Chapter 36

Intellectual Property

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Intellectual property theory grapples with intriguing questions about the political and personal significance of our mental labour and creativity, the metaphysics of art and expression, the justifications for private property, and conflicts between property and free expression rights. This chapter begins with an introduction to the nature of intellectual property, comparing intellectual property to physical property. It continues with an overview of some arguments for, and criticisms of, the legal protection of intellectual property, and concludes with some ethical issues about illegal downloading.

What is Intellectual Property?

'Intellectual property' is used ambiguously. Sometimes it refers to the system of legal protection over useful or expressive inventions, expressions and products the generation of which typically involves the creative use of the mental faculties. Others use the term, as I will, to refer to inventions and products themselves – those things, schemes, objects and ideas – that *may* in turn be the subject of strong legal protection. I will use 'intellectual property rights' to refer to private forms of legal protection and power given over intellectual property, such as the rights conferred by copyright. (For convenience, I will mine the particulars of US intellectual property law for concrete examples.)

The forms of intellectual property are diverse, including letters, books, essays, other written materials, musical compositions, recordings, plays, films, sculptures, paintings, photographs, other forms of artwork, architectural blueprints, logos, inventions, computer programs, and perhaps even visages, names and features of a person's life history, personality and reputation. More controversially, some include biological materials that have been humanly manipulated or whose discovery depended on complex investigative processes, such as some genes, cell lines, genetically altered bacteria, mice and human proteins (Munzer, 2002). Abstractly conceived, much intellectual property consists of those goods, roughly speaking, whose production or specific identification depends primarily upon human cognition and imagination, and only secondarily upon raw materials and physical exertion (see also Becker, 1993). Intellectual property often

involves rendering concrete and external the unique contents of a human mind so that they may be made accessible to and usable by others. By contrast, land – quintessential physical property – does not depend for existence on cognition and imagination; neither do minerals, water, air, nor many animals and plants.

However, the existence of many physical goods, such as particular flat brooms, chairs, pies, and bred animals and plants, does partly depend on the exertion of human labour guided by mental efforts. What distinguishes intellectual property? Or, as some may pose the question, what distinguishes the intellectual property component of a particular physical good? Intellectual property is typically distinguished by its being a type for which there may be many tokens *and* by the labour involved in its production. When referring to Jane Austen's *Pride and Prejudice*, one may either refer to the ordered collection of words that together compose a narrative of characters and a story, or to a particular, perhaps well-worn, physical copy of the book. Roughly, the 'intellectual property' component of the book consists of the ordered collection of words that make up the work *Pride and Prejudice*, or perhaps the story line, characters, and some major subset of the ordered collection of words contained within an authoritative edition. Once these words have been 'fixed', collected together in a format that may be adverted to at different times (e.g. in writing or an oral recording), they may be replicated into many physical token copies. Human labour generates both the ordered collection and the physical copies. The primary labour involved in intellectual property's production is the exercise of the creative faculties supplemented by some physical labour to make these thoughts tangible, publicly accessible, and usable by others. The product itself, though, may be abstract, like the number 5. It may lack a specific spatio-temporal location, but may be partly or fully instantiated or represented in different locations, partly or fully replicated, transformed in whole or part, and used in a variety of ways. An indefinite number of copies of a book may be printed; a book may be excerpted, translated, parodied or made into a film; many physical copies of a particular musical recording may be made; a musical composition may be multiply recorded, transposed or sampled in another composition; many tokens of an invention may be produced; the underlying innovation of an invention may be used as a component of yet another invention. So, to return to the broom, no particular flat broom in your closet is intellectual property, but each instantiates a particular invention; the invention of the flat broom marks the creation of intellectual property, although its Shaker-inventor generously did not seek a patent on it (Hooper, 2003).

Generally, intellectual property *rights* give the creator control over who uses the intellectual property, and under what conditions. With important qualifications, these rights are usually transferable. Copyright and patent typically have restricted terms; currently, copyright lasts seventy years after the author's death and patent lasts twenty years. After the term expires, the work enters the public domain for unrestricted use. In most jurisdictions, intellectual property rights divide into the categories of copyright, patent, trademark, rights of publicity, trade secret law and 'moral rights'.

Copyright typically covers original written expressions such as books, articles, poems and musical compositions, but also printed images such as paintings, photographs and drawings. Subject to some exceptions for fair use, copyright affords the right-holder the ability to prevent use, copying and sampling in whole or in part, performance and

distribution of a work. Copyright also empowers the right-holder to prevent others from making 'derivative' works; in recent years, this right had been more expansively and, thereby controversially, interpreted. Derivative works are distinct, 'spin-off' works, inspired by the original. Examples include *Brokeback Mountain*, the film version of E. Annie Proulx's short story; a novel's sequel; and comic books that imagine alternative universes from the original, such as the *Dark Empire Series*, which explores the consequences of Luke Skywalker's joining the Dark Side. Some derivative works involve perspectives on the original work of which the copyright owner disapproves, such as *The Wind Done Gone*, a retelling of *Gone with the Wind* from the perspective of the slaves (see *Suntrust Bank* v. *Houghton Mifflin Co.*, 2001).

Patent covers novel, useful and non-obvious inventions such as the telephone and the phonograph, but also chemical formulas and compositions, some computer programs, designs, some biological and chemical methods and processes, and, more controversially, some biological products and materials created or discovered through these processes. A patent holder is enabled to prevent others from using, generating or distributing tokens of the invention, or distributing variations and improvements on it. Usually, the holder will exact payment for the invention's use, although patent law permits the holder to refuse to license use no matter what payment is offered, for no reason in particular. An inventor may wish to be the exclusive manufacturer of her invention or for it not to be made at all, perhaps for perverse reasons or perhaps to avoid its competition with another, more profitable product of the same inventor's. A drug to cure cancer may compete with more expensive drugs that treat the symptoms over time; patent holders have the power to suppress all use of the cure, even though suppression may harm many patients.

Trademark standardly covers commercial names and logos, such as the name 'Nike' and the famous swoosh symbol, and permits the owner to police and prevent their use by others. Loosely, the right of publicity is the personal counterpart to trademark. The right permits a public figure, e.g. a celebrity, to exert control over others' commercial use of her name, visage and other distinctive characteristics. Because of his objection to commercial endorsements, Tom Waits used the right against a Doritos advertisement that featured singing imitative of his distinctive voice.

Trade secret empowers its holders to police the use and exposure of confidential information within an organization, typically a business, about that organization's methods, databases, formulas and production designs. The formula for Coca-Cola is perhaps the most famous trade secret.

Finally, 'moral rights' legislation enables creators to protect the integrity of their work (e.g. to forbid alterations to the structure of a sculpture or building), to require attribution (that copies of the work bear the creator's name), and sometimes to reclaim specific tokens of the work from their owners upon offering compensation. Moral rights are stronger and more common in Europe than in the USA.

Diverse issues arise with respect to these different protections and kinds of intellectual property. The chapter's remainder will focus on issues common to them and some issues that arise predominantly for copyright. Even so, space considerations preclude tackling many interesting issues that emerge out of the complexities of copyright (the angels in the details, so to speak).

Justifications

Roughly labelled and classified, three main schools of justifications are offered for strong intellectual property protection: Lockean theories; personality-based theories; and consequentialist, incentive-oriented theories (Waldron, 1993; Fisher, 2001). In brief, Lockean theories contend that creators deserve to own and control intellectual works because they laboured to create them. Personality theories, sometimes (controversially) referred to as 'Hegelian,' appeal to the creator's expressive and dignity interests. Consequentialist theories do not, by contrast, locate the justification for strong intellectual property protection in creators' individual rights. They advocate strong protections to provide necessary incentives for the creation of intellectual works that serve the general public interest.

Before investigating these justifications, it is worth making explicit what is at stake in the debates about intellectual property. Although this is often overlooked, the real issue is *not* whether those who make intellectual property should receive compensation for their labour and production costs. In the contemporary debate, both proponents and opponents of strong intellectual property protection concur that creators of intellectual property (and those who publish, distribute or otherwise make it useful or accessible) should receive fair compensation for their training, labour and material costs. Most also agree that consumers may reasonably be charged fees for the use of intellectual works to cover the costs, if any, associated with production and use. What *is* at stake is the appropriate form of compensation, specifically: (1) whether the creator has a distinct rights-based claim to exclusive control over her works' use, distribution and price; and (2) whether, rights aside, granting creators this exclusive control is for other reasons the optimal form of compensation. Opponents of strong intellectual property protections advocate using alternative mechanisms that afford financial compensation and recognition to creators without also granting strong control to private parties over the price and use of works. Creators could instead be compensated through salaries, stipends, or through more complex methods that are sensitive to the level of use, such as compulsory licensing systems or taxes on ancillary products used for making copies such as blank CDs. Compulsory licensing, the system that governs the recording of musical covers, allows anyone to use a work but requires payment of a nominal set fee per use; this access fee is set at a non-prohibitive level to encourage use while providing fair compensation to providers. Such systems prise apart compensation for labour from private discretionary control over works, facilitating freer use of these works.

Thus, the central justificatory issue about intellectual property is whether private parties should have monopoly control over these resources for significant periods of time. Of most interest are private legal rights: to have broad (and sometimes complete) discretion over the conditions and prices of access to intellectual works; and to control or prohibit the production of a wide range of derivative works.

Lockean Theories

Some regard intellectual property as the most promising application of (loosely labelled) Lockean arguments about property (Locke, [1690] 1994). One popular version of

Lockean property arguments starts from the position that, initially, resources are commonly owned: *ex ante*, no one has any intrinsic claim to any particular resources. An individual may remove resources from the common and privately appropriate them, however, through exerting her self-owned labour merely to grasp or perhaps also to improve them. She may thereby generate a claim over these particular resources so long as she leaves 'enough and as good for others' and does not waste what she takes.

There is a traditional concern that given resource scarcity, private appropriations of *physical* property cannot straightforwardly satisfy the proviso that one leave enough and as good for others, whether to use or to appropriate. Appropriation of intellectual property may seem different. First, one may think that intellectual property does not belong in the original common but comes into existence already attached to individual creators. It may be appropriated even without satisfying the proviso. Many regard some intellectual works, such as science fiction or abstract art (as opposed perhaps to historical works or to chemical processes) as 'pure' creations of intellectual sweat and genius. Because they are unique products of mental labour, their creators are not bound by the limits on private appropriation because those limits only attach to goods that exist, in whole or in part, independently of the appropriator's labour. More sophisticated versions of this argument recognize that certain ideas, e.g. the notion of unconditional love, are part of the common and are not due to any particular mind, but hold that particular expressions of those ideas may be due to their creator, such as Shakespeare's 116th Sonnet. Copyright reflects this distinction between ideas and expressions, protecting only the latter. Second, some may think the appropriation of intellectual works easily satisfies the proviso, whatever their origin or metaphysical status, because their supply is not scarce, unlike the supply of physical resources. Even if *all* intellectual works belong initially to the common, its expanse may be indefinitely vast; perhaps this also enables the permissible appropriation of physical property as well, assuming the different kinds of property are commensurable, since appropriation of physical resources will leave plenty of intellectual property behind for others.

Some take these sorts of considerations to form a strong *prima facie* case for recognizing strong intellectual property rights as an appropriate way to respect or reward creators' valuable labour (Hughes, 1988; Child, 1990; Gordon, 1993; Moore, 1997). Even so (as on all accounts), further questions would have to be resolved, including: whether these rights have indefinite or temporally restricted extension; what sorts of property qualify; whether and why originality, creativity or non-obviousness should be prerequisites for appropriation; whether others may have need-based claims to use some works; and whether there are significant externalities associated with these rights that generate restrictions on their exercise.

One may worry, though, that appropriation is morally more complicated than has been so far suggested: intellectual works should be considered part of the common; they are therefore subject to the proviso that one not appropriate without leaving as much and as good for others; but this proviso is not so simply satisfied.

Why might they belong in the common? Some products may be thought to exist independently of our labour. Therefore, they are a common resource. Some inventions have been independently discovered by different people, after all. Those who regard

expressions as ordered collections of words, or music as ordered collections of notes, may think these sets of words and notes exist independently of any particular person's contemplation of them, although they are unearthed through creative labour. Others observe that even if expressions are pure mental creations, any individual's intellectual product is rarely entirely her own (Hettinger, 1989; Gordon, 1993; Waldron, 1993). Authors build on prior works and cultural influences, whether consciously and explicitly or not. Further, the intelligibility and value of their intellectual products depends partly on others' contributions and cultural features for which they are not responsible. There are also the further issues, familiar from other discussions in political philosophy, about whether one's talents have predominantly social sources or whether, for other reasons, their fruits should be considered social resources. Given the high degree of interweaving mutual influences, some conclude that intellectual products should be regarded as part of our commonly owned intellectual heritage. Just as they are created by borrowing from and reacting to prior materials, so they should be available to others as the raw materials from which to generate new variations and works.

On these views, private appropriations of intellectual products might then be challenged because they remove materials from the common but do not leave as much and as good for others. Not all intellectual works are equal; in some contexts, they may not have adequate substitutes. For example, in many cultural contexts, even at the time of their initial writing, it would be difficult to claim that private appropriation of the Bible or the Koran could be justified merely because others could 'discover' different works such as expressions of astronomical reports and children's stories; there may be no works 'as good' as the perceived directives of God. To take a more quotidian example, in the USA there may be no news resource as authoritative or 'as good' as the *New York Times*; to restrict access to it may, for certain purposes, leave others without a resource as good as what has been appropriated (Gordon, 1993).

A more foundational challenge to the 'Lockean' argument may be mounted (Shiffrin, 2001). So far, we have focused on the fairness of particular appropriations. But no strong positive argument was given as to why intellectual works should be privately ownable at all. Such an argument may be necessary given one understanding of the initial Lockean assumption of common ownership. That starting point need not be interpreted as an assertion about the metaphysics of intellectual works, as being independent of human creation, but rather as embodying a political view about our mutual standing. That each of us has an equal moral claim to resources in which we all have interests may be understood as a manifestation of our equal moral standing. The question of private property, then, is the question how, if at all, can any exclusive claims to goods that are useful to all or many be justified?

If privatization of *some* resources is necessary to make adequate use of them, perhaps it is therefore justified. For instance, one could not make any use of foodstuffs without private appropriation. To deliver nutrition, an apple must be taken from the common and ingested by a single party. In places, Locke seems to suggest that the same may be true for real property; its full and effective use requires agricultural development and controlled manipulation by a single or co-ordinated will. Land could not be put to its full use if it could not be subjected to planned direction and protected from disruption by the uncoordinated use of others. Hence, at least some of it must be

privately owned. On this account, the labour of an appropriator does not provide the justification for the *institution* of private property in a sort of thing; rather, it explains how, given the justification for the institution of private property, one individual rather than another has a claim to a particular piece of property among those forms of property that are appropriately made private.

Intellectual property does not easily fit this framework. As Thomas Jefferson (the first head of the US Patent Office and a Lockean) put the point:

> He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe . . . incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. (Jefferson, [1813] 1943)

That is, many uses of intellectual property are 'non-rivalrous': one party's use of the resource need not compete with another's. I can read Austen's *Pride and Prejudice* at the same time as you, but I cannot use a plot of land for a concert at the same time that you use it for quiet meditation. Moreover, simultaneous use of intellectual property often enhances others' use. My enjoyment of a book or a piece of music is often enhanced by others' ability to converse about it, to understand references to it, and to reveal virtues or expose flaws I failed to see. Full, effective use of intellectual property often depends upon mutual, uncoordinated use in a way that differs from many uses of physical property; intellectual property is not merely non-rivalrous but anti-rivalrous. If the argument for privatization of *some* physical property is that exclusive use is necessary for full, effective use, then that justification does not easily encompass many sorts of intellectual property. To the contrary, an interest in facilitating full, effective use would suggest a system of common property in most intellectual works in which anyone could make use of a work – whether to consume or to use to make another work – without the original creator's permission. Original creators might use stronger rights of exclusive control to quash criticism of their work or to suppress imitators whether for reasons of ego or to stifle real or perceived economic competition. These motivations, while often humanly understandable, may impede full, effective use of a work.

At least two qualifications should be registered. First, some intellectual works may require exclusive use for effective use. Works in progress may not come to their full fruition if they are published before the author consents. Unwanted input or exposure may disrupt the creative process. Some works, such as diaries or personal letters, may be intrinsically private; their proper use may be reliably ensured only by affording the author exclusive control over access to them. Second, some worry that overuse may result if intellectual property is left in common. Although most intellectual property is not exhaustible, its overuse could affect its quality (see Landes and Posner, 2003; but see Lemley, 2004). Songs may lose their resonance, poignance or appeal when they are over-played or put to tiresome, repetitive commercial use. But, it is unclear what force such an argument should exert in a free-speech culture. Usually, we do not find

it a good argument for the wholesale restriction of (non-commercial) speech that the speech will annoy some listeners or that they will come to dislike it.

Personality-based Theories

If Lockean justifications falter because of the non-rivalrous and anti-rivalrous qualities of many intellectual works, are there other individual-rights arguments for strong intellectual property rights? Some argue that because intellectual works express authors' personalities and reflect their characters, authors deserve control over them, whether to protect their reputations, their personhood or their communicative activities (Netanel, 1993; Beitz, 2005). Mickey Mouse's creator should be able to block another's portrayal of Mickey as a swashbuckler not because his mental labour gave rise to Mickey, but because either: (a) Mickey represents him and it maligns his character if Mickey engages in crime; or, (b) as part of the general project of developing and maintaining an identity, individuals need to have property over which they exert exclusive control, defining themselves through and against these objects (Radin, 1982), and intellectual works suit these purposes well; or, (c) because, through Mickey, the creator is engaged in a specific communicative enterprise that the additions and transformations of others may distort or alter (*Walt Disney Productions* v. *Air Pirates*, 1978).

Personality-based arguments are associated with 'moral rights' legislation and rights of publicity. Mickey's mischief may reflect on his creator, so perhaps he should have a tight rein on Mickey's shenanigans. It might be asked, though, why the creator's reputational interests cannot be satisfied instead by merely directing that 'off-licence' transformative works be clearly labelled as 'non-authorized' by the original creator. In any case, such considerations do not provide much support for allowing the creator to *transfer* rights of control to others whose reputation and character are less bound up with Mickey. These arguments also suggest a shorter tenure than copyright currently provides. Terms that extend long past the author's life fit awkwardly with the argument that one needs control over property in order to develop and assert one's personality publicly. True, we do care about the reputations and the communicative intentions of the dead, but they may not provide sufficient reason to impede the expressive, personality-building opportunities of the living.

More generally, personality defenders of strong intellectual property rights must explain why priority should be given to the expressive interests of original creators over others (and for how long). Others may wish to express themselves through the unimpeded use of intellectual works. Effective self-expression may require or be significantly facilitated by using culturally familiar icons like Mickey, whether critically, creatively, or just by reference. Although creators of non-published works may have understandable privacy concerns that may support strong control over their works, authors of published works occupy a more precarious position. They introduce works into the public sphere that may have a strong influence on others' lives and personalities. Why may they attempt both to exert an influence on others *and* to retain strong control over how their audience deploys its own agency and expression to use these materials in response?

Incentives

Another prominent justification for intellectual property rights appeals to the general social interest in facilitating innovation and expression. Some contend that intellectual property rights provide authors and innovators with necessary incentives to create. The initial production process can be arduous and costly; once a work is created, though, it is often relatively easy and inexpensive for others to copy and use the work. This makes it easy for competitors (and consumers) to 'steal' a work and undercut the creator's price. This vulnerability may deter creators from generating intellectual works. Offering periods of monopoly control may offer potential producers the incentives of secured profits and control over works that may compensate for these risks.

This argument depends on often repeated, but ill-studied, empirical claims about the need for, and overall net effect of, these particular incentives on the climate of intellectual property production and consumption (for doubts, see Heller and Eisenberg, 1998; Barnett, 2004). It is important, again, to distinguish the desire to recoup costs and to compensate for production from the more specific desire to exert monopolistic control, whether for maximal profit or power. The incentive argument must apply specifically to the latter if it is to provide a justification for strong intellectual property rights. (For an argument preferring market incentives to patronage and state subsidies, see Netanel, 1996.)

Some wonder whether granting a monopoly generates the best set of incentives for production and consumption, because monopolies hamper competition and other productive uses. One may also worry that the incentives argument underappreciates the degree to which many write and innovate for reasons other than money or power, including a native sense of curiosity and interest, the aim to create art, the urge to engage in self-expression and communication with others, the interest in prestige and acclaim, and the general interest in helping others and improving the world. Many inventors and writers, including the Shakers, Martin Luther, Benjamin Franklin, and many academic authors, have created and made their works freely available for pleasure, to serve others and for the other joys of sharing intellectual advances. In some circumstances, financial incentives may even diminish creativity (Hennessey and Amabile, 1998). (The incentives account may, however, better describe the profile of publishers and manufacturers whose collaboration with creators is often essential. The internet, however, has enabled some viable alternative forms of publication, distribution and co-operative collaboration.)

The diversity of motives for creation may generate problems for strong versions of the incentives argument's claim that a monopoly to creators provides *necessary* incentives that in turn generate the optimal environment of innovation and public use. Affording monopoly control to many authors and inventors may be unnecessary and suboptimal. It may grant economically inefficient and stultifying windfall powers to creators that merely serve as obstacles to consumers and other potential creators who would benefit from freer or cheaper access (Shavell and Van Ypersele, 2001). First, many innovators who would not require incentives of this strong sort to create may still take advantage of them if they are offered. Jeff Bezos, founder of amazon.com, reports that Amazon would have developed the '1-click' technology whether or not it

was patentable, although Amazon took out a patent on it nonetheless (Lessig, 2001a, p. 211). Further, if enough take advantage of monopoly rights, an environment may be created in which others must as well, whether they would like to or not, in order to remain economically competitive and to remain attractive to necessary partners – e.g. publishers and manufacturers who will demand transfer of these rights.

Second, even where these incentives are necessary for some creators, they function in ethically questionable ways (see Cohen, 1992 on incentive arguments generally). They do not merely provide a carrot for a person to create a work rather than engaging in leisure or another activity. Rather, one party, who I will call the *upstream speaker*, is incentivized to produce by the fact that other parties, the *downstream speakers*, are deterred from copying, performing, producing and distributing both extant intellectual works and also new, transformative, derivative works. In the case of copyright and the derivative works protection, according to the incentive argument, expression is suppressed because its suppression is the precondition of another party's willingness to engage in expression (Tushnet, 2001).

This structure provokes some distinctive free speech concerns, representing only one of the many fruitful points of contact between free speech theory and intellectual property theory. First, suppose it is true that upstream speakers, in essence, require, as a condition of their speaking, that downstream speakers be suppressed. Is it permissible to suppress downstream speakers for this purpose? Second, if it can be permissible, *should* we prefer the upstream speakers over the downstream speakers? In some contexts, the answer to the first question seems straightforwardly 'no'. For instance, our commitment to free speech precludes suppressing a controversial speech because a hostile audience wishes it to stop; we should not accede to their demands, even should audience members threaten violence if their demands are not met. A free speech system must permit unpopular speech, whether the state or members of the public oppose it. Should it really make a difference if hostile audience members, instead of threatening violence, allowed that they were more likely to speak if the speakers they disliked were silenced?

Perhaps copyright differs. Typically, the upstream speaker does not respond to the incentive of others' suppression because she is hostile to the *content* of their speech but because their speech putatively threatens the economic returns to her original. (Some copyright enforcement, however, *is* directed at particular content disfavoured by the original author, whether because it is critical of the original or for other reasons. Using copyright, Hitler successfully prevented Alan Cranston, later a Senator, from distributing a more accurate translation of *Mein Kampf* than Hitler wished the English-speaking world to see; Netanel, 2001.) In such cases, does the economic motive for suppresion make all the difference? Is it legitimate to suppress one party's speech because its appreciation will make another party's speech less profitable? That principle seems overbroad, impinging on the ability to write critical reviews. Perhaps what matters is that some speech reduces profits by *competing* directly with the original speech, rather than, like a review, *convincing* people not to purchase the original speech. Regulating the former may seem innocuous, comparable to restricting hecklers from using megaphones to drown out an invited speaker. But copyright regulations do not merely suppress speech on certain occasions to make the original speech easier to understand on those occasions; rather, they suppress others' speech in *all* contexts for a prolonged period of time.

Even if suppression can sometimes be permissible on these grounds, what reason do we actually have to prefer the upstream speech over the downstream speech? Is this question idle because the downstream speech depends for its existence on the upstream speech? For, either we have no speech or we have the original, upstream speech. But this is an exaggeration. We can divide original creators into three categories: (a) those who will create (and publish and distribute) without requiring or using intellectual property protections; (b) those who would create without intellectual property protections but will take advantage of them if they exist; or (c) those who will not create without intellectual property protections and will enforce them if they exist. Incentive arguments favour the speech of those who fall in category (c) at the expense of those who would produce derivative works of those who fall in category (b) (as well as those who would produce derivative works of (a) but are deterred from creation because they are unsure whether the original creators fall into category (a) or if they fall into the more unsafe categories (b) and (c)).

Why should we privilege speakers in category (c) who require intellectual property incentives over the downstream producers whose work will be chilled? It is difficult to decide on sheer grounds of quantity. It's awfully hard to know who falls in category (b) and who falls in category (c) because it serves the financial interests of those in category (b) to bluff. Further, it is difficult to assess how many downstream speakers are chilled by copyright.

One may be tempted to prefer original works over derivative works on grounds of quality; an original work may be considered more precious or significant. It is hard to assert this with broad confidence, though. Many derivative works improve dramatically on original works or take off in an entirely different creative direction. Think of *Macbeth* and *King Lear* as against Raphael Holinshed's *Chronicles of England, Scotland, and Ireland*; the film *Pirates of the Caribbean* as against the theme park ride; the Peggy Lee song 'Is That All There Is?' as against the Thomas Mann short story 'Disillusionment'; Negativland's 'The Forbidden Single: A Cappella Mix' as against U2's 'Still Haven't Found What I'm Looking For'; etc. Given the vast range of potential works, it seems difficult at best to predict which class is superior: upstream works as a class or downstream works as a class.

One might return to what many find an irresistible thought, namely that the original producers are more deserving. Their work is the catalyst and should be privileged over downstream, derivative speech. But note that by reintroducing the idea of desert, the putatively independent incentives argument for copyright protection would now depend on vindicating the previously discussed non-consequentialist arguments.

A further worry may be raised. It is not clear that the relevant upstream speakers who require incentives are more deserving than those creators who would be chilled by copyright. We are attempting to decide whose work to elicit – those who will only speak if they are guaranteed a monopoly versus those who would be suppressed by the monopoly. The former threaten to speak only if the latter do not; by hypothesis, the latter make no similar demands on others' speech. One might hazard that the downstream producers are more deserving because they act more co-operatively. They are willing to speak without making the ability to compel others' silence a condition of their speech.

Freedom of Speech and Related Objections to Intellectual Property Protection

As this discussion amply demonstrates, free speech issues permeate intellectual property arguments. There are yet further connections between freedom of speech and intellectual property. Some assert strong individual free speech rights against certain forms of intellectual property protection, whatever the strengths of its justifications. Copyright powers that forbid others from performing a play, quoting lengthy passages from a book or creating a new derivative work enable private parties to suppress or punish others' speech. Some take the view that however innocent the purpose of these restrictions, they violate the uninfringeable rights of all individual speakers to express whatever content they wish (Baker, 2002; Rubenfeld, 2002; but see Eisgruber, 2003). Others worry that strong intellectual property rights may enable private parties to constrain the social communicative environment, thereby threatening our interests in a flourishing democracy of timely, responsive, free exchange, evaluation, and critical reflection (Netanel, 2001; Lessig, 2001b; Benkler, 2003; Balkin, 2004).

On the other hand, many copyright advocates argue that these legitimate free speech concerns can be comfortably accommodated within copyright (Nimmer, 1970). Copyright only precludes the copying and distribution of particular expressions, e.g. particular books or articles. It does not permit anyone to own an idea. Anyone may communicate an idea so long as they use their own words (or those for which they receive permission). (Derivative works raise knotty questions for this distinction because they are not mere copies of the original expression. Yet, they are somehow to be conceived as extensions of that expression rather than different expressions of the original's underlying idea.) Further, most copyright systems include rights of fair use: roughly put, they allow others to use small portions of copyrighted work, e.g. to quote for purposes of commentary, criticism or education, so long as the use does not displace the market for the original material. Some defend fair use rights on the grounds that even if creators have special rights to their own work, they also have responsibilities to their audiences to allow them to use the works to prevent any harm associated with exposure to them or, more broadly, to permit them to fully digest these materials (Gordon, 1993; O'Neil, 2006). The accommodations within copyright still seem insufficient to some free speech advocates. Those who are not articulate or creative have significant interests in self-expression and participation in public dialogue; these interests may be better advanced through endorsing and using others' exact expressions as a vehicle rather than making clunky efforts of one's own (Tushnet, 2004). Ongoing issues in copyright, then, include what sort of use and how much must be allowed to be fair and whether fair use rights can ever be sufficient to satisfy free speech interests.

Other Issues: Illegal Downloading etc.

I have been discussing whether institutions of intellectual property rights are just. Do the objections made to them, if sound, provide moral support for individuals who wish to download or copy legally protected materials without permission? Illegal copying of

music and videos for pure consumption (and resale) are, it is said, widespread. Some copy purely for profit or convenience, without much ethical deliberation. Others act more deliberately on the grounds that copyright law or its use are unjust – whether because copyright intrinsically violates free speech rights or because copyright holders, in practice, overcharge or wrongfully restrict use of copyrighted material.

These activities raise interesting issues about when one may violate a law one regards as unjust. Consider sheer downloading just for consumption. Most who regard copyright as unjust, in essence or in practice, nonetheless affirm that creators of intellectual property (et al.) deserve some compensation. Most who download would admit they are free-riding off the producers and the consumers who do comply. May one free-ride when one's reason is that the system of production and distribution of an important good is itself unjust and there is no easily accessible alternative mode of access?

Were disagreement with institutional approaches to social problems sufficient grounds for disobedience, no political system that relies on mutual compromise could thrive among free-thinking people. On the other hand, disobeying deeply unjust political decisions such as racially discriminatory laws is often well justified. How should we regard illegal downloading?

If the downloader's objection centres on the prices of intellectual products, the situation resembles more general dissatisfactions with high prices set by owners of capital. However, it seems questionable to take and refuse to pay the grocer for an unreasonably priced litre of Coca-Cola, especially if one could agitate politically within a functional political system for price controls, freer trade or other methods to ensure fairer terms of exchange. Perhaps it is wrong to take the Coke because the grocer will lose the sale and what she paid for it. By contrast, illicitly downloaded intellectual property does not preclude bona fide consumer sales of the same property to willing, paying consumers. Still, other things equal, it seems wrong to stow away on an empty bus that overcharges, even if the stowaway will not increase operating costs or displace paying passengers.

Perhaps matters differ if the price were so high that it interfered with people's ability to fulfil basic needs, e.g. if the beverage were scarce water or milk, or the bus were the sole means of transportation. Is intellectual property like scarce milk or water? Those who regard intellectual property as common property, or expression and communication as basic human needs, may view high charges on intellectual property as akin to commandeering the public well and charging high prices for (publicly owned) water. Some may distinguish between communication for pure entertainment from communication of (other) socially, politically or personally significant facts or opinions. Illicit downloading of the latest Jackie Chan action film may differ from photocopying readings for purely educational use or downloading 'Eyes on the Prize', the seminal documentary series about the civil rights movement, long unavailable due to obstacles posed by copyright (Brown and Harris, 2005). Others resist this idea, pointing out that many intellectual products have rough substitutes. A particular product's underlying idea may be otherwise expressed; other means and works may be found or generated for entertainment and education.

Two further contrasts between illicit downloading and historical forms of civil disobedience may be drawn. First, even if illicit downloading of (some) intellectual works importantly differs from mere free-riding for convenience, it nonetheless inflicts

disadvantages on some relatively innocent people, e.g. those whose work may not get distributed or produced because the systemic costs of free-riding reduce production of riskier works, and those paying consumers whose costs are higher because some free-ride. By contrast, many of those disadvantaged by civil disobedience to apartheid and Jim Crow laws were either more actively complicit in or benefited by the system of injustice. Second, simultaneous efforts to effect political change have standardly accompanied conscientious civil disobedience. Some illicit downloaders download as a form of public protest while actively pushing for reform – e.g. shorter, more permissive periods of intellectual property protection or alternative methods of funding production and distribution. Others, though, merely download for convenience on the grounds that the current system is unjust but do not make efforts towards a larger permanent solution. (Although, sufficiently widespread indifference to the rules may itself engender enough disrespect or despair over their inefficacy to trigger or facilitate others' efforts at social change.)

This raises the interesting question: can it be a sufficient reason to disobey the law that it is unjust, even when there are relative innocents who are (sometimes only mildly) disadvantaged, or must one also participate in positive efforts to establish a just solution? Others create unauthorized derivative works but make these works freely available to others for consumption and further transformative use. These and other practices of reciprocity nicely pose the question of whether it makes a difference to the permissibility of illicit use that it is not done to gain advantage or seek profit and that one makes one's own work available on the same basis that one takes.

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What Is an Author?

The coming into being of the notion of "author" constitutes the privileged moment of *individualization* in the history of ideas, knowledge, literature, philosophy, and the sciences. Even today, when we reconstruct the history of a concept, literary genre, or school of philosophy, such categories seem relatively weak, secondary, and superimposed scansions in comparison with the solid and fundamental unit of the author and the work.

I shall not offer here a sociohistorical analysis of the author's persona. Certainly it would be worth examining how the author became individualized in a culture like ours, what status he has been given, at what moment studies of authenticity and attribution began, in what kind of system of valorization the author was involved, at what point we began to recount the lives of authors rather than of heroes, and how this fundamental category of "the-man-and-his-work criticism" began. For the moment, however, I want to deal solely with the relationship between text and author and with the manner in which the text points to this "figure" that, at least in appearance, is outside it and antecedes it.

Beckett nicely formulates the theme with which I would like to begin: " 'What does it matter who is speaking,' someone said, 'what does it matter who is speaking.' " In this indifference appears one of the fundamental ethical principles of contemporary writing (*écriture*). I say "ethical" because this indifference is not really a trait characterizing the manner in which one speaks and writes, but rather a kind of immanent rule, taken up over and over again, never fully applied, not designating writing as something completed, but dominating it as a practice. Since it is too familiar to require a lengthy analysis, this immanent rule can be adequately illustrated here by tracing two of its major themes.

The Foucault Reader
Ed. Paul Rabinow New York: Pantheon Books 1984

First of all, we can say that today's writing has freed itself from the dimension of expression. Referring only to itself, but without being restricted to the confines of its interiority, writing is identified with its own unfolded exteriority. This means that it is an interplay of signs arranged less according to its signified content than according to the very nature of the signifier. Writing unfolds like a game (*jeu*) that invariably goes beyond its own rules and transgresses its limits. In writing, the point is not to manifest or exalt the act of writing, nor is it to pin a subject within language; it is, rather, a question of creating a space into which the writing subject constantly disappears.

The second theme, writing's relationship with death, is even more familiar. This link subverts an old tradition exemplified by the Greek epic, which was intended to perpetuate the immortality of the hero: if he was willing to die young, it was so that his life, consecrated and magnified by death, might pass into immortality; the narrative then redeemed this accepted death. In another way, the motivation, as well as the theme and the pretext of Arabian narratives—such as *The Thousand and One Nights*—was also the eluding of death: one spoke, telling stories into the early morning, in order to forestall death, to postpone the day of reckoning that would silence the narrator. Scheherazade's narrative is an effort, renewed each night, to keep death outside the circle of life.

Our culture has metamorphosed this idea of narrative, or writing, as something designed to ward off death. Writing has become linked to sacrifice, even to the sacrifice of life: it is now a voluntary effacement which does not need to be represented in books, since it is brought about in the writer's very existence. The work, which once had the duty of providing immortality, now possesses the right to kill, to be its author's murderer, as in the cases of Flaubert, Proust, and Kafka. That is not all, however: this relationship between writing and death is also manifested in the effacement of the writing subject's individual characteristics. Using all the contrivances that he sets up between himself and what he writes, the writing subject cancels out the signs of his particular individuality. As a result, the mark of the writer is reduced to nothing more than the singularity of his absence; he must assume the role of the dead man in the game of writing.

None of this is recent; criticism and philosophy took note of the disappearance—or death—of the author some time ago. But the consequences of their discovery of it have not been sufficiently examined, nor has its import been accurately measured. A certain number of notions that are intended to replace the privileged position of the author actually seem to preserve that privilege and suppress the real meaning of his disappearance. I shall examine two of these notions, both of great importance today.

The first is the idea of the work. It is a very familiar thesis that the task of criticism is not to bring out the work's relationships with the author, nor to reconstruct through the text a thought or experience, but rather to analyze the work through its structure, its architecture, its intrinsic form, and the play of its internal relationships. At this point, however, a problem arises: What is a work? What is this curious unity which we designate as a work? Of what elements is it composed? Is it not what an author has written? Difficulties appear immediately. If an individual were not an author, could we say that what he wrote, said, left behind in his papers, or what has been collected of his remarks, could be called a "work"? When Sade was not considered an author, what was the status of his papers? Were they simply rolls of paper onto which he ceaselessly uncoiled his fantasies during his imprisonment?

Even when an individual has been accepted as an author, we must still ask whether everything that he wrote, said, or left behind is part of his work. The problem is both theoretical and technical. When undertaking the publication of Nietzsche's works, for example, where should one stop? Surely everything must be published, but what is "everything"? Everything that Nietzsche himself published, certainly. And what about the rough drafts for his works? Obviously. The plans for his aphorisms? Yes. The deleted passages and the notes at the bottom of the page? Yes. What if, within a workbook filled with aphorisms, one finds a reference, the notation of a meeting or of an address, or a laundry list: Is it a work, or not? Why not? And

so on, ad infinitum. How can one define a work amid the millions of traces left by someone after his death? A theory of the work does not exist, and the empirical task of those who naively undertake the editing of works often suffers in the absence of such a theory.

We could go even further: Does *The Thousand and One Nights* constitute a work? What about Clement of Alexandria's *Miscellanies* or Diogenes Laertius's *Lives*? A multitude of questions arises with regard to this notion of the work. Consequently, it is not enough to declare that we should do without the writer (the author) and study the work itself. The word *work* and the unity that it designates are probably as problematic as the status of the author's individuality.

Another notion which has hindered us from taking full measure of the author's disappearance, blurring and concealing the moment of this effacement and subtly preserving the author's existence, is the notion of writing (*écriture*). When rigorously applied, this notion should allow us not only to circumvent references to the author, but also to situate his recent absence. The notion of writing, as currently employed, is concerned with neither the act of writing nor the indication—be it symptom or sign—of a meaning which someone might have wanted to express. We try, with great effort, to imagine the general condition of each text, the condition of both the space in which it is dispersed and the time in which it unfolds.

In current usage, however, the notion of writing seems to transpose the empirical characteristics of the author into a transcendental anonymity. We are content to efface the more visible marks of the author's empiricity by playing off, one against the other, two ways of characterizing writing, namely, the critical and the religious approaches. Giving writing a primal status seems to be a way of retranslating, in transcendental terms, both the theological affirmation of its sacred character and the critical affirmation of its creative character. To admit that writing is, because of the very history that it made possible, subject to the test of oblivion and repression, seems to represent, in transcendental terms, the religious principle of the hidden meaning (which requires interpretation) and the critical principle of implicit significations, silent determinations, and obscured contents (which

gives rise to commentary). To imagine writing as absence seems to be a simple repetition, in transcendental terms, of both the religious principle of inalterable and yet never fulfilled tradition, and the aesthetic principle of the work's survival, its perpetuation beyond the author's death, and its enigmatic *excess* in relation to him.

This usage of the notion of writing runs the risk of maintaining the author's privileges under the protection of writing's *a priori* status: it keeps alive, in the gray light of neutralization, the interplay of those representations that formed a particular image of the author. The author's disappearance, which, since Mallarmé, has been a constantly recurring event, is subject to a series of transcendental barriers. There seems to be an important dividing line between those who believe that they can still locate today's discontinuities (*ruptures*) in the historico-transcendental tradition of the nineteenth century, and those who try to free themselves once and for all from that tradition.

It is not enough, however, to repeat the empty affirmation that the author has disappeared. For the same reason, it is not enough to keep repeating (after Nietzsche) that God and man have died a common death. Instead, we must locate the space left empty by the author's disappearance, follow the distribution of gaps and breaches, and watch for the openings that this disappearance uncovers.

First, we need to clarify briefly the problems arising from the use of the author's name. What is an author's name? How does it function? Far from offering a solution, I shall only indicate some of the difficulties that it presents.

The author's name is a proper name, and therefore it raises the problems common to all proper names. (Here I refer to Searle's analyses, among others.[1]) Obviously, one cannot turn a proper name into a pure and simple reference. It has other than indicative functions: more than an indication, a gesture, a finger pointed at someone, it is the equivalent of a description. When one says "Aristotle," one employs a word that is the equivalent of one, or a series, of definite descriptions, such as "the author of the *Analytics*," "the founder of ontology," and

so forth. One cannot stop there, however, because a proper name does not have just one signification. When we discover that Rimbaud did not write *La Chasse spirituelle*, we cannot pretend that the meaning of this proper name, or that of the author, has been altered. The proper name and the author's name are situated between the two poles of description and designation: they must have a certain link with what they name, but one that is neither entirely in the mode of designation nor in that of description; it must be a *specific* link. However—and it is here that the particular difficulties of the author's name arise—the links between the proper name and the individual named and between the author's name and what it names are not isomorphic and do not function in the same way. There are several differences.

If, for example, Pierre Dupont does not have blue eyes, or was not born in Paris, or is not a doctor, the name Pierre Dupont will still always refer to the same person; such things do not modify the link of designation. The problems raised by the author's name are much more complex, however. If I discover that Shakespeare was not born in the house that we visit today, this is a modification which, obviously, will not alter the functioning of the author's name. But if we proved that Shakespeare did not write those sonnets which pass for his, that would constitute a significant change and affect the manner in which the author's name functions. If we proved that Shakespeare wrote Bacon's *Organon* by showing that the same author wrote both the works of Bacon and those of Shakespeare, that would be a third type of change which would entirely modify the functioning of the author's name. The author's name is not, therefore, just a proper name like the rest.

Many other facts point out the paradoxical singularity of the author's name. To say that Pierre Dupont does not exist is not at all the same as saying that Homer or Hermes Trismegistus did not exist. In the first case, it means that no one has the name Pierre Dupont; in the second, it means that several people were mixed together under one name, or that the true author had none of the traits traditionally ascribed to the personae of Homer or Hermes. To say that X's real name is actually Jacques Durand instead of Pierre Dupont is not the same as saying that

Stendhal's name was Henri Beyle. One could also question the meaning and functioning of propositions like "Bourbaki is so-and-so, so-and-so, etc." and "Victor Eremita, Climacus, Anticlimacus, Frater Taciturnus, Constantine Constantius, all of these are Kierkegaard."

These differences may result from the fact that an author's name is not simply an element in a discourse (capable of being either subject or object, of being replaced by a pronoun, and the like); it performs a certain role with regard to narrative discourse, assuring a classificatory function. Such a name permits one to group together a certain number of texts, define them, differentiate them from and contrast them to others. In addition, it establishes a relationship among the texts. Hermes Trismegistus did not exist, nor did Hippocrates—in the sense that Balzac existed—but the fact that several texts have been placed under the same name indicates that there has been established among them a relationship of homogeneity, filiation, authentication of some texts by the use of others, reciprocal explication, or concomitant utilization. The author's name serves to characterize a certain mode of being of discourse: the fact that the discourse has an author's name, that one can say "this was written by so-and-so" or "so-and-so is its author," shows that this discourse is not ordinary everyday speech that merely comes and goes, not something that is immediately consumable. On the contrary, it is a speech that must be received in a certain mode and that, in a given culture, must receive a certain status.

It would seem that the author's name, unlike other proper names, does not pass from the interior of a discourse to the real and exterior individual who produced it; instead, the name seems always to be present, marking off the edges of the text, revealing, or at least characterizing, its mode of being. The author's name manifests the appearance of a certain discursive set and indicates the status of this discourse within a society and a culture. It has no legal status, nor is it located in the fiction of the work; rather, it is located in the break that founds a certain discursive construct and its very particular mode of being. As a result, we could say that in a civilization like our own there are a certain number of discourses that are endowed with the "author function," while others are deprived of it. A private letter may well

have a signer—it does not have an author; a contract may well have a guarantor—it does not have an author. An anonymous text posted on a wall probably has a writer—but not an author. The author function is therefore characteristic of the mode of existence, circulation, and functioning of certain discourses within a society.

Let us analyze this "author function" as we have just described it. In our culture, how does one characterize a discourse containing the author function? In what way is this discourse different from other discourses? If we limit our remarks to the author of a book or a text, we can isolate four different characteristics.

First of all, discourses are objects of appropriation. The form of ownership from which they spring is of a rather particular type, one that has been codified for many years. We should note that, historically, this type of ownership has always been subsequent to what one might call penal appropriation. Texts, books, and discourses really began to have authors (other than mythical, "sacralized" and "sacralizing" figures) to the extent that authors became subject to punishment, that is, to the extent that discourses could be transgressive. In our culture (and doubtless in many others), discourse was not originally a product, a thing, a kind of goods; it was essentially an act—an act placed in the bipolar field of the sacred and the profane, the licit and the illicit, the religious and the blasphemous. Historically, it was a gesture fraught with risks before becoming goods caught up in a circuit of ownership.

Once a system of ownership for texts came into being, once strict rules concerning author's rights, author-publisher relations, rights of reproduction, and related matters were enacted—at the end of the eighteenth and the beginning of the nineteenth century—the possibility of transgression attached to the act of writing took on, more and more, the form of an imperative peculiar to literature. It is as if the author, beginning with the moment at which he was placed in the system of property that characterizes our society, compensated for the status that he thus acquired by rediscovering the old bipolar field of discourse,

systematically practicing transgression and thereby restoring danger to a writing which was now guaranteed the benefits of ownership.

The author function does not affect all discourses in a universal and constant way, however. This is its second characteristic. In our civilization, it has not always been the same types of texts which have required attribution to an author. There was a time when the texts that we today call "literary" (narratives, stories, epics, tragedies, comedies) were accepted, put into circulation, and valorized without any question about the identity of their author; their anonymity caused no difficulties since their ancientness, whether real or imagined, was regarded as a sufficient guarantee of their status. On the other hand, those texts that we now would call scientific—those dealing with cosmology and the heavens, medicine and illnesses, natural sciences and geography—were accepted in the Middle Ages, and accepted as "true," only when marked with the name of their author. "Hippocrates said," "Pliny recounts," were not really formulas of an argument based on authority; they were the markers inserted in discourses that were supported to be received as statements of demonstrated truth.

A reversal occurred in the seventeenth or eighteenth century. Scientific discourses began to be received for themselves, in the anonymity of an established or always redemonstrable truth; their membership in a systematic ensemble, and not the reference to the individual who produced them, stood as their guarantee. The author function faded away, and the inventor's name served only to christen a theorem, proposition, particular effect, property, body, group of elements, or pathological syndrome. By the same token, literary discourses came to be accepted only when endowed with the author function. We now ask of each poetic or fictional text: From where does it come, who wrote it, when, under what circumstances, or beginning with what design? The meaning ascribed to it and the status or value accorded it depend on the manner in which we answer these questions. And if a text should be discovered in a state of anonymity—whether as a consequence of an accident or the author's explicit wish—the game becomes one of rediscovering the author. Since literary anonymity is not tolerable, we can accept

it only in the guise of an enigma. As a result, the author function today plays an important role in our view of literary works. (These are obviously generalizations that would have to be refined insofar as recent critical practice is concerned.)

The third characteristic of this author function is that it does not develop spontaneously as the attribution of a discourse to an individual. It is, rather, the result of a complex operation which constructs a certain rational being that we call "author." Critics doubtless try to give this intelligible being a realistic status, by discerning, in the individual, a "deep" motive, a "creative" power, or a "design," the milieu in which writing originates. Nevertheless, these aspects of an individual which we designate as making him an author are only a projection, in more or less psychologizing terms, of the operations that we force texts to undergo, the connections that we make, the traits that we establish as pertinent, the continuities that we recognize, or the exclusions that we practice. All these operations vary according to periods and types of discourse. We do not construct a "philosophical author" as we do a "poet," just as, in the eighteenth century, one did not construct a novelist as we do today. Still, we can find through the ages certain constants in the rules of author construction.

It seems, for example, that the manner in which literary criticism once defined the author—or, rather, constructed the figure of the author beginning with existing texts and discourses—is directly derived from the manner in which Christian tradition authenticated (or rejected) the texts at its disposal. In order to "rediscover" an author in a work, modern criticism uses methods similar to those that Christian exegesis employed when trying to prove the value of a text by its author's saintliness. In *De viris illustribus*, Saint Jerome explains that homonymy is not sufficient to identify legitimately authors of more than one work: different individuals could have had the same name, or one man could have, illegitimately, borrowed another's patronymic. The name as an individual trademark is not enough when one works within a textual tradition.

How, then, can one attribute several discourses to one and the same author? How can one use the author function to determine if one is dealing with one or several individuals? Saint

Jerome proposes four criteria: (1) if among several books attributed to an author one is inferior to the others, it must be withdrawn from the list of the author's works (the author is therefore defined as a constant level of value); (2) the same should be done if certain texts contradict the doctrine expounded in the author's other works (the author is thus defined as a field of conceptual or theoretical coherence); (3) one must also exclude works that are written in a different style, containing words and expressions not ordinarily found in the writer's production (the author is here conceived as a stylistic unity); (4) finally, passages quoting statements that were made or mentioning events that occurred after the author's death must be regarded as interpolated texts (the author is here seen as a historical figure at the crossroads of a certain number of events).

Modern literary criticism, even when—as is now customary—it is not concerned with questions of authentication, still defines the author the same way: the author provides the basis for explaining not only the presence of certain events in a work, but also their transformations, distortions, and diverse modifications (through his biography, the determination of his individual perspective, the analysis of his social position, and the revelation of his basic design). The author is also the principle of a certain unity of writing—all differences having to be resolved, at least in part, by the principles of evolution, maturation, or influence. The author also serves to neutralize the contradictions that may emerge in a series of texts: there must be—at a certain level of his thought or desire, of his consciousness or unconscious—a point where contradictions are resolved, where incompatible elements are at last tied together or organized around a fundamental or originating contradiction. Finally, the author is a particular source of expression that, in more or less completed forms, is manifested equally well, and with similar validity, in works, sketches, letters, fragments, and so on. Clearly, Saint Jerome's four criteria of authenticity (criteria which seem totally insufficient for today's exegetes) do define the four modalities according to which modern criticism brings the author function into play.

But the author function is not a pure and simple reconstruction made secondhand from a text given as passive material.

The text always contains a certain number of signs referring to the author. These signs, well known to grammarians, are personal pronouns, adverbs of time and place, and verb conjugation. Such elements do not play the same role in discourses provided with the author function as in those lacking it. In the latter, such "shifters" refer to the real speaker and to the spatio-temporal coordinates of his discourse (although certain modifications can occur, as in the operation of relating discourses in the first person). In the former, however, their role is more complex and variable. Everyone knows that, in a novel narrated in the first person, neither the first-person pronoun nor the present indicative refers exactly either to the writer or to the moment in which he writes, but rather to an alter ego whose distance from the author varies, often changing in the course of the work. It would be just as wrong to equate the author with the real writer as to equate him with the fictitious speaker; the author function is carried out and operates in the scission itself, in this division and this distance.

One might object that this is a characteristic peculiar to novelistic or poetic discourse, a "game" in which only "quasi-discourses" participate. In fact, however, all discourses endowed with the author function do possess this plurality of self. The self that speaks in the preface to a treatise on mathematics—and that indicates the circumstances of the treatise's composition—is identical neither in its position nor in its functioning to the self that speaks in the course of a demonstration, and that appears in the form of "I conclude" or "I suppose." In the first case, the "I" refers to an individual without an equivalent who, in a determined place and time, completed a certain task; in the second, the "I" indicates an instance and a level of demonstration which any individual could perform provided that he accepted the same system of symbols, play of axioms, and set of previous demonstrations. We could also, in the same treatise, locate a third self, one that speaks to tell the work's meaning, the obstacles encountered, the results obtained, and the remaining problems; this self is situated in the field of already existing or yet-to-appear mathematical discourses. The author function is not assumed by the first of these selves at the expense of the other two, which would then be nothing more than a fictitious splitting in two of the first one. On the contrary, in these discourses the author function operates so as to effect the dispersion of these three simultaneous selves.

No doubt analysis could discover still more characteristic traits of the author function. I will limit myself to these four, however, because they seem both the most visible and the most important. They can be summarized as follows: (1) the author function is linked to the juridical and institutional system that encompasses, determines, and articulates the universe of discourses; (2) it does not affect all discourses in the same way at all times and in all types of civilization; (3) it is not defined by the spontaneous attribution of a discourse to its producer, but rather by a series of specific and complex operations; (4) it does not refer purely and simply to a real individual, since it can give rise simultaneously to several selves, to several subjects—positions that can be occupied by different classes of individuals.

Up to this point I have unjustifiably limited my subject. Certainly the author function in painting, music, and other arts should have been discussed, but even supposing that we remain within the world of discourse, as I want to do, I seem to have given the term "author" much too narrow a meaning. I have discussed the author only in the limited sense of a person to whom the production of a text, a book, or a work can be legitimately attributed. It is easy to see that in the sphere of discourse one can be the author of much more than a book—one can be the author of a theory, tradition, or discipline in which other books and authors will in their turn find a place. These authors are in a position which we shall call "transdiscursive." This is a recurring phenomenon—certainly as old as our civilization. Homer, Aristotle, and the Church Fathers, as well as the first mathematicians and the originators of the Hippocratic tradition, all played this role.

Furthermore, in the course of the nineteenth century, there appeared in Europe another, more uncommon, kind of author, whom one should confuse with neither the "great" literary authors, nor the authors of religious texts, nor the founders of science. In a somewhat arbitrary way we shall call those who

belong in this last group "founders of discursivity." They are unique in that they are not just the authors of their own works. They have produced something else: the possibilities and the rules for the formation of other texts. In this sense, they are very different, for example, from a novelist, who is, in fact, nothing more than the author of his own text. Freud is not just the author of *The Interpretation of Dreams* or *Jokes and Their Relation to the Unconscious*; Marx is not just the author of the *Communist Manifesto* or *Das Kapital*: they both have established an endless possibility of discourse.

Obviously, it is easy to object. One might say that it is not true that the author of a novel is only the author of his own text; in a sense, he also, provided that he acquires some "importance," governs and commands more than that. To take a very simple example, one could say that Ann Radcliffe not only wrote *The Castles of Athlin and Dunbayne* and several other novels, but also made possible the appearance of the Gothic horror novel at the beginning of the nineteenth century; in that respect, her author function exceeds her own work. But I think there is an answer to this objection. These founders of discursivity (I use Marx and Freud as examples, because I believe them to be both the first and the most important cases) make possible something altogether different from what a novelist makes possible. Ann Radcliffe's texts opened the way for a certain number of resemblances and analogies which have their model or principle in her work. The latter contains characteristic signs, figures, relationships, and structures which could be reused by others. In other words, to say that Ann Radcliffe founded the Gothic horror novel means that in the nineteenth-century Gothic novel one will find, as in Ann Radcliffe's works, the theme of the heroine caught in the trap of her own innocence, the hidden castle, the character of the black, cursed hero devoted to making the world expiate the evil done to him, and all the rest of it.

On the other hand, when I speak of Marx or Freud as founders of discursivity, I mean that they made possible not only a certain number of analogies, but also (and equally important) a certain number of differences. They have created a possibility for something other than their discourse, yet something belonging to what they founded. To say that Freud founded psychoanalysis does not (simply) mean that we find the concept of the libido or the technique of dream analysis in the works of Karl Abraham or Melanie Klein; it means that Freud made possible a certain number of divergences—with respect to his own texts, concepts, and hypotheses—that all arise from the psychoanalytic discourse itself.

This would seem to present a new difficulty, however: is the above not true, after all, of any founder of a science, or of any author who has introduced some important transformation into a science? After all, Galileo made possible not only those discourses that repeated the laws that he had formulated, but also statements very different from what he himself had said. If Cuvier is the founder of biology or Saussure the founder of linguistics, it is not because they were imitated, nor because people have since taken up again the concept of organism or sign; it is because Cuvier made possible, to a certain extent, a theory of evolution diametrically opposed to his own fixism; it is because Saussure made possible a generative grammar radically different from his structural analyses. Superficially, then, the initiation of discursive practices appears similar to the founding of any scientific endeavor.

Still, there is a difference, and a notable one. In the case of a science, the act that founds it is on an equal footing with its future transformations; this act becomes in some respects part of the set of modifications that it makes possible. Of course, this belonging can take several forms. In the future development of a science, the founding act may appear as little more than a particular instance of a more general phenomenon which unveils itself in the process. It can also turn out to be marred by intuition and empirical bias; one must then reformulate it, making it the object of a certain number of supplementary theoretical operations which establish it more rigorously, etc. Finally, it can seem to be a hasty generalization which must be limited, and whose restricted domain of validity must be retraced. In other words, the founding act of a science can always be reintroduced within the machinery of those transformations that derive from it.

In contrast, the initiation of a discursive practice is heterogeneous to its subsequent transformations. To expand a type

of discursivity, such as psychoanalysis as founded by Freud, is not to give it a formal generality that it would not have permitted at the outset, but rather to open it up to a certain number of possible applications. To limit psychoanalysis as a type of discursivity is, in reality, to try to isolate in the founding act an eventually restricted number of propositions or statements to which, alone, one grants a founding value, and in relation to which certain concepts or theories accepted by Freud might be considered as derived, secondary, and accessory. In addition, one does not declare certain propositions in the work of these founders to be false: instead, when trying to seize the act of founding, one sets aside those statements that are not pertinent, either because they are deemed inessential, or because they are considered "prehistoric" and derived from another type of discursivity. In other words, unlike the founding of a science, the initiation of a discursive practice does not participate in its later transformations.

As a result, one defines a proposition's theoretical validity in relation to the work of the founders—while, in the case of Galileo and Newton, it is in relation to what physics or cosmology *is* (in its intrinsic structure and "normativity") that one affirms the validity of any proposition that those men may have put forth. To phrase it very schematically: the work of initiators of discursivity is not situated in the space that science defines; rather, it is the science or the discursivity which refers back to their work as primary coordinates.

In this way we can understand the inevitable necessity, within these fields of discursivity, for a "return to the origin." This return, which is part of the discursive field itself, never stops modifying it. The return is not a historical supplement which would be added to the discursivity, or merely an ornament; on the contrary, it constitutes an effective and necessary task of transforming the discursive practice itself. Reexamination of Galileo's text may well change our knowledge of the history of mechanics, but it will never be able to change mechanics itself. On the other hand, reexamining Freud's texts modifies psychoanalysis itself, just as a reexamination of Marx's would modify Marxism.

What I have just outlined regarding the initiation of discursive practices is, of course, very schematic; this is true, in particular, of the opposition that I have tried to draw between discursive initiation and scientific founding. It is not always easy to distinguish between the two; moreover, nothing proves that they are two mutually exclusive procedures. I have attempted the distinction for only one reason: to show that the author function, which is complex enough when one tries to situate it at the level of a book or a series of texts that carry a given signature, involves still more determining factors when one tries to analyze it in larger units, such as groups of works or entire disciplines.

To conclude, I would like to review the reasons why I attach a certain importance to what I have said.

First, there are theoretical reasons. On the one hand, an analysis in the direction that I have outlined might provide for an approach to a typology of discourse. It seems to me, at least at first glance, that such a typology cannot be constructed solely from the grammatical features, formal structures, and objects of discourse: more likely there exist properties or relationships peculiar to discourse (not reducible to the rules of grammar and logic), and one must use these to distinguish the major categories of discourse. The relationship (or nonrelationship) with an author, and the different forms this relationship takes, constitute—in a quite visible manner—one of these discursive properties.

On the other hand, I believe that one could find here an introduction to the historical analysis of discourse. Perhaps it is time to study discourses not only in terms of their expressive value or formal transformations, but according to their modes of existence. The modes of circulation, valorization, attribution, and appropriation of discourses vary with each culture and are modified within each. The manner in which they are articulated according to social relationships can be more readily understood, I believe, in the activity of the author function and in its modifications than in the themes or concepts that discourses set in motion.

It would seem that one could also, beginning with analyses of this type, reexamine the privileges of the subject. I realize

that in undertaking the internal and architectonic analysis of a work (be it a literary text, philosophical system, or scientific work), in setting aside biographical and psychological references, one has already called back into question the absolute character and founding role of the subject. Still, perhaps one must return to this question, not in order to reestablish the theme of an originating subject, but to grasp the subject's points of insertion, modes of functioning, and system of dependencies. Doing so means overturning the traditional problem, no longer raising the questions: How can a free subject penetrate the substance of things and give it meaning? How can it activate the rules of a language from within and thus give rise to the designs which are properly its own? Instead, these questions will be raised: How, under what conditions, and in what forms can something like a subject appear in the order of discourse? What place can it occupy in each type of discourse, what functions can it assume, and by obeying what rules? In short, it is a matter of depriving the subject (or its substitute) of its role as originator, and of analyzing the subject as a variable and complex function of discourse.

Second, there are reasons dealing with the "ideological" status of the author. The question then becomes: How can one reduce the great peril, the great danger with which fiction threatens our world? The answer is: one can reduce it with the author. The author allows a limitation of the cancerous and dangerous proliferation of significations within a world where one is thrifty not only with one's resources and riches, but also with one's discourses and their significations. The author is the principle of thrift in the proliferation of meaning. As a result, we must entirely reverse the traditional idea of the author. We are accustomed, as we have seen earlier, to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.

The truth is quite the contrary: the author is not an indefinite source of significations which fill a work; the author does not

precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. (When a historically given function is represented in a figure that inverts it, one has an ideological production.) The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.

In saying this, I seem to call for a form of culture in which fiction would not be limited by the figure of the author. It would be pure romanticism, however, to imagine a culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure. Although, since the eighteenth century, the author has played the role of the regulator of the fictive, a role quite characteristic of our era of industrial and bourgeois society, of individualism and private property, still, given the historical modifications that are taking place, it does not seem necessary that the author function remain constant in form, complexity, and even in existence. I think that, as our society changes, at the very moment when it is in the process of changing, the author function will disappear, and in such a manner that fiction and its polysemous texts will once again function according to another mode, but still with a system of constraint—one which will no longer be the author, but which will have to be determined or, perhaps, experienced.

All discourses, whatever their status, form, value, and whatever the treatment to which they will be subjected, would then develop in the anonymity of a murmur. We would no longer hear the questions that have been rehashed for so long: Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse? Instead, there would be

other questions, like these: What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions? And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking?

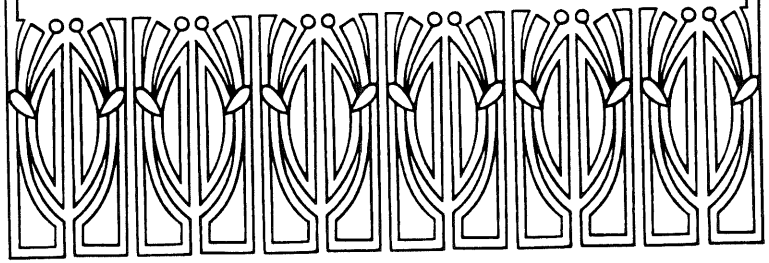
Notes

[1] *Ed.*: John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge, Eng.: Cambridge University Press, 1969), pp. 162–74.

Part

II

Practices and Knowledge



The Death of the Author

Roland Barthes
(from I*mage, Music, Text*, 1977)

In his story Sarrasine Balzac, describing a castrato disguised as a woman, writes the following sentence: 'This was woman herself, with her sudden fears, her irrational whims, her instinctive worries, her impetuous boldness, her fussings, and her delicious sensibility.' Who is speaking thus? Is it the hero of the story bent on remaining ignorant of the castrato hidden beneath the woman? Is it Balzac the individual, furnished by his personal experience with a philosophy of Woman? Is it Balzac the author professing 'literary' ideas on femininity? Is it universal wisdom? Romantic psychology? We shall never know, for the good reason that writing is the destruction of every voice, of every point of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing.

No doubt it has always been that way. As soon as a fact is narrated no longer with a view to acting directly on reality but intransitively, that is to say, finally outside of any function other than that of the very practice of the symbol itself, this disconnection occurs, the voice loses its origin, the author enters into his own death, writing begins. The sense of this phenomenon, however, has varied; in ethnographic societies the responsibility for a narrative is never assumed by a person but by a mediator, shaman or relator whose 'performance' — the mastery of the narrative code — may possibly be admired but never his 'genius'. The author is a modern figure, a product of our society insofar as, emerging from the Middle Ages with English empiricism,

French rationalism and the personal faith of the Reformation, it discovered the prestige of the individual, of, as it is more nobly put, the 'human person'. It is thus logical that in literature it should be this positivism, the epitome and culmination of capitalist ideology, which has attached the greatest importance to the 'person' of the author. The author still reigns in histories of literature, biographies of writers, interviews, magazines, as in the very consciousness of men of letters anxious to unite their person and their work through diaries and memoirs. The image of literature to be found in ordinary culture is tyrannically centred on the author, his person, his life, his tastes, his passions, while criticism still consists for the most part in saying that Baudelaire's work is the failure of Baudelaire the man, Van Gogh's his madness, Tchaikovsky's his vice. The explanation of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the author 'confiding' in us.

Though the sway of the Author remains powerful (the new criticism has often done no more than consolidate it), it goes without saying that certain writers have long since attempted to loosen it. In France, Mallarme was doubtless the first to see and to foresee in its full extent the necessity to substitute language itself for the person who until then had been supposed to be its owner. For him, for us too, it is language which speaks, not the author; to write is, through a prerequisite impersonality (not at all to be confused with the castrating objectivity of the realist novelist), to reach that point where only language acts, 'performs', and not 'me'. Mallarme's entire poetics consists in suppressing the author in the interests of writing (which is, as will be seen, to restore the place of the reader). Valery, encumbered by a psychology of the Ego, considerably diluted Mallarme's theory but, his taste for classicism leading him to turn to the lessons of rhetoric, he never stopped calling into question and deriding the Author; he stressed the linguistic and, as it were, 'hazardous' nature of his activity, and throughout his prose works he militated in favour of the essentially verbal condition of literature, in the face of which all recourse to the writer's interiority seemed to him pure superstition. Proust himself, despite the apparently psychological

character of what are called his analyses, was visibly concerned with the task of inexorably blurring, by an extreme subtilization, the relation between the writer and his characters; by making of the narrator not he who has seen and felt nor even he who is writing, but he who is going to write (the young man in the novel — but, in fact, how old is he and who is he? — wants to write but cannot; the novel ends when writing at last becomes possible), Proust gave modern writing its epic. By a radical reversal, instead of putting his life into his novel, as is so often maintained, he made of his very life a work for which his own book was the model; so that it is clear to us that Charlus does not imitate Montesquiou but that Montesquiou — in his anecdotal, historical reality — is no more than a secondary fragment, derived from Charlus. Lastly, to go no further than this prehistory of modernity, Surrealism, though unable to accord language a supreme place (language being system and the aim of the movement being, romantically, a direct subversion of codes—itself moreover illusory: a code cannot be destroyed, only 'played off'), contributed to the desacrilization of the image of the Author by ceaselessly recommending the abrupt disappointment of expectations of meaning (the famous surrealist 'jolt'), by entrusting the hand with the task of writing as quickly as possible what the head itself is unaware of (automatic writing), by accepting the principle and the experience of several people writing together. Leaving aside literature itself (such distinctions really becoming invalid), linguistics has recently provided the destruction of the Author with a valuable analytical tool by show ing that the whole of the enunciation is an empty functioning perfectly without there being any need for it to be filled with the person of the interlocutors. Linguistically, the author is never more than the instance writing, just as I is nothing other than the instance saying I: language knows a 'subject', not a 'person', and this subject, empty outside of the very enunciation which defines it, suffices to make language 'hold together', suffices, that is to say, to exhaust it.

The removal of the Author (one could talk here with Brecht of a veritable 'distancing', the Author diminishing like a figurine at the far end of the literary stage) is not merely an historical fact or an act of writing; it utterly transforms the modern text (or — which is the same thing —the text is henceforth made and read in such a way that at all its levels the author is absent). The temporality is different. The Author, when believed in, is always conceived of as the past of his own book: book and author stand automatically on a single line divided into a before and an after. The Author is thought to nourish the book, which is to say that he exists before it, thinks, suffers, lives for it, is in the same relation of antecedence to his work as a father to his child. In complete contrast, the modern scriptor is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as predicate; there is no other time than that of the enunciation and every text is eternally written here and now. The fact is (or, it follows) that writing can no longer designate an operation of recording, notation, representation, 'depiction' (as the Classics would say); rather, it designates exactly what linguists, referring to Oxford philosophy, call a performative a rare verbal form (exclusively given in the first person and in the present tense) in which the enunciation has no other content (contains no other proposition) than the act by which it is uttered—something like the I declare of kings or the I sing of very ancient poets. Having buried the Author, the modern scriptor can thus no longer believe, as according to the pathetic view of his predecessors, that this hand is too slow for his thought or passion and that consequently, making a law of necessity, he must emphasize this delay and indefinitely 'polish' his form. For him, on the contrary, the hand, cut off from any voice, borne by a pure gesture of inscription (and not of expression), traces a field without origin—or which, at least, has no other origin than language itself, language which ceaselessly calls into question all origins.

We know now that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture. Similar to Bouvard and Pecuchet, those eternal copyists, at once sublime and comic and whose profound ridiculousness indicates precisely the truth of writing, the writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them. Did he wish to express himself, he ought at least to know that the inner 'thing' he thinks to 'translate' is itself

only a ready-formed dictionary, its words only explainable through other words, and so on indefinitely; something experienced in exemplary fashion by the young Thomas de Quincey, he who was so good at Greek that in order to translate absolutely modern ideas and images into that dead language, he had, so Baudelaire tells us (in Paradis Artificiels), 'created for himself an unfailing dictionary, vastly more extensive and complex than those resulting from the ordinary patience of purely literary themes'. Succeeding the Author, the scriptor no longer bears within him passions, humours, feelings, impressions, but rather this immense dictionary from which he draws a writing that can know no halt: life never does more than imitate the book, and the book itself is only a tissue of signs imitation that is lost, infinitely deferred.

Once the Author is removed, the claim to decipher a text becomes quite futile. To give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing. Such a conception suits criticism very well, the latter then allotting itself the important task of discovering the Author (or its hypostases: society, history, psyche, liberty) beneath the work: when the Author has been found, the text is 'explained'—victory to the critic. Hence there is no surprise in the fact that, historically, the reign of the Author has also been that of the Critic, nor again in the fact that criticism (be it new) is today undermined, along with the Author. In the multiplicity of writing, everything is to be disentangled, nothing deciphered; the structure can be followed, 'run' (like the thread of a stocking) at every point and at every level, but there is nothing beneath: the space of writing is to be ranged over, not pierced; writing ceaselessly posits meaning ceaselessly to evaporate it, carrying out a systematic exemption of meaning. In precisely this way literature (it would bebetter from now on to say writing), by refusing to assign a 'secret', an ultimate meaning, to the text (and to the world as text), liberates what may be called an anti-theological activity, an activity that is truly revolutionary since to refuse to fix meaning is, in the end, to refuse God and his hypostases—reason, science, law.

Let us come back to the Balzac sentence. No one, no 'person', says it: its source, its voice, is not the true place of the writing, which is reading. Another—very precise— example will help to make this clear: recent research (J.-P. Vernant) has demonstrated the constitutively ambiguous nature of Greek tragedy, its texts being woven from words with double meanings that each character understands unilaterally (this perpetual misunderstanding is exactly the 'tragic'); there is, however, someone who understands each word in its duplicity and who, in addition, hears the very deafness of the characters speaking in front of him—this someone being precisely the reader (or here, the listener). Thus is revealed the total existence of writing: a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination. Yet this destination cannot any longer be personal: the reader is without history, biography, psychology; he is simply that someone who holds together in a single field all the traces by which the written text is constituted. Which is why it is derisory to condemn the new writing in the name of a humanism hypocritically turned champion of the reader's rights. Classic criticism has never paid any attention to the reader; for it, the writer is the only person in literature. We are now beginning to let ourselves be fooled no longer by the arrogant antiphrastical recriminations of good society in favour of the very thing it sets aside, ignores, smothers, or destroys; we know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the Author.

I believe that the introduction of "dialects," which is technically erroneous in the context, is almost a reflex action caused by an instinctive desire of the writer to downgrade the discussion to the level of Africa and India. And this is quite comparable to Conrad's withholding of language from his rudimentary souls. Language is too grand for these chaps; let's give them dialects!

In all this business a lot of violence is inevitably done not only to the image of despised peoples but even to words, the very tools of possible redress. Look at the phrase "native language" in the *Christian Science Monitor* excerpt. Surely the only *native* language possible in London is Cockney English. But our writer means something else—something appropriate to the sounds Indians and Africans make!

Although the work of redressing which needs to be done may appear too daunting, I believe it is not one day too soon to begin. Conrad saw and condemned the evil of imperial exploitation but was strangely unaware of the racism on which it sharpened its iron tooth. But the victims of racist slander who for centuries have had to live with the inhumanity it makes them heir to have always known better than any casual visitor, even when he comes loaded with the gifts of a Conrad.

1975 1977

HAROLD BLOOM
b. 1930

Cantankerous rebel and staunch traditionalist, Harold Bloom embodies the tensions he depicts between tradition and innovation. The tradition of great writers is both a blessing and a curse, Bloom tells us. But most of all, it is an inescapable fact. Bloom thus finds himself fighting on two major fronts, seeking to deny tame visions of what the tradition offers *and* to shore up the primacy of the "strong" poets against those who wish to dismantle or stand aside from the tradition. This double fight has made Bloom that oddity more common in England than North America: a conservative rebel, addicted to sweeping condemnations of those who challenge the canon while carrying on his own revisionary battle with the received order.

The burden of Bloom's argument is that we are belated sons who will never be as great as our fathers, but it is death for us to admit that we are inferior. Bloom's basic model is SIGMUND FREUD's Oedipal conflict between sons and fathers—a masculinist paradigm that requires the use of the male pronoun throughout this headnote. There is no denying Bloom's originality or his learning. His vision of our necessarily ambivalent relation to literary ancestors—"the anxiety of influence"—has itself been very influential, while his broad historical generalizations and strong judgments can be counted on to stimulate debate.

Educated at Cornell and Yale Universities, Bloom has taught at Yale and New York University since receiving his Ph.D. in 1955. Legend has it that Bloom read English before he spoke it, and he unquestionably has much of English poetry memorized; like SAMUEL TAYLOR COLERIDGE and John Ruskin, he quotes from memory in his books, disdaining footnotes. In the 1970s, when the so-called Yale School (which included PAUL DE MAN, J. Hillis Miller, Geoffrey Hartman, and BARBARA JOHNSON) was sometimes linked to deconstruction. After devoting much of the 1980s to massive editing projects (over 200 volumes of literary criticism edited for Chelsea House alone), Bloom wrote a number of best-sellers in the 1990s, gaining a general audience. His allegiance to the cult of genius and to the transcendentally great masterpiece, along with his antipathy to ideological criticism, made him one of the most prominent enemies of "cultural studies." In *The Western Canon* (1994), for example, he attacks the revisionist work on the literary canon performed by what he calls "the school of resentment" (all those who question the assumed greatness of received masterpieces).

For Bloom as for the Romantic poet William Blake, one of his heroes, energy is the only life; and both poetry and criticism for him are matters of life and death. In our selection from *The Anxiety of Influence* (1973), Bloom describes the "strong" poet as engaged in a "fight to the end" against both nature and previous poets. "Every poet begins . . . by rebelling more strongly against the consciousness of death's necessity than all other men and women do." In his impossible quest to achieve immortality, the strong poet strives to replace nature with art and previous poems with his own work, thereby declaring himself self-created and the master of his own fate.

But a basic Oedipal ambivalence complicates the "ephebe's" (newcomer's) relation to his forebears. Even as a poet's world and aims are shaped by the words of the precursors he most admires, the project of self-creation requires the denial of all influence, a "misprision" (misunderstanding) of his actual sources. So too each child enters a world he did not create, is named by others (usually his parents), and is initiated into his culture's traditions. We are all "belated," arriving late into a cultural landscape already created by others, and given a preexisting language to express our selves. Most people fit themselves into typical roles, using common idioms; many try to make the world better fit their needs. But the "strong poet" attains a heightened individuality through a radical re-vision of tradition.

The striving for originality necessarily involves aggression, but this struggle with the past is disguised in what Bloom labeled "six revisionary ratios." Each represents a strategy enabling the latecomer to revise the previous poet while either denying influence or professing reverence. If the newcomer only faithfully repeated the words of the past, he would never attain selfhood or originality. Thus, "to imagine [a poem and a self] is to misinterpret, which makes all poems antithetical to their precursors." Every poem rewrites earlier poems; every poem is an interpretation. Only misinterpretation of precursors affords the poet his own voice, his own distinctive existence.

In *The Anxiety of Influence*'s "Manifesto of Antithetical Criticism," Bloom denies any categorical distinction between what poets do and what critics of poetry do: "Poets' misinterpretations or poems are more drastic than critics' misinterpretations or criticism, but there is only a difference in degree and not at all in kind." In other words, Bloom asserts that every critical act alters the text it interprets even when insisting on its faithfulness or accuracy. It is primarily this connection of criticism to misreading that prompted the association of Bloom with deconstructive theory. But while poststructuralists reject the humanist self, Bloom's version of "intertextuality" is placed in service of the psychological struggle to achieve selfhood. Bloom obviously admires those "strong" writers who most fully gain individuality, and he clearly aspires to write a strong, creative criticism that will overcome and outdo his own precursors, especially RALPH WALDO EMERSON, KENNETH BURKE, and NORTHROP FRYE.

Bloom's psychoanalytic model, like Freud's, stresses competition, aggression, and self-assertion in ways that seem stereotypically male. From a feminist perspective, SANDRA M. GILBERT AND SUSAN GUBAR stress more collaborative, nurturing, and cooperative relationships between writers and their precursors, between individuals and the tradition. Other critics have denied the unity that Bloom claims for the tradition (he makes Shakespeare and Milton the origin of all subsequent English poetry, Emerson and Whitman of American), pointing instead to the hybridity and pluralism of cultural life and arguing that poets are in dialogue with a wide variety of materials,

Freud's Oedipal complex, which is presented as (but not proved to be) true for all families at all times and in all places.

In response, Bloom insists that the tradition is so fully written into us that we delude ourselves if we think we can evade it. We must "consciously know" and accept that we are "latecomers." To gain access to images and ideas that we do not immediately recognize as our own, we need "antithetical texts"—which, paradoxically, are precisely the great works that constitute the Western tradition and us (*Paradise Lost* is Bloom's favorite example). That tradition is both endlessly conflicted and remarkably unitary. It continually produces a "we" that is mostly stable and similar, with the occasional genius possessing distinctive strength and individuality—recognized only in contrast to other voices in the tradition.

Bloom sees all poets as seeking "divination," or to be counted among the immortals. His view of readers (and their reasons for reading) is similarly narrow: they are all would-be poets, locked in the revisionary struggle with previous writers and striving for greatness.

This reverence for greatness shapes Bloom's style of argumentation. Greatness is conferred and confirmed by Time, transcending the nattering of literary critics. (In our selection, Bloom casually asserts the futility of all the existing types of criticism in one quick sentence.) But because it can be obscured in a particular era, it needs a spokesman (to tell us, for example, that T. S. ELIOT and Robert Lowell are negligible poets). Greatness for Bloom is both nowhere, off in misty Platonic regions of the transcendent, or embodied in Bloom, the one critic faithful to the long view amid "dying generations at their song" who perversely insist on wasting their time with lesser talents. Either way, the authority of greatness is beyond the reach of mere argument and brooks no disagreement.

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From The Anxiety of Influence

Introduction. A Meditation upon Priority, and a Synopsis

This short book offers a theory of poetry by way of a description of poetic influence, or the story of intra-poetic relationships. One aim of this theory is corrective: to de-idealize our accepted accounts of how one poet helps to form another. Another aim, also corrective, is to try to provide a poetics that will foster a more adequate practical criticism.

Poetic history, in this book's argument, is held to be indistinguishable from poetic influence, since strong poets make that history by misreading one another, so as to clear imaginative space for themselves.

My concern is only with strong poets, major figures with the persistence to wrestle with their strong precursors, even to the death. Weaker talents idealize; figures of capable imagination[1] appropriate for themselves. But nothing is got for nothing, and self-appropriation involves the immense anxieties of indebtedness, for what strong maker desires the realization that he has failed to create himself? Oscar Wilde,[2] who knew he had failed as a poet because he lacked strength to overcome his anxiety of influence, knew also the darker truths concerning influence. *The Ballad of Reading Gaol* becomes an embarrassment to read, directly one recognizes that every lustre it exhibits is reflected from *The Rime of the Ancient Mariner*;[3] and Wilde's lyrics anthologize the whole of English High Romanticism. Knowing this, and armed with his customary intelligence, Wilde bitterly remarks in *The Portrait of Mr. W. H.* that: "Influence is simply a transference of personality, a mode of giving away what is most precious to one's self, and its exercise produces a sense, and, it may be, a reality of loss. Every disciple takes away something from his master." This is the anxiety of influencing, yet no reversal in this area is a true reversal. Two years later, Wilde refined this bitterness in one of Lord Henry Wotton's elegant observations in *The Picture of Dorian Gray*, where he tells Dorian that all influence is immoral:

> Because to influence a person is to give him one's own soul. He does not think his natural thoughts, or burn with his natural passions. His virtues are not real to him. His sins, if there are such things as sins, are borrowed. He becomes an echo of someone else's music, an actor of a part that has not been written for him.

To apply Lord Henry's insight to Wilde, we need only read Wilde's review of Pater's[4] *Appreciations*, with its splendidly self-deceptive closing observa-

1. A phrase from the poem "Mrs. Alfred Uruguay" (1940) by Wallace Stevens (1879–1955), whom Bloom considers the greatest American poet of the twentieth century.

[illegible] an essay on Shakespeare's sonnets, and *The Picture of Dorian Gray* (1890), a novel.

3. A 1798 poem by SAMUEL TAYLOR COLERIDGE (1772–1834), English Romantic poet and critic.

4. WALTER PATER (1839–1894), [illegible]

tion that Pater "has escaped disciples." Every major aesthetic consciousness of imaginative wealth, from the ancients and from the Renaissance masters.

other critical paradigms. Peter de Bolla's *Harold Bloom: Towards Historical Rhetorics* (1988) is a good short introduction, while Graham Allen's *Harold Bloom: A Poetics of Conflict* (1994) offers a "stronger" and theoretical overview of Bloom's whole

tion that Pater "has escaped disciples." Every major aesthetic consciousness seems peculiarly more gifted at denying obligation as the hungry generations go on treading one another down. Stevens, a stronger heir of Pater than even Wilde was, is revealingly vehement in his letters:

> While, of course, I come down from the past, the past is my own and not something marked Coleridge, Wordsworth,[5] etc. I know of no one who has been particularly important to me. My reality-imagination complex is entirely my own even though I see it in others.

He might have said: "particularly because I see it in others," but poetic influence was hardly a subject where Stevens' insights could center. Towards the end, his denials became rather violent, and oddly humored. Writing to the poet Richard Eberhart,[6] he extends a sympathy all the stronger for being self-sympathy:

> I sympathize with your denial of any influence on my part. This sort of thing always jars me because, in my own case, I am not conscious of having been influenced by anybody and have purposely held off from reading highly mannered people like Eliot and Pound[7] so that I should not absorb anything, even unconsciously. But there is a kind of critic who spends his time dissecting what he reads for echoes, imitations, influences, as if no one was ever simply himself but is always compounded of a lot of other people. As for W. Blake,[8] I think that this means Wilhelm Blake.

This view, that poetic influence scarcely exists, except in furiously active pedants, is itself an illustration of one way in which poetic influence is a variety of melancholy or an anxiety-principle. Stevens was, as he insisted, a highly individual poet, as much an American original as Whitman or Dickinson, or his own contemporaries: Pound, Williams, Moore.[9] But poetic influence need not make poets less original; as often it makes them more original, though not therefore necessarily better. The profundities of poetic influence cannot be reduced to source-study, to the history of ideas, to the patterning of images. Poetic influence or as I shall more frequently term it, poetic misprision[1] is necessarily the study of the life-cycle of the poet-as-poet. When such study considers the context in which that life-cycle is enacted, it will be compelled to examine simultaneously the relations between poets as cases akin to what Freud called the family romance,[2] and as chapters in the history of modern revisionism, "modern" meaning here post-Enlightenment. The modern poet, as W. J. Bate[3] shows in *The Burden of the Past and the English Poet*, is the inheritor of a melancholy engendered in the mind of the Enlightenment by its skepticism of its own double heritage

5. WILLIAM WORDSWORTH (1770–1850), English Romantic poet.
6. American poet and critic (b. 1904).
7. Ezra Pound (1885–1972), American poet and critic. T. S. ELIOT (1888–1965), American-born English poet and critic.
8. William Blake (1757–1827), Romantic poet, mystic, and artist.
9. Bloom names first 19th- and then 20th-century American poets: Emily Dickinson (1830–1886) (1940) by Wallace Stevens (1879–1955), whom Bloom considers the greatest American poet of the twentieth century.
2. Irish-born playwright and critic (1854–1900; (1887–1972), and William Carlos Williams (1883–1963).
1. Error, misinterpretation.
2. The son's sexual desire for his mother and aggression toward his father, according to SIGMUND FREUD (1856–1939), the Austrian founder of psychoanalysis; a term also applied to the child's fantasy that these are not his true parents.
3. Walter Jackson Bate (1918–1999), American literary critic whose 1970 book

ture of *Dorian Gray* (1890), a novel.
3. A 1798 poem by SAMUEL TAYLOR COLERIDGE (1772–1834), English Romantic poet and critic.
4. WALTER PATER (1839–1894), English

of imaginative wealth, from the ancients and from the Renaissance masters. In this book I largely neglect the area Bate has explored with great skill, in order to center upon intra-poetic relationships as parallels of family romance. Though I employ these parallels, I do so as a deliberate revisionist of some of the Freudian emphases.

Nietzsche[4] and Freud are, so far as I can tell, the prime influences upon the theory of influence presented in this book. Nietzsche is the prophet of the antithetical, and his *Genealogy of Morals* is the profoundest study available to me of the revisionary and ascetic strains in the aesthetic temperament. Freud's investigations of the mechanisms of defense and their ambivalent functionings provide the clearest analogues I have found for the revisionary ratios[5] that govern intra-poetic relations. Yet, the theory of influence expounded here is un-Nietzschean in its deliberate literalism, and in its Viconian[6] insistence that priority in divination is crucial for every strong poet, lest he dwindle merely into a latecomer. My theory rejects also the qualified Freudian optimism that happy substitution is possible, that a second chance can save us from the repetitive quest for our earliest attachments. Poets as poets cannot accept substitutions, and fight to the end to have their initial chance alone. Both Nietzsche and Freud underestimated poets and poetry, yet each yielded more power to phantasmagoria[7] than it truly possesses. They too, despite their moral realism, over-idealized the imagination. Nietzsche's disciple, Yeats and Freud's disciple, Otto Rank,[8] show a greater awareness of the artist's fight against art, and of the relation of this struggle to the artist's antithetical battle against nature.

Freud recognized sublimation as the highest human achievement, a recognition that allies him to Plato[9] and to the entire moral traditions of both Judaism and Christianity. Freudian sublimation involves the yielding-up of more primordial for more refined modes of pleasure, which is to exalt the second chance above the first. Freud's poem, in the view of this book, is not severe enough, unlike the severe poems written by the creative lives of the strong poets. To equate emotional maturation with the discovery of acceptable substitutes may be pragmatic wisdom, particularly in the realm of Eros, but this is not the wisdom of the strong poets. The surrendered dream is not merely a phantasmagoria of endless gratification, but is the greatest of all human illusions, the vision of immortality. If Wordsworth's *Ode: Intimations of Immortality from Recollections of Early Childhood* possessed only the wisdom found also in Freud, then we could cease calling it "the Great Ode."[1] Wordsworth too saw repetition or second chance as essential for development, and his ode admits that we can redirect our needs by substitution or sublimation. But the ode plangently also awakens into failure, and into the creative mind's protest against time's tyranny. A Wordsworthian critic, even one as loyal to Wordsworth as Geoffrey Hartman,[2] can insist upon clearly

4. FRIEDRICH NIETZSCHE (1844–1900), German philosopher; *On the Genealogy of Morals* was published in 1887.
5. Relationships.
6. Like GIAMBATTISTA VICO (1668–1744), the Italian historian and philosopher who claimed that the first language was poetry and was of divine origin.
7. The fantasies and illusions produced by the imagination.

Butler Yeats (1865–1939), Irish poet.
9. Greek philosopher (ca. 427–ca. 347 B.C.E.; see above).
1. Wordworth's so-called "Intimations Ode" (1804) traces the decline of human creativity from childhood (when we still have "intimations" of our divine origin) to adulthood.
2. American literary critic (b. 1929), a colleague of Bloom's at Yale University; his books include

distinguishing between *priority*, as a concept from the natural order, and *authority*, from the spiritual order, but Wordsworth's ode declines to make this distinction. "By seeking to overcome priority," Hartman wisely says, "art fights nature on nature's own ground, and is bound to lose." The argument of this book is that strong poets are condemned to just this unwisdom; Wordsworth's Great Ode fights nature on nature's own ground, and suffers a great defeat, even as it retains its greater dream. That dream, in Wordsworth's ode, is shadowed by the anxiety of influence, due to the greatness of the precursor-poem, Milton's[3] *Lycidas*, where the human refusal wholly to sublimate is even more rugged, despite the ostensible yielding to Christian teachings of sublimation.

For every poet begins (however "unconsciously") by rebelling more strongly against the consciousness of death's necessity than all other men and women do. The young citizen of poetry, or ephebe[4] as Athens would have called him, is already the anti-natural or antithetical man, and from his start as a poet he quests for an impossible object, as his precursor quested before him. That this quest encompasses necessarily the diminishment of poetry seems to me an inevitable realization, one that accurate literary history must sustain. The great poets of the English Renaissance are not matched by their Enlightened descendants, and the whole tradition of the post-Enlightenment, which is Romanticism, shows a further decline in its Modernist and post-Modernist heirs. The death of poetry will not be hastened by any reader's broodings, yet it seems just to assume that poetry in our tradition, when it dies, will be self-slain, murdered by its own past strength. An implied anguish throughout this book is that Romanticism, for all its glories, may have been a vast visionary tragedy, the self-baffled enterprise not of Prometheus but of blinded Oedipus, who did not know that the Sphinx was his Muse.[5]

Oedipus, blind, was on the path to oracular godhood, and the strong poets have followed him by transforming their blindness towards their precursors into the revisionary insights of their own work. The six revisionary movements that I will trace in the strong poet's life-cycle could as well be more, and could take quite different names than those I have employed. I have kept them to six, because these seem to be minimal and essential to my understanding of how one poet deviates from another. The names, though arbitrary, carry on from various traditions that have been central in Western imaginative life, and I hope can be useful.

The greatest poet in our language is excluded from the argument of this book for several reasons. One is necessarily historical; Shakespeare[6] belongs to the giant age before the flood, before the anxiety of influence became central to poetic consciousness. Another has to do with the contrast between dramatic and lyric form. As poetry has become more subjective, the shadow

3. John Milton (1608–1674), English poet; *Lycidas* (1637) is an elegy for a college classmate.
4. A young man (from *ephēbos*, Greek); here, more particularly, an initiate or trainee. Wallace Stevens uses the term in "Notes toward a Supreme Fiction" (1947).
5. That is, source of inspiration. Prometheus: the Titan punished for stealing fire from the gods and giving it to humans (by some accounts, he was poets. Oedipus: in Greek mythology, the tragic hero whose correct answer to the riddle of the Sphinx—a monster with a woman's face and lion's body—led to his becoming king of Thebes and to his self-blinding after he realized he had unknowingly married his own mother and earlier killed his father, King Laius, in a fight at a crossroads.
6. William Shakespeare (1564–1616), English poet and playwright, wrote before the Enlighten-

cast by the precursors has become more dominant. The main cause, though, is that Shakespeare's prime precursor was Marlowe,[7] a poet very much smaller than his inheritor. Milton, with all his strength, yet had to struggle, subtly and crucially, with a major precursor in Spenser,[8] and this struggle both formed and malformed Milton. Coleridge, ephebe of Milton and later of Wordsworth, would have been glad to find his Marlowe in Cowper (or in the much weaker Bowles),[9] but influence cannot be willed. Shakespeare is the largest instance in the language of a phenomenon that stands outside the concern of this book: the absolute absorption of the precursor. Battle between strong equals, father and son as mighty opposites, Laius and Oedipus at the crossroads; only this is my subject here, though some of the fathers, as will be seen, are composite figures. That even the strongest poets are subject to influences not poetical is obvious even to me, but again my concern is only with *the poet in a poet*, or the aboriginal poetic self.

A change like the one I propose in our ideas of influence should help us read more accurately any group of past poets who were contemporary with one another. To give one example, as misinterpreters of Keats,[1] *in their poems*, the Victorian disciples of Keats most notably include Tennyson, Arnold, Hopkins, and Rossetti.[2] That Tennyson triumphed in his long, hidden contest with Keats, no one can assert absolutely, but his clear superiority over Arnold, Hopkins, and Rossetti is due to his relative victory or at least holding of his own in contrast to their partial defeats. Arnold's elegiac poetry uneasily blends Keatsian style with anti-Romantic sentiment, while Hopkins' strained intensities and convolutions of diction and Rossetti's densely inlaid art are also at variance with the burdens they seek to alleviate in their own poetic selves. Similarly, in our time we need to look again at Pound's unending match with Browning;[3] as at Stevens' long and largely hidden civil war with the major poets of English and American Romanticism—Wordsworth, Keats, Shelley, Emerson,[4] and Whitman. As with the Victorian Keatsians, these are instances among many, if a more accurate story is to be told about poetic history.

This book's main purpose is necessarily to present one reader's critical vision, in the context both of the criticism and poetry of his own generation, where their current crises most touch him, and in the context of his own anxieties of influence. In the contemporary poems that most move me, like the *Corsons Inlet* and *Saliences* of A. R. Ammons and the *Fragment* and *Soonest Mended* of John Ashbery,[5] I can recognize a strength that battles against the death of poetry, yet also the exhaustions of being a late-comer. Similarly, in the contemporary criticism that clarifies for me my own evasions, in books like *Allegory* by Angus Fletcher, *Beyond Formalism* by Geoffrey Hartman, and *Blindness and Insight* by Paul de Man,[6] I am made aware

7. Christopher Marlowe (1564–1593), English poet and playwright.
8. Edmund Spenser (1552–1599), English poet.
9. Thomas Bowles (1694–1773), English scholar and poet. William Cowper (1731–1800), English poet.
1. John Keats (1795–1821), English Romantic poet.
2. All English poets: Alfred, Lord Tennyson (1809–1892); MATTHEW ARNOLD (1822–1888); [illegible]
3. Robert Browning (1812–1889), English Victorian poet.
4. RALPH WALDO EMERSON (1803–1882), American essayist and poet. PERCY BYSSHE SHELLEY (1792–1822), English Romantic poet.
5. Ammons (1926–2001) and Ashbery (b. 1927) are American poets.
6. Belgian-born American literary theorist and critic (1919–1983; see above), author of *Blindness and Insight: Essays into the Rhetoric of Contempo-* [illegible]

Titan punished for stealing fire from the gods and giving it to humans (by some accounts, he was

6. William Shakespeare (1564–1616), English poet and playwright, wrote before the Enlighten-

poet.
2. All English poets: Alfred, Lord Tennyson (1809–1892); MATTHEW ARNOLD (1822–1888); Gerard Manley Hopkins (1844–1889); and Dante

critic (1919–1983; see above), author of *Blindness and Insight: Essays into the Rhetoric of Contemporary* (1971). Fletcher (b. 1930), American literary

of the mind's effort to overcome the impasse of Formalist criticism, the barren moralizing that Archetypal criticism has come to be, and the anti-humanistic plain dreariness of all those developments in European criticism[7] that have yet to demonstrate that they can aid in reading any one poem by any poet whatsoever. My Interchapter,[8] proposing a more antithetical practical criticism than any we now have, is my response in this area of the contemporary.

A theory of poetry that presents itself as a severe poem, reliant upon aphorism, apothegm, and a quite personal (though thoroughly traditional) mythic pattern, still may be judged, and may ask to be judged, as argument. Everything that makes up this book—parables, definitions, the working-through of the revisionary ratios as mechanisms of defense—intends to be part of a unified meditation on the melancholy of the creative mind's desperate insistence upon priority. Vico, who read all creation as a severe poem, understood that priority in the natural order and authority in the spiritual order had been one and had to remain one, *for poets*, because only this harshness constituted Poetic Wisdom. Vico reduced both natural priority and spiritual authority to property, a Hermetic reduction that I recognize as the *Ananke*,[9] the dreadful necessity still governing the Western imagination.

Valentinus,[1] second-century Gnostic speculator, came out of Alexandria to teach the Pleroma, the Fullness of thirty Aeons, manifold of Divinity: "It was a great marvel that they were in the Father without knowing Him." To search for where you already are is the most benighted of quests, and the most fated. Each strong poet's Muse, his Sophia,[2] leaps as far out and down as can be, in a solipsistic passion of quest. Valentinus posited a Limit, at which quest ends, but no quest ends, if its context is Unconditioned Mind, the cosmos of the greatest post-Miltonic poets. The Sophia of Valentinus recovered, wed again within the Pleroma, and only her Passion or Dark Intention was separated out into our world, beyond the Limit. Into this Passion, the Dark Intention that Valentinus called "strengthless and female fruit," the ephebe must fall. If he emerges from it, however crippled and blinded, he will be among the strong poets.

SYNOPSIS: SIX REVISIONARY RATIOS

1. *Clinamen*, which is poetic misreading or misprision proper; I take the word from Lucretius,[3] where it means a "swerve" of the atoms so as to make change possible in the universe. A poet swerves away from his precursor, by

Mode (1964). *Beyond Formalism: Literary Essays, 1958–1970* was published in 1970.
7. Structuralist and poststructuralist criticism, which began to influence North American critics in the 1960s and 1970s; it is "anti-humanist" in ignoring the individual. Formalist criticism: criticism focusing on the literary work itself, primarily practiced by New Critics, who stressed "close reading" (e.g., Bloom's Yale colleagues CLEANTH BROOKS and WILLIAM K. WIMSATT JR.). Archetypal criticism: criticism focusing on mythological patterns in texts (most prominently, the work of NORTHROP FRYE).
8. "A Manifesto for Antithetical Criticism" (see below), which appears between chapters 3 and 4 of Bloom's 6-chapter book.
9. Necessity (Greek). Hermetic: occult; specifically, of or relating to the Gnostic writings or teachings attributed to Hermes Trismegistus. Gnosticism, an early Christian heresy, radically rejected the visible world and especially the body as evil; Gnostic rituals emphasized ways to access the hidden knowledge of the spirit.
1. Best known of the Gnostic teachers (d. ca. 160 C.E.).
2. Wisdom (Greek); this personification (usually as the supreme female principle) played an important role in most Gnostic systems.
3. Roman poet and Epicurean philosopher (ca. 94–55 B.C.E.); see *On the Nature of Things* 2.292.

so reading his precursor's poem as to execute a *clinamen* in relation to it. This appears as a corrective movement in his own poem, which implies that the precursor poem went accurately up to a certain point, but then should have swerved, precisely in the direction that the new poem moves.

2. *Tessera*, which is completion and antithesis; I take the word not from mosaic-making, where it is still used, but from the ancient mystery cults, where it meant a token of recognition, the fragment say of a small pot which with the other fragments would re-constitute the vessel. A poet antithetically "completes" his precursor, by so reading the parent-poem as to retain its terms but to mean them in another sense, as though the precursor had failed to go far enough.

3. *Kenosis*, which is a breaking-device similar to the defense mechanisms our psyches employ against repetition compulsions; *kenosis* then is a movement towards discontinuity with the precursor. I take the word from St. Paul,[4] where it means the humbling or emptying-out of Jesus by himself, when he accepts reduction from divine to human status. The later poet, apparently emptying himself of his own afflatus, his imaginative godhood, seems to humble himself as though he were ceasing to be a poet, but this ebbing is so performed in relation to a precursor's poem-of-ebbing that the precursor is emptied out also, and so the later poem of deflation is not as absolute as it seems.

4. *Daemonization*, or a movement towards a personalized Counter-Sublime, in reaction to the precursor's Sublime; I take the term from general Neo-Platonic usage,[5] where an intermediary being, neither divine nor human, enters into the adept to aid him. The later poet opens himself to what he believes to be a power in the parent-poem that does not belong to the parent proper, but to a range of being just beyond that precursor. He does this, in his poem, by so stationing its relation to the parent-poem as to generalize away the uniqueness of the earlier work.

5. *Askesis*, or a movement of self-purgation which intends the attainment of a state of solitude; I take the term, general as it is, particularly from the practice of pre-Socratic shamans like Empedocles.[6] The later poet does not, as in *kenosis*, undergo a revisionary movement of emptying, but of curtailing; he yields up part of his own human and imaginative endowment, so as to separate himself from others, including the precursor, and he does this in his poem by so stationing it in regard to the parent-poem as to make that poem undergo an *askesis* too; the precursor's endowment is also truncated.

6. *Apophrades*, or the return of the dead; I take the word from the Athenian dismal or unlucky days upon which the dead returned to reinhabit the houses in which they had lived. The later poet, in his own final phase, already burdened by an imaginative solitude that is almost a solipsism, holds his own poem so open again to the precursor's work that at first we might believe the wheel has come full circle, and that we are back in the later poet's flooded apprenticeship, before his strength began to assert itself in the revisionary ratios. But the poem is now *held* open to the precursor, where once it *was*

4. Early Christian leader and writer (d. ca. 67 C.E.); see Philippians 2.6–7.
5. On Neoplatonic thought, see PLOTINUS (ca. 204/5–270 C.E.), who sought ways to move through matter toward an apprehension of spirit.
6. Greek philosopher and poet (ca. 493–ca. 433 B.C.E.).

open, and the uncanny effect is that the new poem's achievement makes it seem to us, not as though the precursor were writing it, but as though the later poet himself had written the precursor's characteristic work.

Interchapter. A Manifesto for Antithetical Criticism

If to imagine is to misinterpret, which makes all poems antithetical to their precursors, then to imagine after a poet is to learn his own metaphors for his acts of reading. Criticism then necessarily becomes antithetical also, a series of swerves after unique acts of creative misunderstanding.

The first swerve is to learn to read a great precursor poet as his greater descendants compelled themselves to read him.

The second is to read the descendants as if we were their disciples, and so compel ourselves to learn where we must revise them if we are to be found by our own work, and claimed by the living of our own lives.

Neither of these quests is yet Antithetical Criticism.

That begins when we measure the first *clinamen* against the second. Finding just what the accent of deviation is, we proceed to apply it as corrective to the reading of the first but not the second poet or group of poets. To practice Antithetical Criticism on the more recent poet or poets becomes possible only when they have found disciples not ourselves. But these can be critics, and not poets.

It can be objected against this theory that we never read a poet as poet, but only read one poet in another poet, or even into another poet. Our answer is manifold: we deny that there is, was or ever can be a poet as poet—to a reader. Just as we can never embrace (sexually or otherwise) a single person, but embrace the whole of her or his family romance, so we can never read a poet without reading the whole of his or her family romance as poet. The issue is reduction and how best to avoid it. Rhetorical, Aristotelian, phenomenological, and structuralist criticisms[7] all reduce, whether to images, ideas, given things, or phonemes. Moral and other blatant philosophical or psychological criticisms all reduce to rival conceptualizations. We reduce—if at all—to another poem. The meaning of a poem can only be another poem. This is not a tautology, not even a deep tautology, since the two poems are not the same poem, any more than two lives can be the same life. The issue is true history or rather the true use of it, rather than the abuse of it, both in Nietzsche's sense. True poetic history is the story of how poets as poets have suffered other poets, just as any true biography is the story of how anyone suffered his own family—or his own displacement of family into lovers and friends.

Summary—Every poem is a misinterpretation of a parent poem. A poem is not an overcoming of anxiety, but is that anxiety. Poets' misinterpretations or poems are more drastic than critics' misinterpretations or criticism, but this is only a difference in degree and not at all in kind. There are no interpretations but only misinterpretations, and so all criticism is prose poetry.

7. Again, Bloom lists the types of criticism prevalent in 1973. Rhetorical criticism considers the relation of text to audience (e.g., see KENNETH BURKE). Aristotelian criticism combines interest in genre with a focus on rhetoric (associated with the University of Chicago). Phenomenological criticism highlights the experience of the reader (e.g., see GEORGES POULET and WOLFGANG ISER). Structuralist criticism identifies the general patterns underlying the surface words of the text; it derives from the structuralist linguistics of FERDINAND DE SAUSSURE (1857–1913).

Critics are more or less valuable than other critics only (precisely) as poets are more or less valuable than other poets. For just as a poet must be found by the opening in a precursor poet, so must the critic. The difference is that a critic has more parents. His precursors are poets and critics. But—in truth—so are a poet's precursors, often and more often as history lengthens.

Poetry is the anxiety of influence, is misprision, is a disciplined perverseness. Poetry is misunderstanding, misinterpretation, misalliance.

Poetry (Romance) is Family Romance. Poetry is the enchantment of incest, disciplined by resistance to that enchantment.

Influence is *Influenza*—an astral disease.[8]

If influence were health, who could write a poem? Health is stasis.

Schizophrenia is bad poetry, for the schizophrenic has lost the strength of perverse, wilful, misprision.

Poetry is thus both contraction and expansion; for all the ratios of revision are contracting movements, yet making is an expansive one. Good poetry is a dialectic of revisionary movement (contraction) and freshening outward-going-ness.

The best critics of our time remain Empson and Wilson Knight,[9] for they have misinterpreted more antithetically than all others.

When we say that the meaning of a poem can only be another poem, we may mean a range of poems:

The precursor poem or poems.
The poem we write as our reading.
A rival poem, son or grandson of the same precursor.
A poem that never got written—that is—the poem that should have been written by the poet in question.
A composite poem, made up of these in some combination.

A poem is a poet's melancholy at his lack of priority. The failure to have begotten oneself is not the cause of the poem, for poems arise out of the illusion of freedom, out of a sense of priority being possible. But the poem—unlike the mind in creation—is a made thing, and as such is an achieved anxiety.

How do we understand an anxiety? By ourselves being anxious. Every deep reader is an Idiot Questioner. He asks, "Who wrote my poem?" Hence Emerson's insistence that: "In every work of genius we recognize our own rejected thoughts—they come back to us with a certain alienated majesty."[1]

Criticism is the discourse of the deep tautology—of the solipsist who knows that what he means is right, and yet that what he says is wrong. Criticism is the art of knowing the hidden roads that go from poem to poem.

1973

8. Epidemics (such as those associated with influenza) were once thought to be influenced by the stars.
9. William Empson (1906–1984) and George Wilson Knight (1897–1985), English literary critics.
1. Emerson, "Self-Reliance" (1841).

Pierre N. Leval, Toward a Fair Use Standard
103 Harv. L. Rev. 1105 (1990)

Random distribution has dealt me a generous share of copyright suits involving claims of fair use. The court of appeals' disagreement with two of my decisions [FN1] provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values. Is this because no rational defining values exist, or is it rather that judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework? This commentary suggests that a cogent set of governing principles exists and is soundly rooted in the objectives of the copyright law.

Not long after the creation of the copyright by the Statute of Anne of 1709, [FN2] courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as "fair abridgment,"' later "fair use,"' would not infringe the author's rights. [FN3] In the United States, the doctrine was received and eventually incorporated into the Copyright Act of 1976, which provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."' [FN4]

What is most curious about this doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives. In Folsom v. Marsh, [FN5] in 1841, Justice Story articulated an often-cited summary of how to approach a question of fair use: "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."' [FN6] The 1976 Copyright Act largely adopted his summary. [FN7] These formulations, ***1106** however, furnish little guidance on how to recognize fair use. The statute, for example, directs us to examine the "purpose and character"' of the secondary use as well as "the nature of the copyrighted work."' Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the "purpose and character"' of the secondary use. It gives no clues at all regarding the significance of "'the nature of"' the copyrighted work. Although it instructs us to be concerned with the quantity and importance of the materials taken and with the effect of the use on the potential for copyright profits, it provides no guidance for distinguishing between acceptable and excessive levels. Finally, although leaving open the possibility that other factors may bear on the question, the statute identifies none. [FN8]

Curiously, judges generally have neither complained of the absence of guidance, nor made substantial efforts to fill the void. Uttering confident conclusions as to whether the particular taking was or was not a fair use, courts have treated the definition of the doctrine as assumed common ground.

The assumption of common ground is mistaken. Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals [FN9] and divided ***1107** courts [FN10] are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

Confusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes. After recent opinions of the Second Circuit casting serious doubt on any meaningful applicability of fair use to quotation from previously unpublished letters, [FN11] publishers are understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of such sources.

The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

I. THE GOALS OF COPYRIGHT

The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.

[C]opyright is intended to increase and not to impede the harvest of knowledge. . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors. . . . [The Constitution's grant of copyright power to Congress] "is a means by which an important public purpose may be achieved. It ***1108** is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . ."' "The monopoly created by copyright thus rewards the individual author in order to benefit the public."' [FN12]

The fundamental historic sources amply support the Supreme Court's explanation of the copyright objectives. The copyright clause of the Constitution, for example, evinces the same premises: "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."' [FN13] Several aspects of the text confirm its utilitarian purpose. [FN14] First is its express statement of purpose: "To promote the Progress of Science and useful Arts . . . ."' By lumping together authors and inventors, writings and discoveries, the text suggests the rough equivalence of those two activities. In the framers' view, authors possessed no better claim than inventors. The clause also clearly implies that the "exclusive right"' of authors and inventors "to their respective Writings and Discoveries"' exists only by virtue of statutory enactment. [FN15] Finally, that the right may be conferred only "for limited times"' confirms that it was not seen as an absolute or moral right, inherent in natural law. The time limit considered appropriate in those days was relatively brief--a once-renewable fourteen-year term. [FN16]

A similar utilitarian message is found in the original British copyright statute, the Statute of Anne of 1709. [FN17] Its caption declares that ***1109** this is "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors . . . during the Times therein mentioned."' [FN18] The preamble declares the statute's purpose to be "for the Encouragement of Learned Men to compose and write useful Books."' [FN19] Elaborating the justification, the preamble exhibits a prevalent concern for the financial entitlements of authorship by noting that the practice of pirated publication without the author's consent "too often [[[causes] the Ruin of [Authors] and their Families."' [FN20]

The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.

If copyright protection is necessary to achieve this goal, then why allow fair use? Notwithstanding the need for monopoly protection of intellectual creators to stimulate creativity and authorship, excessively broad protection would stifle, rather than advance, the objective.

First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers. [FN21] Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences

require continuous reexamination of yesterday's theses.

Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process. Three judicially created copyright doctrines have addressed this problem: first, the rule that the copyright does not protect ideas, but only the manner of expression; [FN22] second, the rule that facts are not within the copyright protection, notwithstanding the labor expended by the original author in uncovering ***1110** them; [FN23] and finally, the fair use doctrine, which protects secondary creativity as a legitimate concern of the copyright.

II. THE NATURE AND CONTOURS OF FAIR USE

The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective. As Lord Ellenborough explained in an early dictum, "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science."' [FN24] Thus, the introductory language of our statute explains that fair use may be made for generally educational or illuminating purposes "such as criticism, comment, news reporting, teaching . . . scholarship, or research."' [FN25]

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright's objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity. One must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law.

A. The Statutory Factors

Following Story's articulation, the statute lists four pertinent "factors to be considered"' "in determining whether the use made of a work in any particular case is a fair use."' [FN26] They are, in summary, the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work. [FN27] Each factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, ***1111** and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.

1. Factor One--The Purpose and Character of the Secondary Use.--Factor One's direction that we "consider[] . . . the purpose and character of the use"' [FN28] raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. [FN29] A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. [FN30] If, on the other hand, the

secondary use adds value to the original--if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings-- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. [FN31]

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner. A biographer or critic of a writer may contend that unlimited quotation enriches the portrait or justifies the criticism. The creator of a derivative work based on the original creation of another may claim absolute *1112 entitlement because of the transformation. Nonetheless, extensive takings may impinge on creative incentives. And the secondary user's claim under the first factor is weakened to the extent that her takings exceed the asserted justification. The justification will likely be outweighed if the takings are excessive and other factors favor the copyright owner.

The importance of a transformative use was stressed in the early decisions, which often related to abridgements. For example, *Gyles v. Wilcox* [FN32] in 1740 stated:

Where books are colourably shortened only, they are undoubtedly infringement within the meaning of the [Statute of Anne] . . . .
But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because . . . the invention, learning, and judgment of the [[[secondary] author is shewn in them . . . . [FN33]

In the United States in 1841, Justice Story wrote in *Folsom*:

[N]o one can doubt that a reviewer may fairly cite [quote] largely from the original work, if . . . [its design be] . . . criticism. On the other hand, it is as clear, that if he thus [quotes] the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, [infringement will be found]. [FN34]

Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. This detailed inquiry is particularly important in instances of a biographical or historical work that quotes numerous passages from letters, diaries, or published writings of the subject of the study. Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede. For example, in the recent cases of biographies of Igor Stravinsky [FN35] and J.D. Salinger, [FN36] although each biography overall served a useful, educational, and instructive purpose that tended to favor the defendant, some quotations from the writings of Stravinsky and Salinger were not justified by a strong transformative secondary objective. The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification.

***1113** I confess to some error in Salinger's case. Although the majority of the biographer's takings were of unprotected facts or ideas and some displayed transformative value in sketching the character portrait, other takings of highly expressive material exhibited minimal creative, transformative justification. My finding of fair use was based primarily on the overall instructive character of the biography. I failed to recognize that the nontransformative takings provided a weak basis for claiming the benefits of the doctrine and that, unless attention were focused on the individual passages, a favorable appraisal of the constructive purpose of the overall work could conceal unjustified takings of protected expression. The converse can also be true: a low estimation of the overall merit of the secondary work can lead to a finding for the copyright owner in spite of a

well-justified, transformative use of the particular quotation that should justify a favorable finding under the first factor.

Although repentantly agreeing with Judge Newman's finding of infringement in at least some of the challenged passages, I respectfully disagree with his reasoning, which I contend failed to recognize the need for quotation as a tool of accurate historical method. His opinion suggested a far-reaching rule--that unpublished matter is off-limits to the secondary user, regardless of justification. "[Unpublished] works normally enjoy complete protection against copying any protected expression."' [FN37]

The Second Circuit's *New Era* opinion carried this suggestion further. [FN38] In *New Era*, unlike *Salinger*, various persuasive justifications were proffered as to why quotation was necessary to accomplish the biographer's objective. For example, the biographer sought to support a portrait of his subject as a liar by showing he had lied; as a bigot by showing he had made bigoted pronouncements; as pompous and self-important by quoting self-important statements. The biographer similarly used quotations to show cruelty, paranoia, aggressiveness, scheming. [FN39] These are points which often cannot be fairly ***1114** demonstrated without quotation. The Second Circuit's majority opinion rejected the pertinence of even considering the necessity of quotation of unpublished matter to communicate such assessments. Citing *Salinger*, it reasserted that "[unpublished] works normally enjoy complete protection."' [FN40]

I believe the *Salinger/New Era* position accords insufficient recognition to the value of accurate quotation as a necessary tool of the historian or journalist. The biographer who quotes his subject is characterized as a parasite or free rider. If he copies "more than minimal amounts . . . he deserves to be enjoined." [FN41] Nor does this restriction "interfere . . . with the process of . . . history," the *Salinger* opinion insists, because "[t] he facts may be reported" [FN42] without risk of infringement. Can it be seriously disputed that history, biography, and journalism benefit from accurate quotation of source documents, in preference to a rewriting of the facts, always subject to the risk that the historian alters the "facts" in rewriting them? [FN43]

As to ideas, the analysis is similar. If the secondary writer has legitimate justification to report the original author's idea, whether for criticism or as a part of a portrait of the subject, she is surely permitted to set it forth accurately. Can ideas be correctly reported, discussed, or challenged if the commentator is obliged to express the idea in her own different words? The subject will, of course, reply, "That's not what I said." Such a requirement would sacrifice clarity, much as a requirement that judges, in passing on the applicability of a statute or contract, describe its provisions in their own words rather than quoting it directly.

***1115** Is it not clear, furthermore, as Chief Judge Oakes' separate opinion in *New Era* recognized, [FN44] that at times the subject's very words are the facts calling for comment? If a newspaper wishes to report that last year a political candidate wrote a personal letter demeaning a race or religion, or proclaiming ideals directly contrary to those now stated in his campaign speeches, how can it fairly do this without quotation from the letter? If a biographer wished to show that her subject was cruel, jealous, vain, or crazy, can we seriously contend she should be limited to giving the reader those adjectives, while withholding the words that support the conclusion? How then may the reader judge whether to accept the biographer's characterization?

The problem was amusingly illustrated in the fall-out of *Salinger*. After the decision, the biographer rewrote his book, this time without quotations. Resorting to adjectives, he described certain of Salinger's youthful letters as "self-promoting . . . boastful" [FN45] and "buzzing with self-admiration." [FN46] A reviewer, who had access to the letters, disagreed and proclaimed that the letters were in fact "exuberant, self-deprecating and charged with hope." [FN47] Where does that leave the reader? What should the reader believe? Does this battle of adjectives serve knowledge and the progress of the arts better than allowing readers to judge for themselves by reading revelatory extracts?

The Second Circuit appears divided over these propositions. After the split vote of the original *New Era* panel, rehearing en banc was narrowly defeated by a vote of 7-5. [FN48] Judge Newman, joined by three colleagues,

argued that rehearing en banc was warranted "to avoid misunderstanding on the part of authors and publishers . . .--misunderstanding that risks deterring them from entirely lawful writings in the fields of scholarly research, biography, and journalism." [FN49] His opinion recognized that "even as to unpublished writings, the doctrine of fair use permits some modest copying of an author's expression . . . where . . . necessary fairly and accurately to report a fact set forth in the author's writings." [FN50] In this discussion, Judge Newman retreated substantially from his position expressed in *Salinger* of normally complete protection. [FN51]

***1116** Quoting is not necessarily stealing. Quotation can be vital to the fulfillment of the public-enriching goals of copyright law. The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations. If a quotation of copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors. [FN52] Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense. [FN53] The strength of that justification must be weighed against the remaining factors, which focus on the incentives and entitlements of the copyright owner.

2. *Factor Two--The Nature of the Copyrighted Work.*--The nature of the copyrighted work is a factor that has been only superficially discussed and little understood. Like the third and fourth factors, it concerns itself with protecting the incentives of authorship. It implies that certain types of copyrighted material are more amenable to fair use than others.

Copyright protection is available to very disparate categories of writings. If it be of original authorship, i.e., not copied from someone else, and recorded in a fixed medium, it is protected by the copyright. [FN54] Thus, the great American novel, a report prepared as a duty of employment, a shopping list, or a loanshark's note on a debtor's ***1117** door saying "Pay me by Friday or I'll break your goddamn arms" are all protected by the copyright. [FN55]

In the early history of copyright, British courts debated whether letters written for private communication should receive any protection at all from the Statute of Anne. [FN56] The question was soon satisfactorily settled in favor of protection, and I do not seek to reopen it. I do not argue that writings prepared for private motives should be denied copyright protection. In the unlikely event of the publication of the Collected Shopping Lists (or Extortion Notes) of a Renowned Personage, of course only the author should enjoy the author's rights. When it comes to making fair use, however, there is a meaningful difference between writings conceived as artistic or instructive creation, made in contemplation of publication, and documents written for a private purpose, as a message or memo, never intended for publication. One is at the heart of the purpose of copyright--the stimulation of creative endeavor for the public edification. The others are, at best, incidental beneficiaries. Thus, the second factor should favor the original creator more heavily in the case of a work (including superseded drafts) created for publication, than in the case of a document written for reasons having nothing to do with the objectives of copyright law.

The statutory articulation of this factor derives from Justice Story's mention in *Folsom* of the "value of the materials used." [FN57] Justice Story's word choice is more communicative than our statute's "nature of," as it suggests that some protected matter is more "valued" under copyright law than others. This should not be seen as an invitation to judges to pass on literary quality, but rather to consider whether the protected writing is of the creative or instructive type that the copyright laws value and seek to foster.

The *Nation*, *Salinger*, and *New Era* opinions discussed the second factor solely in terms of whether the copyrighted work was published or unpublished. The *Nation* opinion observed that the unpublished status of a copyrighted work is a critical element of its nature and a ***1118** "factor tending to negate the defense of fair use"; [FN58] "the scope of fair use is narrower with respect to unpublished works." [FN59]

The Second Circuit in *Salinger* and *New Era* extended this principle. As interpreted in *Salinger*, the Supreme

Court's discussion "conveys the idea that [unpublished] works normally enjoy complete protection against copying any protected expression." [FN60] However extreme this formulation may be, the word "normally" suggests that in the unusual instance fair use may be made of unpublished matter. *New Era*, however, rejected fair use even when necessary for accurate presentation of a fact; the court thus created an apparently insurmountable obstacle to the fair use of unpublished matter. Under the *Salinger/New Era* view, the unpublished nature of a quoted document trumps all other considerations.

The Supreme Court and the Second Circuit justify these positions by the original author's interest in controlling the circumstances of the first public revelation of his work [FN61] and his right, if he so chooses, not to publish at all. [FN62] These are indeed legitimate concerns of copyright law. An author who prefers not to publish a work, or wishes to make aesthetic choices about its first public revelation, will generally have the legal right to enforce these wishes. [FN63] Due recognition of these rights, however, in no way implies an absolute power to bar all quotation, regardless of how persuasive the justification.

A ban on fair use of unpublished documents establishes a new despotic potentate in the politics of intellectual life--the "widow censor." A historian who wishes to quote personal papers of deceased public figures now must satisfy heirs and executors for fifty years after the subject's death. When writers ask permission, the answer will be, "Show me what you write. Then we'll talk about permission." If the manuscript does not exude pure admiration, permission will be denied. [FN64]

The second factor should not turn solely, nor even primarily, on the published/unpublished dichotomy. At issue is the advancement of the utilitarian goal of copyright--to stimulate authorship for the ***1119** public edification. Inquiry into the "nature" or "value" of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements. Notwithstanding that nearly all writings may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public. [FN65] The law was not designed to encourage shoppers to make written shopping lists, executives to keep orderly appointment calendars, or lovers to write love letters. Certainly it was not to encourage the writing of extortion notes. To conclude that documents created for purposes outside the concerns of copyright law should receive more vigorous protection than the writings that copyright law was conceived to protect is bizarre and contradictory. To suggest that simply because a written document is unpublished, fair use of that document is forbidden, or even disfavored, has no logical support in the framework of copyright law.

I do not argue that a writer of private documents has no legal entitlement to privacy. [FN66] He may well have such an entitlement. The law of privacy, however, and not the law of copyright supplies such protection. Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination. [FN67]

I do not dispute that publication can be important in assessing the second factor. Publication for public edification is, after all, a central concern of copyright. Thus, a work intended for publication is a favored protectee of the copyright. [FN68] A secondary use that imperils ***1120** the eventual publication of a creation en route undermines the copyright objective. I therefore agree with the Supreme Court, on the particular facts of the *Nation* case, that the nature of the copyrighted work strongly favored its protection-- but not merely because it was unpublished. In that case, the Nation, a weekly magazine of news and comment, published purloined extracts from the memoirs of former President Gerald Ford, shortly prior to the scheduled appearance of the first authorized serialization in Time Magazine. [FN69] Time then cancelled its plan to print the memoir and withheld payment of the balance of the license fee. [FN70] The Supreme Court rejected the Nation's claim that the newsworthiness of the President's memoir justified a finding of fair use. [FN71]

The critical element was that President Ford's memoir was written for publication, and was on its way to

publication at the time of the Nation's gun-jumping scoop. The Supreme Court emphasized that the Nation's scoop unreasonably diminished the rewards of authorship. [FN72] The Court noted further that if the practice were tolerated on the grounds of newsworthiness, it would discourage public figures from writing and publishing valuable memoirs. [FN73] Read in context rather than excerpting isolated phrases, the *Nation* decision communicates a concern for protection of unpublished works that were created for publication, or on their way to publication, and not for unpublished matter created for private ends and held in secrecy.

It is not always easy to draw the distinction between works created for publication and notations or communications intended as private. A diary, memoir, or letter can be both--private in the first instance, but written in contemplation of possible eventual publication. In a sense, professional authors are writing either directly or indirectly for publication in their private memos and letters, as well as in their manuscripts. In private letters and notebooks, they practice the writer's ***1121** craft, trying out ideas, images, metaphors, cadences, which may eventually be incorporated into published work. [FN74]

The attempt to distinguish, for purposes of the second fair use factor, between work created for publication and other written matter should recognize that the copyright objectives include a reasonable solicitude for the ability of the author to practice the craft in the privacy of the laboratory. A critique of an author's writing based solely on rough drafts that the author had superseded might well be an unreasonable intrusion. [FN75]

On the other hand, notwithstanding the highly protected status of a draft, the privacy of the laboratory should yield in some situations. Assume the following hypothetical cases:

(1) An author's first novel is greeted with critical acclaim for its elegant style and masterful command of the language. A skeptical critic undertakes to show that the author is a literary fraud, the creation of a talented and unscrupulous editor. In support, the critic quotes brief excerpts from the author's very different original manuscript, revealing a grammatical ignorance and stylistic awkwardness she contends could not conceivably have come from the same pen as the elegant published version. The author sues to enjoin publication of the review.

(2) Author A publicly accuses Author B of plagiarism; A claims that B's recently published book steals a metaphor from a letter A wrote to B. B denies the charge and asserts that his first draft, written before he received A's letter, included the same language. The critic quotes from B's first draft, disproving B's defense by showing that the metaphor was not yet present.

Both examples seem convincing cases of fair use, in which the critic's productive and transformative justification would take precedence over the author's interest in maintaining the privacy of the unpublished draft. [FN76]

***1122** In summary, several principles emerge from considering the second factor in light of the copyright objectives: this factor concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage. Thus, a text, including drafts, created for publication, or on its way to publication, presents a far stronger case for protection against fair use than matter written exclusively for private purposes. The more the copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding. The fact that a document is unpublished should be of small relevance unless it was created for or is on its way to publication. [FN77] If, on the other hand, the writing is on its way to publication, and premature secondary use would interfere significantly with the author's incentives, its as yet unpublished status may argue powerfully against fair use. Finally, this factor is but one of four--it is not a sufficient basis for ruling out fair use. There is no logical basis for making it determinative, as was effectively done in *Salinger* and *New Era*. Although the second factor implies a characterization of the protected work on a scale of copyright-protected values, no category of copyrighted material is either immune from use or completely without protection. Wholesale appropriation of the expressive language of a letter, without a transformative justification,

should not qualify as fair use, even though the writer of the letter had never considered publication. On the other hand, if a sufficient justification exists, and the quotations do not cause significant injury to the author's entitlements, courts may allow even quotations from an unpublished draft of a novel.

3. Factor Three--Amount and Substantiality.--The third statutory factor instructs us to assess "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." [FN78] In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use. ***1123** This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market).

As to the first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification. A solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.

In its relation to the market impact factor, the qualitative aspect of the third test--"substantiality"--may be more important than the quantitative. In the case of President Ford's memoir, a taking of no more than 400 words constituting " 'the heart of the book' " [FN79] caused cancellation of the first serialization contract--a serious impairment to the market for the book. As to the relationship of quantity to the market, presumptively, of course, the more taken the greater the likely impact on the copyright holder's market, and the more the factor favors the copyright holder. Too mechanical a rule, however, can be dangerously misleading. One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential. Consider, for example, a lengthy critical study analyzing the structure, symbolism and meaning, literary antecedents and influences of a single sonnet. Fragments dispersed throughout the work of criticism may well quote every word of the poem. Such quotation will not displace the market for the poem itself. If there is strong justification and no adverse market impact, even so extensive a taking could be a fair use.

Too rigid a notion of permissible quantity, furthermore, can seriously distort the inquiry for very short memos or communications. If a communication is sufficiently brief, any quotation will necessarily take most or all of it. Consider, for example, the extortion note discussed above. [FN80] A journalist or historian may have good reason to quote it in full, either for historical accuracy, to show the character of the writer, or to suggest its effect on the recipient. The copyright holder, in seeking to enjoin publication, will argue that the journalist has taken not only the heart but the whole of the protected work. There are three responses, which relate to the first, second, and fourth factors. First, there may be a powerful justification for quotation of the entirety of a short note. Second, because the note was written for private motives and not for publication, quotation will not diminish ***1124** the inducement to authors to create works for the public benefit. Finally, because the note is most unlikely to be marketed as a work of its author, there is no effect on its market. Courts must then evaluate the significance of the amount and substantiality factor in relation to the copyright objectives; they must consider the justification for the secondary use and the realistic risk of injury to the entitlements of authorship.

4. Factor Four--Effect on the Market.--The fourth factor addresses "the effect of the use upon the potential market for the copyrighted work." [FN81] In the *Nation*, the Supreme Court designated this "the single most important element of fair use." [FN82] The Court's recognition of the importance of this factor underlines, once again, that the copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious. The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A secondary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor. [FN83]

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in *Nation*,

this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. [FN84] Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

How much market impairment must there be to turn the fourth factor against the secondary user? By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. [FN85] Therefore, if an insubstantial loss of revenue ***1125** turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. [FN86] And if we then gave serious deference to the proposition that it is "undoubtedly the single most important element of fair use," [FN87] fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial. [FN88] When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.

Not every type of market impairment opposes fair use. An adverse criticism impairs a book's market. A biography may impair the market for books by the subject if it exposes him as a fraud, or satisfies the public's interest in that person. Such market impairments are not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, [FN89] or, in Story's words "supersede[s] the use of the original." [FN90] Only to that extent are the purposes of copyright implicated.

B. Are There Additional Factors?

1. False Factors.--The language of the Act suggests that there may be additional unnamed factors bearing on the question of fair use. [FN91] The more I have studied the question, the more I have come to conclude that the pertinent factors are those named in the statute. Additional considerations that I and others have looked to are false factors that divert the inquiry from the goals of copyright. They may have bearing on the appropriate remedy, or on the availability of ***1126** another cause of action to vindicate a wrong, but not on the fair use defense.

(a) Good Faith.--In all areas of law, judges are tempted to rely on findings of good or bad faith to justify a decision. Such reasoning permits us to avoid rewarding morally questionable conduct. It augments our discretionary power. It provides us with an escape from confronting questions that are difficult to understand. The temptation has been particularly strong in dealing with the difficult issue of fair use. [FN92] This practice is, however, misguided. It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.

Copyright seeks to maximize the creation and publication of socially useful material. Copyright is not a privilege reserved for the well-behaved. Copyright protection is not withheld from authors who lie, cheat, or steal to obtain their information. If they have stolen information, they may be prosecuted or sued civilly, but this has no bearing on the applicability of the copyright. Copyright is not a reward for goodness but a protection for the profits of activity that is useful to the public education.

The same considerations govern fair use. The inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits. This decision is governed by the factors reviewed above--with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.

A secondary user, like an original author, may be liable to criminal prosecution, or to suit in tort, if she has stolen information or has committed fraud. Furthermore, if she has infringed upon a copyright, morally reprehensible conduct may influence the remedy, including the availability of both an injunction and additional damages for willfulness. [FN93]

This false morality factor derives from two misunderstandings of early precedent. The first results from the use of words like "piracy" and the Latin phrase "animus furandi" in early decisions. In rejecting the defense of fair use, courts sometimes characterized the offending secondary work as having been written animo furandi (with intention of stealing). Although this characterization seemed to imply that fair ***1127** use requires honest intentions, the courts reasoned in the opposite direction. The decisions did not explore the mental state of the secondary user to determine whether fair use was shown. They examined the secondary text to determine whether it made a productive transformative use or merely restated the original. If they found no productive use justifying the taking, judges adorned the conclusion of infringement with words like piracy or animus furandi. [FN94] The morality of the secondary user's conduct played no role in the decision. The irrelevance of the morality of the secondary user's conduct was underlined in decisions like Folsom v. Marsh. [FN95] There Justice Story emphasized not only the good faith and "meritorious labors" of the defendants, but also the usefulness of their work. Finding no "bona fide abridgement" [FN96] (what I have described as a transformative use), Justice Story nonetheless concluded with "regret" that good faith could not save the secondary work from being "deemed in law a piracy." [FN97]

A second misleading assumption is that fair use is a creature of equity. [FN98] From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically this notion is incorrect. Litigation under the Statute of Anne began in the law courts. [FN99] Although plaintiffs who sought injunctions could sue, and did, in the courts of equity, [FN100] which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.

The temptation to determine fair use by reference to morality also can lead to examination of the conduct and intentions of the plaintiff ***1128** copyright holder in bringing the suit. The secondary user may contend that the copyright holder is disingenuously invoking copyright remedies as a device to suppress criticism or protect secrecy. [FN101] Such considerations are also false leads.

Like a proprietor of land or an owner of contract rights, the copyright owner may sue to protect what he owns, regardless of his motivation. His rights, however, extend only to the limits of the copyright. As fair use is not an infringement, he has no power over it. Whether the secondary use is within the protection of the doctrine depends on factors pertinent to the objectives of the copyright law and not on the morality or motives of either the secondary user or the copyright-owning plaintiff.

(b) Artistic Integrity.--There are many who deplore our law's failure to protect artistic integrity. French law enforces the concept of the droit moral d'artiste, which covers among other things a right of paternity (the right to be acknowledged as author of the work), the right to preserve a work from mutilation or change, the right to withdraw or modify a work already made public, and the right to determine whether or not a work shall be published. [FN102]

Those who would adopt similar rules in United States law seek a place for them in the copyright law, which is understandable in view of the absence of other niches. I do not oppose our adoption of such rights for artists. I do, however, oppose converting our copyright law, by a wave of a judicial magic wand, into an American droit moral. To do so would generate much unintended mischief. Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the droit moral.

As the copyright privilege belongs not only to Ernest Hemingway but to anyone who has drafted an interoffice

memo or dunning letter or designed a computer program, it would be preposterous to permit all of them to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. If we wish to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of ***1129** art. [FN103] Those difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.

(c) Privacy.--The occasional attempt to read protection of privacy into the copyright is also mistaken. [FN104] This trend derives primarily from an aberrational British case of the mid-nineteenth century in which there had been no replication of copyrighted material.

Queen Victoria and Prince Albert had made etchings which were exhibited privately to friends. The defendant Strange, a publisher, obtained copies surreptitiously. Strange wrote descriptions of the etchings and sought to publish his descriptions. Prince Albert brought suit to enjoin this intolerable intrusion. The Lord Chancellor, expressing concern for the privacy of the royal family and disapproval of the surreptitious manner by which the defendant had obtained copies of the etchings, affirmed the grant of an injunction. [FN105]

Prince Albert's case is noteworthy as the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren. [FN106] But it should not be considered a meaningful precedent for our copyright law. The decision reflects circumstances that distinguish British law from ours-- particularly the absence from British law of two of our doctrines. First, although British society placed a higher value on privacy than we do, English law did not have a right of privacy. [FN107] In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication. [FN108] Second, ***1130** British law did not include a strong commitment to the protection of free speech. [FN109] American law, in contrast, maintains a powerful constitutional policy that sharply disfavors muzzling speech.

Serious distortions will occur if we permit our copyright law to be twisted into the service of privacy interests. First, it will destroy the delicate balance of interests achieved under our privacy law. For example, the judgment that, in the public interest, the privacy right should terminate at death would be overcome by the additional fifty years tacked onto copyright protection. Such a change would destroy the policy judgment developed under privacy law denying its benefits to persons who have successfully sought public attention. In addition, as a result of the preemption provisions of the federal copyright statute, [FN110] construing the copyright law to encompass privacy might nullify state privacy laws.

Moreover, the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect the privacy interest involved. [FN111] Because the copyright generally cannot be enforced without a public filing in the Library of Congress, the very act required to preserve privacy would ensure its violation. Finally, incorporating privacy concerns into copyright would burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal. Privacy and concealment are antithetical to the utilitarian goals of copyright.

C. Injunction

One of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily ***1131** implicates the grant of an injunction. Many commentators have disparaged the overly automatic tendency of courts to grant injunctive relief. [FN112] The copyright statute and its predecessors express no preference for injunctive relief. The 1976 Act states only that a court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." [FN113] Moreover, the tendency toward the automatic injunction can harm the interests of plaintiff copyright owners, as well as the interests of the public and the secondary user. Courts may instinctively shy away from a

justified finding of infringement if they perceive an unjustified injunction as the inevitable consequence. [FN114]

***1132** Legal rhetoric has dulled thought on the injunction remedy. It is a venerable maxim that irreparable injury is "presumed" in a case of copyright infringement. [FN115] Injunction thus follows as a matter of course upon a finding of infringement. In the vast majority of cases, this remedy is justified because most infringements are simple piracy. Successful fabric designs, fashion accessories, toys, and videos instantly spawn parasitic industries selling cheap copies. These infringers incur no development cost, no advertising expense, and little risk. They free-ride on the copyright owner's publicity, undercut the market, and deprive the copyright owner of the rewards of his creation. Allowing this practice to flourish destroys the incentive to create and thus deprives the public of the benefits copyright was designed to secure. It is easy to justify enjoining such activity. In fact, the presumption of irreparable harm is probably unnecessary. It merely simplifies and reduces the cost of proving what could be shown without a presumption.

Such cases are worlds apart from many of those raising reasonable contentions of fair use. Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work. And the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found.

In such cases, should we indulge a presumption of irreparable harm and grant injunctions as a matter of course? According to the *Salinger* opinion, "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined . . . ." [FN116] Judge Miner's majority opinion in *New Era* extended this ***1133** proposition, expressly rejecting the idea that the public interest in publication of an informative biography could outweigh the copyright owner's preference for an injunction. [FN117] Upon application for rehearing en banc, Judge Newman, author of the *Salinger* opinion but not a part of the *New Era* panel, writing in favor of rehearing of *New Era*, retracted *Salinger*'s seminal assertion. Judge Newman explained that his phrase "deserves to be enjoined" had meant nothing more than "deserves to be found liable for infringement." [FN118] He pointed out that in *Salinger* there had been no dispute over the appropriateness of injunctive relief. Because at the time of the lawsuit the book was in prepublication copy, the infringing passages could be easily excised or altered without destroying the book. Thus there was no good reason to deny the injunction. Judge Newman's *New Era* opinion goes on to argue convincingly that the public interest is always relevant to the decision whether to grant an injunction. [FN119]

The customary bias in favor of the injunctive remedy in conventional cases of copyright infringement has no proper application to the type of case here discussed. When a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits. [FN120] The court should grant or deny the injunction for reasons, and not simply as a mechanical reflex to a finding of infringement. Plaintiffs should be required to demonstrate irreparable harm and inadequacy of compensation in damages. [FN121] As Chief Judge Oakes noted in his separate opinion in *New Era*, "Enjoining publication of a book is not ***1134** to be done lightly. . . . [T]he grant or denial of an injunction remains an open question, to be determined by carefully balancing the appropriate factors." [FN122]

As with other issues arising in connection with a fair use defense, analysis of this issue should reflect the underlying goals of the copyright law to stimulate the creation and publication of edifying matter. In considering whether the plaintiff would suffer irreparable harm, the court should focus on harm to the plaintiff's interest as copyright owner. A public figure may suffer irreparable injury to his reputation if publication of extracts from his private papers reveals him to be dishonest, cruel, or greedy. An individual suffers irreparable harm by the revelation of facts he would prefer to keep secret. But those are not the types of harms against which the copyright law protects; despite irreparability, they should not justify an injunction based on copyright infringement. Only injuries to the interest in authorship are the copyright's legitimate concern.

Critics of these views express concern that obstacles to injunctive relief may undermine the incentives of authorship for which copyright law was created. If the grant or denial of injunction is informed by the concerns of copyright law, such a worry will prove groundless. If the infringement is of a type likely to diminish creative incentives, the court should favor an injunction. In a case like the *Nation*, where the infringement deprives the author of significant monetary and non-monetary rewards of authorship, and where, as the Supreme Court found, such infringement diminishes the incentive to public figures to write valuable memoirs, an injunction would be justified. If, on the other hand, the original document had been created for purely private purposes and not as a work of authorship for the public benefit, denial of an injunction would not adversely affect creative incentives. For reasons similar to those discussed under the second factor, courts should more readily grant an injunction where the original is a work of authorship created with a view to publication (or is on its way to publication) than in the case of private communicative documents created for reasons that are not the concerns of copyright law. [FN123]

***1135** In my argument against automatically granting injunctive relief, I have deliberately refrained from invoking the support of the first amendment's opposition to prior restraints. I have excluded such arguments not because they are irrelevant but because they are unnecessary and risk importing confusion. Although copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment. "[T]he Framers intended copyright . . . to be the engine of free expression." [FN124] It "is intended to increase and not to impede the harvest of knowledge"; [FN125] "[t]o promote the Progress of Science and the useful Arts"; [FN126] to encourage "Learned [writers] to compose and write useful Books." [FN127] It was never intended to serve the goals of secrecy and concealment. Thus, the copyright law on its own terms, and not merely in deference to the first amendment, demands caution in awarding oppressive injunctions.

III. CONCLUSION

A question to consider in conclusion is whether imprecision--the absence of a clear standard--in the fair use doctrine is a strength or a weakness. The case that it is a weakness is easy to make. Writers, publishers, and other would-be fair-users lack a reliable guide on how to govern their conduct. The contrary argument is more abstract. Perhaps the abundance of disagreement reflects the difficulty of the problem. As Justice Story wrote in 1841, it is not easy "to lay down any general principles applicable to all cases." [FN128] A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. We should not adopt a bright-line standard unless it were a good one--and we do not have a good one.

We can nonetheless gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright--and by resisting the impulse to import extraneous policies. Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law. ***1136** The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly. But it depends equally on the recognition that the monopoly must have limits. Those limits include the public dedication of facts (notwithstanding the author's efforts in uncovering them); the public dedication of ideas (notwithstanding the author's creation); and the public dedication of the right to make fair use of material covered by the copyright.

[FNa] Judge, United States District Court for the Southern District of New York.

[FN1]. See Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987); New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp. 1493 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989).

[FN2]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN3]. See, e.g., Gyles v. Wilcox, 26 Eng.Rep. 489, 2 Atk. 141 (1740) (No. 130). See generally W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17 (1985).

[FN4]. 17 U.S.C. § 107 (1982).

[FN5]. 9 F.Cas. 342 (C.C.D.Mass.1841) (No. 4901).

[FN6]. Id. at 348.

[FN7]. The statute states:
Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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.
17 U.S.C. § 107 (1982).

[FN8]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

[FN9]. Five of the recent leading cases were reversed at every stage of review. In Rosemont Enterprises, Inc. v. Random House, Inc., 256 F.Supp. 55 (S.D.N.Y.), rev'd, 366 F.2d 303 (2d Cir.1966), cert. denied, 385 U.S. 1009 (1967)--the Howard Hughes case--the Second Circuit reversed a district court injunction. In Universal City Studios, Inc. v. Sony Corp. of America, 480 F.Supp. 429 (C.D.Cal.1979), rev'd, 659 F.2d 963 (9th Cir.1981), rev'd, 464 U.S. 417 (1984), the court of appeals reversed the district court's finding for the defendant, and was in turn reversed by the Supreme Court. In Harper & Row, Publishers, Inc. v. Nation Enterprises, 557 F.Supp. 1067 (S.D.N.Y.), modified, 723 F.2d 195 (2d Cir.1983), rev'd, 471 U.S. 539 (1985), the district court's damage award was reversed by the court of appeals, which in turn was reversed by the Supreme Court. In Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987), and in New Era Publications International v. Henry Holt & Co., 695 F.Supp. 1493 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989), my findings of fair use were rejected on appeal.

[FN10]. In its first two encounters with fair use, the Supreme Court split 4-4 and thus failed to resolve anything. See Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958). The Court decided Sony by a 5-4 majority, see Sony, 464 U.S. 417, and Nation by a 6-3 majority, see Nation, 471 U.S. 539. In New Era, the Second Circuit voted 7-5 to deny en banc review to alter the panel's dicta on fair use. Four judges joined in a concurring opinion, see New Era, 884 F.2d at 660 (Miner, J., concurring), and four in a dissenting opinion, see id. at 662 (Newman, J., dissenting).

[FN11]. See New Era, 873 F.2d 576; Salinger, 811 F.2d 90.

[FN12]. Nation, 471 U.S. at 545-46 (citation omitted) (quoting Sony, 464 U.S. at 429; and id. at 477 (Blackmun, J., dissenting)). In numerous prior decisions, the Supreme Court has explained copyright in similar terms. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[FN13]. U.S. Const. art. I, § 8, cl. 8.

[FN14]. In The Federalist No. 43, Madison observes: "The utility of [the power conferred by the patent and copyright clause] will scarcely be questioned. . . . The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST NO. 43, at 186 (J. Madison) (C. Beard ed.1959).

[FN15]. "That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it." Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834).

[FN16]. Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124. See LATMAN'S THE COPYRIGHT LAW 6 (W. Patry 6th ed.1986). The original copyright term was but a tiny fraction of the duration of protection under the new 1976 Act--extending 50 years after death--which, in the case of youthful letters of an octogenarian, could easily exceed 100 years. See 17 U.S.C. § 302(a) (1982).

[FN17]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN18]. Id. The duration was the once-renewable fourteen-year term later adopted for the United States in the 1790 enactment. See supra text

accompanying note 16.

[FN19]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN20]. Id.

[FN21]. See Chafee, Reflections on the Law of Copyright, 45 COLUM.L.REV. 503, 511 (1945). "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book . . . ." Id.

[FN22]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985); New York Times Co. v. United States, 403 U.S. 713, 726 n. * (1971) (Brennan, J., concurring); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir.1960) (L. Hand, J.); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.1936)(L. Hand, J.); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir.1930) (L. Hand, J.); 17 U.S.C. § 102(b) (1982).

[FN23]. See Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980).

[FN24]. Cary v. Kearsley, 170 Eng.Rep. 679, 681, 4 Esp. 168, 170 (1803).

[FN25]. 17 U.S.C. § 107 (1982).

[FN26]. Id.

[FN27]. See id.

[FN28]. See id. § 107(1).

[FN29]. See Cary v. Kearsley, 170 Eng.Rep. 679, 681-82, 4 Esp. 168, 170- 71 (1802). In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), the dissenters approved this approach, see id. at 480 (Blackmun, J., dissenting), but the majority of the Supreme Court rejected it, see 464 U.S. at 448-51.

[FN30]. See Folsom v. Marsh, 9 F.Cas. 342, 345 (C.C.D.Mass.1841) (No. 4901).

[FN31]. But cf. Fisher, Reconstructing the Fair Use Doctrine, 101 HARV.L.REV. 1659, 1768-69 (1988) (using the term "transformative" in a somewhat different sense).

[FN32]. 26 Eng.Rep. 489, 2 Atk. 141 (1740) (No. 130).

[FN33]. Id. at 490, 2 Atk. at 143.

[FN34]. 9 F.Cas. at 344-45.

[FN35]. See Craft v. Kobler, 667 F.Supp. 120 (S.D.N.Y.1987).

[FN36]. See Salinger v. Random House, Inc., 650 F.Supp. 413 (S.D.N.Y.1986), rev'd, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

[FN37]. Salinger, 811 F.2d at 97.

[FN38]. See New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir.1989).

[FN39]. See New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp.1493, 1508-19 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989). The district court opinion found approximately twenty categories of justifications under the first factor. Personal qualities of the subject that the biographer sought to demonstrate through quotations included dishonesty, boastfulness, pomposity, pretension, paranoia, snobbery, bigotry, dislike of Asians and of the Orient, cruelty, disloyalty, aggressiveness, vicious scheming tactics, cynicism, and mental derangement. Other uses included the exposition of a false mythology built up around the personage of L. Ron Hubbard, of his self-image as revealed in early diaries, and of his teenage writing style. Some passages were quoted to ensure an accurate rendition of an idea.
Early drafts of this Commentary included samples of these quotations to illustrate the point here argued about fair use justifications under the first factor. I believed that such quotation in a law review article to further the discussion of a disputed point of law would be a fair use. Reconsideration of the standards declared by the court of appeals in Salinger and New Era suggests that no such tolerance exists. I have accordingly deleted the illustrative quotations. Interested readers are referred to the district court opinion, which sets forth numerous examples.

[FN40]. New Era, 873 F.2d at 583.

[FN41]. Salinger, 811 F.2d at 96; see also New Era, 873 F.2d at 584.

[FN42]. Salinger, 811 F.2d at 100 (emphasis added).

[FN43]. Sometimes, in the permitted exercise of reporting the facts that are set forth in a letter, a historical writer will inevitably use similar (or identical) language, especially if the original conveyed the fact by simple direct assertion. Consider a biographer whose information about her subject

comes largely from letters. One such letter reported to an old college friend, "In July I married Lynn Jones, from San Francisco. We have rented a house on the beach in Malibu and spend most of our free time sunbathing." The biographer, seeking to report these facts writes, "We learn from X's letter to a college friend that in July 1952 he married a San Franciscan named Lynn Jones, that they rented a house on the beach in Malibu and spent most of their free time sunbathing." (This example parallels many instances raised by Salinger.) Is this infringement? Notwithstanding virtually identical language, I contend it is not. Where the secondary writer's purpose is to report the facts revealed in the original, and not to appropriate the personal expressive style of the original, she is surely not required--as the Second Circuit's Salinger opinion seems to suggest, see Salinger, 811 F.2d at 96-97--to seek refuge in altered language merely to avoid using the same words as the original. Where a simple direct statement of the facts calls for use of the original language, the need to report the fact justifies such use.

[FN44]. See New Era, 873 F.2d at 592 (Oakes, C.J., concurring).

[FN45]. I. HAMILTON, IN SEARCH OF J.D. SALINGER 53 (1988).

[FN46]. Id. at 56.

[FN47]. Richler, Rises at Dawn, Writes, Then Retires, N.Y. Times, June 5, 1988, (Book Review) § 7, at 7.

[FN48]. See New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 662 (2d Cir.1989) (Newman, J., dissenting).

[FN49]. Id.

[FN50]. Id.

[FN51]. In an illuminating article to be published in the next edition of the Journal of the Copyright Society, see Newman, Not the End of History: The Second Circuit Struggles with Fair Use, 37 J. COPYRIGHT SOC'Y 1 (1990), Judge Newman substantially clarifies the issue. He now espouses the propriety of such quotation in limited quantity when necessary to demonstrate facts. After my changes of position and his, the gulf between us in Salinger has significantly narrowed. See infra note 119 and accompanying text.

[FN52]. Nonetheless, every trivial taking of copyrighted material that fails to demonstrate a compelling justification is not necessarily an infringement. Because copyright is a pragmatic doctrine concerned ultimately with public benefit, under the de minimis rule negligible takings will not support a cause of action. The justifications of the de minimis exemption, however, are quite different from those sanctioning fair use. They should not be confused. See, e.g., Funkhouser v. Loew's, Inc., 208 F.2d 185 (8th Cir.1953), cert. denied, 348 U.S. 843 (1954); Suid v. Newsweek Magazine, 503 F.Supp. 146, 148 (D.D.C.1980); McMahon v. Prentice-Hall, Inc., 486 F.Supp. 1296, 1303 (E.D.Mo.1980); Greenbie v. Noble, 151 F.Supp. 45, 70 (S.D.N.Y.1957); Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155 (S.D.N.Y.1978).

[FN53]. The interpretation of the first factor is complicated by the mention in the statute of a distinction based on "whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1982). One should not exaggerate the importance of this distinction. It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses. Nor can it mean that books produced by a commercial publisher are excluded from eligibility for fair use. A historian is not barred from making fair use merely because she will receive royalty compensation. This clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.

[FN54]. See 17 U.S.C. § 102(a) (1982).

[FN55]. The latter examples of writing are not ordinarily considered "work," the term used in Factor Two.

[FN56]. Although Pope v. Curl, 26 Eng.Rep. 608, 2 Atk. 342 (1741), answered in the affirmative soon after the passage of the Statute of Anne, Perceval v. Phipps, 35 Eng.Rep. 225, 2 Ves. & Bea. 19 (1813), suggested the contrary:
[T]hough the Form of familiar Letters might not prevent their approaching the Character of a literary Work, every private Letter, upon any Subject, to any Person, is not to be described as a literary Work, to be protected upon the Principle of Copyright. The ordinary Use of Correspondence by Letters is to carry on the Intercourse of Life between Persons at a Distance from each other, in the Prosecution of Commercial, or other, Business; which it would be very extraordinary to describe as a literary Work, in which the Writers have a Copyright.
Id. at 229, 2 Ves. & Bea. at 28.

[FN57]. Folsom v. Marsh, 9 F.Cas. 342, 344 (C.C.D.Mass.1841) (No. 4901).

[FN58]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

[FN59]. Id. at 551.

[FN60]. Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

[FN61]. See Nation, 471 U.S. at 552-55.

[FN62]. See id. at 559.

[FN63]. See id. at 552; 17 U.S.C. § 106(3) (1982).

[FN64]. Counsel to a major publisher advised me that the majority of nonfiction books in publication today present legal problems that did not exist prior to the Salinger opinion. Telephone conversation with Harriette Dorsen, counsel of Bantam-Doubleday-Dell Publishing (Dec. 1989); see also Kaplan, The End of History?, NEWSWEEK, Dec. 25, 1989, at 80 (discussing the hesitancy of publishers to publish books quoting from unpublished sources).

[FN65]. See supra pp. 1108-10.

[FN66]. See infra pp. 1129-30.

[FN67]. Professor Weinreb argues it is "counterintuitive" that matter intended to be kept private should be more subject to exposure than what was created for others to see. See Weinreb, Fair's Fair, 103 HARV.L.REV. 1137, 1145-46 (1990). Indeed, it is. For this reason, one who wishes to keep private matters secret possesses various legal remedies, including civil and criminal actions for trespass and conversion, as well as an action to enforce the right of privacy.
My observations here in no way suggest that courts should deprive a person seeking privacy of legal remedies designed to protect privacy. My concern is solely with the understanding of the copyright law--a body of law conceived to encourage publication for the public edification. Construing its rules as more solicitous of an intention to conceal than to publish contravenes its purposes. See infra pp. 1129-30.

[FN68]. It was an anomaly of the original drafting that the literal terms of the Statute of Anne provided no pre-publication protection. It measured the limited period of protection as fourteen years running not from the time of authorship but from the date of publication. This problematic drafting formulation no doubt resulted from the fact that the antecedents of the Statute of Anne were acts that conferred monopoly printing franchises upon printers under royal license. See B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3-9 (1967); LATMAN'S THE COPYRIGHT LAW, supra note 16, at 2-4.
Construing the statute in accordance with its literal terms would have left authors unprotected at the time of their greatest exposure to piracy--the time before the act of publication made public the author's entitlement to protection. Thus, an author who showed an unpublished manuscript to a friend, critic, or prospective publisher would have had no protection had the latter pirated the work and published it without authorization. The British courts, however, cured the problem by construing the Statute to confer protection prior to publication. See Pope v. Curl, 26 Eng.Rep. 608, 2 Atk. 342 (1741).

[FN69]. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543 (1985).

[FN70]. See id.

[FN71]. See id. at 569.

[FN72]. See id. at 554-55.

[FN73]. See id. at 557.

[FN74]. A recent New Yorker cartoon by David Jacobson imagines James Joyce's to-do list posted on his refrigerator. It reads:
TO DO:
1. Call Bank.
2. Dry Cleaner.
3. Forge in the smithy of my soul the uncreated conscience of my race.
4. Call Mom.
NEW YORKER, Sept. 25, 1989, at 100.

[FN75]. Professor Fisher suggests a per se rule barring fair use of material that the original author considered unfinished, on the grounds of injury to the creative process resulting from premature divulgence and absence of benefit. His discussion assumes, however, that the original author's work was created, and is destined, for publication. His reasoning does not apply to a biographer's quotation of an unfinished and abandoned love letter, an extortion demand, or a shopping list. See Fisher, supra note 31, at 1780.

[FN76]. I therefore question the validity of Chief Judge Oakes' interpretation of Salinger in his opinion in New Era: "quotation used merely to demonstrate writing style may not qualify for the fair use defense." New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 592 (2d Cir.1989) (Oakes, C.J., concurring).

[FN77]. William Patry has expressed readiness, based on these arguments, to amend his previous positions as outlined in THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, cited above in note 3.
[He] confesses to mechanically reciting the adage "there is no fair use of unpublished works," thereby failing to adequately take into account the different types of unpublished works and uses thereof . . . [as well as to] mechanically recit[ing that] "harm is presumed when a prima facie case of infringement has been made out" thereby inviting . . . confusion between substantive law and remedy . . . .
Editor's Note, 36 J. COPYRIGHT SOC'Y, note 3 (Apr. 1989).

[FN78]. 17 U.S.C. § 107(3) (1982).

[FN79]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 557 F.Supp. 1067, 1072 (S.D.N.Y.1983)).

[FN80]. See supra text accompanying note 55.

[FN81]. 17 U.S.C. § 107(4) (1982).

[FN82]. Nation, 471 U.S. at 566.

[FN83]. This reasoning assumes that the author created the copyrighted matter with the hope of generating rewards. It has no bearing on materials written for personal reasons, independent of the hope of commanding a market.

[FN84]. An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition. Nonetheless, if the taking is unjustified under the first factor, it should be considered an infringement, regardless of the absence of market impairment.
Because the fourth factor focuses on the "potential" market, see Nation, 471 U.S. at 568 (emphasis in original), perhaps such a case should be considered an impairment, despite the bonanza. The taking of the tune for the movie forecloses its eligibility for use in another film.

[FN85]. It does not necessarily follow that the fair use doctrine diminishes the revenues of copyright holders. If a royalty obligation attached to every secondary use, many would simply forgo use of the primary material in favor of free substitutes.

[FN86]. Cf. Fisher, supra note 31, at 1671-72.

[FN87]. Nation, 471 U.S. at 566.

[FN88]. Although the Salinger opinion acknowledged that the biography "would not displace the market for the letters," it counted this factor in the plaintiff's favor because "some impairment of the market seem[ed] likely." Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir.), cert. denied, 484 U.S. 890 (1987). This potential impairment, furthermore, resulted not from the copying of Salinger's words but from the readers' mistaken belief, based on the biographer's use of phrases such as "he wrote," "said Salinger," and "Salinger declares," that they had read Salinger's words. See id. The New Era opinion also awarded this factor to the plaintiff on a speculative assessment of slight market impairment. See New Era, 873 F.2d at 583. I believe the criterion requires a more substantial injury. See Fisher, supra note 31, at 1671-72.

[FN89]. See Salinger, 650 F.Supp. at 425.

[FN90]. Folsom v. Marsh, 9 F.Cas. 342, 345 (C.C.D.Mass.1841) (No. 4901).

[FN91]. The statute states that "the factors to be considered shall include" the four factors. See 17 U.S.C. § 107 (1982). "The terms ' including' and 'such as' are illustrative and not limitative." Id. § 101.

[FN92]. See Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130, 146 (S.D.N.Y.1968); W. PATRY, supra note 3, at 121.

[FN93]. See 17 U.S.C. § 504(c)(2) (1982) (providing for additional damages if a willful infringement is found).

[FN94]. See, e.g., Cary v. Kearsley, 170 Eng.Rep. 679, 4 Esp. 168 (1802); Jarrold v. Houlston, 69 Eng.Rep. 1294, 1298, 3 K. & J. 708, 716-17 (1857); see also Marcus v. Rowley, 695 F.2d 1171, 1175 (9th Cir.1983) ("[F]air use presupposes that the defendant has acted fairly and in good faith . . . ."); Iowa State Univ. Research Found., Inc. v. American Broadcasting Co., 621 F.2d 57, 62 (2d Cir.1980) (noting the relevance of conduct to fair use).

[FN95]. 9 F.Cas. 342 (C.C.D.Mass.1841) (No. 4901).

[FN96]. Id. at 349.

[FN97]. Id. at 345; see also Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir.1962) (stating that a lack of intent to infringe does not entitle a defendant to the protections of the fair use doctrine); Reed v. Holliday, 19 F. 325, 327 (C.C.W.D.Pa.1884) ("Intention . . . is . . . of no moment if infringement otherwise appears."); Scott v. Stanford, 3 L.R.-Eq. 718, 723 (1867) (holding that the honest intentions of a defendant are immaterial if the resulting work infringes plaintiff's copyright).

[FN98]. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason"); see also S.Rep. No. 473, 94th Cong., 1st Sess. 62 (1975) ("[S]ince the doctrine is an equitable rule of reason, no . . . applicable definition is possible . . . ."); H.R.Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976).

[FN99]. See W. PATRY, supra note 3, at 3-5.

[FN100]. See, e.g., Dodsley v. Kinnersley, 27 Eng.Rep. 270 (1761) (seeking an injunction to prevent further publication of a novel abstract).

[FN101]. See, e.g., Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir.1966) (Lumbard, C.J., concurring), cert. denied, 385 U.S. 1009 (1967); New Era Publications Int'l v. Henry Holt & Co., 695 F.Supp. 1493, 1526 (S.D.N.Y.1988), aff'd on other grounds, 873 F.2d 576 (2d Cir.1989).

[FN102]. See DaSilva, Droit Moral and the Amoral Copyright, 28 BULL. COPYRIGHT SOC'Y 1, 3-4 (1980). See generally Ginsburg, French Copyright Law: A Comparative Overview, 36 J. COPYRIGHT SOC'Y 269 (1989).

[FN103]. See Berne Convention Implementation Act of 1988, Pub.L. No. 100- 568, 102 Stat. 2853 (to be codified in scattered sections of 17 U.S.C.).

[FN104]. See, e.g., Newman, Copyright Law and the Protection of Privacy, 12 COLUM.-VLA J.L. & ARTS 459 (1988).

[FN105]. See Prince Albert v. Strange, 41 Eng.Rep. 1171, 1171-72, 1178- 79, 1180, 1 Mac. & G. 25, 25-27, 40, 44-45, 48 (1849), aff'g 64 Eng.Rep. 293, 2 DeG. & Sm. 652 (1849).

[FN106]. See Warren & Brandeis, The Right to Privacy, 4 HARV.L.REV. 193 (1890).

[FN107]. See generally, Report of the Committee on Privacy Command Papers 5, No. 5012, at 5-12, 202-07 (1972) (recommending against the creation of a statutory general right of privacy).

[FN108]. The Restatement (Second) of Torts § 652A (1977) formulates a cause of action for invasion of privacy, which may arise from unwarranted publication of private facts. Numerous states recognize such a privacy action. Relief is typically available if the publicized matter would be highly offensive to a reasonable person and if no strong public interest exists in the disclosure of the facts. See, e.g., Reed v. Real Detective Publishing Co., 63 Ariz. 294, 304-05, 162 P.2d 133, 138 (1945); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128, 448 A.2d 1317, 1329 (1982); Florida Publishing Co. v. Fletcher, 340 So.2d 914, 919 (Fla.1976) (Sundberg, J., dissenting) (discussing the absence of an invasion of privacy action when publishing matters of legitimate public interest), cert. denied, 431 U.S. 930 (1977); Midwest Glass Co. v. Stanford Dev. Co., 34 Ill.App.3d 130, 133, 339 N.E.2d 274, 277 (1975); Beaumont v. Brown, 401 Mich. 80, 96, 257 N.W.2d 522, 527 (1977) (discussing invasion of privacy based on public disclosure of embarrassing private facts); Deaton v. Delta Democrat Publishing Co., 326 So.2d 471 (Miss.1976) (holding that plaintiff alleged facts sufficient to establish an invasion of privacy claim); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo.1983); Commonwealth v. Hayes, 489 Pa. 419, 432-33, 414 A.2d 318, 324-25, cert. denied, 449 U.S. 992 (1980); Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex.1976) (discussing Prosser's categorization of an invasion of privacy action into four distinct torts), cert. denied, 430 U.S. 931 (1977); see also Restatement (Second) of Torts § 652E (1977) (discussing "false light" invasion of privacy). Some commentators have argued for change in the doctrine. See, e.g., Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort, 68 Cornell L.Rev. 291 (1983) (arguing for a shift in focus away from the amount of publicity given to private information).

[FN109]. Cf. E. BARENDT, FREEDOM OF SPEECH 304-07 (1985) (arguing that British law does not protect freedom of speech as fully as American or German law and recommending the adoption of a "free speech clause" for Britain); Lee, Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights?, 49 U.PITT.L.REV. 777, 811-15 (1988) (discussing the Spycatcher incident as having provoked the adoption of a bill of rights to protect free speech more adequately).

[FN110]. See 17 U.S.C. § 301 (1982).

[FN111]. See id. § 102(b); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

[FN112]. Benjamin Kaplan chided courts for "sometimes forg[etting] that an injunction does not go of course; the interest in dissemination of a work may justify a confinement of the remedy to a money recovery." B. KAPLAN, supra note 68, at 73. Professor Nimmer, noting judicial authority requiring an injunction, cautions that "where great public injury would be worked by an injunction, the courts might follow cases in other areas of property law, and award damages or a continuing royalty instead of an injunction in such special circumstances." 3 M. NIMMER, THE COPYRIGHT LAW § 14.06[B], at 14-56 (1989). The remedial standard suggested by the Restatement (Second) of Torts would allow courts to award a plaintiff damages when countervailing interests, including free speech, disfavor an injunction. See Restatement (Second) of Torts § 951 comment a (1979); id. § 942 comment e; see also Abrams, First Amendment and Copyright, 35 J. Copyright Soc'y 1, 3, 12 (1987) (urging that first amendment values should be viewed as a basis for making copyright law more responsive to the shared values of the nation); Goldstein, Copyright and the First Amendment, 70 Colum.L.Rev. 983, 1030 (1970) (arguing that one way to accommodate copyright property with the public interest in access is to prefer an award of damages to an injunctive remedy); Wishingrad, First Amendment "Fair Use," N.Y.L.J., May 22, 1989, at 2, cols. 3-5 (arguing that courts should select other remedies to avoid infringing the first amendment).

[FN113]. 17 U.S.C. § 502(a) (1982).

[FN114]. An example of such confusion, I confess, may be my own opinion in Salinger. With hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification.

I believe Professor Weinreb's analysis could similarly deprive copyright owners of their lawful entitlements. Professor Weinreb argues that fair use should not be understood as a part of copyright law, designed exclusively to help achieve its objectives, but as a limitation on copyright based also on other social policies including fairness. It is incorrect, he argues, to restrict fair uses to those that make creative use of the copyrighted material. In some cases, concerns for the public interest will demand that the secondary user's presentation be exempt from the copyright owner's rights, notwithstanding unproductive copying. As an example he cites the finding of fair use involving an unauthorized publication of a copy of a spectator's film of President Kennedy's assassination. See Weinreb, supra note 67, at 1143 (citing Time Inc. v. Bernard Geis Assocs., 293 F.Supp. 130 (S.D.N.Y.1968)).

Let us explore Professor Weinreb's example. Assume as our plaintiff a gifted news photographer who, through a combination of diligence, preparedness, rapidity, imagination, instinct, skill, sense of composition, and other undefinable artistic gifts, manages again and again to take captivating photographs of cataclysmic or historic occurrences. According to Professor Weinreb's analysis, the more successful he is in the practice of his creative art, the less copyright protection he has. When there is a sufficiently great public interest in seeing his documentary recordings, he loses his right to receive compensation for them. In the public interest, the newspapers, news magazines, and television networks may simply take and republish his photographs without payment. That is fair use.

I think Professor Weinreb's example proves the contrary of his point. He confuses the author's copyright with the questions of remedy. It makes no sense that an "author," whose art and livelihood are to make news photographs that the public will desperately need to see, loses his right to compensation for his labors because he succeeds in his endeavors. On the other hand, the public interest disfavors an injunction barring the dissemination of such a work. The conflict is not difficult to reconcile. The taking of the author's photographs for public display is not fair use; the copyright holder may sue for compensation for the unauthorized republication of his work. The public interest may nevertheless override the right he

otherwise would have had to bar distribution. He will be denied an injunction, but will recover damages. Both the copyright law and the public interest will thus be vindicated.

[FN115]. See LATMAN'S THE COPYRIGHT LAW, supra note 16, at 278 & n. 105.

[FN116]. Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), cert. denied, 480 U.S. 890 (1987).

[FN117]. See New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir.1989).

[FN118]. New Era Publications Int'l v. Henry Holt & Co., 884 F.2d 659, 663 n. 1 (2d Cir.1989) (Newman, J., dissenting) (advocating rehearing en banc).

[FN119]. See id. at 664. In his new article, Judge Newman emphasizes the importance of the public interest in determining the availability of an injunction. See Newman, supra note 51.

[FN120]. See supra note 77.

[FN121]. The appropriate measure of damages will raise questions because of the vagueness of the statutory standard. 17 U.S.C. § 504(b) grants the copyright owner his "actual damages suffered . . . and any profits of the infringer that are attributable to the infringement." Id. He is permitted, however, to elect instead "statutory damages" of $500 to $20,000 per work infringed. If the infringement was "committed willfully," this statutory award may be increased to $100,000. It may be reduced to $200 if infringers in certain narrow categories believed on reasonable grounds that fair use had been made. See 17 U.S.C.A. § 504(c) (West Supp.1989). A court has wide discretion in setting the award.
It is altogether proper for courts to distinguish in fixing damages between bad faith appropriation and a good faith miscalculation of the permissible scope of fair use. Unquestionably in some circumstances damages should be set to punish and deter. In other instances, no punitive content would be appropriate; fairness would rather suggest reasonable compensation for the use of literary property--a kind of compulsory license.
Where a court has found infringement but denied an injunction, a defendant may limit the risk of catastrophic liability for further distribution of the infringing work by counterclaiming for a declaratory judgment fixing the measure of damages.

[FN122]. New Era, 873 F.2d at 596 (Oakes, C.J., concurring).

[FN123]. Furthermore, although the change of approach to remedy suggested here may sound substantial, I believe based on my experience adjudicating copyright cases in federal court that it would have no significant statistical effect on the grant of injunctions. Of the 150-200 copyright cases that have come before me (by random distribution) in 12 years on the bench, the vast majority involved unmistakable copying without claim of fair use and resulted in injunctions; additional cases presented disputes over performance of the terms of licensing agreements; a few involved overambitious claims, where the similarity was attributable to coincidence or to the fact that both the plaintiff and defendant were copying the same conventional model; in some, the similarity related to unprotected elements such as facts, styles, or ideas. None of those cases are affected by the suggested approach to injunctions. Fewer than ten have involved colorable claims of fair use. Half of these were in the area of advertising; fair use was rejected and an injunction appropriately granted. Only in three or four cases, or approximately two percent, could differing views conceivably have affected the standard. I can think of only one where my grant or denial of an injunction would turn on whether the traditional or the suggested approach were followed. If my experience is representative, this approach to the injunction remedy would not undermine the incentives that the copyright seeks to foster.

[FN124]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[FN125]. Id. at 545.

[FN126]. U.S. Const. art. I, § 8, cl. 8.

[FN127]. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19.

[FN128]. Folsom v. Marsh, 9 F.Cas. 342, 344 (C.C.D.Mass.1841) (No. 4901).