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Fair Use of Unpublished Materials

by William M. Hannay, Esq.

Librarians, particularly research librarians, have developed a continuing uncertainty about the copyright law's "rules" regarding use of unpublished materials. While the copyright law does not make a librarian responsible for the way that researchers use (or misuse) unpublished materials in the library's collections, it may be comforting to review the current state of the law in this area.

The interface between the rights of researcher-scholars and the rights of authors of unpublished materials are governed by the broad "fair use" exemption contained in Section 107 of the Copyright Act. Under this exemption, "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. To determine whether or not a use is "fair" requires consideration of four factors:

(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."

The application of the fair use doctrine to unpublished materials, unfortunately, has proved to be a vexing task, leaving none of the parties to such disputes satisfied. *E.g. Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (news magazine's quoting 300 words from Pres. Ford's unpublished autobiography not "fair use").

Should a biographer or other researcher be allowed to quote the unpublished letters of the subject of his study regardless of whether the subject objects? Put another way, should the copyright owner (or his estate) have a veto power over the use of the unpublished material? Since the Second Circuit's decision in the *J.D. Salinger* case in 1987, this issue has been a hot topic and made the applicability of the "fair use" doctrine even harder to predict. A three-year old amendment to Section 107 may have cured the problem.

As noted above, the 1976 Copyright Act permits an otherwise unauthorized use if — using the four-part test contained in 17 U.S.C. § 107 — the use is a "fair" one. In *J.D. Salinger*,

however, the Second Circuit handed down a decision that appeared to prohibit any use of unpublished materials.

The case of *Salinger v. Random House Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987), involved a suit by novelist J. D. Salinger against the publisher and author of an "unauthorized" biography of Salinger for infringing the copyright in his unpublished letters.

Salinger's unpublished letters from the '40s and '50s had been deposited in the Harvard, Princeton and University of Texas libraries. In 1983, Ian Hamilton, a literary critic for *The Sunday Times* of London, decided to do a book on the famous recluse. He worked on *J.D. Salinger: A Writing Life* for the next three years, including visiting the libraries and reviewing the unpublished letters that Salinger had written to friends and associates between 1939 and 1961. Hamilton quoted from and paraphrased about 40 of them.

Salinger was sent a courtesy copy of the galley proofs, and shortly thereafter told his lawyers to sue for copyright infringement. After a hearing, the U.S. District Court agreed

biographer and to the public's interest in being informed through Salinger's own words of the interpretation of his works and facets of his life.

Two years later, the Second Circuit reaffirmed the reasoning of Salinger in *New Era Publications International v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990). Henry Holt had published a biography of the late L. Ron Hubbard, founder of the Church of Scientology, in which biographer Russell Miller attempted to prove that Hubbard's character was at odds with his public image. Among the traits Miller attributed to Hubbard in *Bare-Faced Messiah* were viciousness, paranoia, and bigotry, and he quoted Hubbard's unpublished letters and diaries to demonstrate his claims.

Observing that it would be unfair not to allow the biographer to quote words that would prove his accusations, the District Court found that quoting to demonstrate facts constitutes a "compelling" fair-use purpose and denied an injunction. On appeal, the Second Circuit upheld the denial of injunctive relief to New Era but on very narrow, technical grounds. The Second Circuit held that a preliminary injunction against *Bare-Faced Messiah* was barred by laches, and discussed fair use solely in dicta. In that part of its opinion, however, the court rejected the lower court's reasoning and reiterated its position that "more than minimal" copying of unpublished material for any reason entitles the copyright holder to an injunction.

Organizations representing biographers, historians, and other scholars, writers, and publishers — including the Association of American Publishers and the American Historical Association — vigorously opposed these decisions. They contended that the Second Circuit's decisions prevented them from citing primary sources, as responsible scholars traditionally have and must be able to do. Publishers warned that these decisions would lead to the suppression of information, because copyright holders would use them to threaten litigation whenever a critical or embarrassing book quoted unpublished material.

Immediately after the *Salinger* decision, scholars and publishers began lobbying Congress to amend Section 107 so that it would explicitly state that fair use applies to both published and unpublished works. Their effort met with initial success ... until the computer software industry decided that the proposed changes might create problems for them.

The legislative effort was temporarily derailed until 1991 while representatives of the computer and publishing industries tried to

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"Should the copyright owner (or his estate) have a veto power over the use of the unpublished material?"

with lawyers for Hamilton and Random House, his publisher, that the unauthorized use of the letters was legal under the fair use doctrine. 650 F.Supp. 413 (S.D.N.Y. 1986). On appeal, however, a panel of the Second Circuit reversed.

Interpreting Supreme Court precedent to mean that unpublished works "normally enjoy complete protection," the U.S. Court of Appeals for the Second Circuit ordered the District Court to enjoin publication of the biography in the form in which it was written. The court wrote that Salinger's interest in protecting his privacy under the Copyright Act was superior both to the interests of his

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work out a compromise bill. In the Spring of 1991, a compromise was reached that would have added the following sentence to Section 107:

"The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors."

In May of 1991, the compromise bill was introduced by Senators Patrick Leahy and Paul Simon as S. 1035 and easily passed the Senate on September 27th. In October, the bill was referred to the House Committee on the Judiciary and was expected to have passage in the House as swift as that in the Senate. But then — as they say — a funny thing happened. In May, the House Judiciary Committee chairman, William J. Hughes (D-N.J.), had introduced a companion bill to S. 1035 in the House. In a surprise shift in position at a markup session of the House subcommittee on intellectual property on October 1st, Rep. Hughes moved to drop the very fair use revision he introduced, and the subcommittee approved.

Hughes explained that he was now persuaded that there was no need for the legislation. According to Hughes, the concerns of the publishers were largely resolved by Judge Walker's opinion in *Wright v. Warner Books*, which was then on appeal and expected to be affirmed.

In *Wright v. Warner Books*, 748 F. Supp. 105 (S.D.N.Y. 1990), aff'd, 953 F.2d 731 (2d Cir. 1991), Judge John Walker of the Second Circuit (sitting by designation as a district judge) considered a case involving a 1988 biography which quoted and paraphrased the unpublished letters of the late author Richard Wright. Judge Walker held that the use was "fair" and did not infringe Wright's copyrights.

Judge Walker observed there is no hard-and-fast rule against the use of unpublished works in all cases, noting that here the biographer permissibly paraphrased the unpublished works to establish facts, not to re-create Wright's expression. Distinguishing *Wright* from *Salinger*, the district court asserted that "what motivated the Court of Appeals in *Salinger* at least in part was concern over J. D. Salinger's right to privacy," which was not applicable to the Wright biography. Mr. Wright had died in 1960.

If that was the end of the matter, Congressman Hughes may have been perfectly justified in his conclusion that the fair use bill was unnecessary. Unfortunately, the Second Circuit managed to muddy things up one more time.

The appellate court affirmed Judge Walker's decision, but disagreed with his com-

ments about the significance to be attached to unpublished work. The Second Circuit observed that the district court gave "insufficient weight" to the unpublished status of the letters and journal entries, stating: "Our precedents ... leave little room for discussion of this factor once it has been determined that the copyrighted work is unpublished." Nevertheless, the court emphasized that there was no *per se* rule against a finding of fair use of unpub-

"[F]airness is a relative, not an absolute concept."

lished works and that "a party need not 'shut-out' her opponent on the four factor tally to prevail." *Id.* at 1898.

So, is there a real problem or not? Despite (or maybe because of) the *Wright* decision, writers and publishers remained concerned and redoubled their efforts to obtain passage of a legislative change to counteract the perceived effect of the *Salinger* and *New Era* cases.

On November 19, 1991, the full House Committee approved copyright-related legislation (H.R. 2372) but excluded the fair use provisions. The future of legislative efforts in this area remained very much up in the air. Under strong lobbying pressure, Rep. Hughes reconsidered and in early 1992 introduced H.R. 4412 which converted the previous proposal into a one-sentence bill that would add the following to the end of Section 107:

"The fact that a work was unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors."

The revised language was approved by the House subcommittee on March 12, 1992, and by the House itself on August 11th. The differences in language with S. 1035 were considered by a House-Senate Conference and resolved in favor of the House bill, with the Senate conferees filing a report that declared there to be no meaningful difference between the two versions.

On October 7, 1992, the Senate approved H.R. 4412, and a joint statement was issued by Senators Simon, Leahy, Kennedy, Grassley, Metzenbaum, and Kohl explaining that the newly-passed bill was "designed to undo the harm caused by the overly restrictive standards adopted in *Salinger* and *New Era*, and to clearly and indisputably reject the view that the unpublished nature of the work triggers a virtual *per se* ruling against a finding of fair use."

Shortly thereafter, on October 24, 1992, President Bush signed the bill into law as Pub. L. 102-492, 106 Stat. 3145. It applies to all works whenever written and affects lawsuits filed on or after its enactment, whether or not the disputed use occurred before.

Some may still not be aware of the change wrought by the amendment to Section 107. In a book review published in the August 22, 1994 issue of *The New Republic*, for example,

the reviewer commented as follows: "In the wake of *Salinger*'s suit against Hamilton, biographers are now restrained by law from quoting from unpublished documents, except by permission." This statement is surely an overstatement. The better view is that, "[b]ecause of the new fair use amendment, and its legislative history, the overly restrictive standards of *Salinger* and *New Era* should no longer be good law in the Second Circuit."

(See Hartnick, "New Fair Use Amendment is Well Worth the Effort," *N.Y. Law J.* (Dec. 18, 1992) at 5.)

Having said that, it is useful to keep in mind that, as Supreme Court Justice Cardozo once said, "fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934). The relativeness of fairness inevitably leads to at least a mild degree of uncertainty.

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