Harper & Row v. Nation Enterprises

471 U.S. 539
Supreme Court of United States
May 20, 1985

HARPER & ROW, PUBLISHERS, INC., ET AL. v. NATION ENTERPRISES ET AL. No. 83-1632. Argued November 6, 1984. Decided May 20, 1985. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT . *Edward A. Miller* argued the cause for petitioners. With him on the briefs were *Barbara Hufham* and *David Otis Fuller, Jr.* *Floyd Abrams* argued the cause for respondents. With him on the brief were *Devereux Chatillon, Carol E. Rinzler, Andrew L. Deutsch,* and *Leon Friedman.* Briefs of *amici curiae* urging reversal were filed for the Association of American Publishers, Inc., by *Jon A. Baumgarten* and *Charles H. Lieb;* and for Volunteer Lawyers for the Arts, Inc., by *I. Fred Koenigsberg.* Briefs of *amici curiae* urging affirmance were filed for the Pen American Center by *Stephen Gillers;* and for Gannett Co., Inc., et al. by *Melville B. Nimmer, Benjamin W. Heineman, Jr., Alice Neff Lucan,* and *Robert C. Lobdell.*

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 Revision Act of 1976 (hereinafter the Copyright Act), 17 U.S. C. § 107, sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In March 1979, an undisclosed source provided The Nation Magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford."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. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row), and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of The Nation article, Time canceled its agreement. 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 granted certiorari, 467 U.S. 1214 (1984), and we now reverse.

I

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." App. to Pet. for Cert. C-14 – C-15. In addition to the right to publish the Ford memoirs in book form, the agreement gave petitioners the exclusive right to license prepublication excerpts, known in the trade as "first serial rights." Two years later, as the

memoirs were nearing completion, petitioners negotiated a prepublication licensing agreement with Time, a weekly news magazine. Time agreed to pay $25,000, $12,500 in advance and an additional $12,500 at publication, in exchange for the right to excerpt 7,500 words from Mr. Ford's account of the Nixon pardon. 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. 557 F.Supp. 1067, 1069 (SDNY 1983). He hastily put together what he believed was "a real hot news story" composed of quotes, paraphrases, and facts drawn exclusively from the manuscript. *Ibid.* 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." App. 416-417. 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, §§ 106(1), (2), and (3), protecting respectively the right to reproduce the work, the right to license preparation of derivative works, and the right of first distribution of the copyrighted work to the public. App. to Pet. for Cert. C-29–C-30. The District Court rejected respondents' argument that The Nation's piece was a "fair use" sanctioned by § 107 of the Act. Though billed as "hot news," the article contained no new facts. The magazine had "published its article for profit," taking "the heart" of "a soon-to-be published" work. This unauthorized use "caused the *Time* agreement to be aborted and thus diminished the value of the copyright." 557 F.Supp., at 1072. Although certain elements of the Ford memoirs, such as historical facts and memoranda, were not *per se* copyrightable, the District Court held that it was "the totality of these facts and memoranda, collected together with Ford's reflections that made them of value to The Nation, [and] this . . . totality . . . is protected by the copyright laws." *Id.,* at 1072-1073. The court awarded actual damages of $12,500.

A divided panel of the Court of Appeals for the Second Circuit reversed. The majority recognized that Mr. Ford's verbatim "reflections" were original "expression" protected by copyright. But it held that the District Court had erred in assuming the "coupling [of these reflections] with uncopyrightable fact transformed that information into a copyrighted 'totality.' " 723 F.2d 195, 205 (1983). The majority noted that copyright attaches to expression, not facts or

ideas. It concluded that, to avoid granting a copyright monopoly over the facts underlying history and news, "'expression' [in such works must be confined] to its barest elements – the ordering and choice of the words themselves." *Id.,* at 204. Thus similarities between the original and the challenged work traceable to the copying or paraphrasing of uncopyrightable material, such as historical facts, memoranda and other public documents, and quoted remarks of third parties, must be disregarded in evaluating whether the second author's use was fair or infringing.

> "When the uncopyrighted material is stripped away, the article in *The Nation* contains, at most, approximately 300 words that are copyrighted. These remaining paragraphs and scattered phrases are all verbatim quotations from the memoirs which had not appeared previously in other publications. They include a short segment of Ford's conversations with Henry Kissinger and several other individuals. Ford's impressionistic depictions of Nixon, ill with phlebitis after the resignation and pardon, and of Nixon's character, constitute the major portion of this material. It is these parts of the magazine piece on which [the court] must focus in [its] examination of the question whether there was a 'fair use' of copyrighted matter." *Id.,* at 206.

Examining the four factors enumerated in § 107, see *infra,* at 547, n. 2, the majority found the purpose of the article was "news reporting," the original work was essentially factual in nature, the 300 words appropriated were insubstantial in relation to the 2,250-word piece, and the impact on the market for the original was minimal as "the evidence [did] not support a finding that it was the very limited use of expression *per se* which led to Time's decision not to print the excerpt." The Nation's borrowing of verbatim quotations merely "len[t] authenticity to this politically significant material. . . complementing the reporting of the facts." 723 F.2d, at 208. 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." *Id.,* at 197, 209.

II

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. *Twentieth Century Music Corp.* v. *Aiken,* 422 U.S. 151, 156 (1975).

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." *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984). "The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Id.,* at 477 (dissenting opinion). 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.

Section 106 provides in pertinent part:

> "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and authorize any of the following:
>
> "(1) to reproduce the copyrighted work in copies . . . ;
>
> "(2) to prepare derivative works based upon the copyrighted work;
>
> "(3) to distribute copies . . . of the copyrighted work to the public . . . ."

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. § 106. 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. §§ 107-118. Among these is § 107 which codifies the traditional privilege of other authors to make "fair use" of an earlier writer's work.

Section 107 states:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;

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

"(4) the effect of the use upon the potential market for or value of the copyrighted work."[7]

In addition, no author may copyright facts or ideas. § 102. 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. See, *e. g., Schroeder* v. *William Morrow & Co.,* 566 F.2d 3 (CA7 1977) (copyright in gardening directory); cf. *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U.S. 53, 58 (1884) (originator of a photograph may claim copyright in his work). The copyright holders of "A Time to Heal" complied with the relevant statutory notice and registration procedures. See §§ 106, 401, 408; App. to Pet. for Cert. C-20. Thus there is no dispute that the unpublished manuscript of "A Time to Heal," as a whole, was protected by § 106 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. See 1 M. Nimmer, Copyright § 2.11[B], p. 2-159 (1984) (hereinafter Nimmer). 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. *Ibid.;* A. Latman, Fair Use of Copyrighted Works (1958), reprinted as Study No. 14 in Copyright Law Revision Studies Nos. 14-16, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 7 (1960) (hereinafter Latman). 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. Compare *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.,* 558 F.2d 91 (CA2 1977) (protection accorded author's analysis, structuring of material and marshaling of facts), with *Hoehling* v. *Universal City Studios, Inc.,* 618 F.2d 972 (CA2 1980) (limiting protection to ordering and choice of words). See, *e. g.,* 1 Nimmer § 2.11[D], at 2-164 – 2-165.

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.

III

A

Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property 260 (1944) (hereinafter Ball). The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine. 3 Nimmer § 13.05. Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976) (hereinafter House Report).

"[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained." Ball 260. Professor Latman, in a study of the doctrine of fair use commissioned by Congress for the revision effort, see *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S., at 462-463, n. 9 (dissenting opinion), summarized prior law as turning on the "importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?" Latman 15.

⌙Professor Nimmer notes: "[Perhaps] no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: 'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.' " 3 Nimmer § 13.05[A], at 13-66, quoting McDonald, Non-infringing Uses, 9 Bull. Copyright Soc. 466, 467 (1962). This "equitable rule of reason," *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S., at 448, "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.,* 621 F.2d 57, 60 (CA2 1980). See generally L. Seltzer, Exemptions and Fair Use in Copyright 18-48 (1978).⌟

As early as 1841, Justice Story gave judicial recognition to the doctrine in a case that concerned the letters of another former President, George Washington.

> "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, 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." *Folsom* v. *Marsh,* 9 F. Cas. 342, 344-345 (No. 4,901) (CC Mass.)

As Justice Story's hypothetical illustrates, the fair use doctrine has always precluded a use that "supersede[s] the use of the original." *Ibid.* Accord, S. Rep. No. 94-473, p. 65 (1975) (hereinafter Senate Report).

Perhaps because the fair use doctrine was predicated on the author's implied consent to "reasonable and customary" use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works. Under common-law copyright, "the property of the author. . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same." *American Tobacco Co.* v. *Werckmeister,* 207 U.S. 284, 299 (1907); 2 Nimmer § 8.23, at 8-273. 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. See Copyright Law Revision – Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., 27 (H. R. Comm. Print 1963) (discussion suggesting works disseminated to the public in a form not constituting a technical "publication" should nevertheless be subject to fair use); 3 Nimmer § 13.05, at 13-62, n. 2. But it has never been seriously disputed that "the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use." *Ibid.* 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. Respondents contend, however, that Congress, in including first publication among the rights enumerated in § 106, which are expressly subject to fair use under § 107, intended that fair use would apply *in pari materia* to published and unpublished works. The Copyright Act does not support this proposition.

The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine. See *Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 159-160 (1985); *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S., at 462-463, n. 9 (dissenting opinion). Among its other innovations, it eliminated publication "as a dividing line between common law and statutory protection," House Report, at 129, extending statutory protection to all works from the time of their creation. It also recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works. The Report of the House Committee on the Judiciary confirms that "Clause (3) of section 106, establishes the exclusive right of publications . . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work." *Id.,* at 62.

Though the right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107, fair use analysis must always be tailored to the individual case. *Id.,* at 65; 3 Nimmer § 13.05[A]. The nature of the interest at stake is highly relevant to whether a given use is fair. From the beginning, those entrusted with the task of revision recognized the "overbalancing reasons to preserve the common law protection of undisseminated works until the author or his successor chooses to disclose them."

Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 41 (Comm. Print 1961). The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

The Senate Report confirms that Congress intended the unpublished nature of the work to figure prominently in fair use analysis. In discussing fair use of photocopied materials in the classroom the Committee Report states:

> "A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it . . . . The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's 'right of first publication' would outweigh any needs of reproduction for classroom purposes." Senate Report, at 64.

Although the Committee selected photocopying of classroom materials to illustrate fair use, it emphasized that "the same general standards of fair use are applicable to all kinds of uses of copyrighted material." *Id.,* at 65. We find unconvincing respondents' contention that the absence of the quoted passage from the House Report indicates an intent to abandon the traditional distinction between fair use of published and unpublished works. It appears instead that the fair use discussion of photocopying of classroom materials was omitted from the final Report because educators and publishers in the interim had negotiated a set of guidelines that rendered the discussion obsolete. House Report, at 67. The House Report nevertheless incorporates the discussion by reference, citing to the Senate Report and stating: "The Committee has reviewed this discussion, and considers it still has value as an analysis of various aspects of the [fair use] problem." *Ibid.*

Even if the legislative history were entirely silent, we would be bound to conclude from Congress' characterization of § 107 as a "restatement" that its effect was to preserve existing law concerning fair use of unpublished works as of other types of protected works and not to "change, narrow, or enlarge it." *Id.,* at 66. We conclude that the unpublished nature of a work is "[a] key, though not necessarily determinative, factor" tending to negate a defense of fair use. Senate Report, at 64. See 3 Nimmer § 13.05, at 13-62, n. 2; W. Patry, The Fair Use Privilege in Copyright Law 125 (1985) (hereinafter Patry).

We also find unpersuasive respondents' argument that fair use may be made of a soon-to-be-published manuscript on the ground that the author has demonstrated he has no interest in nonpublication. This argument assumes that

the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination. It is true that common-law copyright was often enlisted in the service of personal privacy. See Brandeis & Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 198-199 (1890). In its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection. The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the "right to control the first public distribution" of his work, House Report, at 62, echos the common law's concern that the author or copyright owner retain control throughout this critical stage. See generally Comment, The Stage of Publication as a "Fair Use" Factor: *Harper & Row, Publishers v. Nation Enterprises,* 58 St. John's L. Rev. 597 (1984). The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term "news value" to be gained from premature publication of the author's expression. See Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983, 1004-1006 (1970) (The absolute protection the common law accorded to soon-to-be published works "[was] justified by [its] brevity and expedience"). The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing. See *Belushi* v. *Woodward,* 598 F.Supp. 36 (DC 1984) (successful marketing depends on coordination of serialization and release to public); Marks, Subsidiary Rights and Permissions, in What Happens in Book Publishing 230 (C. Grannis ed. 1967) (exploitation of subsidiary rights is necessary to financial success of new books). Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.

B

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." *Consumers Union of the United States, Inc.* v. *General Signal Corp.,* 724 F.2d 1044, 1050 (CA2 1983) (construing 723 F.2d 195 (1983) (case below) as allowing advertiser to quote Consumer Reports), cert. denied, 469 U.S. 823 (1984). 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." Brief for Respondents 38-39. 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." 723 F.2d, at 203. No author may copyright his ideas or the facts he narrates. 17 U.S. C. § 102(b). See, *e. g., New York Times Co.* v. *United States,* 403 U.S. 713, 726, n. (1971) (BRENNAN, J., concurring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed); 1 Nimmer § 1.10[B][2]. 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." *International News Service* v. *Associated Press,* 248 U.S. 215, 234 (1918). 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. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 575 (1977).

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. See *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.,* 558 F.2d 91 (CA2 1977), cert. denied, 434 U.S. 1014 (1978).

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." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.,* 621 F.2d 57, 61 (1980) (citations omitted).

Accord, *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.,* 503 F.Supp. 1137 (SDNY 1980) ("newsworthiness" of material copied does not justify copying), aff'd, 672 F.2d 1095 (CA2), cert. denied, 459 U.S. 826

(1982); *Quinto* v. *Legal Times of Washington, Inc.,* 506 F.Supp. 554 (DC 1981) (same).

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." 422 U.S., at 156.

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." Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1615 (1982). 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." Sobel, Copyright and the First Amendment: A Gathering Storm? 19 ASCAP Copyright Law Symposium 43, 78 (1971). See generally Comment, Copyright and the First Amendment; Where Lies the Public Interest?, 59 Tulane L. Rev. 135 (1984).

Moreover, freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard,* 430 U.S. 705, 714 (1977) (BURGER, C. J.). 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." *Estate of Hemingway* v. *Random House, Inc.,* 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968).

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

See *Schnapper* v. *Foley,* 215 U.S. App. D. C. 59, 667 F.2d 102 (1981), cert. denied, 455 U.S. 948 (1982); 1 Nimmer § 1.10[B], at 1-70, n. 24; Party 140-142.

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.

IV

Fair use is a mixed question of law and fact. *Pacific & Southern Co.* v. *Duncan,* 744 F.2d 1490, 1495, n. 8 (CA11 1984). Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work." *Id.,* at 1495. Thus whether The Nation article constitutes fair use under § 107 must be reviewed in light of the principles discussed above. The factors enumerated in the section are not meant to be exclusive: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." House Report, at 65. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. We address each one separately.

Purpose of the Use. The Second Circuit correctly identified news reporting as the general purpose of The Nation's use. News reporting is one of the examples enumerated in § 107 to "give some idea of the sort of activities the courts might regard as fair use under the circumstances." Senate Report, at 61. This listing was not intended to be exhaustive, see *ibid.;* § 101 (definition of "including" and "such as"), or to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis. See H. R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967); Patry 477, n. 4. "[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." Senate Report, at 62. The fact that an article arguably is "news" and therefore a productive use is simply one factor in a fair use analysis.

We agree with the Second Circuit that the trial court erred in fixing on whether the information contained in the memoirs was actually new to the public. As Judge Meskill wisely noted, "[c]ourts should be chary of deciding what is and what is not news." 723 F.2d, at 215 (dissenting). Cf. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 345-346 (1974). "The issue is not what constitutes 'news,' but whether a claim of newsreporting is a valid fair use defense to an infringement of *copyrightable expression.*" Patry 119. The Nation has every right to seek to be

the first to publish information. But The Nation went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a "news event" out of its unauthorized first publication of a noted figure's copyrighted expression.

The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S., at 451. In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. See *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.,* 503 F.Supp., at 1144; 3 Nimmer § 13.05[A][1], at 13-71, n. 25.3.

In evaluating character and purpose we cannot ignore The Nation's stated purpose of scooping the forthcoming hard-cover and Time abstracts.

"The dissent excuses The Nation's unconsented use of an unpublished manuscript as "standard journalistic practice," taking judicial notice of New York Times articles regarding the memoirs of John Erlichman, John Dean's "Blind Ambition," and Bernstein and Woodward's "The Final Days" as proof of such practice. *Post,* at 590-593, and n. 14. *Amici curiae* sought to bring this alleged practice to the attention of the Court of Appeals for the Second Circuit, citing these same articles. The Court of Appeals, at Harper & Row's motion, struck these exhibits for failure of proof at trial, Record Doc. No. 19; thus they are not a proper subject for this Court's judicial notice."

App. to Pet. for Cert. C-27. The Nation's use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication. See *Meredith Corp.* v. *Harper & Row, Publishers, Inc.,* 378 F.Supp. 686, 690 (SDNY) (purpose of text was to compete with original), aff'd, 500 F.2d 1221 (CA2 1974). Also relevant to the "character" of the use is "the propriety of the defendant's conduct." 3 Nimmer § 13.05[A], at 13-72. "Fair use presupposes 'good faith' and 'fair dealing.' " *Time Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130, 146 (SDNY 1968), quoting Schulman, Fair Use and the Revision of the Copyright Act, 53 Iowa L. Rev. 832 (1968). The trial court found that The Nation knowingly exploited a purloined manuscript. App. to Pet. for Cert. B-1, C-20 – C-21, C-28 – C-29. Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification. Like its competitor news-weekly, it was free to bid for the right of abstracting excerpts from "A Time to Heal." Fair use "distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit.' " *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.,* 558 F.2d, at 94, quoting from Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 3, p. 1706 (1966) (statement of John Schulman).

Nature of the Copyrighted work. Second, the Act directs attention to the nature of the copyrighted work. "A Time to Heal" may be characterized as an unpublished historical narrative or autobiography. The law generally recognizes a

greater need to disseminate factual works than works of fiction or fantasy. See Gorman, Fact or Fancy? The Implications for Copyright, 29 J. Copyright Soc. 560, 561 (1982).

> "[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case." *Id.,* at 563.

Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the "smoking gun" is perhaps so integral to the idea expressed as to be inseparable from it. Cf. 1 Nimmer § 1.10[C]. But The Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression. Such use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts.

The fact that a work is unpublished is a critical element of its "nature." 3 Nimmer § 13.05[A]; Comment, 58 St. John's L. Rev., at 613. Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

In the case of Mr. Ford's manuscript, the copyright holders' interest in confidentiality is irrefutable; the copyright holders had entered into a contractual undertaking to "keep the manuscript confidential" and required that all those to whom the manuscript was shown also "sign an agreement to keep the manuscript confidential." App. to Pet. for Cert. C-19 – C-20. While the copyright holders' contract with Time required Time to submit its proposed article seven days before publication, The Nation's clandestine publication afforded no such opportunity for creative or quality control. *Id.,* at C-18. It was hastily patched together and contained "a number of inaccuracies." App. 300b-300c (testimony of Victor Navasky). A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to characterize as "fair."

Amount and Substantiality of the Portion Used. Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of "A Time to Heal." The District Court, however, found that "[T]he Nation took what was essentially the heart of the book." 557 F.Supp., at 1072. We believe the Court of Appeals erred in overruling the District Judge's evaluation of the qualitative nature of the taking. See, *e. g., Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.,* 503 F.Supp., at 1145

(taking of 55 seconds out of 1 hour and 29-minute film deemed qualitatively substantial). A Time editor described the chapters on the pardon as "the most interesting and moving parts of the entire manuscript." Reply Brief for Petitioners 16, n. 8. The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters. He testified that he used verbatim excerpts because simply reciting the information could not adequately convey the "absolute certainty with which [Ford] expressed himself," App. 303; or show that "this comes from President Ford," *id.,* at 305; or carry the "definitive quality" of the original, *id.,* at 306. In short, he quoted these passages precisely because they qualitatively embodied Ford's distinctive expression.

As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the *infringing* work. As Judge Learned Hand cogently remarked, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 81 F.2d 49, 56 (CA2), cert. denied, 298 U.S. 669 (1936). Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.

Stripped to the verbatim quotes, the direct takings from the unpublished manuscript constitute at least 13% of the infringing article. See *Meeropol* v. *Nizer,* 560 F.2d 1061, 1071 (CA2 1977) (copyrighted letters constituted less than 1% of infringing work but were prominently featured). The Nation article is structured around the quoted excerpts which serve as its dramatic focal points. See Appendix to this opinion, *post,* p. 570. In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the "magazine took a meager, indeed an infinitesimal amount of Ford's original language." 723 F.2d, at 209.

Effect on the Market. Finally, the Act focuses on "the effect of the use upon the potential market for or value of the copyrighted work." This last factor is undoubtedly the single most important element of fair use. See 3 Nimmer § 13.05[A], at 13-76, and cases cited therein.

⤷Economists who have addressed the issue believe the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero. See, *e. g.,* T. Brennan, *Harper & Row* v. *The Nation,* Copyrightability and Fair Use, Dept. of Justice Economic Policy Office Discussion Paper 13-17 (1984); Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1615 (1982). As the facts here demonstrate, there is a fully functioning market that encourages the creation and dissemination of memoirs of public figures. In the economists' view, permitting "fair use" to displace normal copyright channels disrupts the copyright market without a commensurate public benefit.⤶

"Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D], at 1-87. The trial court found not merely a potential but an actual effect on the market. Time's cancellation of its projected serialization and its refusal to pay the $12,500 were the direct effect of the infringement. The Court of Appeals

rejected this factfinding as clearly erroneous, noting that the record did not establish a causal relation between Time's nonperformance and respondents' unauthorized publication of Mr. Ford's *expression* as opposed to the facts taken from the memoirs. We disagree. Rarely will a case of copyright infringement present such clear-cut evidence of actual damage. Petitioners assured Time that there would be no other authorized publication of *any* portion of the unpublished manuscript prior to April 23, 1979. *Any* publication of material from chapters 1 and 3 would permit Time to renegotiate its final payment. Time cited The Nation's article, which contained verbatim quotes from the unpublished manuscript, as a reason for its nonperformance. With respect to apportionment of profits flowing from a copyright infringement, this Court has held that an infringer who commingles infringing and noninfringing elements "must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 309 U.S. 390, 406 (1940). Cf. 17 U.S. C. § 504(b) (the infringer is required to prove elements of profits attributable to other than the infringed work). Similarly, once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression. See 3 Nimmer § 14.02, at 14-7 – 14-8.1. Petitioners established a prima facie case of actual damage that respondents failed to rebut. See *Stevens Linen Associates, Inc.* v. *Mastercraft Corp.,* 656 F.2d 11, 15 (CA2 1981). The trial court properly awarded actual damages and accounting of profits. See 17 U.S. C. § 504(b).

More important, to negate fair use one need only show that if the challenged use "should become widespread, it would adversely affect the *potential* market for the copyrighted work." *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S., at 451 (emphasis added); *id.,* at 484, and n. 36 (collecting cases) (dissenting opinion). This inquiry must take account not only of harm to the original but also of harm to the market for derivative works. See *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.,* 621 F.2d 57 (CA2 1980); *Meeropol* v. *Nizer, supra,* at 1070; *Roy Export* v. *Columbia Broadcasting System, Inc.,* 503 F.Supp., at 1146. "If the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the adaptation [and serialization] right) the use is not fair." 3 Nimmer § 13.05[B], at 13-77 – 13-78 (footnote omitted).

It is undisputed that the factual material in the balance of The Nation's article, besides the verbatim quotes at issue here, was drawn exclusively from the chapters on the pardon. The excerpts were employed as featured episodes in a story about the Nixon pardon – precisely the use petitioners had licensed to Time. The borrowing of these verbatim quotes from the unpublished manuscript lent The Nation's piece a special air of authenticity – as Navasky expressed it, the reader would know it was Ford speaking and not The Nation. App. 300c. Thus it directly competed for a share of the market for prepublication excerpts. The Senate Report states:

> "With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." Senate Report, at 65.

Placed in a broader perspective, a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general. "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Ibid.*

V

The Court of Appeals erred in concluding that The Nation's use of the copyrighted material was excused by the public's interest in the subject matter. It erred, as well, in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use. Finally, in finding the taking "infinitesimal," the Court of Appeals accorded too little weight to the qualitative importance of the quoted passages of original expression. 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. See *Pacific & Southern Co.* v. *Duncan,* 744 F.2d, at 1499-1500. 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.

{The following is the article "The Ford Memoirs – Behind the Nixon Pardon" from *The Nation,* as set forth in an appendix to the opinion. References in superscript brackets denote a portion taken verbatim from the book, *A Time to Heal: The Autobiography of Gerald R. Ford.*}

THE FORD MEMOIRS – BEHIND THE NIXON PARDON

In his memoirs, *A Time To Heal,* which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Rockefeller for Vice President, and that he regretted his "cowardice"[1] in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun"[2] and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view."[3] Ford had believed him, but he let Haig explain the President's alternatives.

He could "ride it out"[4] or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him.[5] Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."[6]

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

But because Ford had neglected to tell Haig he though the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."[7]

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."[8]

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all."[9] Rather, he did it because he had "to get the monkey off my back one way or the other."[10]

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information[11] – *i. e.,* that Nixon was under investigation in ten separate areas, and that the court process could "take years."[12] Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente,"[13] and "it would be virtually impossible for me to direct public attention on anything else."[14]

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would

require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response. Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."[15]

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Lets get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that "no statement would be better than that."[16] They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon – and Watergate – behind us as quickly as possible."[17]

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't people would say I lacked compassion."[18] Ford went:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death.[19]

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."[20]

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the

President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."[21]

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977."[22] Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez.* At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."[23]

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"[24]

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong,"[25] all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."[26]

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H. R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post's* feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here – a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

{Excerpts from:

A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD}

[1] I was angry at myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller, whatever the consequences." p. 496.

[2] [I]t contained the so-called smoking gun. p. 3.

[3] [O]ver the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view. p. 7.

[4] The first [option] was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. p. 4.

[5] Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President – Gerald Ford – would pardon him. p. 5.

[6] Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power. pp. 5-6.

[7] Only after I had finished did [Bryce Harlow] let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead. p. 18.

[8] During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. p. 21.

[9] But compassion for Nixon as an individual hadn't prompted my decision at all. p. 266.

[10] I had to get the monkey off my back one way or another. p. 236.

[11] Jaworski gave Phil several crucial pieces of information. p. 246.

[12] And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. p. 248.

[13] The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. p. 238.

[14] It would be virtually impossible for me to direct public attention on anything else. p. 239.

[15] But [Miller] wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. p. 246.

[16] When Zeigler asked Becker what he thought of it, Becker replied that *no* statement would be better than that. p. 251.

[17] Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon – and Watergate – behind us as quickly as possible. p. 256.

[18] My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out it had begun. Of course I would go. p. 298.

[19] He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. p. 299.

[20] "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you." p. 46.

[21] "We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." p. 46.

[22] I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. p. 155.

[23] Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets in the vicinity of Kompong Som. p. 416.

[24] In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) p. 53.

[25] His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. p. 54.

[26] The speech lasted fifteen minutes, and at the end I was convinced Nixon was out of touch with reality. p. 57.