471 U.S. 539 (1985)

HARPER & ROW, PUBLISHERS, INC., ET AL.
v.
NATION ENTERPRISES ET AL.

No. 83-1632.

Supreme Court of United States.

Argued November 6, 1984
Decided May 20, 1985

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider to what extent the "fair use" provision of the Copyright Act sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In March 1979, an undisclosed source provided The Nation Magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled "The Ford Memoirs — Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in Time Magazine. Petitioners brought a successful copyright action against The Nation. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material. We now reverse.

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In February 1977, shortly after leaving the White House, former President Gerald R. Ford contracted with petitioners Harper & Row and Reader's Digest, to publish his as yet unwritten memoirs. The memoirs were to contain "significant hitherto unpublished material" concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon and "Mr. Ford's reflections on this period of history, and the morality and personalities involved." Two years later, as the memoirs were nearing completion, petitioners negotiated a prepublication licensing agreement with Time, a weekly news magazine. The issue featuring the excerpts was timed to appear approximately one week before shipment of the full length book version to bookstores. Exclusivity was an important consideration; Harper & Row instituted procedures designed to maintain the confidentiality of the manuscript, and Time retained the right to renegotiate the second payment should the material appear in print prior to its release of the excerpts.

Two to three weeks before the Time article's scheduled release, an unidentified person secretly brought a copy of the Ford manuscript to Victor Navasky, editor of The Nation, a political commentary magazine. Mr. Navasky knew that his possession of the manuscript

was not authorized and that the manuscript must be returned quickly to his "source" to avoid discovery. He hastily put together what he believed was "a real hot news story" composed of quotes, paraphrases, and facts drawn exclusively from the manuscript. Mr. Navasky attempted no independent commentary, research or criticism, in part because of the need for speed if he was to "make news" by "publish[ing] in advance of publication of the Ford book." The 2,250-word article, reprinted in the Appendix to this opinion, appeared on April 3, 1979. As a result of The Nation's article, Time canceled its piece and refused to pay the remaining $12,500.

Petitioners brought suit in the District Court for the Southern District of New York, alleging conversion, tortious interference with contract, and violations of the Copyright Act. After a 6-day bench trial, the District Judge found that "A Time to Heal" was protected by copyright at the time of The Nation publication and that respondents' use of the copyrighted material constituted an infringement under the Copyright Act. The court awarded actual damages of $12,500.

A divided panel of the Court of Appeals for the Second Circuit reversed. The Court of Appeals was especially influenced by the "politically significant" nature of the subject matter and its conviction that it is not "the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a democratic state" or "chill the activities of the press by forbidding a circumscribed use of copyrighted words."

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

Article I, § 8, of the Constitution provides:

> *"The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."*

As we noted last Term: "[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." "The monopoly created by copyright thus rewards the individual author in order to benefit the public." This principle applies equally to works of fiction and nonfiction. The book at issue here, for example, was two years in the making, and began with a contract giving the author's copyright to the publishers in exchange for their services in producing and marketing the work. In preparing the book, Mr. Ford drafted essays and word portraits of public figures and participated in hundreds of taped interviews that were later distilled to chronicle his personal viewpoint. It is evident that the monopoly granted by copyright

actively served its intended purpose of inducing the creation of new material of potential historical value.

Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights — to publish, copy, and distribute the author's work — vest in the author of an original work from the time of its creation. In practice, the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author's work. The copyright owner's rights, however, are subject to certain statutory exceptions. Among these is § 107 which codifies the traditional privilege of other authors to make "fair use" of an earlier writer's work. In addition, no author may copyright facts or ideas. The copyright is limited to those aspects of the work — termed "expression" — that display the stamp of the author's originality.

Creation of a nonfiction work, even a compilation of pure fact, entails originality. The copyright holders of "A Time to Heal" complied with the relevant statutory notice and registration procedures. Thus there is no dispute that the unpublished manuscript of "A Time to Heal," as a whole, was protected from unauthorized reproduction. Nor do respondents dispute that verbatim copying of excerpts of the manuscript's original form of expression would constitute infringement unless excused as fair use. Yet copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original — for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain — as long as such use does not unfairly appropriate the author's original contributions. Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole. Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.

We need not reach these issues, however, as The Nation has admitted to lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of The Nation article. In using generous verbatim excerpts of Mr. Ford's unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right. For the reasons set forth below, we find that this use of the copyrighted manuscript, even stripped to the verbatim quotes conceded by The Nation to be copyrightable expression, was not a fair use within the meaning of the Copyright Act.

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Respondents, however, contend that First Amendment values require a different rule under the circumstances of this case. The thrust of the decision below is that "[t]he scope of [fair use] is undoubtedly wider when the information conveyed relates to matters of high public concern. Respondents advance the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use — the piracy of verbatim quotations for the purpose of "scooping" the authorized first serialization. Respondents explain their copying of Mr. Ford's expression as essential to

reporting the news story it claims the book itself represents. In respondents' view, not only the facts contained in Mr. Ford's memoirs, but "the precise manner in which [he] expressed himself [were] as newsworthy as what he had to say." Respondents argue that the public's interest in learning this news as fast as possible outweighs the right of the author to control its first publication.

The Second Circuit noted, correctly, that copyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." No author may copyright his ideas or the facts he narrates. As this Court long ago observed: "[T]he news element — the information respecting current events contained in the literary production — is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day." But copyright assures those who write and publish factual narratives such as "A Time to Heal" that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment.

Respondents' theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book.

Nor do respondents assert any actual necessity for circumventing the copyright scheme with respect to the types of works and users at issue here. Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication. The fact that the words the author has chosen to clothe his narrative may of themselves be "newsworthy" is not an independent justification for unauthorized copying of the author's expression prior to publication. To paraphrase another recent Second Circuit decision:

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

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. This Court stated in *Mazer* v. *Stein,* 347 U. S. 201, 209 (1954):

"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 through the talents of authors and inventors in `Science and useful Arts.' "

And again in *Twentieth Century Music Corp.* v. *Aiken*:

"The immediate effect of our copyright law is to secure a fair return for an `author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good."

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. "[T]o propose that fair use be imposed whenever the `social value [of dissemination] . . . outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." And as one commentator has noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."

Moreover, freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all." We do not suggest this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts. But in the words of New York's Chief Judge Fuld:

"The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value.

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use.

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In sum, the traditional doctrine of fair use, as embodied in the Copyright Act, does not sanction the use made by The Nation of these copyrighted materials. Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for judicially imposing, a "compulsory license" permitting unfettered access to the unpublished copyrighted expression of public figures.

The Nation conceded that its verbatim copying of some 300 words of direct quotation from the Ford manuscript would constitute an infringement unless excused as a fair use.

Because we find that The Nation's use of these verbatim excerpts from the unpublished manuscript was not a fair use, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

The Court holds that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance — the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting "the economic incentive to create and disseminate ideas," this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. I therefore respectfully dissent.

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings." Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product. The challenge of copyright is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."

The "originality" requirement now embodied in the Copyright Act is crucial to maintenance of the appropriate balance between these competing interests.[2] Properly interpreted in the light of the legislative history, this section extends copyright protection to an author's literary form but permits free use by others of the ideas and information the author communicates. This limitation of protection to literary form precludes any claim of copyright in facts, including historical narration.

"It is not to be supposed that the framers of the Constitution, when they empowered Congress `to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

The "promotion of science and the useful arts" requires this limit on the scope of an author's control. Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors. This limitation on copyright also ensures consonance with our most important First Amendment values. Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" leaves no room for a statutory monopoly over information and ideas. "The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained." A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are "the essence of self-government." And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.[1]

It follows that infringement of copyright must be based on a taking of literary form, as opposed to the ideas or information contained in a copyrighted work. Deciding whether an infringing appropriation of literary from has occurred is difficult for at least two reasons. First, the distinction between literary form and information or ideas is often elusive in practice. Second, infringement must be based on a *substantial* appropriation of literary form. This determination is equally challenging. Not surprisingly, the test for infringement has defied precise formulation.[2] In general, though, the inquiry proceeds along two axes: *how closely* has the second author tracked the first author's particular language and structure of presentation; and *how much* of the first author's language and structure has the second author appropriated.

In my judgment, the Court's fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history. The failure to distinguish between information and literary form permeates every aspect of the Court's fair use analysis and leads the Court to the wrong result in this case.

The Court's exceedingly narrow approach to fair use permits Harper & Row to monopolize information. This holding "effect[s] an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas." The Court has perhaps advanced the ability of the historian — or at least the public official who has recently left office — to capture the full economic value of information in his or her possession. But the Court does so only by risking the robust debate of public issues that is the "essence of self-government." The Nation was providing the grist for that robust debate. The Court imposes liability upon The Nation for no other reason than that The Nation succeeded in being the first to provide certain information to the public. I dissent.

[1] It would be perverse to prohibit government from limiting the financial resources upon which a political speaker may draw but to permit government to limit the intellectual resources upon which that speaker may draw.

[2] The protection of literary form must proscribe more than merely word-for-word appropriation of substantial portions of an author's work. Otherwise a plagiarist could avoid infringement by immaterial variations. The step beyond the narrow and clear prohibition of wholesale copying is, however, a venture onto somewhat uncertain terrain.