

Harper and Row v. Nation Enterprises
Supreme Court of the United States
471 U.S. 539 (1985)

THE STORY

In the spring of 1977, after President Gerald R. Ford's final term in office, he contracted with Harper & Row and Readers' Digest to publish his unwritten memoirs. The contract gave exclusivity to Harper Row to license prepublication excerpts to the memoir which promised to include "significant previously unpublished material" concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon and "Mr. Ford's reflections on this period of history, and the morality and personalities involved."

About two years later, soon before the memoirs were complete, Harper & Row negotiated an exclusive prepublication licensing agreement with Time. Time agreed to pay a \$12,500 advance and another \$12,500 at publication for a total of \$25,000 for the deal. As a stipulation of the contract, Time had the right to renegotiate the second payment if the material appeared in print prior to their article being published. The deal allowed Time to quote 7,500 words from Mr. Ford's account of the Nixon pardon and publish a week before the final books were available for sale to the general public in bookstores.

A few weeks before Time's article was set to run, Victor Navasky, editor of the Nation, a political commentary magazine, was given an unauthorized copy of the manuscript. Navasky knew he shouldn't have the manuscript and quickly reviewed it before having to return it to his source. While in his possession, he pulled quotes, facts and paraphrases from the manuscript to write up "a real hot news story". With the desire to "make news", Mr. Navasky didn't do any additional research or make an effort to get independent commentary because he was in such a rush. The Nation published Navasky's 2,250-word article on April 3, 1979. As a result of the public release, Time canceled its release and refused to pay the remaining \$12,500 as stated in the prepublication licensing agreement.

Harper Row sued The Nation for conversion, tortious interference with contract, and violations of the Copyright Act.

THE LEGAL ROUTE

- I. District Court for the Southern District of New York
 - a. Ruled in favor of Harper Row
- II. Court of Appeals for the Second Circuit
 - a. Reversed. Ruled in favor of The Nation
- III. Supreme Court of the United States
 - a. Currently hearing the case

THE PRECEDENTS

1. **The Constitution** (Article I, § 8) "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
2. **Consumers Union v General Signal**: the courts should give more leeway for fair use when the information related to matters "of high public concern."
3. **The Copyright Act**
 - a. Section 102: One can't copyright facts nor ideas. In practice, the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author's work. The copyright owner's rights, however, are subject to certain statutory exceptions. §§ 107-118. Among these is § 107 which codifies the traditional privilege of other authors to make "fair use" of an earlier writer's work. [] In addition, no author may copyright facts or ideas. § 102. The copyright is limited to those aspects of the work--termed "expression"--that display the stamp of the author's originality.
 - b. Section 106: The rights of the copyright holder are to publish, copy, and distribute the author's work. That author can sell his/her rights to others. However, others can make "fair use" of the author's work
 - c. Section 107: allows others to make fair use of others' works
Criteria for evaluation are: purpose and character, nature substantiality of amount used, the effect on the potential market or value of the © work.
4. **Folsom v Marsh**: "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy."
5. **Sony Corp. of America v. Universal City Studios, Inc.**, 464 U.S. 417 (1984). The purpose of copyright is to "motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

Commercial uses are presumed unfair.

It isn't fair use if the borrowing adversely affects the potential market for the work.

6. **Twentieth Century Music Corp v Aiken**: the real goal of the copyright law is to stimulate works for the good of the public.

THE KEY QUESTION

Under the First Amendment, can an unpublished memoir be published by a magazine without permission and claim to be Fair Use under the Copyright Act?

THE ANSWER AND VOTE

No. The justices voted 6-3 in favor of Harper Row.

REASONS FOR THE DECISION

1. Citing a hypothetical from Justice Story, the publication of an author's expression before it is authorized infringes on the authors right to decide when and if it will be made public. This isn't a factor when discussing the fair use of published works.
2. The ability to assure authors they can create freely without fear of their work being prematurely disseminated to the public outweighs any newsworthiness.
3. The Framers of the Constitution intended copyright to be the engine of free expression, supplying economic value for people to create work and market their ideas and expressions.
4. Since The Nation published this and it was for commercial use, the Justices cited *Sony Corp Of America v. Universal City Studios* saying it goes against fair use because the user (in this case The Nation) profited from its exploitation without paying the customary price even though it had the ability to bid for the right to the excerpts just as Time did. (Purpose of Use)
5. Since this was unpublished there were contractual obligations and agreements in place that spelled out publication deadlines, procedures and confidentiality of the article. The Nation's advance publication didn't allow for creative or quality control as noted in the contract. (Nature of the Copyrighted Work)
6. The Nation article was structured around the quoted excerpts which were used as dramatic focal points that also served key parts which were the heart of the book. (Amount and Substantiality of the Portion Used)
7. When used properly, fair use is limited to copying others in a way that the original works marketability will not be affected, which is not what happened in this case. (Effect on the Market)

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POINTS FROM THE DISSENT

1. The definition of the scope of fair use is too narrow and may inhibit the broad dissemination of ideas that copyright is intended to nurture.
2. The Nation's article was really a synopsis of lengthy discussions in the manuscript and the sentence and vocabulary similarities aren't enough to be infringement.
3. The article is not the same structure as the Ford memoir, is many fewer words and it is difficult to say a 2,000 word article could appropriate a 200,000 word book. (Structure of Presentation)
4. Fair use is applied in a more broad sense when the borrowed expression is a factual or historical work. (Nature of Copyrighted Work)

KEY LEGAL POINT

Fair use as described in the Copyright Act does not authorize magazines to publish unpublished memoirs that include personal reflections and significant information not publicly known without permission and claim fair use under the Copyright Act.