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INTRODUCTION

On November 21, 1991, the United States Court of Appeals for the Second Circuit—in Wright v. Warner Books, Inc.—affirmed a district court decision that a biographer's "sparing use" of excerpts from her subject's unpublished letters and journals did not constitute copyright infringement under the fair use doctrine. The book in question was a biography of Richard Wright—a prominent African-American author who died in 1960—entitled Richard Wright: Daemonic Genius. Ellen Wright, Richard Wright's widow and the owner of the copyrights in his works, sued the author Margaret Walker and the publisher Warner Books for copyright infringement. The defendants responded by claiming fair use and the courts agreed, holding that the author's use of Richard Wright's works in her book was "fair."

This decision represents the culmination of several years of controversy in the Second Circuit regarding the application of the fair use defense to unpublished works. In Salinger v. Random

2. Id. at 734.
3. Id.
4. Richard Wright's two best-known works are Native Son and Black Boy. Id. See MARGARET WALKER, RICHARD WRIGTH: DAEMONIC GENIUS 382-84 (1988), for a complete bibliography of Richard Wright's works.
5. Wright, 953 F.2d at 734.
6. Id.
7. Id.
House, Inc.\textsuperscript{9} and New Era Publications International v. Henry Holt & Co. ("New Era I"),\textsuperscript{10} the Second Circuit interpreted the Supreme Court's decision in Harper & Row, Publishers, Inc. v. Nation Enterprises\textsuperscript{11} to create a very strong presumption against the fair use of unpublished materials by authors. Many publishers believed that a virtual \textit{per se} rule had been erected against the fair use of unpublished works (particularly unpublished letters), making it almost impossible for an author who quoted even modest amounts from unpublished sources to defend himself against a charge of infringement by claiming fair use.\textsuperscript{12} Since biographers and historians commonly make extensive use of unpublished documents, many people feared that these decisions would have a "chilling" effect on authors, discouraging them from undertaking

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\item 9. 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987).
\item 10. 873 F.2d 576 (2d Cir.), \textit{reh'g} denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).
\item 12. David Goldberg \& Robert Bernstein, \textit{A Balanced View of Fair Use}, N.Y. L.J., Jan. 17, 1992, at 3 (publishing industry believed that a "virtual \textit{per se} rule" existed against the fair use of unpublished works in the Second Circuit). \textit{See also} Bilder, \textit{supra} note 8, at 327.
new works that relied on unpublished materials.\textsuperscript{13}

This comment argues that \textit{Wright} represents a significant step forward in the process of reaching a reasonable compromise between the needs of some authors to use unpublished manuscripts and the legitimate rights of other authors to protect their property. By holding that there is no \textit{per se} rule barring the fair use of unpublished works, the Second Circuit has returned to the idea that fair use is a flexible "case-by-case" doctrine. However, because the amount of allegedly infringing material in \textit{Wright} was so minimal, in both quantitative and qualitative terms, and because the court distinguished \textit{Salinger} and \textit{New Era I} partly on this basis, even authors who quoted modest amounts from unpublished sources might still find themselves vulnerable to threats of litigation.

Part I of this comment gives a brief history of the fair use doctrine. Part II discusses the way that previous courts have treated unpublished works under the fair use doctrine both before and after the passage of the 1976 Copyright Act. Part III describes the Second Circuit's decision in \textit{Wright v. Warner}. Part IV analyzes the strengths and weaknesses of the decision as well as its likely impact on future litigation in this area, and Part V reviews the newly enacted amendment to the Copyright Act regarding the fair use of unpublished works. This comment concludes that this new legislation should resolve the potential problems left open by \textit{Wright}, leaving future authors free to make reasonable use of unpublished sources.

I. THE ORIGINS OF FAIR USE

Fair use is traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a

\textsuperscript{13} Pepe, supra note 8, at 444-45; Landes, supra note 8, at 80. \textit{See also} David A. Kaplan, \textit{The End of History?}, \textit{Newsweek}, Dec. 25, 1989, at 80; R.Z. Sheppard, \textit{Foul Weather for Fair Use}, \textit{Time}, April 30, 1990, at 86. \textit{But see} Zissu, \textit{Salinger and Random House II}, supra note 8, at 189 (arguing that the expectation in the legal and publishing communities that \textit{Salinger} would stifle the creation of new works was unjustified).
reasonable manner without his consent.” It is a judicially created doctrine, the beginnings of which can be traced all the way back to the courts of eighteenth century England. Not long after the enactment of the first copyright law—the Statute of Anne, in 1710—courts began to recognize the need of authors to make limited use of other authors’ work. Those courts recognized that allowing authors to make reasonable use of pre-existing works benefited the public by encouraging the creation of new works. By contrast, enforcing the copyright monopoly too strictly would strangle the free flow of ideas that the copyright law is intended to encourage. A less commonly articulated—but still very important—reason for the existence of fair use doctrine is that it provides a way to permit all sorts of de minimus and socially accepted uses of copyrighted material that just do not seem particularly inappropriate—uses that are, in a word, “fair.”

Fair use was first recognized in American jurisprudence in 1841 in Folsom v. Marsh, a case involving the use by a biographer of George Washington’s published letters. In this case, Judge Story wrote that a “reviewer may fairly cite largely from the original work” as long as his purpose is “fair and reasonable criticism.” However, if the user “cites the most important parts of the work, with a view not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.”

Judge Story also identified three of the four factors that are still used by courts today in deciding whether or

16. Id.
17. Id. See, e.g., Rosemont Enters., 366 F.2d at 307.
19. See Weinreb, supra note 8, at 1138.
20. 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4901).
21. Id. at 344-45.
not a particular use is fair: "the nature of the new work,"22 "the quantity and value of the materials used," and the effect on the market for "the original work."23

After 130 years of judicial recognition,24 Congress codified the fair use doctrine in the Copyright Act of 1976.25 This statute makes all of the copyright holder's exclusive rights in his work specifically subject to the fair use exception.26 The legislative history indicates that Congress meant to retain the previous "judicial doctrine of fair use" and not to "change, narrow, or enlarge it in any way."27 The history also indicates that fair use as codified was intended to be a flexible doctrine that "the courts must be free to adapt... to particular situations on a case-by-case basis."28

The fair use provision of the Copyright Act, 17 U.S.C. § 107, specifies four non-exclusive factors that are to be considered in determining whether or not a particular use is fair. They are: (1) "the purpose and character of the use," (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."29

II. FAIR USE AND UNPUBLISHED WORKS

Until the Copyright Act of 1976, only published works received

22. Id. at 349.
23. Id. at 348.
28. Id.
federal copyright protection. Unpublished works, if protected, were protected by state law. Under the pre-1976 common law approach, unpublished works were generally not subject to fair use. Courts regarded disseminating portions of an unpublished work as usurping the author's common law right of first publication. In England, another major underlying reason behind the greater protection accorded to unpublished works at common law seems to have been a concern for the author's personal privacy. In practice, however, courts made some limited exceptions to the bar on fair use of unpublished works.

The 1976 Copyright Act pre-empted state common law, making published and unpublished works alike subject to federal protection.

32. Golding, 193 P.2d at 162.
33. See Samuel D. Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 201-07 (1890). In this famous article, Brandeis and Warren cited the protection given by the courts against the unauthorized publication of private writings as one manifestation of the individual's "right to be left alone." Id. (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)). According to Second Circuit Judge Jon O. Newman, when English common law courts enjoined the publication of private writings, they did so not just to protect the author's right to first publication, but also to protect his right not to publish at all: "[t]his latter interest was personal, not economic." Newman, Copyright Law and the Protection of Privacy, supra note 8, at 466. American courts, however, were not "so generous" in protecting the privacy of authors. Id. See also Murphy, supra note 8, at 126-27.
34. Harper & Row, 471 U.S. at 551. "This absolute rule, however, was tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent through de facto publication on performance or dissemination of a work may tip the balance of equities in favor of prepublication use." Id. Patry argues that this absolute protection for unpublished works at common law did not extend to works that although technically unpublished were voluntarily disseminated to the public by the author. Thus, if a play was publicly performed before the manuscript was published, a critic could still quote from the dialogue in reviewing the work even though it was technically unpublished. PATRY, supra note 15, at 76. The recipient of private letters could also publish them in certain very limited circumstances such as to defend himself in a court action. Baker v. Libbie, 97 N.E. 109, 111 (Mass. 1912).
from the moment they are fixed in tangible form.\textsuperscript{35} The Act also made all published and unpublished works subject to the fair use exception.\textsuperscript{36} However, the legislative history of the Act indicates that Congress still meant to retain an additional measure of protection for unpublished works.\textsuperscript{37}

In 1985, the Supreme Court decided \textit{Harper & Row, Publishers, Inc. v. Nation Enterprises}.\textsuperscript{38} This case involved the use of several excerpts from a "purloined" copy of President Ford's then-unpublished memoirs by the author of an article for the \textit{Nation} magazine.\textsuperscript{39} Harper & Row, Ford's publisher, sued the \textit{Nation} for copyright infringement and won at the trial court level; the Court of Appeals for the Second Circuit reversed the district court's decision, finding fair use.\textsuperscript{40} Obviously outraged by the defendant's behavior in this case,\textsuperscript{41} the Supreme Court held that fair use did not excuse the \textit{Nation}'s actions.\textsuperscript{42} The Court stated that the fact that the Ford manuscript was unpublished was a "key, though not necessarily determinative factor" tending to negate a defense of fair use,\textsuperscript{43} and that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{35} 17 U.S.C. § 301 (1988); \textit{Salinger}, 811 F.2d at 95.
\item \textsuperscript{36} \textit{Harper & Row}, 471 U.S. at 552; \textit{Salinger}, 811 F.2d at 95.
\item \textsuperscript{37} \textit{Harper & Row}, 471 U.S. at 552. In \textit{Harper & Row} the Court specifically rejected the argument that Congress meant the fair use doctrine to be applied equally to both unpublished and published works under the 1976 Copyright Act. \textit{Id.}
\item \textsuperscript{38} 471 U.S. 539 (1985). Until this case, there were only a few district court decisions dealing directly with the application of the fair use defense to unpublished works under the 1976 Copyright Act. \textit{See} Sinkler v. Goldsmith, 623 F. Supp. 727, 732 (D. Ariz. 1985) (noting that fair use generally applied only to materials that were already published, either expressly or de facto, and concluding that reading unpublished letters aloud in classes did not constitute fair use); Schuchart & Assocs., Inc. v. Solo Serve Corp., 220 U.S.P.Q. (BNA) 170, 179 (W.D. Tex. 1983) (holding that copying architectural plans did not constitute fair use).
\item \textsuperscript{39} \textit{Harper & Row}, 471 U.S. at 542.
\item \textit{Id.} at 543-44.
\item \textsuperscript{41} \textit{See} Weinreb, \textit{supra} note 8, at 1157-58.
\item \textsuperscript{42} \textit{Harper & Row}, 471 U.S. at 542.
\item \textsuperscript{43} \textit{Id.} at 553 (quoting S. REP. NO. 94-473, at 64 (1975)).
\item \textit{Id.} at 555.
\end{itemize}
The Court noted that under the common law, fair use did not apply to unpublished works, and it briefly discussed some of the reasons why unpublished works received greater protection from fair use. The Court emphasized that an author has the right to decide both when his work will be made public and whether it will be made public at all. The Court also spoke about authors' need for a period of time to "groom" their works prior to public dissemination and about the damage that releasing it prematurely could do to the economic value of the work. Since President Ford's memoirs had been scheduled for publication shortly after the Nation "scooped" them, no privacy concerns were implicated in the case and the Court down-played this factor.

The Court rejected the Nation's argument that "first amendment values" entitled it to greater leniency under the copyright laws due to the public importance of the contents of the Ford manuscript. Justice O'Connor, writing for the majority, found that the structure of the Copyright Act itself already addressed any first amendment concerns by distinguishing "copyrightable expression and uncopyrightable facts and ideas," and by according "latitude

45. Id. at 551.
46. Id. ("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.").
47. Id. at 554-55. The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a critical one for any literary endeavor. The Copyright Act which accords the copyright owner the right to control the first public distribution of his work... echoes the common law concern that the author or copyright owner retain control throughout this critical stage.
49. Id. at 554-55 ("It is true that common-law copyright was often enlisted in the service of personal privacy... In its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection.").
50. Id. at 555.
51. Id. at 555-560.
for scholarship and comment traditionally afforded by fair use.”  

In 1983, Ian Hamilton, a well-known literary biographer, began work on a biography of J.D. Salinger, the famous American author of *The Catcher in the Rye*. He requested Salinger’s cooperation but Salinger refused, saying that “he preferred not to have his biography written during his lifetime.” Hamilton chose to proceed with the project anyway. In order to write the book, he utilized several collections of Salinger’s letters that had been placed in university libraries by the letter recipients. In 1986, Salinger filed suit to block publication of the book arguing that it violated his copyright in these unpublished letters.  

Judge Leval of the United States District Court for the Southern District of New York refused to enjoin publication of the work on the grounds that Hamilton’s use of Salinger’s letters was fair. The Court of Appeals for the Second Circuit reversed, ruling that Salinger was entitled to a preliminary injunction to prevent the biography’s publication. In applying the Copyright Act’s four-factor fair use test to the biography, the Second Circuit placed particular emphasis on the unpublished nature of Salinger’s letters. Relying on *Harper & Row*, the court stated that unpublished works “normally enjoy complete protection against copying any protected expression.”  

Two years later, the Second Circuit faced another case involving the fair use of unpublished works by a biographer. In *New Era*
Publications International, ApS v. Henry Holt & Co. 61 ("New Era I"), representatives of the deceased L. Ron Hubbard, founder of the Church of Scientology, sought to enjoin an unflattering biography of him entitled Bare-Faced Messiah: The True Story of L. Ron Hubbard on the grounds that it infringed copyrights in his published and unpublished writings.62 The district court, with Judge Leval again presiding, reluctantly concluded that under Salinger the use of the unpublished works was not fair, even though the author had a compelling reason for quoting from these unpublished texts.63 Judge Leval refused to issue an injunction, however, because of first amendment considerations.64

On appeal, the Second Circuit again emphasized the importance to its fair use determination of the status of Hubbard’s works as unpublished.65 The court stated that “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.”66 The majority of the court also rejected the distinction that the district court had tried to make between an author like the one in Salinger who uses unpublished works in order to “enliven” his own text and one who quotes from such documents in order to prove “significant points.”67 The Second Circuit did ultimately affirm the district court’s decision not to enjoin publication of the book but only on the basis of laches.68

Concerned about some of the Second Circuit’s statements in

62. Id. at 577.
64. New Era I, 695 F. Supp. at 1528 (“[T]his is one of those special circumstances in which the interests of free speech overwhelmingly exceed the plaintiff’s interest in an injunction.”).
65. New Era I, 873 F.2d at 583.
66. Id.
67. Id. The concurring opinion accepted this distinction and criticized the majority for casting Salinger “in concrete.” Id. at 585 (Oakes, C.J., concurring).
68. Id. at 584 (“The prejudice suffered by Holt as the result of New Era’s unreasonable and inexcusable delay in bringing the action invokes the bar of laches.”).
FAIR USE AND UNPUBLISHED WORKS

New Era I, the defendants took the “unprecedented” step of petitioning the Second Circuit for a rehearing of the case by the full court even though they had prevailed on the merits. The Second Circuit denied the petition, but the concurring and dissenting opinions to the decision to deny the petition for rehearing seemed to indicate that the court’s position regarding the fair use of unpublished works was softening.

The New Era I and Salinger decisions caused considerable controversy. They raised fears that it would be impossible for authors to make even minimal use of unpublished sources without risking an infringement suit. The New Era I decision, in particular, created the possibility that the subject of a critical biography or his heirs could manipulate the copyright laws to keep unflattering information from reaching the public.

The judges of the Second Circuit were divided on the issue and publicly debated it. Judge Leval advocated limiting the extra protection given to unpublished works to cases where the works were actually intended for publication at some point. Judge Miner of the United States Court of Appeals for the Second Circuit advocated strong protection for unpublished works but would have allowed fair use for works that were “voluntarily disseminated to the public,” including private letters. Judge Newman, also of the Court of Appeals for the Second Circuit, indicated that he would give greater protection if the work was both unpublished and

70. Id. at 661. Judge Miner, the author of the majority opinion in New Era I indicated that the copying of “small amounts of unpublished expression” might be allowed. Id.
71. See supra notes 12-13 and accompanying text.
72. See supra, supra note 8, at 49-50.
73. Leval, Toward a Fair Use Standard, supra note 8, at 1119. Judge Leval focused on the utilitarian purpose of the copyright law, namely to promote the creation of new works. Id. at 1108-09. He argued that the economic incentive to produce new works only applied to authors who wrote with the intention of publishing their works one day. Id. at 1117. Therefore, he argued, allowing greater fair use of works that were never intended for publication would not discourage writers from composing private letters or keeping journals. Id. at 1117-19; see also Leval, Fair Use or Foul, supra note 8.
74. Miner, supra note 8, at 10-11.
private.\textsuperscript{75}

These concerns began to ease a bit with the Second Circuit's subsequent decision in \textit{New Era Publications International ApS v. Carol Publishing Group}\textsuperscript{76} ("New Era II"). This case involved another attempt by the heirs of L. Ron Hubbard to enjoin the publication of an unauthorized biography by claiming copyright infringement.\textsuperscript{77} This time, however, only Hubbard's published works were at issue.\textsuperscript{78} The Court of Appeals found that the defendant's quotations from Hubbard's writings constituted fair use since the author used the quotes, not for their expressive content, but rather "to convey the facts contained therein" and to support the author's opinion that Hubbard was a pompous hypocrite.\textsuperscript{79}

Meanwhile, however, publishers and writers groups pushed for legislation in Congress to amend the fair use provision of the copyright statute. A bill was introduced that attempted to modify the fair use section of the Copyright Act to eliminate the distinction between published and unpublished works.\textsuperscript{80} The computer industry strongly opposed these bills. Since most software is technically unpublished, the computer industry feared that amending the fair use statute in this manner would make it more difficult to protect computer programs from unauthorized copying.\textsuperscript{81} There were also concerns that this proposal would not adequately protect authors' right to first publication.\textsuperscript{82} In any case, the legislation was withdrawn by its sponsor before any vote was taken on it.\textsuperscript{83}

\textsuperscript{75} Newman, \textit{Copyright Law and the Protection of Privacy}, supra note 8, at 476-77.


\textsuperscript{77} \textit{New Era II}, 904 F.2d at 153.

\textsuperscript{78} Id. at 157.

\textsuperscript{79} Id. at 156.


\textsuperscript{82} Goldberg & Bernstein, supra note 12.

\textsuperscript{83} Cohen, supra note 81, at A1.
A new weaker proposal was introduced in the 102nd Congress. This legislation would have amended the fair use section of the Copyright Act to say that unpublished status "tends to weigh against a finding of fair use" but that it would "not bar a finding of fair use." The bill passed the Senate, but the House version was dropped before reaching the floor, apparently in anticipation of the Second Circuit's upcoming decision in Wright v. Warner.  

III. Wright v. Warner Books, Inc.

Wright v. Warner Books, Inc. is the first case in the Second Circuit since New Era I to deal directly with the fair use of unpublished books. Like Salinger and New Era I, Wright involves the use of unpublished manuscripts by a biographer.

Margaret Walker, a university professor and friend of the late Richard Wright, began a book about him during the seventies. Ellen Wright, the author's widow and the owner of his copyrights, would not give Walker permission to use Wright’s works unless she was allowed to read the manuscript of the biography prior to

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85. Id.
87. 873 F.2d 576 (2d Cir.), reh’g denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). New Era II involved the fair use of published works only. One district court case during this time did address the issue of the fair use of unpublished writings. Arica Inst., Inc. v. Palmer, 761 F. Supp. 1056 (S.D.N.Y. 1991). This case foreshadowed the Second Circuit's decision in Wright by first stating that since the majority of plaintiff's works were unpublished, factor two favored the plaintiffs. The court still found that the use was fair since all three of the other factors favored the defendants. Id. at 1066-67. However, there was some doubt in this case as to whether the defendants ever had the necessary access to the plaintiff's unpublished writings to establish infringement in the first place. Id. at 1064 n.23. See also Bernstein & Goldberg, supra note 12.
88. 811 F.2d 90 (2d Cir. 1987).
89. 953 F.2d at 734.
its publication.\textsuperscript{91} Walker refused to agree to these terms, viewing them as "prior restraint tantamount to censorship," and the book became an unauthorized biography.\textsuperscript{92}

Walker revised the manuscript five times in response to complaints and threats of legal action by Ellen Wright.\textsuperscript{93} The version that was eventually published in 1988 contained references to Richard Wright's published and unpublished works including letters that Wright had sent to Walker and entries from his journal,\textsuperscript{94} which had been sold to Yale University Library by his estate for $175,000.\textsuperscript{95}

Ellen Wright filed suit in May 1989 for copyright infringement, false designation of origin, breach of contract, and libel.\textsuperscript{96} The district court, Judge Walker of the Court of Appeals for the Second Circuit sitting by designation, found that Professor Walker's use of both the published and published works was fair, and he granted defendant's motion for summary judgment.\textsuperscript{97}

The district court found that all four fair use factors, with regard to the unpublished works, favored the defendants. In its analysis of factor two—the nature of the copyrighted work—the court acknowledged that a work's unpublished status is "critical" to the determination of fair use. The court concluded, however, that for several reasons factor two still favored the defendants.\textsuperscript{98} In regard to the journal entries, the author paraphrased rather than quoting from the protected works, and the paraphrasing merely reported the facts.\textsuperscript{99} Further, in contrast to \textit{Salinger}, Wright's

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\textsuperscript{91} Margaret Walker, \textit{Richard Wright: Daemonic Genius} xvi (1988).
\textsuperscript{92} Id.
\textsuperscript{93} Publishers Wkly., \textit{supra} note 90.
\textsuperscript{94} 953 F.2d at 731.
\textsuperscript{95} Id. at 740.
\textsuperscript{97} Id. at 113-14. The court also granted the defendant's motion for summary judgment on the breach of contract claim. The plaintiff voluntarily withdrew the allegation of false designation of origin, and the court dismissed the libel claim for want of federal jurisdiction. \textit{Id.} at 115.
\textsuperscript{98} Id. at 110 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985)).
\textsuperscript{99} Id.
\end{flushleft}
death eliminated any privacy considerations. The court also noted that in further contrast to Salinger, the plaintiff herself had arranged for these journals to be placed in a library where scholars would have access to them. As for the letters, the court recognized that Walker had “used the letters not to recreate Wright’s creative expression, but simply to establish facts necessary to her biography . . . .” Therefore, the court held, the biography had not taken anything protected by copyright law.

This issues were narrowed on appeal; only the alleged infringement of the Wright’s unpublished works and the breach of contract claim remained for the Second Circuit to consider. Although the Second Circuit disagreed with the lower court’s analysis with respect to factor two, it nevertheless affirmed the decision that defendant’s use of the unpublished works was fair.

Judge Meskill, writing for the majority, first addressed the issue of whether the allegedly infringing portions of the unpublished works conveyed protected expression or only unprotected facts (since copyright law protects only the expression of facts or ideas and not the underlying substance of them). The court found that “under a liberal interpretation of the fact/expression dichotomy,” three paraphrased excerpts from Wright’s unpublished journals and four quotations from Wright’s letters to Walker constituted copyright infringement unless the fair use defense applied.

The court then proceeded to evaluate these protected passages against the four statutory fair use factors. In regard to factor one, the circuit court agreed with the district court that the purpose

100. Id. at 111.
101. Id. at 110.
102. Id. at 111.
103. 953 F.2d at 734-735.
104. Id. at 734.
106. 953 F.2d at 736. Fair use is an affirmative defense. See Harper & Row, 471 U.S. at 561. It assumes that infringement does exist. Wright, 953 F.2d at 743 (Van Graafeiland, J., concurring).
107. For a list of the four fair use factors, see supra note 29 and accompanying text.
and character of the use favored the defendant, since Professor Walker's work was a scholarly biography.\textsuperscript{108} It also agreed that factors three and four, the quantity used and the effect on the market, favored defendant.\textsuperscript{109} The court emphasized in particular Walker had used less than 1\% of the material contained Wright's journals and letters.\textsuperscript{110} The court also stated that, qualitatively, the defendant had not taken the "heart" out of the "copyrighted work,"\textsuperscript{111} and that Walker used the "borrowed expression" to "enhance her analysis" and to "establish credibility."\textsuperscript{112} The author's use of the protected works did not "make the book worth reading"\textsuperscript{113} and did not "pose a significant threat to the potential market for Wright's letters or journals."\textsuperscript{114}

The Second Circuit disagreed, however, with Judge Walker regarding factor two—the nature of the copyrighted work—stating that the district court gave "insufficient weight to the unpublished status of the letters and journal entries."\textsuperscript{115} The court rejected Judge Walker's rationale for finding that factor two favored the defendants.\textsuperscript{116} It stated that although considerations such as whether the defendant paraphrased or quoted, whether the defendant borrowed fact or expression, and whether the author's privacy was compromised could "enter into the infringement equation" and could be used to overcome the presumption against the fair use of unpublished works, they had "no bearing on factor two" in the case at bar.\textsuperscript{117} According to the court, once a work is shown to be unpublished, "[o]ur precedents then, leave little room for discussion

\begin{itemize}
  \item \textsuperscript{108} 953 F.2d at 736.
  \item \textsuperscript{109}  Id. at 738-39.
  \item \textsuperscript{110}  Id. at 738.
  \item \textsuperscript{111}  Id. at 738 (citing Harper & Row, 471 U.S. at 564-65). The "passages" quoted and paraphrased by Walker had "no plausible parallel in the critical passages taken from President Ford's memoir discussing his decision to pardon President Nixon, which indeed were the 'heart' of that copyrighted work."  Id.
  \item \textsuperscript{112}  Id. at 739.
  \item \textsuperscript{113}  Id. at 739 (citing Salinger, 811 F.2d at 99).
  \item \textsuperscript{114}  Id.
  \item \textsuperscript{115}  Id. at 737.
  \item \textsuperscript{116}  Id. at 737-38.
  \item \textsuperscript{117}  Id.
\end{itemize}
of this factor . . . ."118 Factor two favored the plaintiffs.119

The court concluded, however, that the use was fair because three of the four fair use factors clearly favored the defendants; accordingly, it affirmed the district court's grant of summary judgment.120 The court held that while factor two favoring the plaintiff (due to the unpublished nature of the works) was an "obstacle" to finding fair use, it was not an "insurmountable one."121 The court then laid to rest the worst fears of the critics of Salinger and New Era I by categorically stating that neither of these cases "erected a per se rule regarding unpublished works."122 A defendant does not have to win on every factor in order to prevail in establishing fair use.123 "The fair use test," stated the court, "remains a totality inquiry, tailored to the particular facts of each case."124

In a concurring opinion, Judge Van Graafeiland argued that the amount of infringing material was so little that the case could have been resolved in the defendant's favor without ever reaching the subject of fair use.125 He concluded that the majority placed "too much emphasis on the unpublished nature of Wright's words in discussing factor (2) of 17 U.S.C. § 107."126

IV. ANALYSIS OF WRIGHT v. WARNER BOOKS, INC.

By establishing that there is no per se rule against the fair use of unpublished works,127 the Second Circuit took the first step

118. Id. at 737.
119. Id. at 738.
120. Id. at 740.
121. Id.
122. Id.
123. Id.
124. Id. The court also affirmed the lower court's decision to dismiss the plaintiff's breach of contract claim.
125. Wright, 953 F.2d at 743 (Van Graafeiland, J., concurring) ("The defense of fair use assumes the existence of infringement. In my opinion, if there is any infringement in the instant case, it is technical at best and so de minimis as not to be actionable.").
126. Id.
127. Of course, as the Wright court correctly noted, none of the Second Circuit's earlier decisions ever established such a hard and fast rule, but that was still the
toward reaching an acceptable compromise between the needs of some authors to make reasonable use of unpublished documents and the rights of other authors to protect their writings. There should be a presumption against the fair use of unpublished works. Giving greater protection to unpublished writings serves several legitimate policy objectives and is in accord with the legislative history of the fair use section of the Copyright Act of 1976, not to mention the Supreme Court’s decision in Harper & Row v. Nation Enterprises. However, making this presumption an absolute one would unnecessarily restrict the creation of new works. Thus, as Wright demonstrates, the presumption against the fair use of unpublished works should be a rebuttable one.

Under Wright, the plaintiff in an infringement suit involving unpublished works is essentially guaranteed to win on at least one of the four fair use factors whenever an alleged infringer raises this defense. Once the work is determined to be unpublished, the plaintiff almost automatically prevails on factor two, the nature of the copyrighted work. However, the defendant can still rebut the presumption against fair use if she can show that, at a minimum, the other three fair use factors favor her. Of course, it

impression held by many in the publishing industry. This belief alone was enough to create a “chilling” climate for books that relied on unpublished sources. See Newman, Not the End of History: The Second Circuit Struggles with Fair Use, supra note 8, at 12 (expressing concern that lawyers were advising their clients to delete all references to unpublished works from their manuscripts).

128. See supra notes 46-49 and accompanying text.

129. The common law protected unpublished works more stringently from fair use and the legislative history of the 1976 Copyright Act indicates that Congress meant to adopt the principles that the courts had established at common law regarding fair use. See supra notes 27, 30-34 and accompanying text.

130. See supra notes 38-49 and accompanying text.

131. Leval, Fair Use or Foul, supra note 8, at 173 (“When we place all unpublished private papers under lock and key, immune from any fair use for periods of 50-100 years, we have turned our backs on the Copyright Clause.”).

132. Wright, 953 F.2d at 737 (“Unpublished works are the favorite sons of factor two. . . . Our precedents then, leave little room for discussion of this factor once it has been determined that the copyrighted work is unpublished.”).

133. Id.

134. Id. at 738. See also Arica Inst., Inc. v. Palmer, 761 F. Supp. 1056, 1066-67
would not hurt if she could show that additional factors favor her as well.\footnote{135}

One question that still remains is how strong the defendant’s showing under the other three factors will have to be in order to overcome the presumption against the fair use of unpublished works. Future courts will have to delineate further exactly how much expressive material an author may fairly copy from unpublished works.

Unfortunately, the emphasis that the court placed throughout \textit{Wright} on the small amount of expressive material used by the defendant,\footnote{136} combined with the fact that the court distinguished \textit{Salinger} and \textit{New Era I} partially on this basis,\footnote{137} implies that future authors who quote or paraphrase even modest amounts from unpublished sources may still find themselves vulnerable to threat of suits for copyright infringement.

Most legitimate authors who act in good faith will have little difficulty satisfying the requirements of factor one—the purpose and character of the use. In section 107 of the Copyright Act of 1976, Congress specifically listed “scholarship,” “research,” and “criticism” as illustrations of the types of use that may be fair.\footnote{138} “[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107.”\footnote{139} In all the Second Circuit cases

\footnote{135. \textit{Wright}, 953 F.2d at 737-38.}
\footnote{136. \textit{Id.} at 734 (characterizing defendant’s use as “sparing”). “Dr. Walker used no more than one percent of the Wright/Walker letters or journal entries. . . . While this percentage may be higher with respect to the letters alone, it is clear that Dr. Walker utilized a very small portion of those letters.” \textit{Id.} at 738. “[T]he expressive portions comprise a slight fraction of the biography—at most, two pages of a 428 page book.” \textit{Id.} at 739.}
\footnote{137. \textit{Id.} at 739 (“In contrast to \textit{Salinger} and \textit{New Era I}, marginal amounts of expressive content were taken from Wright’s works.”). “In short, this is not a reprise of \textit{Salinger} and \textit{New Era I}. The biography’s use of Wright’s expressive works is \textit{modest} and serves either to illustrate factual points or to establish Dr. Walker’s relationship with the author, not to ‘enliven’ her prose.” \textit{Id.} at 740 (emphasis added).}
\footnote{139. \textit{Wright}, 953 F.2d at 736.}

discussed in this comment—*Salinger, New Era I, New Era II,* and *Wright*—the court found that factor one favored the defendant.\(^{140}\)

Thus, future cases regarding the fair use of unpublished works will probably turn on factors three and four—the amount copied and the effect of the new work on the market for the original one. As regards factor three, the allegedly infringing material in Wright was so minimal in both quality and quantity\(^{141}\) that even authors who make reasonable use of unpublished manuscripts may still have difficulty prevailing on this factor.

However, in regard to factor four—the effect on the market—*Wright* represents a more mixed development for the alleged infringer seeking to justify his use of unpublished materials on the basis of fair use. On one hand, the court again distinguished *Salinger* and *New Era I* in its factor four analysis, finding that some "marginal amounts of expressive content were taken from Wright's works."\(^{142}\) On the other hand, *Wright* does bring the Second Circuit's analysis of this factor\(^{143}\) into better relationship with economic reality. While it may be granted that interfering with an author's right to control the first public appearance of his work can severely diminish its value,\(^{144}\) it is difficult to understand how even extensive paraphrasing of Salinger's letters in a biography could have a real impact on the market for a future

\(^{140}\) *Salinger,* 811 F.2d at 96; *New Era I,* 873 F.2d at 583; *New Era II,* 904 F.2d at 157; *Wright,* 953 F.2d at 736.

\(^{141}\) Id. at 740.

While the biography draws on works that we have characterized as unpublished for the purposes of this appeal, it takes only seven protected segments from Wright's letters and journals. These portions are short and insignificant with the possible exception of a fifty-five word description of the art of writing. This use is *de minimis* and beyond the protection of the Copyright Act.

\(^{142}\) Id. at 739.

\(^{143}\) After *New Era I* and *Salinger,* some commentators had feared that once a work was classified as unpublished, the defendant would automatically lose not only on factor two—nature of the copyrighted work—but also on factor four—effect on the market. *See, e.g.*, Leval, supra note 8, at 175; Bilder, supra note 8, at 534 n.218.

\(^{144}\) *Harper & Row,* 471 U.S. at 555. In this case, the "scooping" of President Ford's memoirs had a clear and discernable effect on their market value. *Id.* at 567-68.
collection of his letters.\textsuperscript{145} It is even harder to fathom how the use of L. Ron Hubbard's letters in a critical biography of him could undermine the market for a collection of such works later published by his heirs.\textsuperscript{146}

In \textit{Wright}, the court correctly held that there was little likelihood that the biography could replace or compete with a published collection of Richard Wright's letters and journals.\textsuperscript{147} This finding was much more in accord with the Second Circuit's analyses of the "effect on the market" factor in cases before \textit{Salinger}. The discussions in these prior cases either concentrated on whether or not the allegedly infringing work could replace the original one in the market place or they demanded some relatively specific indications of how the market for the original work would be impaired.\textsuperscript{148}

Another question that future cases will have to address is what additional factors—beside the four statutory ones—courts should take into consideration in deciding if a particular defendant has overcome the presumption against fair use of unpublished works. The \textit{Wright} court acknowledged that whether or not the "use implicates the author's privacy considerations" is one such factor.\textsuperscript{149} The desire to protect authors' privacy has definitely

\begin{itemize}
\item \textsuperscript{145} See Peppe, supra note 8, at 457.
\item \textsuperscript{147} \textit{Wright}, 953 F.2d at 739 ("[E]ven if [publication of Wright's letters] were to go forward, we can see no likelihood of harm.").
\item \textsuperscript{148} See \textit{Rosemont Enters.}, 366 F.2d at 311 (biography of Howard Hughes did not compete with a series of magazine articles or lessen their value); Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977) (impact of book about Julius and Ethyl Rosenberg on the market for their collected letters not clear), \textit{cert. denied}, 434 U.S. 1013 (1978); Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980) (use of 8% of a student film in a network broadcast would cause at least some impairment of its market value, particularly in regard to future television sales); Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1264 (2d Cir. 1986) (market for pro-choice book containing a sympathetic interviews with women discussing their abortions would not be affected by use of small portions of it in pro-life essay), \textit{cert. denied}, 481 U.S. 1059 (1987). See Peppe, supra note 8, at 455.
\item \textsuperscript{149} \textit{Wright}, 953 F.2d at 738. The court also stated that "whether [or not] the infringer paraphrased or copied, [or] whether he borrowed fact or expression" would be
\end{itemize}
influenced courts to protect unpublished works more strictly.\textsuperscript{150} In cases where there is no issue as to whether the copyright law should be used to protect the personal privacy of the author\textsuperscript{151} (such as in Wright where the author had been dead for a number of years), courts should give less weight to the fact that a work is unpublished as an argument against fair use.\textsuperscript{152}

Also, courts should consider whether an author has made an effort to keep her work private.\textsuperscript{153} The greater protection that is usually accorded to unpublished works should not be available to works that, although technically unpublished like Wright's journals, have been voluntarily and publicly disseminated.\textsuperscript{154} As Judge Walker pointed out in his district court opinion in Wright, the copyright holder herself arranged to place some of the unpublished materials in a library where the public would have access to them, and she received a great deal of money for doing so.\textsuperscript{155} Such was not the case in Salinger. Under any reasonable sense of equity, a copyright holder such as Ellen Walker—who retained the

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\textsuperscript{150} New Era I, 873 F.2d at 585 (Oakes, C.J., concurring). This was particularly true in the Salinger case. "Salinger is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications . . . ." New Era I, 873 F.2d at 585 (Oakes, C.J., concurring). The court's "tacit agenda" in Salinger was protecting the author's personal privacy. Peppe, supra note 8, at 458.

\textsuperscript{151} This issue has been extensively debated. Judge Newman, for example, argues that:

In litigation under the federal statute . . . the privacy interest should be recognized and weighed carefully. It should not always prevail. Yet it ought not be ignored. Copyright law seeks to promote the useful arts. This task requires some zone of privacy in which each of us may not only formulate our thoughts but also commit them to paper.

Newman, Copyright Law and the Protection of Privacy, supra note 8, at 477. See also Miner, supra note 8, at 9. Judge Leval, however, vigorously opposes the idea that privacy should enter into decisions under the copyright law. See Leval, Toward a Fair Use Standard, supra note 8, at 1137.

\textsuperscript{152} Newman, Copyright and the Protection of Privacy, supra note 8, at 475 (arguing that the protection of an author's privacy interest in his unpublished writings should not extend for more than three to five years after his death).

\textsuperscript{153} Bernstein & Goldberg, supra note 12.

\textsuperscript{154} See supra notes 34, 74.

\textsuperscript{155} Wright, 748 F. Supp. at 110.
copyright and the sole right to publish her husband's works—certainly abandoned any expectations of privacy in these documents and must be chargeable with knowledge that scholars and others would make reasonable use of the works.\textsuperscript{156}

V. THE NEW AMENDMENT TO 17 U.S.C. § 107

The \textit{Wright} decision "did not explicitly disavow"\textsuperscript{157} the Second Circuit's statement in \textit{Salinger} that unpublished works "normally enjoy complete protection against copying any protected expression."\textsuperscript{158} As a result, the publishing industry remained concerned about the "pall" cast on authors' use of unpublished material by \textit{Salinger} and \textit{New Era I}.\textsuperscript{159} In response to this concern, William J. Hughes, a United States Representative from New Jersey, introduced an amendment to the fair use provisions of the Copyright Act to deal specifically with unpublished works.\textsuperscript{160}

Representative Hughes' bill—H.R. 4412, introduced on March 5, 1992—amends the end of 17 U.S.C § 107 to read: "The fact that a work is unpublished shall not by itself bar a finding of fair use if such a finding is made upon consideration of all the above factors."\textsuperscript{161} The bill was approved by the House Judiciary Committee on April 30, 1992, and the entire House passed it on August 11. The bill passed the Senate on October 7,\textsuperscript{162} and President Bush signed it on October 25.\textsuperscript{163} It is now the law.\textsuperscript{164}

\textsuperscript{156} See \textit{Wright}, 953 F.2d at 740-41 (discussing plaintiff's claim that the defendant breached her agreement with Yale University Library by quoting from the Wright manuscripts that had been deposited there).

\textsuperscript{157} \textit{HOUSE COMM. ON THE JUDICIARY, FAIR USE OF COPYRIGHTED WORKS, H.R. REP.} No. 836, 102d Cong., 2d Sess. 8 (1992).

\textsuperscript{158} \textit{Id.} (citing \textit{Salinger}, 811 F.2d at 97).


\textsuperscript{160} \textit{Copyright Bill Clarifying Fair Use of Unpublished Works Clears Congress}, Wash. Insider (BNA) (Oct. 9, 1992) [hereinafter \textit{Bill Clears Congress}].

\textsuperscript{161} H.R. REP. No. 836, 102d Cong., 2d Sess. 9 (1992). The original version of this legislation directed courts to examine "all the factors set forth in paragraphs (1) through (4)" of section 107. This language was changed in order to make it clear that the courts may consider additional factors besides those listed in the statute.

\textsuperscript{162} \textit{Bill Clears Congress}, supra note 160.

\textsuperscript{163} \textit{President Signs Bill on Fair Use}, Pat. Trademark & Copyright L. Daily (BNA),
According to the House Committee Report accompanying H.R. 4412, the purpose of the amendment is "to clarify the intent of Congress that there be no per se rule barring claims of fair use of [un]published works." Instead, Congress directs the courts to determine the affirmative defense of fair use of unpublished works on a case-by-case basis after considering the four statutory fair use factors "as well as any other factors a court may find relevant." This legislation also overrules certain portions of the Salinger decision that indicated that the "unpublished nature of the work" leads to a diminished likelihood that the fair use defense as a whole will be available in a given case.

The legislation does not change the holding of Wright, although it does "reject any dicta" in this decision "to the extent that such dicta is premised upon the disapproved language in Salinger and New Era I." The amendment also preserves the presumption against fair use of unpublished works that was established by the Supreme Court in Harper & Row.

This amendment to the Copyright Act should help resolve the difficulties that might have been caused by Wright's emphasis on the minimal amount of copyrighted material used by the defendant.
The Judiciary Committee Report accompanying the bill specifically notes "that the Wright opinion did not reach the outer limits of what might be regarded as fair use .... Certainly uses beyond those permitted in Wright may also be fair use, depending on the facts of a particular case."\textsuperscript{171} The amendment also overrules certain portions of Salinger and New Era I concerning unpublished works and any dicta in Wright premised on the language in these decisions.\textsuperscript{172} This should eliminate any possibility that a later court will interpret Wright strictly, based upon the fact that the Wright court distinguished Salinger and New Era I through its finding that the alleged infringement in Wright was so minute.

\textbf{CONCLUSION}

In Salinger and New Era I, the Second Circuit interpreted the Supreme Court's decision in Harper & Row to create a very strong presumption against the fair use of unpublished works. Many people believed that a virtual \textit{per se} rule had been created, forbidding an author from making any use of unpublished sources.\textsuperscript{173}

In Wright \textit{v.} Warner Books, Inc., the Second Circuit explicitly rejected the idea that there was a \textit{per se} rule against the fair use of unpublished works.\textsuperscript{174} By doing so, it began the process of creating a more reasonable rule that would accommodate the need of authors to make use of unpublished writings while still preserving the presumption against fair use of unpublished works.

Under Wright, in an infringement case involving unpublished works, the second fair use factor—the nature of the copyrighted material—is automatically weighed against the defendant. A

\begin{itemize}
  \item \textsuperscript{171} Id. at 8. The Committee then gave two examples of other uses that might be fair: situations where copying an author's unpublished expression is necessary to report facts accurately, and cases where the statement itself is the fact "calling for comment." Id. (citing New Era \textit{I}, 695 F. Supp. at 1502).
  \item \textsuperscript{173} See supra notes 9-13 and accompanying text.
  \item \textsuperscript{174} Wright, 953 F.2d at 740.
\end{itemize}
defendant can rebut the presumption against the fair use of unpublished works and can still prevail if he can show that the other three statutory factors favor him, and perhaps if he can show that other considerations favor him as well.\textsuperscript{175}

Unfortunately, there was so little allegedly infringing material at issue in \textit{Wright} that future authors who used even minimal amounts of unpublished material might still have found themselves vulnerable to suits for copyright infringement. The fact that the Second Circuit distinguished \textit{Salinger} and \textit{New Era I} partly on this basis exacerbated this possibility.\textsuperscript{176}

Dissatisfied with the limited nature of the \textit{Wright} decision, Congress recently enacted new legislation to amend 17 U.S.C. § 107. The amendment makes clear that no \textit{per se} rule exists against the fair use of unpublished works.\textsuperscript{177} This new legislation does not change \textit{Wright}'s holding, but it should alleviate the major deficiency of this decision.\textsuperscript{178} Thus, future authors should now be able to make reasonable use of unpublished sources without fear of being subject to “unfair” suits for copyright infringement.

Ginger A. Gaines

\textsuperscript{175} See supra notes 132-135 and accompanying text.
\textsuperscript{176} See supra notes 136-137, 141 and accompanying text.
\textsuperscript{177} See supra notes 157-165.
\textsuperscript{178} See supra notes 168-172.