Coase-Sandor Working Paper Series in Law and Economics   Coase-Sandor Institute for Law and Economics

1991
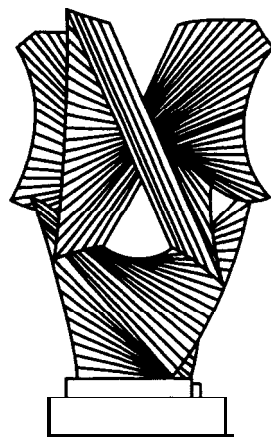
Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach

William M. Landes
William.Landes@chicagounbound.edu

CHICAGO

COPYRIGHT PROTECTION OF LETTERS, DIARIES AND OTHER UNPUBLISHED WORKS: AN ECONOMIC APPROACH

William M. Lades

COPYRIGHT PROTECTION of LETTERS, DIARIES AND OTHER UNPUBLISHED WORKS: AN ECONOMIC APPROACH

*William M. Landes**

O ne of the more controversial questions in copyright today concerns the proper scope of protection for unpublished works, such as letters, diaries, journals, reports or drafts which the copyright owner may publish in the future. The question is not whether such works are copyrightable, for they surely are. Rather, it is whether such works should be given, as they are today, even stronger copyright protection than published or widely disseminated works.

Interest in this arcane area of copyright law is the result of several recent and widely discussed cases. In *Harper & Row v. Nation Enterprises*,[1] an unnamed source provided the Nation magazine with galleys of the soon-to-be published memoirs of Gerald Ford. Paraphrasing and quoting from the memoirs, the Nation rushed into print what it believed to be a "hot" article on Ford's decision to pardon Richard Nixon. Harper & Row had earlier sold prepublication rights to Time Magazine for $25,000 but after the Nation's article appeared Time cancel-led its contract to publish excerpts from the forthcoming memoirs. In ruling against the Nation, the Supreme Court held that the unpublished nature of the work was a key factor tending to negate a defense of fair use. Two more recent

---

[1] 471 U.S. 539 (1985).

cases involved the rights of biographers to quote unpublished material without authorization. In *Salinger v. Random House,*[2] the Second Circuit preliminarily enjoined the publication of Ian Hamilton's biography of J.D. Salinger until Hamilton deleted from the galley proofs certain quotes and closely paraphrased materials from about 30 unpublished letters that Salinger had written between 1939 and 1962. The recipients of the letters or their estates had donated the letters to various university libraries, which had given Hamilton access to them. The court held that unpublished "works normally enjoy complete protection against copying any protected expression." Eventually, Hamilton published the biography after deleting the infringing material. Two years later the Second Circuit faced a similar question in a case involving L. Ron Hubbard, the founder of the Church of Scientology. In *New Era Publications v. Henry Holt & Co.*[3] Russell Miller wrote a highly critical biography of Hubbard entitled "Bare-Faced Messiah" that quoted extensively from Hubbard's unpublished letters and diaries to expose him as a charlatan, paranoid and bigot. Although the court rejected an injunction, because the plaintiff had delayed bringing its suit until two years after learning of the planned publication of the biography, it left open the possibility of monetary damages and suggested that it would have enjoined publication if the suit had been brought earlier.[4]

---

[2] 811 F.2d 90 (2d Cir. 1987).

[3] 873 F. 2d 576 (2d Cir. 1989).

[4] There have been more recent cases as well. *Love v. Kwitny,* 706 F. Supp. 1123 (S.D.N.Y. 1989), involved an unpublished manuscript written in 1960 which described the alleged role played by the CIA in Iran in helping to put the Shah in power in 1953. Kwitny obtained a purloined copy of Love's manuscript and quoted verbatim about half of the manuscript in a chapter in his critically acclaimed book *Endless Enemies* published in 1984. A key factor in the district court's decision denying fair use was the unpublished nature of Love's manuscript. In *Wright v. Warner Books, Inc.,* 748 F. Supp. 105 (S.D.N.Y. 1990), the widow of the author Richard Wright brought an infringement action against the publishers of Margaret Walker's biography of Wright for her use of both Wright's published and unpublished works. Although the publication status of some of the works involved was ambiguous, the court found that Walker's use was fair because "she has paraphrased, rather than directly quoted, Wright's work. And second, the paraphrasing by and large involves straightforward factual reportage."

The *Salinger* and *New Era* decisions brought forth strong responses from the publishing community. Publishers claimed that the decisions would chill their willingness to publish biographies and historical works because of added legal expenses, uncertainties and long delays brought about by the prospect of litigation over the use of unpublished materials. Newsweek magazine ran an article aptly titled "The End of History?" which quoted Arthur Schlesinger as saying that if the Hubbard decision had been the law when he wrote his three volume history, "The Age of Roosevelt," he would still be two volumes short.[5] In an article with a similar theme, Time Magazine described the recent difficulties publishers were having with forthcoming biographies of Saul Bellow, Malcolm X, Richard Wright, and William Faulkner because of potential litigation over the use of unpublished materials.[6]

My purpose in this paper is not simply to analyze these cases. That has been done by others.[7] Instead, I want to use the issues raised by these cases to examine from the standpoint of economics the general question of the proper scope of copyright protection for unpublished works. For example, should the fact that a work is unlikely ever to be published affect the scope of protection compared to works that are likely to be published in the future? Should the way in which the unpublished material is used matter? For example, in the *Salinger* and *New Era* cases the unpublished materials were part of larger biographical works while in the *Nation* case the article was based entirely on material from Ford's memoirs without adding any significant commentary or analysis. Should the copyright in letters belong to the letter writer, as it does in copyright law, rather than the recipient who "owns" the letter and has the right to sell it, destroy it,-show it to friends, or give it to a university library but not to make copies of it?

---

[5] David Kaplan, The End of History? A Copyright Controversy Leads to Self-Censorship, Newsweek, Dec. 25, 1989, at 80.

[6] R. Z. Sheppard, Foul Weather for Fair Use, Time, Apr. 30, 1990 at 86.

[7] In particular, see Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990); Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137 (1990); and Mary Sarah Bilder, The Shrinking Back: The Law of Biography, 43 Stan. L. Rev. 299 (1991).

Before examining these questions, I provide in Part I of this paper a brief overview of the economic approach to copyright law based on a paper that Richard Posner and I published.* That paper, however, did not discuss unpublished works. In Part II, I develop an economic model for optimal copyright protection for unpublished works. Here I distinguish between unpublished works not intended for publication and works intended for publication but not yet published. Although the line distinguishing between the two classes of unpublished works may be fuzzy, there are clear examples on either side of it. For example, Salinger's letters were not created with the intention of publishing them, while Ford's memoirs were about to be published. I also distinguish between productive and reproductive uses that subsequent authors make of unpublished works. A productive use builds on the work borrowed from and has little or no effect on the anticipated earnings of the earlier work A reproductive use substitutes for the work borrowed from and may have significant effects on its expected earnings. A biography that quotes from the unpublished letters of its subject is a productive use; publishing the subject's letters without any significant commentary is a reproductive use. In Part III of the paper I present some concluding remarks. My main conclusion is that copyright protection for productive uses of unpublished works should be minimal and no greater than for already published works; but that copyright protection for reproductive uses of unpublished works should often be stronger than for already published works. These conclusions run counter to current interpretations of copyright law that give more protection to unpublished than published works without regard to the use of the unpublished work

Finally, I want to mention one omission in my paper. Since my focus is on copyright, I largely ignore other considerations such as a right of privacy, the first amendment, breach of an implied contract and artistic integrity, which may also affect the desirability of protecting unpublished works. Although these concerns are separate from the goals of copyright, I briefly discuss how they can be incorporated into the analysis.

---

[8]See William M. Landes and Richard A. Posner, An Economic Analysis of Copyright Law 18 J. Leg. Studies 325 (1989).

I. THE LAW AND ECONOMICS OF COPYRIGHT PROTECTION

Creating a copyrightable work such as a novel or biography involves two costs. One is the time and effort of the author and publisher in creating the book plus various other expenditures (such as editing) to get the book ready for publication. The other is the cost of making copies of the book For convenience, I call the former the cost of expression and the latter the cost of copying. Expression has an important public goods aspect to it. Once the cost of expression is incurred, it can be embodied in additional copies of the work at no added cost. In the absence of legal protection against copying, the author will find it difficult to prevent others from copying all or part of his work Consequently, the price of a copy will tend to be driven down to the marginal cost of making a copy. Since this will leave no revenue to cover the cost of expression, the incentive to create the work in the first place will be greatly diminished.

Copyright protection gives the copyright owner the right to prevent others from making copies. This enables the copyright owner to charge a price above the cost of making a copy without fear of losing sales to the copier. In this way, copyright protection provides a financial incentive to create new works. To be sure, there are reasons why the absence of copyright protection may not completely eliminate the incentives to create new works. For example, copying takes time and there may be advantages from being first in the market; the copy may be of poorer quality and hence not a good substitute for the original; copying may be relatively costly compared to the cost of creating a new work; the creator may be able to capture some of the value of copies made by others by charging a high price for the original; and the creator may receive substantial benefits over and above the revenue he receives from selling his copies. Although these factors do not add up to a case against providing any copyright protection, they suggest that limiting the scope of protection in particular ways may have only minor consequences on the number on new works created.

There is another factor suggesting the desirability of limiting the scope of protection for copyrightable works. It is more expensive to enforce systems of property rights in copyrighted materials than it is for most forms of tangible property. Enforcement costs tend to be higher because it is more difficult to define in a copyrighted work

what is to be protected and who owns it. One can put a fence around a piece of property to mark boundary lines and prevent trespass. It is not so easy to put a fence around a copyrighted work because the dividing line between what the author has created and what he has borrowed from the public domain and from other authors may be a fuzzy one. Moreover, the public goods character of copyrightable works also raises enforcement costs because it makes detecting theft a greater problem. One may be able to copy a copyrighted work without the author knowing it. One cannot steal a car or house without the owner discovering it.

A more subtle cost of copyright protection results from restricting access to a good that has a public goods character. For example, individuals who value the work by more than the cost of making a copy but less than its price will choose not to buy it. This creates a deadweight or social loss. Similarly, creators may be prevented from incorporating into their work material from an earlier work because of the fear of infringing that work or because of the high cost of licensing and transacting with the original copyright holder. Yet once the earlier work has been created, it is costless for other creators to use it. This restriction on access also creates a social or deadweight loss because users forgo benefits that exceed the cost of their use.

The fact that some new works will be created in the absence of copyright protection or that copyright is a more costly system of property rights than is tangible property does not mean that copyright should not exist. The problem is to limit protection in ways that balance the incentives to create new works against the cost of enforcement and the cost of limiting access. Richard Posner and I tried to show that the principal doctrines of copyright law can be best explained as efforts to make this trade-off in a way that promotes economic efficiency-i.e., by maximizing the benefits from creating additional works minus both the costs of limiting access and the costs of administering copyright protection. Among the copyright doctrines we analyzed from an economic standpoint were why copyright protects against copying but not independent or accidental duplication; the rationale for protecting expression but not ideas; why the law gives the copyright holder protection over derivative works; why copyright protection is not perpetual; and the fair use defense to copying expression.

One question we did not explicitly examine is the rationale for separating the ownership of the copyright from the good it embodies. I examine this below because it is particularly important to one class of unpublished works, letters. I also summarize briefly our analysis of fair use because it is the principal defense raised by defendants who use unpublished materials, and a key doctrine in understanding the scope of protection for unpublished works.

A. *Ownership of the Copyright and the Good*

A fundamental feature of copyright law separates ownership of the copyright from the good it embodies. This division of ownership has a simple economic explanation. Normally, concentrating in a single owner all rights to a good will minimize transactions cost and promote economic efficiency. For a copyrightable work, the opposite is often the case. Imagine what would happen if each owner of a Batman comic book also owned the copyright as well. Then someone wanting to copy the Batman characters for a movie, television series, or clothing collection might have to deal with millions of potential copyright holders in order to avoid infringement. This would create potential hold-out problems and add to transaction costs compared to the alternative of separating ownership of the copyright from the physical good it embodies. Then a potential copier need only negotiate a single transaction (with the owner of the copyright).

There is, of course, a related reason for separating ownership of the copyright from the good. The creator of the work may not be able to earn a sufficient return to cover the cost of creating the work Although each owner of the comic book might be willing to pay a little more if he also owned the copyright, this amount is likely to be trivial because the high transaction costs of dealing with millions of copyright holders is likely to make it uneconomical for a potential user to license the right to make copies. Alternatively, if each owner of a copy had the right to authorize copies, transaction costs would fall but the price of a copy sold by the original author would not include any premium for the right to make further copies. Competition among holders of copies would drive the price of making copies

to marginal cost and so the incentive to create the original work would be significantly reduced.[9]

It is not always the case that separating ownership of the copyright from the work will promote economic efficiency. Consider a copyright in a unique work such as a painting or sculpture where copying is likely to be very limited or not to occur at all. Moreover, copying requires that one make copies from the unique work Here transaction costs are likely to be-minimized while still preserving the creator's incentives by combining the copyright with the original work it embodies. To be sure, this could be accomplished by contract when the work is sold but transferring the copyright along with the work would marginally increase transaction costs. Even here, however, there will be circumstances when it is efficient to separate the copyright from the work itself such as when the artist is in a better position to exploit future uses of his work or is better able to value these uses.

When we turn to the copyright in letters the case for giving the writer the copyright falls somewhere between the Batman example and the unique work of art. Although separating ownership of the copyright from the letter will increase the incentive to write a letter, it will reduce the incentive for the recipient to preserve the letter and in some circumstances it may also raise transaction costs. If the letter is eventually published, transaction costs might rise because the publisher would have to negotiate both with the letter writer who owns the copyrights and the recipient who possesses the letter rather than just the recipient alone.

Three qualifications, however, suggest that separating ownership of the copyright from the letter is the more efficient rule. First, the preservation rationale for combining ownership of the letter with its copyright is unimportant today because of the widespread availability of photocopying. Moreover, the incentive of the writer to preserve the letter is greater when he owns the copyright. Second, if the writer keeps a copy of the letter, then only a single transaction is required to publish the letter independent of which party holds the copyright. Thus, no efficiency savings would occur from changing the existing copyright rule. Third, the circumstances in which one

---

[9] See Stanley M. Besen and Sheila Nataraj Kirby, Private Copying, Appropriability, and Optimal Copying Royalties, 32 J. Law & Econ. 255 (1989).

desires to publish a single letter will be rare. The more usual case will involve the publication of the collected letters of X or excerpts from them, for example, in a biography of X. Typically, X will have corresponded with many individuals. If X has copies of all or some of these letters, then the number of transactions to obtain permission to use these letters and hence transaction costs will tend to be lower if the copyrights in the many letters are held by a single party as X or his estate instead of by the numerous recipients of X's letters who may be scattered throughout the world. Even if X does not have copies of all his letters and so the publisher must contact some of the recipients, the number of transactions will still be lower if the copyrights are held by X. For the remainder of my analysis, I will take as given that the copyright in a letter belongs to the letter writer. Of course, this is just the starting point when asking whether unauthorized copying or quoting from the letter violates its copyright.

B. *Fair Use*

Fair use is a significant limitation on the copyright owner's property right for it allows some unauthorized copying without deeming the copying an infringement. Posner and I grouped the cases that invoked the fair use doctrine for copying published works into three categories, each of which can be explained on grounds of economic efficiency.

> 1. *The costs of a voluntary exchange are so high relative to the benefits that no exchange between a potential user of a copyrighted work and its owner is feasible.*

A might be willing to pay B, the copyright holder, a sum that B would be happy to accept for the use of the work, but the cost of locating and negotiating with B may be prohibitive if all A wants to do is quote brief passages from B's work A fair use privilege creates a clear benefit to A but does no harm to B since high transactions costs would have prevented B from transacting with A.[10]

---

[10] Several qualifications are in border, though none undermines this important justification for fair use. They are arguments for construing the doctrine narrowly. First, we might prefer a liability rule under which the user would pay damages (if any) ex post for using the copyrighted work. However, the transaction costs of using the legal system are likely to be high relative to potential benefits (the added incentive to create works) because users are often

2. Implied consent.

A good example is a review of a book that quotes brief passages from the book being reviewed. A book is an experience good so that accurate pre-use information about its quality is likely on average to enlarge the demand for it and benefit authors. A critical review may destroy the market for a particular work but on balance reviews will provide information to potential customers and thereby benefit authors. Also, the reader is likely to value the information more knowing that the reviewer did- not have to obtain the author's permisson, which might well be conditioned on the reviewer's deleting critical parts of the review. And the more valuable the information, the greater on average should be the demand for the underlying works.

3. Productive use.

The final category of fair use relies on the observation that copying would be desirable if it allowed an author to borrow a limited amount of expression from an earlier author but not so much as to substitute for the original work Courts refer to this as a productive use as distinct from a reproductive use. A productive use incorporates the work that it copies from into a new work; the copying lowers the cost or equivalently raises the quality of the new work, and finally, and most importantly, the copying will have no significant effect on the expected revenues of the author of the earlier work? To be sure deeming a productive use a fair use may result in lost licensing revenues to the author of the copied work, but this loss does not affect the incentive to create the work since the prospect of such revenues were largely unanticipated at the time the work was

numerous. Second, fair use, if too broadly interpreted, might reduce the incentive to develop innovative market mechanisms that reduce transaction costs and make voluntary exchanges between copyright holders and users feasible. Third, there may be some harm to copyright holders in the prohibitive transaction cost case because some users even of a few passages of the copyrighted work might be willing to purchase the entire work.

[11] In some instances, "implied consent" will be a subcategory of "productive use." For example, a book review or critical essay will have value independent of its advertising value for the underlying work.

created. In contrast, a reproductive use essentially substitutes for the work it copies from, and results in anticipated lost revenues.[12]

Behind a veil of ignorance, authors would favor a rule allowing productive fair use because it would enable an author to borrow some expression from others and lower his costs, while his expected revenues would not change when others borrow from him. In contrast, a reproductive use reduces the profits of the original author and hence the incentives to create the work in the first place. Not surprisingly, the law looks on a fair use defense for a productive use more favorably than such a defense for a reproductive one.

This discussion of fair use points out that none of the justifications I have offered for this doctrine seem to cover unpublished works in general. The high transactions cost case does not fit because its underlying assumption is that a voluntary exchange would have taken place but for transaction costs. But the fact that the work is unpublished may well mean that its author has no interest in a selling the right to copy all or part of his work And if the author of an unpublished work has no interest in selling copies, implied consent or the distinction between a reproductive and productive use are also not applicable to the question of fair use. It might appear, therefore, that the case for greater copyright protection for unpublished than published works is an open and shut one. This view is consistent with copyright law today. Although there is no per se rule against the fair use of an unpublished work, the fact that the work is unpublished is an important factor negating fair use.

---

[12] The distinction between a productive and reproductive use is not always obvious. Consider the musical "My Fair Lady" which is based on Shaw's play "Pygmalion." "My Fair Lady" might appear to be a productive use given the originality and importance of the music to the popularity of the show and movie. Still, it might be classified as a reproductive use if its popularity diminished the demand for Shaw's play, and Shaw anticipated at the time he wrote "Pygmalion" the possible creation of a musical that would reduce his income. More likely, "My Fair Lady" may have increased Shaw's income by stimulating interest in and hence demand for Shaw's works. Then, "My Fair Lady" would fit both the implied consent and productive use categories.

II. An Economic Model of Protection of Unpublished Works

Let me now turn to the question of copyright protection for unpublished works. Prior to the 1976 Copyright Act, publication was the critical line dividing common law and statutory protection. Under the 1909 Copyright Act, unpublished works were generally protected at common law while published works were protected by the federal copyright statute, provided that certain formalities such as notice were met.[13] Common law protection was perpetual while statutory protection was limited to two consecutive terms of 28 years each. For all practical purposes, the 1976 Act eliminated common law copyright. Publication lost much of its significance because statutory protection now occurs from the moment a work is fixed in a tangible form for a term equal to the life of the author plus 50 years.[14] Moreover unpublished works that are fixed in a tangible form are no longer kntitled to common law protection because Section 301 of the 1976 Act preempts any such rights that are equivalent to copyright. What remains of common law copyright is limited, for example, to works not fixed in a tangible form such as improvised speeches and live jazz performances.

Publication still plays a role, however, in interpreting the fair use provision of the 1976 Act. The legislative history of the Act indicates that Congress intended the fair use provision "to restate the present judicial doctrine of fair use, not to change, narrow, or en-

---

[13] The 1909 Act did not define publication but left that question to the courts. An important distinction developed between publication that divested its owner of common law copyright and publication that invested its owner with statutory protection. Limited publication of a work or its performance would not divest its owner of common law copyright yet the distribution of a few copies could invest the owner at his option with statutory protection. For example in *King v. Mister Maestro, Inc.,* 224 F. Supp. 101 (S.D.N.Y. 1963), neither the broadcast of Martin Luther King's speech "I Had a Dream" to millions of listeners nor the distribution of copies to the press constituted publication for purposes of divesting it of common law protection.

[14] In the case of "works for hire," the copyright lasts the minimum of 75 years from the year of first publication or 100 years from creation.

large it in any way."[15] Since the common law did not recognize a fair use defense to copying unpublished works, except for works that were so widely disseminated that they were *de facto* published,[16] the unpublished nature of a work weighs heavily against finding fair use under the 1976 Act.[17]

In the *Nation* case, the court tried to explain the rationale for why fair use differs for published and unpublished works. The court reasoned that the author's "right of first publication," which includes the right to decide when and in what form to release the work or whether to release it at all, is fundamentally different from other statutory rights enjoyed by the copyright holder, such as the right to make and distribute copies. Essentially, the right of first publication lacks the public goods aspect of other rights because only a single person can enjoy it. If A has the right of first publication, then B cannot also enjoy that right. In contrast, both A and B can simultaneously enjoy the right to make copies of A's published work although the law may choose to give A this right subject to certain limitations. Since I showed earlier that the public goods aspect of a copyrightable work is a key factor limiting copyright protection and since the fair use doctrine is one of the principal means of limiting such protection, it might seem reasonable to conclude that there should be no fair use for unpublished materials or at the least, a more limited fair use defense for unpublished than published works. This argument seems to be further supported by my earlier analysis

---

[15] See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) reprinted in Latman, Gorman and Ginsburg, Copyright for the Nineties: Cases and Materials 582 (3rd. ed. 1989).

[16] The common law also carved out a narrow exception for publication of the unpublished material in legal proceedings and when publication was necessary to defend one's reputation from charges made by the letter writer or others.

[17] Sec. 107 of the 1976 Copyright Act lists four factors to be considered in determining whether copying is a fair use. One factor, the nature of the copyrighted work, draws a distinction between whether a work is published or unpublished. If it is unpublished, this factor works against finding fair use. Fair use may still be found, however, if the remaining three factors (the purpose and character of the use, the amount and substantiality of the portion taken, and the effect of the potential market of the copyrighted work) are sufficiently favorable to fair use.

showing that the economic justifications for fair use, such as high transactions costs, are less relevant for unpublished works.

The argument against fair use of unpublished materials might seem overwhelming. On closer examination, however, it is wrong. It ignores important differences among types and uses of unpublished works. Indeed, for certain classes or uses of unpublished works the case for allowing fair use is as great as it is for published works.[18]

I want to distinguish two categories of unpublished works that I believe capture the important differences in determining the optimal scope of protection for unpublished works. In the first, I assume that the author of the unpublished work does not intend to publish or disseminate it widely. Both the *Salinger* and *New Era* cases fit this category. The unpublished works in question were letters and personal diaries that were created without any expectation of publication. Salinger had a powerful desire for privacy as evidenced by his reclusive life in New Hampshire. He had not published anything in over twenty years and showed no interest in publishing his letters notwithstanding their estimated publication value in excess of *$500,000.* The Church of Scientology, the owner of the copyrights in Hubbard's works, also had a powerful interest in withholding Hubbard's private papers from publication. Here the motive was not privacy but concealing Hubbard's unpublished views which, if revealed, could have had adverse financial effects on the Church. To be sure, since copyright only protects expression and not facts, theories, opinions and ideas contained in published or unpublished writings, copyright protection would not prevent all possible losses suffered by Salinger and the Church of Scientology.[19] Still, there

---

[18] I use the terms "the scope of copyright protection" and fair use interchangeably in my analysis in the sense that a greater the scope of protection is equivalent to construing fair use more narrowly and vice versa.

[19] In principle, the scope of copyright protection could be expanded to include ideas, facts, etc. The reasons for limiting copyright protection to expression (e.g., the higher administrative costs of defining the boundaries of an idea, determining its original author and identifying the idea in the work of the alleged infringer than it is to decide if expression has been copied) is discussed in Landes & Posner, supra note 8. Since these same reasons apply to ideas, facts, theories contained in unpublished works, I take as given in my analysis of unpublished works that copyright protection is limited to expression.

would be some incremental losses from publishing their expression as evidenced, in part, by their willingness to incur the costs of a lawsuit.

In the second category I include unpublished materials that the author intends to publish in its current or revised form or incorporate into a larger work The *Nation* case fits this example for the prepublication rights to publish excerpts from Ford's memoirs had been sold to Time magazine and the book was about to be published shortly. Of course the distinction between the two categories is a matter of degree because there is always some uncertainty about future publication. Salinger might have turned out to be someone who craved publicity in later life or became so financially desperate that he eagerly sought to publish an autobiography quoting extensively from his letters. L. Ron Hubbard might have sought to expose the church he founded by publishing his diaries and letters. And Ford might have had a personal crisis that led him to shun the publicity that would result from publishing his memoirs. Still, in the Salinger and Hubbard examples, the probability of future publication was very small and to simplify I assume it is zero. In contrast, in the Ford example the probability of publication was very high and I assume it equals one.[20]

I also distinguish two uses of unpublished materials, productive and reproductive uses. The publication of an unannotated set of Salinger letters is reproductive, while the use of those letters in a biography is productive. As noted in Part I, a fair use defense is likely to -be more successful for productive than reproductive uses of published materials because free riding is less and there is not likely to be any expected financial loss to the first author. The question is

---

[20] One can define a third category in which uncertainty over future publication is a key factor in the calculus of the author of unpublished material. Here we might include diaries and notebooks of an author or public figure who is uncertain at the time he writes them whether they will be published in the future. This category could also include the private letters and papers of a famous (or not yet famous) person who is uncertain over whether he or someone he authorizes will publish this material. Since the critical factor in determining the scope of copyright protection for unpublished works turns on the distinction between productive and reproductive uses not whether a work is or is not intended for publication, uncertainty does not affect my analysis or conclusions. Therefore, I do not discuss this category separately.

whether a similar difference in the scope of copyright protection for productive and reproductive uses should apply for unpublished works.

A. *No Intention to Publish the Unpublished Materials*

   1. *Productive uses of unpublished materials.*

Consider the category where the author of the unpublished materials does not intend to publish them. Provisionally, I assume that the user (not the author) of the unpublished materials makes a productive rather than reproductive use of them. To make the analysis more concrete, let me take the case of a biographer who quotes extensively from the unpublished letters or other written materials of his subject. I assume that the biographer has obtained access to the unpublished materials in a lawful manner.

   a. Author of unpublished materials. Looking first at the author of the unpublished materials, the decision to create these materials will depend on a comparison of benefits and costs. The benefits are whatever positive value the author derives from communicating in this form. Costs depend not only on the time and effort of the writer and incidental costs (e.g., postage stamps for letters) but also on the expected harm appropriately discounted if all or part of these materials are eventually published without permission by someone else. The expected harm will depend on both the probability of publication and the future harm from publication. The probability may depend on how famous the writer of the unpublished materials is or likely to be in the future, the likelihood that the materials will be destroyed or misplaced after they are created, access to the materials, the significance of the unpublished materials to subsequent biographers and countless other factors as well. The harm may include a loss of privacy, diminished reputation or lost earnings, all of which depend on what the unpublished materials reveal. The harm will also depend on the discount rate since, if publication occurs, it will take place in the future. In addition, the expected harm will depend on the scope of copyright protection for unpublished materials. The greater the protection, the smaller the amount of unpublished materials the biographer can lawfully copy and the greater risk that any unauthorized copying will violate the copyright law. To simplify the analysis, I assume that copyright protection for unpublished mate-

rials only reduces the probability of harm not the amount of harm if the material is copied.

The analysis of copyright protection for unpublished works can be more clearly illustrated by a formal model. Let g equal the net gain (which may be positive or negative) to the author of unpublished materials after deducting all costs as in

$$g = b - p(z)h \qquad\qquad (1)$$

where b is the net benefit before deducting h, the harm from publication, and p(z) is the probability that the material not intended for publication will be published in the future by a biographer. This probability, in turn, depends negatively on z, the level of copyright protection for unpublished materials. Although z can involve numerous factors, such as the amount of the unpublished materials that can be lawfully copied, the extent of paraphrasing before an infringement is found, whether the quoted material is used to enliven the text or only to establish facts, the elements of the materials that are protected, and the term of protection, I assume that these factors can be incorporated into a single index of copyright protection which equals the fraction $(0 \le z \le 1)$ of the unpublished work that cannot be copied without violating its copyright.[21] Thus, $(1 - z)$ denotes the fraction of the unpublished work that may be copied lawfully. I assume further that when $z = 1$, p is zero or close to it, because it is unlawful for subsequent authors to copy any of the unpublished materials. Even without any copyright protection for unpublished works ($z = 0$), there will be many reasons for not copying the unpublished materials (e.g., there is no interest in writing a biography of the author of the unpublished materials, the materials are unimportant to a biographer, the materials have been destroyed or are unavailable, etc.). Indeed, these other factors may be so important that for most unpublished materials, p may be close to zero even if $z = 0$.[22]

---

[21] This approach is identical to that taken in Landes and Posner, An Economic Analysis of Copyright Law, supra note 8.

[22] When $z = 1$, one could argue that $p(1) > 0$ because enforcement is not perfect and copyright law does not prevent a biographer from copying ideas, theories or facts contained in the unpublished materials. Hence there is still a positive probability that the unpublished materials will be used and will harm

There is the related question of what unpublished materials to include in the category "unpublished materials." Consider the case of law professors. One possibility is to include the shopping lists, correspondence, reading lists, exam questions, lecture notes, drafts of papers and all other unpublished materials created by the universe of law professors. Such an all inclusive definition would be too broad for the kind of questions I am interested in since the unpublished writings of most law professors will hold no interest to biographers, historians, critics of academic law, editors of law school newspapers, etc. Another possibility is to limit the definition to unpublished materials that are likely to be of future interest to biographers, critics, reporters and historians. This would greatly limit the material included in the category "unpublished materials," and it is the definition I adopt in this paper. Even so, $p(z)$ will be near zero for most of this material, particularly for material created by persons before they are well known, because the amount of such material is likely to be large relative to that which is actually published and the relevant probability is calculated at the time the unpublished work is created.

The decision to write a letter or keep a diary will depend on whether $\dot{g}$ is greater or less than zero, or whether b/h is greater or less than $p(z)$. If $b/h \geq 1$, the level of copyright protection will have no effect on this decision since $p(z) \leq 1$ even if there is no copyright protection for unpublished materials. Potentially, a large number of unpublished materials (that may be of future interest) will be created independent of copyright law because b will be large relative to h (which is discounted because publication, if it occurs, takes place in the future) and p will be small. Copyright protection only matters in cases where $b/h < 1$ or where net benefits are less than the harm from publishing the materials not intended for publication. In those cases, the greater z is, the lower is p (i.e., p_z is negative) and the

the letter writer. Whether $p(1) = 0$ or > 0 is not critical to our analysis. However, this suggests that a more general formulation of the model would allow for both p and h to depend on z. This would capture more realistically the effect of increasing z on reducing the amount of copying of expression but not ideas, etc.

more likely $b/h > p(z)$ and, therefore, the more likely the unpublished materials will be written.[23]

Let Q denote the aggregate quantity of unpublished materials not intended for publication (or created for private purposes only). We can write Q as

$$Q = Q(p(z), b/h, x) \tag{2}$$

where $p(z)$ and b/h are now the average values of these variables calculated over the population of potential authors of unpublished materials, and x denotes the combined effect of all other relevant factors including, for example, the number of persons capable of creating unpublished materials of interest to biographers or historians. Q will be greater, the greater on average b/h is and the smaller on average p is, which, in turn, depends negatively on z.[24]

It is convenient to rewrite Q as

$$Q = q_0 + q(z) \tag{3}$$

where q_0 denotes the quantity of Q that is available without regard to copyright protection (i.e., unpublished materials in which $b/h > p(0)$) and $q(z)$ denotes the quantity that depends positively on the

---

[23] I assume further that as z increases, p_z decreases at a decreasing rate ($p_{zz} > 0$) — i.e., as z increases, the effectiveness of copyright protection increases but at a decreasing rate.

[24] Note that Q_z (the increase in Q per unit increase in z) is positive but decreasing in z. A simple example is helpful in illustrating the relationship between z and Q. Suppose there are L potential letter writers of one letter each. The ith individual's decision to write will depend on whether $g_i >$ or < 0, or whether $b_i/h_i >$ or $< p_i$. Assume a uniform distribution for B_i/H_i between a and c (where $a < c$, $a > 0$ and $c > 1$) across the L individuals, and assume that p_i is the same for all individuals ($= p$). The latter assumption is not as unrealistic as it may appear because the unpublished materials may be created before each author has much information on the likelihood of publication and thus differences among individuals in p are likely to be small. Then the fraction of individuals who write letters equals $(c - p(z))/(c - a)$ for each value of z, and $Q = L(c - p(z))/(c - a)$. The effect on Q of an increase in z is $Q_z = -Lp_z/(c - a) > 0$ which will be greater, the greater the absolute value of p_z, the larger is L and the narrower the range of b/h among individuals (i.e., the smaller is $c - a$). Note that $Q_{zz} < 0$ assuming $p_{zz} > 0$.

degree of such protection ($q_z > 0$).[25] Since q_0 is the quantity of unpublished materials created by persons where $b/h > p(0)$, it follows that q_0 will be greater, the greater on average is b/h and the lower on average is the probability that unpublished materials will be copied even if unlimited copying is lawful. For positive levels of copyright protection, the greater z is, the greater is $q(z)$ and the greater Q will be. But, for reasons I will discuss shortly, I would not expect greater copyright protection to bring forth a large increase in the quantity of letters or other unpublished materials that were created for private purposes only.

b. User of unpublished materials. Let me now turn to the biographer or historian. On the one hand, the effect of greater copyright protection for unpublished materials will benefit biographers as a group by making it more likely that unpublished materials will be available. This will tend to raise the quality of the biography or lower the cost of creating it by eliminating inferior source material. On the other hand, the benefit comes at a cost. The greater the copyright protection, the less the biographer can lawfully use of such materials including those that would have been available anyway with less copyright protection. Just as the greater supply of unpublished materials will benefit the biographer, so his inability to use fully the materials that would have been available with less copyright protection will be harmful. Limiting the biographer's right to quote and closely paraphrase unpublished materials will make it more difficult to accurately portray the subject to the reader and may expose the biographer to criticisms that he has distorted the underlying source materials.[26] Indeed, without quoting extensively it may not be possible to communicate to the reader the precise meaning of what has been

---

[25] To simplify the notation, I have suppressed p, b/h and x from Q in equation (3) although b/h and x will affect q_0 and q, and z will affect q indirectly through its effect on p. Using the same notation as fn. 19, we have

(i) $q_0 = [(c - p(0))/(c - a)]L$

and

(ii) $q(z) = [(p(0) - p(z))/(c - a)]L.$

[26] In a review of Hamilton's biography of Salinger, Mordechai Richler, who had access to Salinger's letters, claimed that Hamilton had mischaracterized the letters. (See N.Y. Times, June 5, 1988, (Book Review). Such a claim would have been less likely if Hamilton had not been required to remove quotations from Salinger's letters and rewrite his book.

written.[27] Just as the most effective way to impeach the credibility of an expert witness is to show that his prior testimony or writings contradict his current testimony, so the critical biography may best accomplish its purpose by quoting from its subject's unpublished materials. Extensive quotations may also enliven the biography and make good reading, even if paraphrasing may communicate equally well the content of the unpublished materials?

We can illustrate the relationship between copyright protection for unpublished materials and the quality of the work that copies from these unpublished materials as follows.[29] Let N = the number of biographies created; $\alpha = \alpha((1-z)Q) > 0$, a function that transforms the N biographies into quality adjusted biographies or the "effective" output of biographies; and let X = the quality adjusted output as in

---

[27] An 18th century English copyright case (Pope v. Curl, 26 Eng. Rep. 608, 2 Atk. 342 (1741)) involving the publication of a book of letters entitled "Letters from Swift, Pope and others," points out in a humorous way the importance of unpublished letters. I quote from the Lord Chancellor's opinion:

> It has been insisted on by the defendant's counsel, that this is a sort of work which does not come within the meaning of the act of Parliament because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work. It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this [that] makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.

[28] Consider General Colin Powell's remarks to U.S. troops in the Gulf War. 'We tried to give him some good advice a few months ago, we told him move it or lose it. They wouldn't move it, now they're going to lose it." One could rephrase this as "we told Hussein to leave Kuwait, he didn't take our advice and now we are going to force him to leave." This would not alter the meaning of Powell's words but would be infinitely duller. Biographers and historians need not worry in this case because "a work prepared by an officer or employee of the United States Government as part of that person's official duties" is not copyrightable (see Sec. 105 of the 1976 Copyright Act).

[29] I take as given that the biography itself is protected by copyright subject to a number of limitations (e.g., copyright protects expression but not ideas, a fair use exception, etc.). The economic basis for these limitations is examined in Landes & Posner, supra note **8.**

$$X = \alpha((1-z)Q)N. \tag{4}$$

I assume that a depends positively on $(1 - z)Q$, the quantity of un-published materials that can be lawfully copied (i.e., $\alpha' > 0$). Thus, a depends negatively on the degree of copyright protection for un-published materials (holding Q constant) and positively on the quantity of unpublished materials (holding z constant). Since $\alpha = X/N$, a measures the average quality per biography. Let $\alpha=1$, if no unpublished materials are available to biographies $((1-z)Q =0)$. Therefore, $X > N$ when the quantity of unpublished materials that can be lawfully copied is positive.

The net effect of increasing copyright protection for unpub-lished works on X (holding constant N) equals

$$X_z = \alpha_z N = \alpha'[- Q + (1 - z)Q_z] N =$$

$$\alpha'[- (q_0 + q(z)) + (1 - z)q_z] N \tag{5}$$

which is $>$ or < 0, depending on whether the marginal benefit of increasing Q ($= \alpha'(1-z)q_z$) is greater or less than the marginal loss from reducing the permissible use of unpublished materials ($-\alpha'(q_0 + q(z))$). Observe that X is maximized with respect to z (for each value of N) when $\alpha_z = 0$ or when the marginal benefits and marginal losses from increasing Z are equal.

I use the term the "cost of expression" to define the cost of creat-ing a biography as opposed to the cost of making copies of a work already created. I assume the cost of expression is independent of the number of copies produced or sold because it consists primarily of the author's time, research expenditures, editing and typesetting ex-penditures. Let the total cost of expression for N biographies equal

$$E = E(N) \tag{6}$$

Since the cost of writing one more biography is positive, marginal cost is positive ($E_N > 0$). I assume further that marginal cost is in-creasing ($E_{NN} > 0$), or equivalently that the cost of expression will differ among biographers. Some biographers will be more efficient than others and so their costs of expression will be lower.[30]

---

[30] In Landes & Posner, supra note 8, we use a more complicated cost of expression function, which depends on both N and the degree of copyright protection. In our model, copyright protection affects the cost of expression be-

In equilibrium the number of biographies created (N) will increase until the marginal cost of creating an additional biography just equals the expected net revenue from selling copies of the work Expected net revenue is the producer surplus in the market in which copies of books are sold. The marginal. biography will earn just enough producer surplus to cover its cost of expression. All other biographies will yield producer surplus (or economic rent) above the cost of creating the work

To simplify, I assume that the N biographies are "equivalent" in the sense that each faces an identical demand curve for copies which is downward sloping (indicating that biographies are not perfect substitutes for each other although the elasticity of demand for any particular work is likely to be high). I also assume that the marginal cost of making copies for each work is identical. This implies that both the price and number of copies sold of each biography is the same, and hence each biography earns identical net revenues or producer surplus in the market for copies. Let the producer surplus earned per biography equal α (= X/N) multiplied by s (= producer surplus when $\alpha=1$), so that the higher the quality of the work, the greater the demand for it and the greater will be the producer surplus.[31] In equilibrium, the number of biographies will increase until $E_N = s\alpha$ or until the marginal cost of expression equals the producer surplus earned in the market for copies of books. We can denote the "supply curve" of biographies as

$$N = N(\alpha s, z) \qquad\qquad (7)$$

where N is an increasing function of producer surplus s (from the assumption of increasing marginal cost of expression). Whether

cause the more one can lawfully borrow from prior works, the lower the cost of creating new works. An alternative formulation of the model in this paper would assume that copyright protection for unpublished materials affects E(N) through its effect on Q - i.e., the quantity of unpublished materials lowers the cost of creating biographies rather than raising their quality. Both approaches yield similar implications. I chose the quality approach because it yielded more intuitive results.

[31] These are obviously simplifying assumptions. One could introduce into the analysis differences in both the demand for copies of biographies and in the cost of making copies; and interactions between the number of biographies created and the demand for copies of a particular biography. This would greatly complicate the presentation without changing the basic results.

greater copyright protection for unpublished materials increases or decreases N depends on whether z increases or decreases α.[32]

c. Optimal copyright protection. Optimal copyright protection for unpublished works not intended for publication requires setting Z to maximize social welfare subject to the constraint that *N* will increase to the point where $E_N = \alpha s$. As a first approximation, let social welfare (W) depend positively both on the number of quality adjusted works published, in this case biographies, and on the sum of consumer and producer surplus per biography and negatively on the cost of expression as in

$$W = X(c + s) - E(N) \qquad\qquad (8)$$

where c equals consumer surplus per quality adjusted biography and the other terms are defined as before. The higher the quality per biography (i.e., the greater α is), the greater the total consumer surplus it will generate since consumer surplus per biography equals $cX/N = c\alpha$.

Observe that I have limited the social welfare function to published works. This is consistent with the widely held view that the principal purpose of copyright is to protect works conceived for publication in order to maximize the benefits that society receives from works that are available to its members.[33] Still, excluding completely unpublished materials not intended for publication from the social welfare function would seem to go too far. Both the creator of the unpublished materials and the limited number of persons who may have access to them are members of society and will benefit from

---

[32] The number of biographies created will increase until in equilibrium producer surplus equals the marginal cost of expression (i.e., the cost of writing the marginal biography) or until $s\alpha = E_N$. The slope of the supply curve of N (with z constant) is $dN/ds = \alpha/E_{NN}$ which is positive from the assumption of increasing marginal cost. Note that the greater is α, the greater is the response of N to an increase in s because each additional biography will earn a greater return because it is of higher quality. We also have $dN/dz = E_N\alpha'(- Q + (1-z)Q_z)/ E_{NN}\alpha$ which is > or < 0 depending on whether $(- Q + (1-z)Q_z)$ is > or < 0, or whether the marginal benefit of increasing Q is greater than the losses from reducing the lawful use of Q as z increases. Observe that the condition for whether N increases or decreases with respect to a change in z is identical to whether X increases or decreases with respect to z. (See equation (5).)

[33] For example, see Leval, supra note 7, at 1107-09 and 1119.

these materials. That number may be small relative to the benefits of the far greater number of persons who will have access to published and widely disseminated works. In that case, the weight given to unpublished works in the social welfare function will tend to be much smaller than the weight given to published works.[34] Provisionally, I simplify the analysis by excluding unpublished materials from the social welfare function. The fact that these works are excluded, however, does not mean that they should not receive any copyright protection.

Social welfare is maximized when $W_Z = 0$ or when

$$\alpha'(- Q + (1-z)Q_Z) \, N(c + s) + \alpha N_Z(c + s) - E_N N_Z = 0. \qquad (9)$$

This expression can be simplified by noting that $E_N = s\alpha$ in equilibrium (i.e., the marginal cost of expression equals producer surplus), and that $N_Z = E_N \alpha'(- Q + (1-z)Q_Z)/E_{NN}\alpha$. This yields

$$\alpha'(- Q + (1-z)Q_Z)[N(c + s) + cE_N/E_{NN}] = 0. \qquad (10)$$

Since the terms in brackets are positive, W is maximized when $\alpha'(- Q + (1-z)Q_Z) = 0$, which is the expression for maximizing the average quality (α) per biography or the output of quality adjusted biographies (X) holding constant N (see equation (5)).[35]

The intuition behind equation (10) is straightforward. In setting the level of copyright protection for unpublished works, society is constrained by the behavior of biographers, each of whom will write a book only if the expected return is-greater or equal to the cost of

---

[34] There are two factors working in the opposite direction. One is that the benefits from unpublished materials occur in the present while the benefits from published works that incorporate the unpublished materials will occur in the future. The other is that the number of persons writing unpublished materials that may be of interest to future biographers and historians will probably greatly exceed the number of published biographies and histories. Thus Q will exceed N which will be a factor tending to increase the benefits and harms to writers of unpublished materials in an expanded social welfare function (although the larger Q relative to N, the lower is p and the lower the expected harm per unit of Q)

[35] Observe that the second-order condition for a maximum ($W_{ZZ} < 0$) is satisfied since it requires $- 2Q + (1-z)Q_{ZZ} < 0$ since the other terms in W_{ZZ} equal 0 from the first-order conditions. I assume Q_{ZZ} is negative because it is likely that Q will increase at a decreasing rate as z increases.

expression. In equilibrium the number of biographies (N) will increase until producer surplus (αs) per book just equals marginal cost (or, identically, the cost of the marginal biography). Since s or producer surplus per unit of quality is given, society will maximize the number of biographies by choosing a level of z, call it z^*, that maximizes α or average quality because that yields the highest producer surplus per biography. Since z^* maximizes $s\alpha$ and, therefore, the equilibrium number of biographies, it also maximizes total producer surplus after deducting the cost of expression ($\alpha sN - E(N)$). And since each N yields, by assumption, a constant consumer surplus of αc, z^* maximizes $W = \alpha N(c + s) - E(N)$.

Observe that the constraint $\alpha s = E_N$ implies that z^* is a second best solution. Social welfare would be greater if N increased until E_N equaled the sum of consumer and producer surplus per biography rather than producer surplus only. In this case, however, the marginal biography would not cover its cost of expression. One could imagine schemes for subsidizing authors to increase N until $E_N = \alpha(c + s)$ but I do not consider them explicitly in this paper.

We can solve for z^* as follows. Recall that $Q = q_0 + q(z)$ and letting ε (> 0) denote the elasticity of q with respect to z ($= q_z z/q(z)$) and noting from equation (10) that $z^* = 1 - Q/Q_z$, we can rewrite z^* as

$$z^* = \varepsilon / [\varepsilon + 1 + q_0/q(z)] \tag{11}$$

Our analysis has a number of implications.

1. Since $z^* < 1$, some copying of unpublished materials will be allowed in order to maximize social welfare. From equation (11), we see that z^* will be lower, the greater $q_0/q(z)$, where q_0 denotes the quantity of unpublished materials available at zero copyright protection and q(z) denotes the quantity available only because of copyright protection. Therefore, if a relatively large amount of unpublished materials exists without regard to the level of copyright protection, the welfare losses from restricting the copying of unpublished materials will tend to dominate any increase in benefits from increasing Q, and copyright protection for unpublished works should be set at a low level. Similarly, the less responsive the supply of unpublished materials to copyright protection (the lower is E), the smaller the benefits of increasing z and the smaller is z^*. Not surpris-

ingly, as the elasticity of response approaches 0 so does z^*. Alternatively, the greater the elasticity, the greater is z^*. In the limit, as ε approaches infinity, z^* approaches one and, therefore, no copying will be allowed.

2. There are reasons to believe that the relative availability of unpublished materials without regard to copyright protection is likely to be large, and the elasticity of response of unpublished materials to copyright protection is likely to be small. I suggested earlier that the probability that unpublished materials will eventually be copied and published by someone else is likely to be remote in most instances and only weakly related to z (i.e., $-p_z$ will be small); the harm will be discounted because publication, if it occurs at all, will take place in the future; and the relevant measure of harm is the incremental harm which will tend to be small since copyright protects expression but not ideas, facts, theories, etc. This suggests that ε will be relatively small and that b/h will be larger than $p(0)$ in most instances so that $q_0/q(z)$ will be relatively large.

3. Another factor that limits the expected incremental harm is the availability of substitute methods of protection. Unpublished materials are already protected against theft, breach of contract and invasions of privacy. The greater the levels of such protection, the smaller the probability that such materials will be used by others and the more likely b/h will be greater than $p(0)$. Hence $q_0/q(z)$ will tend to be large, implying that z^* will be low. Thus, recent legislation and judicial decisions recognizing greater rights of privacy imply that welfare would be increased by offsetting reductions in the scope of copyright protection for unpublished works.

4. Although the formal analysis is simplified by equating the quantity of unpublished materials created with the quantity available to subsequent biographers, the two are not identical. Not only will some material be lost during the time interval between creation and subsequent use but the incentive to preserve such materials and the related decision whether to destroy such materials, particularly, if it becomes clear at some later date that the materials may fall into unfriendly hands, may depend on the level of copyright protection for such unpublished materials. Put differently, when one takes account of the difference between the quantity of unpublished materials created and preserved for future use, the ratio $q_0/q(z)$ may be smaller

and ε larger than I have suggested. Still, it is not clear that copyright protection will have much effect on the incentives to preserve unpublished materials since the party in possession of the materials may be able to protect them through other means-for example, by allowing a biographer to use them only on the condition that he consent to certain restrictions. And if these methods are inadequate, copyright protection may be of little help. If publication of the unpublished materials is particularly harmful to the copyright holder, he will probably destroy the material anyway since copyright only prevents copying expression not the information revealed in the unpublished materials.

5.   So far the cost of administering copyright protection for unpublished materials has been ignored. If these costs are considered, optimal copyright protection for unpublished materials would be weaker than suggested above.

6. To simplify the formal presentation I have ignored differences among types of unpublished works that could affect the optimal scope of copyright protection. Yet if differences in ε and the ratio $q_0/q(z)$ among different types of unpublished materials can be identified at reasonable cost, welfare can be enhanced by setting copyright protection to take account of such differences. For example, one might argue that copyright protection for letters should be less than for other unpublished materials such as a personal diary. Since the letter writer reveals the content of the letter to the recipient who in turn may reveal the content to others or may deposit the letter in a library where others will have limited access to it, the incremental harm from eventual publication should be smaller than if the material in question is a private diary not intended for anyone else to read. And the smaller the incremental harm for a particular class of unpublished materials, the greater will be the relevant $q_0/q(z)$ ratio and the lower the optimal level of protection. The implications of such a rule may appear paradoxical. Often the most valuable material to a biographer will be private papers whose publication may pose the greatest potential harm to their author. My analysis implies that such materials should receive more copyright protection than less valuable unpublished materials because the former are least likely to be created and preserved in the absence of such protection.

7. There are factors today that may tend to work in the direction of expanding copyright protection for unpublished works. One is that common law protection for unpublished works was perpetual. Unpublished works now receive statutory protection equal to the life of the author plus fifty years. If one believed that common law protection was about right and since the term of copyright is an element of the scope of protection, one could make a case for expanding copyright protection for unpublished works to keep overall protection approximately constant. Another factor tending to work in the direction of increasing copyright protection for unpublished works is the declining incentive to communicate in written form because of the greater availability of substitutes such as the telephone and low cost travel. To the extent that the greater availability of substitutes for letter writing increases ε in equation (ll), the optimal scope of copyright protection would increase. A potential offset, however, is that modern technology has significantly reduced the cost of making and storing copies which should increase, other things the same, the likelihood that unpublished materials will be preserved. This will tend to increase the likelihood that unpublished materials will be available independent of any added incentive created by copyright protection.[36]

Consider once again the reasonableness of excluding from social welfare the net benefits to creators of unpublished materials and persons having access to these materials (e.g., the recipient of a letter). Formally, there is no difficulty including these net benefits in the social welfare function. Let $G(z)$ denote these aggregate net benefits. The greater the scope of copyright protection for unpublished materials, the greater these benefits $(G_z > 0)$ because both the expected harm from creating unpublished material will decline (since p_z is negative) and more unpublished materials will be-created yielding net benefits to creators and recipients. Adding G to the social welfare function yields $W = X(c + s) - E(N) + G(z)$. Maximizing W with respect to z requires $\alpha'(- Q + (1 - z)Q_z)[N(c + s) + cE_N/E_{NN}] + G_z = 0$. Since $G_z > 0$, the first set of terms must be negative (not

---

[36] There are additional offsets Word processing equipment and fax machines will lower the cost of creating written materials. Much of this unpublished material is business material that will be of little interest to biographers and so is largely irrelevant to our analysis.

zero as before) which requires increasing z beyond z^* (see eq. (11)) to the point where marginal losses ($= -Q$) from restricting the use of unpublished materials are greater than marginal gains ($(1-z)Q_z$) to biographers from increasing Q. Let z^{**} equal the value of z that satisfies the expanded social welfare function. The difference between z^{**} and z^* will probably be small because the negative value for $-Q + (1-z)Q_z$ is weighted by terms that include the full consumer and producer surplus from the published works that make use of the unpublished materials. As noted earlier, that number is likely to be large relative to the incremental gains to creators of unpublished materials from greater copyright protection because their harm is the incremental harm from publishing expression compared to revealing the ideas, facts, etc. contained in the unpublished materials, and the probability of publication is likely to be small even without copyright protection. In short, whether one believed that copyright protection should be limited to promoting the benefits from published and widely available works or that it should embrace privacy values as well (the G function), the net difference in optimal copyright protection for productive uses of unpublished works is likely to be small.

Another reason-for excluding G from the social welfare function (or at least for discounting its value in the social welfare function) is consumer surplus. Recall that z^* in equation (11) is a "second best" solution because W is maximized subject to the constraint that the cost of the marginal biography (E_N) equals producer surplus (αs) in the market for copies of the work From society's standpoint, however, the value of the marginal biography is the sum of producer and consumer surplus ($\alpha s + \alpha c$). Since the biographer doesn't capture the consumer surplus, too few biographies are created. Excluding G from the social welfare function results in a lower level of z, a higher a and, therefore, a greater value of N, which offsets the incentive to create too few biographies.[37]

---

[37] Richard Posner has suggested another reason for excluding G from the social welfare function. Suppose the author of the unpublished materials objects to their use because they reveal disreputable or unethical behavior by him. Knowing in advance that copyright protection for such materials is weak may induce the author to behave better and improve social welfare. It will also make the author less willing to reveal this behavior in a letter or diary, but that factor is explicitly considered in determining z^* in equation (11).

2. *Reproductive uses of unpublished materials not intended for publication.*

So far I have limited the analysis to productive uses of unpublished materials not intended for publication. I have ignored the question whether copyright protection should prevent reproductive uses of unpublished materials, such as A's unauthorized publication of B's copyrighted letters. This question has received little analysis in the scholarly literature as well, in part because preventing such uses is regarded as desirable and uncontroversial. Why this should be so, however, is not obvious. Indeed, the usual economic argument against a reproductive use of a published work makes less sense in the case of unpublished works. What drives this distinction in the former case is the significantly greater profit-reducing effect of a reproductive compared to a productive use, which undermines the incentive to create the work in the first place. But this negative profit effect is hardly relevant to an author who by definition creates unpublished materials with no intention to publish them and, therefore, to profit from their publication.[38] Still, there are two possible reasons for giving stronger copyright protection against reproductive than productive uses of unpublished materials.

A reproductive use might reveal more information and details and thereby increase the expected harm to the author of the unpublished materials compared to a productive use. Salinger, for example, might find it more painful to see his collected letters published than a biography that quoted from them. And if the law makes no distinction between reproductive and productive uses, future Salingers will be more deterred from writing letters. Yet the expected harm from a reproductive use is likely to be small anyway for reasons mentioned earlier (i.e., the probability that someone will publish them in the future is low, the relevant measure of harm is the incremental harm from copying, and the harm that occurs is in the future and thus discounted) so this factor alone would not result

---

[38] I ignore the question whether the publication of the letters might reduce their "collector's" value as opposed to their publication value.

in significantly more copyright protection against reproductive than productive uses.[39]

Coase's theorem provides another reason for giving unpublished works stronger copyright protection against reproductive than productive uses. Suppose Salinger has the right to prohibit the unauthorized publication of his letters as opposed to the publication of a biography containing quotations and close paraphrasing of his letters. Still, the letters will be published if their market value exceeds Salinger's harm. Salinger will negotiate to have them published in exchange for a sum that compensates him for his harm. Alternatively, if the market value is less than the harm, publication will not take place. Giving Salinger a monopoly in the publication of his letters results in the value maximizing outcome. Now suppose Salinger does not have the legal right to prevent publication of his letters. Doesn't Coase's theorem imply that the value maximizing outcome will also result? For example, if B is free to publish the letters, Salinger can offer B a sum not to publish them. Whether B accepts or rejects the offer will depend on whether Salinger's harm is greater or less than the market value of the letters. The outcome appears, therefore, not to depends on whether Salinger can prohibit publication of his letters.[40] The analysis, however, is incomplete. If Salinger does not have this right, then no one has it. It does Salinger no good to pay B not to publish the letters for B cannot prevent C, D, E and all other persons who have access to the letters from publishing them. Salinger would have to negotiate with all persons who may have access to his letters now or in the future. High transaction costs probably would defeat such negotiations. The net result is that the letters will be published (provided the ex-

---

[39] In terms of equation (II), the supply elasticity (E) would be greater and the ratio $q_0/q(z)$ smaller in the case of a reproductive than productive use and so z^* would be greater.

[40] If wealth effects are considered the outcomes may differ. For example, if a property right in the letters is an important part of Salinger's wealth and the harm is an increasing function of Salinger's wealth, then Salinger would offer less to prevent publication than he would accept to allow publication. I ignore wealth effects in my example because they have no bearing on the question of copyright protection against reproductive compared to productive uses.

pected revenue from selling copies is greater than its cost) even if the harm to Salinger greatly exceeds the market value of publication.[41]

In short, we can justify on efficiency grounds giving Salinger the right to prevent publication of his letters or, more generally, giving the author of unpublished materials not intended for publication significant protection against reproductive uses. The reasons for this result are the greater expected harm from reproductive compared to productive uses, and the inability to achieve the efficient outcome when the harm to the author greatly exceeds the market value of publication.[42]

The discussion of the Coase theorem might suggest a problem with my earlier analysis of productive uses of unpublished works. To explain, why not give Salinger the right to prevent productive uses as well rather than giving the biographer the right to quote extensively from the letters without violating Salinger's copyright. The biographer can buy the right to quote from the letters if he gains more than Salinger is harmed. If the harm is greater than the gain, no such transaction will occur. The efficient outcome results in either case. In short, why not give the author of unpublished materials a monopoly over both reproductive and productive uses of unpublished materials? There are two reasons for not doing so.

---

[41] This same asymmetry in transaction cost is developed in analyzing the relative efficiency of "fencing in" and "fencing out" rules with respect to cattle trespass. (See Kenneth R. Vogel, The Coase Theorem and California Animal Trespass Law, 16 J. Leg. Studies 149 (1987).) Vogel shows that if there are many cattle ranchers, assigning entitlements to ranchers (a fencing out rule) may not solve the externality problem (when fencing in is efficient) because a farmer's contract with one rancher to fence in his cattle will not prevent cattle owned by other ranchers from coming on to the farmer's land.

[42] One qualification should be noted. The market value for, say, Salinger's letters will be less than their full value because there will be consumer surplus in the market for copies of a book of his letters (unless perfect price discrimination is possible). Consumer surplus results from the assumption that different books are not perfect substitutes for each other and, therefore, the demand curve for copies of each book is negatively inclined. To the extent that market value significantly understates full value, the argument for prohibiting reproductive uses entirely $(z = 1)$ is weaker although, as I show shortly, it does not undermine the case for giving greater copyright protection against reproductive than productive uses.

In contrast to the publication of Salinger's letters, transaction costs would not prevent Salinger from negotiating with a biographer who has the right to publish excerpts from the letters without Salinger's permission. Significant time and effort is required to write a biography and the number of potential biographers is surely far smaller than the number of persons capable of publishing Salinger's letters. Moreover, a biographer will typically make efforts to interview his subject, which will also facilitate negotiation between the parties. Therefore, from a transaction cost perspective, there is no obvious advantage to giving Salinger the right to prevent a biographer from copying passages from the unpublished letters. Indeed, if one believed that the benefits to biographers from quoting were greater than incremental harm (compared to paraphrasing and using the ideas, facts, etc. contained in the letters) to the author of unpublished materials, transactions costs would be saved by giving the biographer that right in the first instance.[43]

A more subtle reason for not assigning the copyright owner the right to prevent productive uses of his unpublished materials is that it will lower the value of such uses (i.e., the sum of consumer and producer surplus). If the biographer must obtain the subject's approval to quote from his unpublished letters, approval may be conditioned on limiting the biographer to selected portions of letters that portray the subject in a favorable light or deleting critical parts of the biography. This potentially would transform a critical biography into an authorized one, which should reduce its value to readers. Hence the demand for copies of the biography will fall compared to a biography that can use this material without the subject's permission.[4] In short, consumer and producer surplus should be greater when the biographer or historian does not have to buy the rights to productive uses of unpublished materials.[45]

---

[43] That does not mean copyright protection against productive uses would be zero for we would still be concerned with the effect of protection on the incentive to create unpublished materials.

[44] Of course if the unpublished materials are not accessible, the biographer will require the owner's permission to use them. This, however, is not a copyright problem. Our focus is on unpublished materials that are accessible (e.g., letters that have been deposited in a university library).

[45] Posner and I use a similar argument to explain fair use for book reviews that quote brief passages from the book being reviewed. If there was no fair use

3. *Unpublished versus published materials.*

Should the scope of copyright protection for unpublished materials be greater than for already published materials? As noted, the prevailing view appears to be that unpublished materials should be given greater copyright protection or, at least, that the unpublished nature of a work is a factor negating fair use. How much weight should be given this factor is a controversial question. My analysis suggests little or no weight in the case of unpublished materials not intended for publication. Productive uses of both unpublished and published works should be given about the same level of protection, and that level should be relatively weak For unpublished works, the level of protection will depend on the trade off between the incentive to create unpublished materials and the cost to biographers and historians from limiting the use of unpublished materials that would have been available with less copyright protection. Because of the weak link between copyright protection and the expected harm from the use of unpublished materials, the incentive to create and preserve unpublished works should be relatively unresponsive to copyright protection (given other ways of protecting unpublished works) and, therefore, the level of protection should be low. Similarly, since productive uses of published works will have only small (and in the limit "zero") effects on the expected earnings of published works from which they quote and, therefore, little effect on the incentive to create these works, copyright protection against productive uses should also be small.

Protection should be far greater against reproductive uses of copyrighted works. But this applies equally to unpublished and published works. In the case of unpublished materials, there are two reasons for substantial copyright protection. Reproductive uses cause greater expected harm which adversely affect one's incentives to create unpublished materials; and efficient market solutions would be prevented by high transaction costs if copyright protection were weak In the case of published materials, a reproductive use reduces

---

doctrines, publishers might condition the license to quote passages on the reviewer writing a favorable review. This would reduce the information contained in reviews and ultimately could reduce the demand for books. See Landes and Posner, supra note 8 at **359.**

significantly the expected income of the original author and, therefore, undermines his incentive to create the work

B. *Unpublished Materials that will be Published in the Future*

Let me now turn to the second category, the case of unpublished materials that are created with the intention to publish them in the future. I assume that the author's incentive to create such a work depends on the expected profits less any expected losses if someone else publishes all or part of the work either before or after publication or both. I add that it is the prospect of publication not the actual publication that distinguishes this case from that of someone creating private materials with no intention to publish them. Works that fall into the category of "as yet unpublished" present the strongest case for giving a greater scope of copyright protection to unpublished than already published works.[46] The case, however, is not as general as it may first seem but depends on the use the copier makes of the as yet unpublished work

1. *Reproductive uses of unpublished works intended for publication.*

I begin with a reproductive use of the unpublished work as illustrated by the *Nation* case. Another example might be the unauthorized publication of the collected letters of Salinger just before Salinger was about to publish them. In both examples, the use is reproductive. By substituting for the original work, a reproductive use reduces the market demand for the work it copies from and reduces the incentive to incur the costs of creating the original work.[47] The greater the scope of permissible copying for reproductive uses of

---

[46] I use the terms "about to be published," "as yet unpublished," and "intended for publication" interchangeably, although the latter two terms are broader than the first since they include works than may never be published or works that may be published far in the future. Arguably, works that will be published, if ever, far in the future belong in the "works not intended for publication" category. My focus in this section, however, is on works that will be published shortly. How one classifies an unpublished work is not critical to my analysis since I show that copyright protection depends primarily on the use of the unpublished work not whether its author intends to publish it.

[47] In the *Nation* case the substitution is less complete because the reproductive use substituted for prepublication rights granted to Time magazine rather than the book itself.

unpublished materials, the greater the adverse incentive effects will be. As I show below, a rule that permits even some reproductive copying of unpublished works intended for publication (i.e., where z < 1) will reduce the number of new works created and probably lower social welfare.

Let social welfare equal $W = N(c + s) - E(N)$ where N is now the number of as yet unpublished works, c and s are respectively consumer and producer surplus per work, and $E(N)$ is the total cost of expression. Observe that as yet unpublished works directly enter the social welfare function because they will soon be available to consumers. Let $\phi = \phi(z)$ where ϕ is the probability of a reproductive use which depends negatively on the degree of copyright protection for as yet unpublished works (z). In equilibrium, N will increase until expected producer surplus equals the marginal cost of expression or until $(1 - \phi(z))s = E_N$. Thus, as copyright protection increases, the incentive to create new works increases.

Consider now the scope of optimal copyright protection with respect to reproductive uses. Copyright protection should be set where $z^* = 1$ because that minimizes the probability of reproductive uses, maximizes N and hence social welfare.[48] In short, the incentive

---

[48] Let $W = N(c + s) - E(N)$. Setting $W_z = 0$ yields

     (i) $c + s = E_N$

but recall that in equilibrium $(1 - \phi(z))s = E_N$. Substituting the latter expression into (i) yields

     (ii) $\phi(z) = -c/p$

which is not possible since the probability of a reproductive use, $\phi(z) \geq 0$. Given this constraint, W will be maximized by making $\phi(z)$ as small as possible, which requires setting $z^* = 1$. If we define copyright protection as the fraction of a work that cannot be copied (similar to the way protection was defined in our analysis of unpublished works not intended for publication) and assume that works intended for publication will be copied if not prohibited by law (because they yield producer surplus), then $\phi(z) = 1 - z$ and $\phi(z) = 0$ when $z^* = 1$. This analysis is oversimplified for several reasons but none undermines the conclusion that copyright protection for as yet unpublished works should be stronger than for works not intended for publication. For example, one effect of allowing a reproductive use is that it may lower the price of copies and hence increase consumer surplus for works that are still created in the face of reproductive uses. If this increase more than offsets the loss in producer surplus (which is not obvious because it depends on the relative cost of making copies for the reproductive copier and the original creator), one might allow

to create works intended for publication will be reduced by re-productive uses without offsetting benefits and hence the level of copyright protection should be set to minimize such uses $(z^* = 1)$.

Although our analysis explains why copyright protection should largely prohibit reproductive uses of as yet unpublished works, it fails to distinguish between already published and as yet unpublished material. Recall that in the *Nation* case the court emphasized that the right of first publication is unlike other rights given to the copy-right owner because it can be enjoyed by only one party. If A pos-sesses that right, B doesn't. Both A and B cannot enjoy the right simultaneously. Since we must choose between A and B, the creator beats the copier for incentive and possibly other reasons as well. In contrast, we showed that the public goods considerations are an im-portant reason for explaining from an economic standpoint why property rights in copyrighted works are more limited than in tan-gible property.

Focusing on the non-public goods aspect of the right of first publication, however, is not particularly helpful in explaining why fair use should be more narrowly construed for reproductive uses of as yet unpublished as opposed to already published works (i.e., why z^* should be greater in the former than in the latter category). In both, a reproductive use substitutes for the original work and so reduces the incentive to create the work There are two reasons, however, to believe that copyright protection for reproductive uses of an author's as yet unpublished work should be even stronger than for already published works. That is, a fair use defense should be construed more narrowly for a reproductive use of an as yet unpublished than published work

First, the adverse incentive effects are greater for the author of the as yet unpublished work because he loses the revenues that nor-mally come from being first in the market. If A has published his

---

some reproductive uses provided the incentive effects to create original works were not completely destroyed. This would be more likely if the reproductive use in question copied only part of the original work and thus did not substi-tute completely for it. (The *Nation* case is an example of such a "partial" repro-ductive use because the Nation's article substituted for the article in Time mag-azine but not the book itself.) Another possibility is that the reproductive use will lead to a more rapid publication which also holds out the prospect of higher present value of consumer surplus .

work and is selling copies and then B makes unauthorized copies of A's work, A will at least have had the opportunity to earn revenues in the interval before B starts selling copies. If this interval is long enough and A's cost of expression is not too large, A's incentives to create the work may be unaffected by B's copying. On the other hand, if A's work is not yet published and B starts selling copies before A has had the opportunity to earn any revenue, A's incentives to create the work in the first place will be severely depressed.

Second, once a work is published there is little its author can do to prevent others from having access to the work and copying from it. This is not true for the as yet unpublished work. The fear that the copier will be the first to publish the work will invite defensive measures to prevent access and so prevent copying. The author might purchase a safe, hire persons to guard the work, restrict the number and circulation of drafts, and even publish the work too soon. Although these actions lower the probability the work will be copied before publication, they are costly.[49] Similarly, the potential copier may undertake costly counter measures to offset the expenditures by the original author. He may hire spies or pay informants. Society can save these expenditures by adopting a rule that prohibits copying or fair use of unpublished materials intended for publication.

2. Productive uses of works intended for publication.

Now consider a productive rather than a reproductive use of an as yet unpublished work Recall that a key difference between the two is that a productive use will have little adverse effect on the expected revenues of the author of the earlier work Thus, making a movie based on a comic book character would not satisfy the conditions of a productive use because the prospect of potential licensing revenues from a variety of sources may well be an important motivating factor in creating and marketing the comic book in the first place. Writing a biography or history that quotes from soon to be published sources would be more likely to satisfy the conditions of a productive use. Indeed, publication of the biography or history may

---

[49] Authors of already published works may also take defensive measures to discourage copying but these are likely to be relatively costless. For example, the author of a map may place deliberate errors in the map which will discourage copyright infringement by increasing the likelihood of detecting unlawful copying.

well stimulate the demand for the as yet unpublished materials so that its author will earn greater revenues upon its publication.

Looking at the reasons why copyright protection should be greater for as yet unpublished than already published works, we find that they are not applicable to the case of productive uses. First, since a productive use does not substitute for the original work or result in any significant losses of anticipated licensing revenues, it will have a negligible effect, if any, on the incentive to create the work This holds even though the productive use occurs before publication of the as yet unpublished work. Thus, timing, which was critical in distinguishing between reproductive uses of as yet unpublished and already published works, is not a factor for a productive use.

Second, a productive use of an as yet unpublished work will not invite the kind of defensive efforts that are likely to occur in the case of a reproductive use. The expected return from such efforts would be zero because the productive use by someone else does not lower in any significant way the expected revenues of the author of the as yet unpublished work. Indeed, a productive use may actually increase the demand for the as yet unpublished work by stimulating interest in its author. Since defensive efforts are costly, there would be no economic reason to undertake them. In short, economics does not provide a reason why copyright protection should be greater or why a fair use defense should be construed more narrowly for productive uses of as yet unpublished works as opposed to already published works.

III. Concluding Remarks

I have developed an economic model of copyright protection for unpublished works. I analyze two classes of unpublished works: private materials such as letters or diaries which the author has no intention to publish; and drafts of works intended for publication. I also divide the use of unpublished materials by other authors into productive and reproductive uses. The former is illustrated by a biography that quotes from the unpublished letters of its subject; the latter by the unauthorized publication of the letters themselves. Econonmic analysis leads to a number of interesting conclusions.

1. For unpublished works created for private purposes only, copyright protection with respect to productive uses should be rela-

tively weak The precise level of protection will depend on the responsiveness of the supply of unpublished works to such protection, which for a variety of reasons I claim is very weak Indeed, optimal protection may be zero once administrative and enforcement costs are considered. Since productive uses of already published works will have small or negligible effects on the incentives to create these works, economic analysis implies that a fair use defense for productive uses of both unpublished and published materials should be liberally construed (as it is for already published works). In short, I find no reason to treat the unpublished nature of the materials as a factor negating fair use in the case of a productive use.

2.   A fair use defense should be rejected or construed much more narrowly for reproductive as opposed to productive uses of unpublished materials notintended for publication. This conclusion rests on the greater harm to authors of unpublished materials from reproductive-uses (and the resulting adverse effect on their incentives to create such materials) and on the feasibility of efficient market outcomes when the author of the unpublished materials is given a "monopoly" over reproductive uses. Since a reproductive use of an already published work reduces the author's expected profits (in contrast to a productive use) and, therefore, his incentive to create the work, already published works also should receive substantial copyright protection against reproductive uses.

3. Similar conclusions result in the case of as yet unpublished or, equivalently, unpublished works intended for publication. Productive uses, by definition, have negligible effects on the expected economic returns of both as yet unpublished and already published works. Hence, fair use should be liberally construed for a productive use without regard to whether the work copied from is as yet unpublished or already published. In contrast, the scope of copyright protection should be substantial against reproductive uses of both as yet unpublished and already published works. Indeed, there is a case for stronger protection for works in the as yet unpublished category. because the incentive effects are greater (since already published works capture the benefits of being first in the market) and cost savings are possible from lowering expenditures on defensive efforts to prevent parties from gaining access to the work before publication (which are-not possible once the work is published).

A final consideration is the possibility of implementing the rules suggested in this paper. That should be relatively easy. The critical factor is deciding whether the use of the unpublished materials is productive or reproductive not whether the unpublished materials were created for private purposes only or for future publication. The latter question would involve difficult issues of proof over intent, particularly because future publication is often uncertain at the time a work is created. Fortunately, how one classifies an unpublished work has little, to do with the scope of copyright protection it should receive. Protection depends on a more objective consideration: whether the use in question is a productive or reproductive one.