

Bills Committee on the Copyright (Amendment) Bill 2006

Fair Dealing Provision for Education and Public Administration

Introduction

At the Bills Committee meeting on 19 June 2006, Members requested the Administration to explain the relationship between the proposed fair dealing provisions and the existing permitted acts under the Copyright Ordinance (Cap. 528), and to provide some case law on the interpretation of fair use or fair dealing. Members also requested the Administration to give some examples illustrating what scenarios would fall under or outside the proposed fair dealing provisions for education and public administration (i.e., the proposed sections 41A, 54A, 242A and 246A). This paper provides the information as requested.

Relationship between the fair dealing provisions and the permitted acts

2. There are existing provisions in the Copyright Ordinance that provide for permitted acts for education and public administration (i.e. sections 41 to 45 and sections 54 to 59). In these provisions, the purposes and circumstances under which certain copyright restricted acts will not be regarded as infringing are exhaustively set out. If the use of a copyright work does not fall under the circumstances, it will be restricted by copyright no matter how “fair” they may be. The objective of introducing fair dealing provisions for education and public administration is to provide flexibility to the existing copyright exemption regime so that acts which do not fall under the existing copyright permitted act provisions may still be exempted from copyright restriction if they constitute fair dealing. Such flexibility is justified because changes in teaching methods and social expectations will create new circumstances of reasonable use of copyright works for education and public administration and it would not be feasible to foresee and provide an exhaustive list of permitted acts in the law that can keep up with these changes.

3. It should be noted that “fair dealing” is not a novel concept under our copyright protection regime. The existing sections 38 and 39 of the Copyright Ordinance already stipulate that fair dealing with a work for research, private study, criticism, review or news reporting will not be regarded as infringement. One of the major differences between a “fair dealing” exemption and other permitted acts is that “fair dealing” is not limited to a specified restricted act but could extend to any act that is restricted by copyright. Where an act is exempted as a permitted act (including under the

fair dealing provisions), no infringement will be involved and there is no need for the copyright work users to seek permission from the copyright owners before or after the act. Exemption is only available where the use does not conflict with the copyright owner's normal exploitation of the work or unreasonably prejudice his legitimate interests. Whether certain act constitutes "fair dealing" will depend on the specific facts of the case and the weighing of the relevant factors by the court. The factors listed in the proposed sections 41A(2), 54A(2), 242A(2) and 246A(2) that the court shall consider are drawn up in the light of the fair use/fair dealing provisions in the copyright laws of the US, Singapore and Australia. In fact, the existing section 38(3) of the Copyright Ordinance also stipulates some factors to be considered by the court in determining whether any dealing with a work constitutes fair dealing for research or private study and we have taken the opportunity of the Copyright (Amendment) Bill 2006 to align the factors in section 38(3) along those in the proposed sections 41A(2), 54A(2), 242A(2) and 246A(2) for the sake of consistency.

4. Section 37(5) of the Copyright Ordinance stipulates that the provisions of permitted acts in Division III, Part II of the Copyright Ordinance are to be construed independently of each other, so that the fact that an act does not fall within one provision does not mean that it is not covered by another provision. Hence, the proposed fair dealing provisions and other permitted acts will operate independently of each other. The proposed fair dealing provisions and the existing permitted acts are all subject to the primary consideration as set out in section 37(3) of the Copyright Ordinance, i.e. the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner.

Fair dealing under the existing Copyright Ordinance

5. As noted in the above, the existing sections 38 and 39 of the Copyright Ordinance provide for fair dealing for research, private study, criticism, review and the reporting of current events. These provisions were closely modelled on the equivalent provisions in the U.K. Copyright, Designs and Patents Act 1988, except that the U.K. provision on fair dealing for research and private study (section 29 of the 1988 Act) does not contain the non-exhaustive list of factors as the Hong Kong provision does under section 38(3).

6. It is noted from the U.K. case law that similar criteria of “fairness” are employed in considering whether the use in question amounts to “fair” dealing. As a general guiding principle, fairness should be judged by the objective standard of whether a fair-minded and honest person would have dealt with the copyright work in the manner in which the defendant did, for the relevant purpose¹. Ultimately the decision must be a matter of impression².

7. Relevant factors to be taken into account in judging whether the dealing was fair have been identified in various cases decided by the U.K. courts, and these incorporate a number of considerations similar to the statutory criteria under the U.S. fair use provision (see paragraph 9 below). The three most important factors have been identified to be³ –

- (a) the degree to which the alleged infringing use competes with exploitation of the copyright work by the owner. This is likely to be a most important factor. The test should be understood as referring to any form of activity which potentially affects the value of the copyright work;
- (b) whether the work has been published or not. If the work is not yet published, any dealing is unlikely to be fair; and
- (c) the extent of the use and the importance of what has been taken. A useful test may be whether it was necessary to use as much as the defendant did for the relevant purpose⁴.

Other relevant factors that may be considered include –

- (d) the motives of the alleged infringer, for example, whether the use was merely dressed up in the guise of the permitted purpose⁵;
- (e) the purpose of the use, i.e. whether the use was necessary at all to make the point in question⁶; and

¹ Hyde Park Residence Ltd v Yelland [2001] Ch. 143, applied in Newspaper Licensing Agency Ltd v Marks and Spencer plc [2001] Ch. 257

² Hubbard v Vosper [1972] 2 Q.B. 84 at 92-95

³ Ashdown v Telegraph Group Ltd [2002] Ch. 149

⁴ PCR Ltd v Dow Jones Telerate Ltd [1998] F.S.R. 170; Associated Newspapers Group plc v News Group Newspapers Ltd [1986] R.P.C. 515

⁵ Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 W.L.R. 605

⁶ Hyde Park Residence Ltd v Yelland [2001] Ch. 143

- (f) where the work was not yet published, whether the copy was obtained by the defendant by theft or other misappropriation⁷.

8. We believe that the above general principles developed by the U.K. case law, which include considerations similar to the four non-exhaustive factors set out for section 38 and the proposed sections 41A, 54A, 242A and 246A, will continue to be of relevance in interpreting the fair dealing provisions under the Copyright Ordinance.

Fair use under the US law

9. Section 107 of the U.S. Copyright Act 1976 provides for a general fair use exemption which is not limited to specific purposes –

“the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by other means....., for purposes such as criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”

In considering what amounts to fair use, it is expressly provided under section 107 that the following factors are relevant –

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (b) the nature of the copyrighted work;
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) the effect of the use upon the potential market for or value of the copyrighted work.

⁷ Hyde Park Residence Ltd v Yelland [2001] Ch. 143; Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142; Beloff v Pressdram [1973] 1 All E.R. 241

10. The U.S. courts have considered the effect of the four factors in various cases and the following are some general principles that we can summarize –

(a) Purpose and character of the use

Commercial use of copyrighted materials was less favoured than nonprofit use. However, the mere fact that a copyright user was a commercial enterprise would not preclude the applicability of the fair use defence. The crux of the profit/nonprofit distinction was whether the user stood to profit from exploitation of the copyrighted material without paying the customary price.

It is relevant to look at the degree to which the challenged use has transformed the original copyrighted works. The more transformative the new work, the less will be the significance of other factors.

The propriety of the defendant's conduct is relevant to the character of the use.

(b) Nature of the copyright work

Information disseminating works are more likely to be the subject of fair use than creative works.

The fact that a work is not yet published is a key, though not necessarily determinative, factor tending to negate a defence of fair use.

The copyright holder's interest in maintaining confidentiality of the materials will work against a finding of fair use.

(c) Amount and substantiality of the portion used in relation to the copyright work as a whole

Generally speaking, the larger the volume or the greater the importance of what was taken, the less likely that a taking would qualify as fair use. The court will consider whether the amount copied is reasonable in relation to the purposes.

- (d) Effect of the use upon the potential market for or value of the copyright work

This is often considered by the courts to be the most important factor.

One way of proving market harm is for the plaintiff to show that if the challenged use should become widespread, it would adversely affect the potential market for the copyright work.

The court will look at the traditional, reasonable, or likely to be developed markets for this purpose.

11. We believe that the approach taken by the US courts in interpreting the fair use provision under the U.S. Copyright Act will be of persuasive value to the HK Courts in considering the proposed fair dealing provisions for education and public administration. A more detailed analysis of some major US cases on fair use is set out at Annex.

Examples of fair dealing with a work

12. Under the proposed section 41A and section 54A, to decide whether a dealing with a copyright work is “fair”, the court shall consider –

- (a) the purpose and character of the dealing, including whether such dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work.

Apart from the above four factors, the court may also consider other factors which are relevant in the circumstances of the case. The following are some examples of what may or may not be covered by the proposed fair dealing provisions under sections 41A and 54A.

Fair dealing for purposes of giving or receiving instruction

13. It is likely that the following cases could be considered as constituting fair dealing with a work for the purposes of giving or receiving instruction under the proposed section 41A –

- (a) a student copying a short passage from a magazine on the relevant subject for incorporation in his project to illustrate certain important points in the project. Acknowledgement of the source of the work is included. The project will be submitted to his teacher and presented to the class as part of a course of study for the purpose of receiving instruction; and
- (b) a teacher including in a presentation a very short excerpt of a documentary on the relevant subject to illustrate certain important points to be brought out in his presentation. The title of the documentary and acknowledgement of its authors are included. The presentation will be given by the teacher for giving instruction in a course of study to a class of students.

14. The following cases are unlikely to constitute fair dealing with a work for the purposes of giving or receiving instruction under the proposed section 41A –

- (a) students are unable to go outside due to bad weather, their teacher plays a DVD of a current movie to entertain the class;
- (b) a student's parents say that a required school textbook is too expensive. The student goes to the library and photocopy a significant portion of the textbook, thereby obviating the need to purchase the book;

- (c) a teacher compiles a course-pack by extracting different chapters from different textbooks, without seeking authorization or obtaining licence from the relevant copyright owners. The course-pack will be used by students as the major course materials and there is no need for the students to acquire any textbook for the course;
- (d) a teacher photocopies most of the essay questions and model answers from an exercise book. The exercise book also contains many other exercises such as multiple-choice exercises but the essay questions and answers constitute its major market attraction; and
- (e) a teacher extracts a significant amount of the highlights of a recently released comedy into a video clip and compiles it as a course material to illustrate certain pop culture for the purpose of giving instruction in a course of civic education. As a significant amount of the highlights is included, it is possible that students would lose interest in acquiring the video after viewing the clip.

Fair dealing for purposes of public administration

15. It is likely that the following cases could be considered as fair dealing with a work for the purposes of efficient administration of urgent business under the proposed section 54A –

- (a) there is a misleading news report about an infectious disease possibly causing public panic. To clarify the situation immediately, the Government needs to quote a small portion of an authoritative report from an overseas research institution; and
- (b) a featured article in a magazine alleges maladministration and misconduct of a District Council in organizing an activity which is a major tourist attraction. The event will be held in the evening of the day when the magazine is published. The article has impaired the Council's reputation and may seriously affect the success or otherwise of the event if the allegations are not refuted immediately. Hong Kong's reputation as a tourist centre may also be

affected. The Council members have to meet urgently to consider what actions should be taken to refute the allegations and the relevant parts of the article are photocopied to facilitate discussion at the meeting.

16. The following cases are unlikely to be considered as fair dealing with a work for the purposes of efficient administration of urgent business under the proposed section 54A –

- (a) a Government department needs a few books on a specialized subject for reference in answering an enquiry from a member of the public to whom the department is required to give a timely response in accordance with its performance pledge. An officer borrows the books from a library and makes copies of various chapters of these books for distribution to the relevant officers for reference; and
- (b) a Government department organizes a charitable fund-raising concert in a park. The purpose of the concert is to raise fund among civil servants and their friends and relatives for the purpose of relieving a natural disaster. A number of songs are played as accompanying music in the concert, without seeking authorization or obtaining licence from the copyright owners concerned.

Intellectual Property Department
Commerce and Industry Branch, Commerce, Industry and Technology Bureau
July 2006

Major US Cases on Fair Use

(1) *Princeton University Press, MacMillan Inc., and St. Martin's Press, Inc. v. Michigan Document Services, Inc., and James M. Smith*⁸

Facts

The defendant was a commercial copyshop that reproduced substantial segments of copyrighted works of scholarship, bound the copies into “coursepacks”, and sold them to students for use in fulfilling reading assignments given by professors at the University. The copyshop acted without permission from the plaintiffs who were publishers of the works concerned. It was noted that many other copyshops conducting similar business obtained permission for doing so. The main question presented was whether the “fair use” doctrine in section 107 of the US Copyright Act obviated the need to obtain such permission.

Held

2. By majority, it was held on appeal that the copying by the copyshop did not constitute “fair use”. It was found that -

(a) *Purpose and character of the use*

Duplication of copyrighted materials for sale by a for-profit corporation that had decided to maximize its profit was of a commercial nature. This factor weighed against a finding of fair use.

It would be relevant to look at the degree to which the challenged use had transformed the original copyrighted works. Such transformation was virtually indiscernible in this case.

(b) *Nature of the copyrighted work*

The excerpts copied in the course packs contained creative works. This factor cut against a finding of fair use.

⁸ United States Court of Appeals for the Sixth Circuit 99 F.1381. Decided: Nov 8 1996.

(c) *Amount and substantiality of the portion used in relation to the copyrighted work as a whole*

Generally speaking, the larger the volume or the greater the importance of what was taken, the less likely that a taking would qualify as fair use.

In this case, the publishers alleged copyright infringement for 6 different works copied –

- 95 pages copied, representing 30% of the whole
- 45 pages copied, representing 18 % of the whole
- 78 pages copied, representing 16% of the whole
- 52 pages copied, representing 8% of the whole
- 77 pages copied, representing 18% of the whole
- 17 pages copied, representing 5% of the whole

The court held that the above portions copied were not insubstantial.

In relation to the quality copied, the fact that the professors had required students to read these excerpts testified to the qualitative value of the copied materials.

The court also made reference to the “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with respect to Books and Periodicals” which provided guidance on fair use in relation to classroom copying. The fact that the amount of copying was so excessive compared with the guidelines weighed against a finding of “fair use”.

(d) *Effect of the use upon the potential market for or value of the copyrighted work*

It was often considered by the courts that this was the most important factor. One way of proving market harm was for the publishers to show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work. This

test was endorsed in two other previous cases⁹. The court noted in this case that most copyshops that competed with the defendant in the sale of coursepacks paid permission fees for duplicating and selling excerpts from copyrighted works. If copyshops across the nation were to follow the footsteps of the defendant, the plaintiffs' revenue stream would shrivel and the potential value of the copyrighted works of scholarship published by the plaintiffs would diminish accordingly.

The court emphasized that only "traditional, reasonable, or likely to be developed markets" should be considered in this connection. In this case, the publishers clearly had an interest in the licensing market (and had actually succeeded in establishing such a market). Therefore, it was appropriate that potential licensing revenues for photocopying be considered in the fair use analysis. It was found that the potential destruction of the licensing market by widespread circumvention of the plaintiffs' permission fee system was enough to negate "fair use".

(2) *Association of American Medical Colleges v. Viken Mikaelian et al. d/b/a Multiprep*¹⁰

Facts

3. The plaintiff (AAMC) was a non-profit education association composed of medical teaching institutions. Among its functions, AAMC (through its contractors) developed and administered examinations (MCAT) for evaluating applicants for admission by its member medical schools. Because of the importance of the examination, the questions were set, edited and tested with a high level of scrutiny and expertise to ensure their accuracy, clarity and fairness. About 20-50% of the questions in each examination were repeated from previous examinations so that there could be a consistent benchmark for evaluating applicants. As a result, tight security measures were taken in each examination e.g. participants were prohibited from bringing paper to the examination so that they could not copy the questions. AAMC never published its examination questions.

⁹ *Harper & Row*, 471 US at 568, quoting *Sony Corp v. Universal City Studios, Inc.* 464 US at 451.

¹⁰ United States District Court for the Eastern District of Pennsylvania 571 F. Supp 144; Decided: August 8 1983.

4. The defendant offered organized preparation courses designed to better equip students for the MCAT since 1979. It charged \$485 as tuition for the 14-week prep course. The defendant was also a frequent participant of the MCAT. Since 1978, he took the MCAT on 8 separate occasions. The evidence presented at the hearing showed that 15 of the defendant's examination preparation booklets contained 879 questions that had appeared, word-for-word, on previously administered MCAT. These questions constituted 90% of the total number of questions in these booklets. Furthermore, they were actual questions that had appeared on MCAT examination forms administered to the defendant on the 8 occasions he took the examination.

5. The plaintiff sought, *inter alia*, a preliminary injunction against the defendant.

Held

6. Although there was no direct evidence of copying, the court has no difficulty in making such an inference based on the facts of the case.

7. The defendant contended that use of the MCAT questions fell within the "fair use" exception and alleged that they were used for "teaching". On the assumption that the defendant's activities were teaching activities within the meaning of section 107, the court went on to consider each of the four factors.

(a) Purpose and character of the use

It had been established in previous decisions that commercial use of copyrighted materials was less favoured than nonprofit use. One policy underlying this factor was that of encouraging education without raising the costs of nonprofit institutions. However, the court acknowledged that the mere fact that a copyright user was a commercial enterprise would not preclude the applicability of the "fair use" defence.

The court noted that in a previous decision¹¹, a non-profit educational service corporation was restrained from videotaping copyrighted films, making copies and distributing them to public schools. The court in

¹¹ *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp.243 (WD NY 1978)

that case noted that the activity did “not involve an isolated instance of a teacher copying copyrighted materials for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale.” Similarly, the court in this case took the view that the defendant had not copied a portion of a textbook to illustrate a problem to students; he had made wholesale use of another organisation’s copyrighted materials. Therefore the use was highly commercial.

(b) Nature of the copyrighted work

The examination questions were original works painstakingly drafted and tested and carefully administered under strict security conditions. The very purpose of copyrighting the questions was to prevent their use as teaching aid, since each use would confer an unfair advantage to those taking an examination preparation course. Therefore, the court concluded that the questions were a type of copyrighted material which might not be fairly used under the circumstances.

(c) Amount and substantiality of the portion used in relation to the copyrighted work as a whole

The greater the amount of the copyrighted work used, the less likely it is that the fair use exception is applicable. As nearly 90% of the questions in the defendants’ booklets were copied verbatim from actual MCAT questions, such copying could not be fair.

(d) Effect of the use upon the potential market for or value of the copyrighted work

The defendant’s use of the MCAT questions in their entirety, if continued, would make the copyrighted materials worthless to the copyright holder. A use of the protected work which destroyed the value of the protected work to the copyright holder could hardly be considered as fair.

8. The court granted plaintiff’s motion for a preliminary injunction.

*(3) Newport-Mesa Unified School District v. State of California Department of Education et al.*¹²

Facts

9. The California Education Code provided that parents of special education students could obtain copies of their child's test protocols. One of the defendants was a parent who requested copies of his son's test protocols from the plaintiff, the school district. The plaintiff declined to provide the parent with the copyrighted test protocols, contending that the copyright law prevented it from providing copies of the protocols and requested the court to grant a declaration of its rights under copyright law.

Held

10. The central issue was whether the doctrine of "fair use" avoided preemption of the California Education Code. The court cited previous cases and noted that the fair use doctrine was an equitable rule of reason. It "permits [and requires] 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." The following were discussed in relation to the relevant factors:

(a) Purpose and character of use

The defendant's purpose was an independent educational evaluation of his son's special education needs and abilities to place him in an appropriate educational program. That was a nonprofit educational use not for commercial gain. Thus, this factor weighed in favour of a finding of fair use.

The court took the view that whether use of the work was transformative should be considered under this factor. The more transformative the new work, the less would be the significance of other factors, like commercialism, that might weigh against a finding of fair use." Here, copies of the test protocols with answers given by the student were considered to be transformative.

¹² United States District Court for the Central District of California, Southern Division 371 F.Supp. 2d 1170; Decided: May 23, 2005

(b) Nature of the copyrighted work

The nature of the copyrighted questions was creative rather than information disseminating. This ordinarily would weigh against finding fair use. But with the addition of a student's answers, the questions and answers were information disseminating in nature, which weighed in favour of fair use.

(c) Amount used

The court noted that only part of the entire copyrighted test – portions identifiable with a student – was copied for parents. This weighed in favour of fair use. The amount copied was found to be reasonable in relation to the purpose of the copying to assess the students' educational needs.

(d) Market effect

The parties agreed that widespread public access to the test protocols, if existed, could have a detrimental effect on the tests' market value. However, the court noted that there was no evidence indicating there was a substantial risk of widespread public access or an adverse market effect in this case.

(e) Other factors

It was noted that parents already have a right to examine test protocols in the presence of a school official. Providing a copy was to some extent, similar to "time-shifting" which was permissible.

11. The court concluded that a school giving parents of special education students copies of their children's test protocols when requested under the California Education Code was a fair use under the Copyright Act.

*(4) Harper & Row, Publishers, Inc. et al v. Nation Enterprises et al*¹³

Facts

12. Former President Ford contracted with the publishers Harper & Row to publish his as yet unwritten memoirs. The agreement gave the publishers the exclusive first serial right to license prepublication excerpts. As the memoirs were nearing completion, the publishers negotiated a prepublication licensing agreement with Time Magazine under which Time was given the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. Shortly before the Time article's scheduled release, an unauthorized source provided The Nation Magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of The Nation produced a 2,250-word article, at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expressions taken from the manuscript. It was timed to "scoop" the Time article. As a result of the publication of The Nation's article, Time cancelled its article and refused to pay the licence fee to the publishers. One of the issues for consideration by the court was whether the use of the verbatim quotes by the Nation Magazine constituted fair use under section 107 of the Copyright Act.

Held

13. The Supreme Court of US quoted the following from the House Report in illustrating that the four factors set out in section 107 were not meant to be exclusive –

“The fair use 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”.

On the four factors, the court found that –

(a) Purpose of the use

The fact that a publication was commercial as opposed to nonprofit was a separate factor that tended to weigh against a finding of fair use.

¹³ Supreme Court of the United States 471 US 539; Decided: May 20 1985

“Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”¹⁴ However, the crux of the profit/nonprofit distinction was not whether the sole motive of the use was monetary gain but whether the user stood to profit from exploitation of the copyrighted material without paying the customary price.

Also relevant to the “character” of the use was “the propriety of the defendant’s conduct. Fair use presupposed “good faith” and “fair dealing”.

It was true that news reporting was the general purpose of The Nation's use. While there might be a greater need to disseminate works of fact than works of fiction, the Nation’s taking of copyrighted expressions exceeded that necessary to disseminate the facts. Its unauthorized use of the not yet disseminated manuscript had not merely the incidental effect but the *intended purpose* of supplanting the copyright holders’ commercially valuable right of first publication.

(b) *Nature of the copyrighted work*

The law generally recognized a greater need to disseminate factual works than works of fiction or fantasy. However, even within the field of factual works, there could be gradations as to the relative proportion of fact and fancy. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, would thus vary from case to case.

The fact that a work was not yet published was a key, though not necessarily determinative, factor tending to negate a defence of fair use. Under ordinary circumstances, the author's right to control the first public appearance of his not yet disseminated expression would outweigh a claim of fair use.

In this case, the copyright holder had a keen interest in maintaining confidentiality. As the publishers’ use of the materials clearly

¹⁴ *Sony Corp. of America v. Universal City Studios Inc*, 464 US at 451.

infringed the copyright holder's interests in confidentiality and creative control, such use could hardly be characterized as "fair".

(c) *Amount and substantiality of the portion used*

In this case, the direct taking from the manuscript, which was not yet published, constituted at least 13% of the infringing article. Although the verbatim quotes in question were an insubstantial portion of the Ford manuscript, they qualitatively embodied Mr. Ford's distinctive expression and played a key role in the infringing article. The court concluded that the portion taken was not insubstantial.

(d) *Effect of the use upon potential market for or value of the copyrighted work*

This is undoubtedly the single most important element of fair use. Once a copyright holder established with reasonable probability the existence of a casual connection between the infringement and a loss of revenue, the burden properly shifted to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression. More importantly, to negate a claim of fair use it need only be shown that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work. Here, The Nation's liberal use of verbatim excerpts posed substantial potential for damage to the marketability of first serialization rights in the copyrighted work.

14. On the facts of the case, the court came to the conclusion that the use in question here was not fair.