

The Burger Court Opinion Writing Database

Harper & Row, Publishers, Inc. v. Nation Enterprises

471 U.S. 539 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1985

Personal

Re: No. 83-1632 - Harper & Row, Publishers, Inc. v.
Nation Enterprises

Dear Sandra,

I have some of the same problems that Lewis indicated in his memo December 27. I see no real problem about ultimately joining you.

Regards,

WOB

Justice O'Connor

cc: Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 15, 1985

Re: No. 83-1632 - Harper & Row v. Nation Enterprises

Dear Sandra:

I have decided to file my concurring opinion in the "Deathless Prose" file. (There is a lot of spare space in that file!)

Regards,



Justice O'Connor

Copies to the Conference

85 MAY 12 6 15 PM '85

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Supreme Court of the United States
Washington, D. C. 20543

M

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 9, 1984

No. 83-1632

Harper & Row, Publishers, Inc.
v. Nation Enterprises

Dear Byron, Thurgood and John,

We four are in dissent in the
above. I'll be glad to try my hand at a
dissent.

Sincerely,

Bill

Justice White

Justice Marshall

Justice Stevens

84 11-9 6352

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 27, 1984

No. 83-1632

Harper & Row, Inc. v. Nation
Enterprises, et al.

Dear Sandra,

I'll circulate a dissent in due
course. I'm sorry, but it may take me a
while.

Sincerely,



Justice O'Connor

Copies to the Conference

84 DEC 28 11 21

200
200

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAY 3 1985

Recirculated: _____

WSB
Please join me
in your dissent
H

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1632

**HARPER & ROW, PUBLISHERS, INC. AND THE READ-
ER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION
ASSOCIATES, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

[May —, 1985]

JUSTICE BRENNAN, dissenting.

The Court holds that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance—the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting “the economic incentive to create and disseminate ideas,” *ante*, at 18, this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U. S. C. § 107. I therefore respectfully dissent.

I

A

This case presents two issues. First, did The Nation's use of material from the Ford manuscript in forms other than di-

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To: The Chief Justice
Justice White
Justice Marshall
Justice Brennan
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAY 17 1985

Recirculated:

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES 15, 18-20, 26

SUPREME COURT OF THE UNITED STATES

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 20, 1985]

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

The Court holds that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance—the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting “the economic incentive to create and disseminate ideas,” *ante*, at 18, this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U. S. C. § 107. I therefore respectfully dissent.

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A

This case presents two issues. First, did The Nation's use

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 6, 1985

1632
83-1362-

Harper & Row, Publishers, Inc. and The
Reader's Digest Ass'n, Inc. v. National
Enterprises and The Nation Associates, Inc.

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference

ON 61-3 10 180

LIBRARY OF CONGRESS
MANUSCRIPT DIVISION
COLLECTIONS OF THE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 27, 1984

Re: No. 83-1632-Harper & Row v. Nation Enterprises

Dear Sandra:

I await the dissent.

Sincerely,

T.M.
T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 6, 1985

Re: No. 83-1632-Harper & Row v. Nation Enterprises

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

December 20, 1984

Re: No. 83-1632, Harper & Row Publishers
v. Nation Enterprises

Dear Sandra:

I appreciate your sending over a pre-circulation copy of the proposed opinion for this case. I have read it with interest. The opinion, I think, is sound, and I could join one along this line. In response to your request that I comment, I offer the following for your consideration:

1. What would you think of deleting the sentence beginning with the word "Nevertheless" at the bottom of page 23, together with the following sentence setting forth the quote from Judge Meskill, and simply saying, in place of the deleted material, that, although the courts will not decide what is or is not news, the fact that an article arguably is "news" and therefore is presumed to be a productive use is simply one factor in the fair use analysis? I think the statement as presently set forth in the opinion is somewhat at odds with the discussion of fair use in the Senate and House Reports on the Copyright Act. See 104 S.Ct. 774, 807, n. 29.

accepted

2. I would like to see deleted the quote from Nimmer that appears at the end of the full paragraph on page 18. That quote announces a standard of copyrightability that I think the Court need not adopt, at least not yet. And it seems to me that you say what needs to be said along this line in the material on pages 26-27.

accepted

3. I suggest that the entire paragraph beginning at the bottom of page 25 be deleted, and that the sentence concerning the 13% and the sentence regarding the quoted excerpts being used as "dramatic focal points" be included, instead, in the discussion of the substantiality of the use. I make this suggestion because of my reaction that the material on pages 25-26 skirts too closely to the issue of copyrightability.

accepted

4. I am a little uncomfortable with the paragraph beginning at the bottom of page 21. I wonder if the Court would wish to endorse the right to use the copyright laws to "refrain from speaking" in a situation where a public figure has

not accepted

accepted

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not published a work and is using his copyright to prevent others from publishing particular facts. I doubt if that paragraph adds much to your argument, and I suggest that it be deleted or that a sentence be added to disclaim any intent to allow the abuse of a copyright to suppress facts.

accepted

5. On page 20, is a quote from Nimmer that strikes me as perhaps unnecessary. The evidence indicates that Mr. Navasky deliberately copied expression because he thought the expression itself was newsworthy, and there is no indication that he was merely lazy.

accepted

6. At the top of page 13 is a sentence about the distinction between published and unpublished works being retained in the Copyright Act. I feel the opinion would be strengthened if that sentence were omitted.

accepted

7. On page 2 of the draft is a statement that Navasky obtained a copy of the manuscript two weeks before the scheduled release of the Time article. The District Court found that Navasky obtained the article in "late March," which was more than two weeks prior to the April 16 release date. Because the "scooping" aspect of the article is so important, should we be scrupulous about the facts here and say either "at least two weeks before" or, preferably, "two to three weeks before"?

accepted

The following are very minor matters, having to do mainly with style. You may be unsympathetic with them, but I pass them on to you for what they may be worth:

1. On page 7, near the bottom, appears "(hereinafter the Copyright Act)." Yet the Act itself is referred to in the second sentence of the opinion. Is that not where the reference should be placed?

accepted

2. I have a personal dislike for a citation that names the author of the opinion or dissent unless the writing is not joined by anyone else. After all, our majority opinions here are Court opinions, not the author's. The same is true of nonindividual dissents. Thus, I would prefer not to be named whenever the dissenting opinion in the Sony case is mentioned, as on pages 7, 9, 12, and 29. I suppose the same could be said of the references to Judge Kaufman on page 20, to the Chief Justice on page 21, and to Chief Judge Fuld on page 22. Using Irving's name on page 20 strikes me as being almost too

accepted

accepted

accepted

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much, inasmuch as he is the author of the opinion below in the present case, the judgment of which is being reversed. He just may resent having his nose rubbed in the dirt.

3. On occasion in the opinion when Navasky's magazine is mentioned the article "The" is capitalized. On other occasions, it is not. Should this be consistent?

4. There seems to be, here and there, a misuse of "id." for "ibid." This may distress our good friend Henry Lind, and your clerk may wish to correct the instances now rather than have Henry do so later.

The opinion indeed is a valiant effort in a sensitive and difficult area, and, as I have said above, I see my way clear to join one along this line.

Sincerely,

HAB

Justice O'Connor



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States
Washington, D. C. 20543

December 28, 1984

Re: No. 83-1632, Harper & Row, Publishers, Inc.
v. Nation Enterprises

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

91 DEC 28 10:25

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91 DEC 28 10:25

HAB

March 5, 1985

Re: No. 83-1632, Harper & Roe, Publishers, Inc.
v. Nation Enterprises

Dear Sandra:

I have no problem with your revisions set forth in the second draft of your opinion. I am still with you on that draft.

Sincerely,

HAB

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 27, 1984

83-1632 Harper & Row v. Nation Enterprises

Dear Sandra:

I have read your opinion with special interest, and think your disposition of the "fair use" issue is extremely well written. At least for me, it is totally convincing.

As I read the opinion, I understood that you were assuming the validity of the copyright. In Part IV (pp. 25-26), however, you expressly decline to address the "issues of copyrightability".

I may have said at Conference that we could assume CA2 was correct on the copyright issues and just decide the fair use question. On further reflection, I think we should reverse CA2's holding, as I understand it, that only the 300/400 words of President Ford were copyrightable. If only selected quotes of a biographer's personal reflections on events are protected, the writing of biography would be seriously chilled. Churchill's great autobiographies are filled with the great facts of history. My understanding is that they are no less protected by copyrights throughout the western world, and by copyrights that are not limited to Churchill's reflections. This is not to say, of course, that the facts themselves - out of the context of the autobiography - are subject to copyright. Of course, they are not.

In sum, Sandra, the copyright issues are presented by this case, and I think we should decide them. The case properly affords the Court an opportunity to establish as a matter of copyright law that an effort like The Nation's in this case simply to "steal" two years of work by a biographer is a gross violation of copyright laws and contrary to the public interest.

Sincerely,



Justice O'Connor
lfp/ss

84 DEC 31 6 121

cc: The Conference

DEC 28 1984

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W
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 9, 1985

Re: No. 83-1632 - Harper & Row v. Nation Enterprises

Dear Sandra:

After further consideration of your opinion and your letter of January 2, 1985, I have concluded that there is considerable merit to leaving the copyright issues until another day, especially since the fair use issue is dispositive of the case. Therefore, I am pleased to join your fine opinion.

I wonder, however, if you would consider making some minor changes designed to make clear early in the opinion how you view the copyright issues. It would help make the opinion clearer if you were to state up front that the copyright in the book as a whole was validly obtained, and no question is raised as its validity. The opinion might also be somewhat improved if it stated early on that the 300/400 words quoted from Ford are copyrightable and why this is so. It seems more logical to me to establish first that some of what the Nation used was protected by copyright, and then to proceed to discuss why their use was not fair.

My join is not, however, conditioned upon your accepting the foregoing suggestions.

Sincerely

Lewis
/eq

Justice O'Connor

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

M
CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 4, 1985

Re: No. 83-1632 Harper & Row v. Reader's Digest

Dear Sandra,

Please join me.

Sincerely,
wm

Justice O'Connor

cc: The Conference

84 JAN -1 10 30

2007
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 2, 1985

Re: 83-1632 - Harper & Row v. Nation
Enterprises

Dear Sandra:

Your opinion is extremely persuasive. Since I tentatively voted the other way at Conference, however, I shall wait for other writing.

Respectfully,



Justice O'Connor

Copies to the Conference

89 771-5 615:23

206

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 6, 1985

Re: 83-1632 - Harper & Row v. Nation
Enterprises

Dear Bill:

As did Sandra, you have written an extremely persuasive opinion. Nevertheless, after wrestling with this difficult case, I have decided to change my vote and to join her opinion. I think, however, that both opinions are a real credit to the Court.

Respectfully,



Justice Brennan

Copies to the Conference

ON 05-11-85

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 6, 1985

Re: 83-1632 - Harper & Row v. Nation
Enterprises

Dear Sandra:

Please join me.

Respectfully,



Justice O'Connor

Copies to the Conference

.S1 83-1632

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 17, 1984

Re: 83-1632 Harper & Row v. Nation Enterprises

Dear Harry,

I am enclosing a pre-publication draft of an opinion in this case. The votes at Conference were close. I have tried to accommodate your views in the draft, at least insofar as I was aware of them. If you don't mind taking a look at this, I would welcome your suggestions. You have written as much as anyone on the Court on the subject of fair use.

Sincerely,



Justice Blackmun

Hand

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 20, 1984

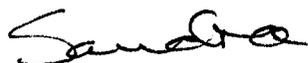
No. 83-1632 Harper & Row v. National Enterprises

Dear Harry,

I appreciate greatly the time you spent looking at the draft opinion in this case. You have a fine eye and a sharp scalpel. I am incorporating your suggestions with the exception of some of the attributions. With luck, it will produce a court.

Have a wonderful Christmas.

Sincerely,



Justice Blackmun

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: DEC 21 1984

Recirculated: _____

SDO
cancel the dissent
WJ

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[January —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider to what extent the "fair use" provision of the Copyright Revision Act of 1976, 17 U. S. C. § 107 (hereinafter the Copyright Act), sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In April 1977, an undisclosed source provided The Nation magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled "The Ford Memoirs—Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in Time magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row) and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of The Nation article, Time cancelled its agreement. Petitioners brought a successful copyright action against The Nation. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material. We granted certiorari, — U. S. — (1984), and we now reverse.

12/26
WJ

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 2, 1985

Re: 83-1632 Harper & Row v. Nation Enterprises

Dear Lewis,

Thank you for your letter concerning this case. I share your view that the Court of Appeals erred not only as to its treatment of fair use, but also in its treatment of copyrightability. As you will recall, at Conference I shared the Chief's view that more than merely the words underlined in the Appendix to the draft were copyrightable and were infringed. I thought "long and hard" about how to approach the opinion with respect to the copyrightability issue. As I count the votes, I think there are an insufficient number for a Court on my view of the copyrightability aspect in this case. It is likely to be only a 5/4 decision even if we limit it to the fair use question. The fair use issue is dispositive even if we assume arguendo that only the minimum number of words admittedly copied directly constituted the infringement.

If we were to address the copyrightability issue in this case, because neither the District Court nor the Court of Appeals made some of the necessary findings, a remand would be necessary. The District Court adopted a "totality" approach to copyrightability. Thus, neither the trial nor the appellate court really addressed the question whether an author's reconstruction of conversations is copyrightable. A majority of courts and commentators adopt the view that an author's reconstruction of dialogue constitutes protected expression, although verbatim quotes from a stenographic transcript are not. See 1 Nimmer §2.11[B] at 2-160, N.11. Much of the quoted material in The Nation's article purports to be words spoken by persons other than Ford. The trial court, however, "decline[d] to enter the thicket of deciding which statements were exact quotations - and therefore not protected by copyright - and which were merely reconstructions of statements pieced together by Ford - and therefore copyrightable." Petn B-11. "The Court of Appeals apparently assumed that the quotations were literal, although in most instances it would seem that recollections of statements made by others in the past must of necessity involve reconstruction rather than literal repetition." 1 Nimmer §2.11[B], at 2-161, n.11 (discussing this case).

Even assuming the Court of Appeals departed from some well established principles in dealing with the copyrightability issue, I think it is advisable to limit our opinion in this case to the fair use issue which is dispositive. In view of the lack of votes, as well as the absence of adequate factfinding below, I think it best to save the copyrightability issue for another day. I hope you will feel comfortable with the present more limited approach.

Sincerely,

Sandra

Justice Powell

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 11, 1985

No. 83-1632 Harper & Row v. Nation Enterprises

Dear Lewis,

First, let me say how great it is to be receiving your communications again.

Second, I am happy to have your joinder in this case as well as your suggestions. I will try to incorporate them in the next circulation.

Sincerely,



Justice Powell

Copies to the Conference

5070

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1985

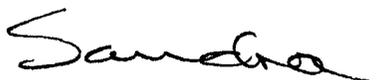
No. 83-1632 Harper & Row Publishers v. Nation Enterprises

Dear Harry,

At Lewis' request, I have prepared some revisions to the earlier draft in this case. The main change is to acknowledge in Part II the different views on copyrightability and to explain that we do not resolve them in this case.

Please let me know if you object to any of the changes. I have not yet circulated the new draft.

Sincerely,



Justice Blackmun

Stylistic Changes Throughout

pp. 5, 7, 8, 9, 14, 19, 27

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: MAR 5 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[March —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider to what extent the "fair use" provision of the Copyright Revision Act of 1976, 17 U. S. C. § 107 (hereinafter the Copyright Act), sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In April 1977, an undisclosed source provided The Nation magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled "The Ford Memoirs—Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in Time magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row) and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of The Nation article, Time cancelled its agreement. Petitioners brought a successful copyright action against The Nation. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material. We granted certiorari, — U. S. — (1984), and we now reverse.

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p.p. 20-25, 27 New footwote 7

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: MAY 7 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1632

**HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May —, 1985]

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

Stylistic Changes Throughout

From: Justice O'Connor

Circulated: _____

Recirculated: MAY 14 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May —, 1985]

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Stylistic Changes Throughout
8, 11, 21, 26

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice O'Connor
Justice Stevens
Justice Souter
Justice Thomas
Justice Alito
Justice Kagan
Justice Gorsuch
Justice Kavanaugh
Justice Barrett

From: Justice O'Connor

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SUPREME COURT OF THE UNITED STATES

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION, INC., PETITIONERS
v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 20, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider to what extent the "fair use" provision of the Copyright Revision Act of 1976, 17 U. S. C. § 107 (hereinafter the Copyright Act), sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In March 1979, an undisclosed source provided The Nation magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled "The Ford Memoirs—Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in Time magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row) and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of The Nation article, Time canceled its agreement. Petitioners brought a successful copyright action against The Nation. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material. We granted certiorari, 467 U. S. _____ (1984), and we now reverse.

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