warranted, not because Hamilton was caught in the "biographer's dilemma,"³⁷ but because the biography is about a writer and as such, the mode of expression of the subject, J.D. Salinger, can be more relevant than the actual idea conveyed therein.³⁸ Notwithstanding

activities the courts might regard as fair use . . . : ' . . . quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations' " HOUSE REPORT, *supra* note 4, at 65, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5678. See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) (scholar deprived of use harms society as whole). The Second Circuit adopted the concept that the commercial aspirations of the user do not diminish Hamilton's admirable purpose of use. *Salinger*, 811 F.2d at 96.

³⁶ *Salinger*, 811 F.2d at 97.

³⁷ *Cf. id.* at 96; *Salinger*, 650 F. Supp. at 424. The dilemma is explained as follows: "[t]o 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." *Salinger*, 650 F. Supp. at 424. The Second Circuit disagreed with the notion that a biographer has a right to his subject's "accuracy" or "vividness." *Salinger*, 811 F.2d at 96. "Indeed, 'vividness of description' is precisely an attribute of the author's expression that he is entitled to protect." *Id.* See *supra* note 28 for a discussion of the idea/expression dichotomy. See also *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("protection is given only to the expression of the idea"); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.) ("the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization."), *cert. denied*, 429 U.S. 980 (1976); *Werlin v. Reader's Digest Ass'n*, 528 F. Supp. 451, 462 (S.D.N.Y. 1981) (test is whether similarity is to ideas or manner of expression). See generally *Denicola*, *supra* note 5, at 292 (expression/idea dichotomy is intended to protect first amendment rights).

³⁸ See *Meeropol v. Nizer*, 417 F. Supp. 1201, 1212 (S.D.N.Y. 1976), *rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

It is not sufficient . . . for the defendants who wished to describe [the subjects'] thoughts and feelings to resort to "the obvious device of not quoting them directly." To do so would have prevented them from fully and accurately conveying [the subjects'] own expression, which in this situation may be *essential* to an accurate rendition of the relevant thoughts themselves. Furthermore, [the subjects'] expression itself may be a relevant part of the history relating to the case.

Id. (emphasis added) (footnote omitted).

One commentator has suggested that "[f]ree speech considerations should operate to permit the use of expression only to the extent necessary to allow the users to make their own contributions to the marketplace of ideas." See *Denicola*, *supra* note 5, at 309 (emphasis in original) (discussing *Meeropol*, 417 F. Supp. at 1212). It is submitted that Salinger's "expression" is necessary in order to do a biography about him presuming, however, the use of expression is kept to a minimum. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (the use should be deemed fair owing to its necessity). *Cf. Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (fair use is intended to distinguish "a true scholar and a chisler who infringes a work for personal profit") (quoting *Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1706 (1966) (statement of John Schulman)).

Hamilton's personal opinion,³⁹ a biographer of a writer cannot use the writer's expression to avoid penning a "pedestrian sentence" himself.⁴⁰ However, it is suggested that a strict application of the idea/expression dichotomy in *Salinger* is neither reasonable nor in furtherance of the ultimate goals of copyright law.⁴¹ In *Time Inc. v. Bernard Geis Associates*,⁴² the District Court for the Southern District of New York held the intended flexibility of the fair use doctrine permitted a finding of fair use when the entire "expressive content" of particular frames from the film of Kennedy's assassination were reproduced for historical and news purposes, even under protest of the copyright owner.⁴³ Therefore, it is not without precedent to suggest some "special consideration" for Hamilton.

The Nature of the Copyrighted Work

The doctrine of fair use is intended to "adapt . . . to particular situations on a case-by-case basis"⁴⁴ employing a "sensitive balancing of interests"⁴⁵ which "cannot be determined by resort to any . . . fixed criteria."⁴⁶ It is submitted that the court's myopic allegiance to the judicially created presumption of a "more limited"

³⁹ See *Salinger*, 811 F.2d at 96. When asked why he quoted a particular phrase rather than describing what Salinger had done, Hamilton responded in a deposition "[t]hat would make a pedestrian sentence I didn't wish to put my name to." *Id.*

⁴⁰ *Id.*

⁴¹ See *supra* note 2. By enjoining the dissemination of Hamilton's biography, it is submitted that the "progress of . . . useful Arts," U.S. CONST. art. I, § 8, cl. 8, was thwarted.

⁴² 293 F. Supp. 130 (S.D.N.Y. 1968).

⁴³ See *id.* at 144-46. In *Bernard Geis*, Thompson, a writer, used sketches of the "Zapruder film," the "most important photographic evidence concerning the fatal shots," for a book he wrote in which he offered an alternative theory of President Kennedy's assassination. *Id.* at 131-32. To illustrate his theory, Thompson needed the film to which *Time* owned the copyright and was granted permission by the court to use it because there was a "public interest in having the fullest information available." *Id.* at 135, 146. See also Denicola, *supra* note 5, at 300-10 (discussing *Time Inc. v. Bernard Geis Assocs.*).

⁴⁴ HOUSE REPORT, *supra* note 4, at 66, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5680.

⁴⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984).

⁴⁶ *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sales, or diminish the profits, or supersede the objects, of the original work.

Patry, *supra* note 5, at 20 (quoting *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)).

application of the fair use doctrine to unpublished works⁴⁷ was unfaithful to the rationale of fair use.⁴⁸

Absent this presumption, the facts of *Salinger* would suggest a less favorable finding for Salinger with respect to this factor. The letters, although not technically published by Salinger, were on public display and a reference to the Princeton letters had been published in a bibliography.⁴⁹ Consequently, the classic reason for limiting pre-publication use, preserving the original author's right of first publication, is not entirely applicable.⁵⁰ Nor does Hamil-

⁴⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 554-55 (1985). "Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use." *Id.* at 555.

⁴⁸ See *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). "The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Id.*

⁴⁹ *Salinger*, 650 F. Supp. at 416. The letters were donated by their respective recipients or their estates to the libraries. *Id.* In 1984, Garland Press, Inc. had printed a bibliography of Salinger materials, edited by Jack Sublette, which used the letters located at Princeton. *Id.* Salinger was unaware of this bibliography. *Id.* Whether the bibliography would be considered a publication is arguable. See 17 U.S.C. § 101 (1982). Section 101 states in pertinent part:

"Publication" is the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies . . . to a group of persons for purposes of further distribution, . . . or public display, constitutes publication. A public performance or display of work does not of itself constitute publication.

Id. See also *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 464, 279 N.Y.S.2d 51, 55 (Sup. Ct. Spec. T. N.Y. County) (no publication when literary work exhibited for limited purpose), *aff'd*, 29 App. Div. 2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). Compare *Salinger*, 811 F.2d at 97 (letters publicly displayed) with *Harper & Row*, 471 U.S. at 555 (exclusivity of memoirs in soon-to-be published state constituted unpublished status).

⁵⁰ See *Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 552-55 (1985) ("balance of inquiries" shifts to author only when material is unpublished). The *Harper & Row* Court relied on the legislative history of the 1976 Act and stated that: "[t]he applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner." *Id.* at 553 (quoting S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975)).

But see *Harper & Row*, 471 U.S. at 594-98 (Brennan, J., dissenting) (criticizing majority's reliance on legislative history when face of statute indicates application of section 106 is subject to section 107); 3 M. NIMMER, *supra* note 2, § 13.05[A][2], at 13-75 (1987) ("[t]he scope of the fair use doctrine is considerably narrower with respect to unpublished works which are held confidential by their copyright owners") (citing *Association of Am. Medical Colleges v. Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983), *aff'd per curiam*, 734 F.2d 3 (3d Cir. 1984)). It is submitted, however, that the facts of *Salinger* do not support the contention that works which the author desires to keep from the public should be subject to more than protection of first publication rights. The letters in the present case were written and mailed by Salinger and the recipients donated them to the various universities. They were

ton's use sufficiently thwart the economic objective underlying protection of the author's right of first publication.⁵¹ Finally, "[i]t has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity."⁵² It is suggested that through reliance on this presumption the Second Circuit inadequately accounted for the particular facts in this case which tend to negate the usually detrimental effects of pre-publication use.

Amount and Substantiality of the Portion Used

Copyright laws protect only the author's "expression" and not his ideas.⁵³ It is imperative when evaluating the amount and substantiality of the portion used, to first determine the nature of the alleged infringement.⁵⁴ The difficulty of this task is evidenced by the polar results reached by the two courts; the district court found "insignificant" appropriation while the Second Circuit found a "very substantial appropriation."⁵⁵ Without attempting to recon-

on public display and available to users of the research facilities. See Note, *Personal Letters: In Need of a Law of their Own*, 44 IOWA L. REV. 705, 705-12 (1959) (discussing unique needs of letters in copyright and privacy areas).

⁵¹ See *Harper & Row*, 471 U.S. at 542 (unpublished nature of manuscript worth \$25,000 to *Time*). In the present case, it is submitted, there is no tangible negative economic impact on Salinger as existed in *Harper & Row*.

⁵² See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, J., concurring), *cert. denied*, 385 U.S. 1009 (1967). In *Rosemont*, Howard Hughes sought to prevent a biographer's use of articles on his life; the court upheld the biographer's right to use them. *Id.* at 304. It has been suggested that the copyright owner's desire to suppress information solely to preserve anonymity can be considered in a fair use defense. See *id.* at 311 (Lumbard, J., concurring); *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). See generally Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1632-34 (1982) (anti-dissemination motives and fair use). It is submitted that Salinger, a recluse, had a similar motive to that of Hughes and that the court erroneously failed to consider this motive in its decision.

⁵³ 17 U.S.C. § 102(b) (1982). Section 102(b) states that: "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* See HOUSE REPORT, *supra* note 4, at 56, 57, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 5670. See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (theme of play not copyrightable because idea); 1 M. NIMMER, *supra* note 2, § 1.10[B][2], at 1-72 to -74.1 (1987) (discussion of idea/expression dichotomy).

⁵⁴ *Salinger*, 650 F. Supp. at 418.

⁵⁵ Compare *Salinger*, 650 F. Supp. at 423 (use of less than 2% of copyrighted protected material in biography is considered insignificant) with *Salinger*, 811 F.2d at 97-98 (utilization of one-third of 17 letters and at least 10% of 42 letters protected by copyright is very

cile these divergent interpretations, it is submitted that the historical value of the Hamilton biography should have tempered the weight afforded this factor by the Second Circuit.

The significant public interest in historical and biographical works traditionally supersedes the economic interest of the copyright owner.⁵⁶ Thus, historical works, which are broadly defined in this context,⁵⁷ are subject to less copyright protection permitting more extensive "appropriate" use.⁵⁸ In *Meeropol v. Nizer*,⁵⁹ the

substantial appropriation). "[T]he determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations." 3 M. NIMMER, *supra* note 2, § 13.03[A], at 13-20 (1987) (emphasis in original). See also *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("test for infringement of a copyright is of necessity vague"). Other examples of court determinations of substantiality of infringement abound. See, e.g., *Harper & Row*, 471 U.S. at 564-65 (actual amount insubstantial but was "heart of the book"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (fair use found even though entire work copied on videocassette recorder); *Werlin v. Reader's Digest Ass'n*, 528 F. Supp. 451, 462 (S.D.N.Y. 1981) (literal duplication was de minimus, similarity substantial, but no infringement); *Martin Luther King Jr. Center v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981) (court outlines number of sentences which constituted substantial quoting), *rev'd on other grounds*, 694 F.2d 674 (11th Cir. 1983).

⁵⁶ See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). The narrowness of protection for copyrighted works of historical importance is essential for the furtherance of historical knowledge. *Id.* "[A]bsent wholesale usurpation of another's expression, claims of copyright infringement where works of history are at issue are rarely successful." *Id.*

Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works, . . . research and occasionally to quote directly from such works. This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution.

Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citation omitted). See also *Patry, supra* note 5, at 65 (biographical and historical research generally not available for copyright). But see *Hill, Copyright Protection for Historical Research: A Defense of the Minority View*, 31 COPYRIGHT L. SYMP. (ASCAP) 14 (1984) (need for re-evaluation of prevailing view of how historical research is protected).

⁵⁷ *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). "[T]he definition of an historical work for the purpose of the fair use doctrine is very broad one." *Id. Cf. Rosemont*, 366 F.2d at 308 (worthiness of biographies in historical studies discussed).

⁵⁸ See, e.g., *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152 (9th Cir. 1986) (scholarly use presumptively fair; commercial use presumptively unfair); *Martin Luther King Jr. Center v. American Heritage Prods., Inc.*, 508 F. Supp. 854, 861 (N.D. Ga. 1981) (fair use more readily found where use is for educational, historical or scientific purposes), *rev'd on other grounds*, 694 F.2d 674 (11th Cir. 1983); *Gardner v. Nizer*, 391 F. Supp. 940, 943 (S.D.N.Y. 1975) ("the copying must be even more substantial to constitute infringement when historical works are involved").

court suggested that the quoting of "expression" was permissible because "[the] expression itself may be a relevant part of the history."⁶⁰ While most commentators and courts would not go this far,⁶¹ it is suggested that in light of the historical value of the *Salinger* biography, a more liberal interpretation of "protected" and "unprotected" material was appropriate.

Effect on the Market

The "effect on the market" has been called the "most important" element of fair use because copyright protection is based upon the theory that by providing the author with an economic incentive through copyright protection, he will continue to produce for the public's benefit.⁶² Consequently, if the author is economically injured by an infringement, the incentive to produce is presumably rendered ineffectual.⁶³ The injury does not have to be actual; a potential harm capable of ruining an author's "opportunity" for an economic benefit is sufficient.⁶⁴ The *Salinger* court stated that it was unlikely that the biography would displace the market

⁵⁹ 417 F. Supp. 1201 (S.D.N.Y. 1976).

⁶⁰ *Id.* at 1212.

⁶¹ See *Salinger*, 811 F.2d at 100 (expression is protected); *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985) (fair use factors not even applied to use of unpublished letters); *Denicola*, *supra* note 5, at 309 (suggests first amendment criteria rather than distorting "fair use" in *Meeropol*).

⁶² See *Harper & Row*, 471 U.S. at 566 ("[t]his last factor is undoubtedly the single most important element of fair use"). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . ." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 426 (1984) (copying is "fair use 'because there is no accompanying reduction in the market for plaintiff's original work.'"); *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (must balance harm to author against harm to public); *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (if effect on market is minimal greater use is privileged), *cert. denied*, 434 U.S. 1013 (1978).

⁶³ See *Sobel*, *supra* note 3, at 78.

If every volume that was in the public interest could be pirated away by a competing publisher, publishers would soon stop publishing books that serviced the public interest. Authors, who usually rely on royalties for payment, would stop writing anything that might be in the public interest and therefore be ineligible for copyright protection.

Id.

⁶⁴ *Salinger*, 811 F.2d at 99 (some market impairment seems likely); see, e.g., *Sony*, 464 U.S. at 450-51 (examines effect on potential market and prospect of "some meaningful likelihood of future harm."); *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (looks to potential markets, not fact that program is not actively marketed), *cert. denied*, 471 U.S. 1004 (1985).

for Salinger's letters and that few potential purchasers would be dissuaded by its publication.⁶⁵ Nevertheless, the court held this factor "slightly" in Salinger's favor.⁶⁶ The effect on the market in this instance would be negligible, if not positive.⁶⁷ Moreover, most authors do not write letters to their friends with an "economic benefit" in mind and this reality should have been considered by the court when evaluating the fair use factor.

CONCLUSION

The injunction against Hamilton's biography should have been lifted because the potential harm to Salinger from Hamilton's use was slight in comparison to the harm the injunction imposed on the public. The intentional flexibility of the fair use doctrine was clearly in conflict with the court's reliance on the presumption of "more limited" application of fair use to unpublished work. The letters were neither confidentially held nor more valuable because of their exclusivity. When a biographical work of historical value is involved, a more lenient standard of "substantial appropriation" should be employed. Finally, when the facts clearly indicate that the effect on the author's market would be minimal and the public need is great, the biographer should be deemed to have made "fair use" of the material.

Catherine A. Diviney

⁶⁵ See *Salinger*, 811 F.2d at 99.

⁶⁶ *Id.*

⁶⁷ See Bawer, *Salinger's Arrested Development*, THE NEW CRITERION, Sept. 1986, at 34. "[I]t seems likely that Ian Hamilton's forthcoming para-biography, *J.D. Salinger: A Writing Life*, will generate an enormous amount of interest. I call it a 'para-biography' because . . . Mr. Hamilton . . . has simply been unable to gather enough material to produce a full-fledged biography of Salinger." *Id.* at 34-35.

But it should be recalled, in the middle of all the lawyering, that the dispute is about literature. And the literary significance of the present dispute is not large . . . Hamilton's book, some 200 pages long, is not a weighty one. It does have a wryness that is worthy of its subject, and it makes the most of its scarce source material . . . still, by and large the writer's elusiveness remains undiminished by this book. His retreat from the world has not been denied him.

Delbanco, *Holden Caulfield Goes to Law School*, THE NEW REPUBLIC, Mar. 9, 1987, at 27-28.