Two recent decisions from the United States Court of Appeals sharply restrict the “fair use” of unpublished manuscripts and threaten the traditional activities of historians and biographers. The rulings have curtailed broad public access to archival materials as publishers revise and cancel projects drawing upon unpublished resources. These copyright developments raise questions about the utility of manuscript collections, and thus have the unintended—but perhaps paramount—effect of heightening the responsibilities of archivists to collection donors and to the researchers they serve. Archivists inadvertently have joined researchers and publishers as the newest “gatekeepers” of legal rights and privileges. This article proposes a strategic plan for managing those new responsibilities and for responding to the judicial tightening of fair use.

The two decisions reflect the complexity of copyright law, with its constitutional roots and social and economic effects. Copyright law is frequently described as a balance of rights and privileges. On the one hand, the law seeks to protect creators’ rights in order to encourage creativity and its open dissemination. On the other hand, the law also recognizes the need to serve additional public interests in using, learning from, and building upon the creative efforts of others. The basic structure of the 1976 Copyright Act reflects an attempt at this balance, all in furtherance of the U.S. Constitution’s provision that copyright “promote the Progress of Science and the useful Arts.” For example, Section 106 grants exclusive rights to creators—rights that

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include copying, distribution, performance, and display. Notwithstanding these exclusive rights, Section 107 grants limited rights of “fair use” to the public. Fair use long has included the right to quote from other materials, especially for purposes of research, scholarship, and education.

For all its good intentions, this balance now seems severely out of kilter for unpublished manuscripts following the two rulings from the Second Circuit Court of Appeals involving authors J. D. Salinger and L. Ron Hubbard. In January 1987 the Second Circuit ruled that Salinger could prohibit most uses of his unpublished letters in a biographical study by Ian Hamilton. The court barred not only reprinting and quoting from the letters—activities that frequently raise copyright questions—but also the detailed paraphrasing of Salinger’s correspondence. Quotations from manuscript materials customarily appear in historical and biographical works under the aegis of fair use, and the Salinger letters were openly available to Hamilton and other researchers at university libraries around the country. Salinger wrote and mailed the letters; they eventually made their way from recipients to the libraries. By sending the letters, Salinger lost control of their disposition, although he retained the copyrights. Archives are replete with documents from multitudes of correspondents, and biographers and historians long have relied on them. The decision does not prevent donors from depositing papers or archivists from providing access to them. By expanding Salinger’s copyright privileges to block most quoting and even paraphrasing, however, the ruling restrained publication of, and thus public access to, archival information.

The Salinger decision is built on incidental language from the 1985 U.S. Supreme Court ruling in Harper & Row, Publishers, Inc. v. Nation Enterprises, in which the Court declared a new general rule: the scope of fair use for unpublished materials is narrower than the scope for published works. Under this principle, a biographer may be allowed limited quotations from Salinger’s published stories, but not necessarily from his manuscripts. The problem with the high Court’s statement, however, is that it is a dictum arising from a much easier case. The Nation magazine surreptitiously obtained the page proofs from President Gerald Ford’s then-unpublished memoir. By publishing some of its most interesting excerpts, The Nation undermined the value of the memoir’s scheduled publication in Time magazine. It was a case of the unpermitted taking of a manuscript, the use of extensive quotations, and the direct hindrance of economic value which the author and publisher were ready to exploit. None of those circumstances appeared in the Salinger case. Yet the Salinger decision adhered to the dictum and the simplistic rule, rather than grapple with these important distinctions. The Hubbard case in April 1989 reaffirmed that conclusion with more absolute language and less explanation.

Although a blanket rule narrowing fair use for unpublished materials has unwelcome consequences, it nevertheless fits the fair use analysis. When Congress adopted a fair use statute for the first time in 1976, it listed four criteria for evaluation:
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{14}

These criteria evolved in judicial decisions that originated and developed the fair use doctrine, but they offer few specifics about whether a particular use is "fair" or infringement.\textsuperscript{15} Moreover, fair use has its most important applications for teaching and scholarship, yet academic uses seldom produce major litigation or generate judicial rulings to clarify rights and duties.\textsuperscript{16}

The four factors of fair use—purpose, nature, amount, and effect—are applicable to a wide range of possible uses, including quotations from unpublished manuscripts. Under "purpose," the law clearly favors noncommercial uses, although history and biography can be a commercial endeavor as well as a noncommercial, educational pursuit.\textsuperscript{17} "Amount" refers to whether the quotations are only small portions or extensive excerpts.\textsuperscript{18} Minimal quoting is ordinarily acceptable. Courts generally treat the "effect" on markets or value as the most important factor in fair use,\textsuperscript{19} but brief quotations from manuscripts rarely erode economic interests.\textsuperscript{20} The unpublished "nature" of the materials may ultimately be most important in this analysis.

In \textit{Salinger} and \textit{Hubbard}, the Second Circuit gave special emphasis to the unpublished "nature" of the materials.\textsuperscript{21} This focus appears rooted in two theories: a former common law right of "first publication" granted to authors, and a right of privacy creeping into the copyright equation. Before Congress expressly terminated common law copyright in the 1976 Copyright Act,\textsuperscript{22} authors held exclusive legal privileges as long as their works remained unpublished. While statutory copyright for published works expired after a certain number of years, rights to unpublished letters, manuscripts, diaries, and other works once lasted forever—so long as writers, their heirs, and assignees chose not to publish.

This common law right was based on the principle that authors should retain the privilege of determining the time and circumstances of first publication. The intentions of such a doctrine have merit; authors should decide when their manuscripts are fully prepared for public exposure. But like other exclusive rights—whether under common law or federal statutes—fair use should have its limited and socially beneficial applications.\textsuperscript{23} Even if the common law continued in force, the fair use
analysis could easily distinguish extensive excerpts from short quotations, and could identify the likely publication and economic value of correspondence. Despite the fact that fair use depends on many variables, and despite the full preemption of the common law by the 1976 Act, the Second Circuit held to the common law rationale of "right of first publication" to constrain fair use.24

The relationship of privacy and copyright poses greater complications. Privacy law evolved slowly during the past century—inspired by the 1890 Louis Brandeis and Samuel Warren article25—and is secured today even in constitutional principles.26 It is a discrete body of law with its own applicability and appropriateness. But the Salinger and Hubbard cases have infused fair use with privacy overtones. These cases do not give copyright and privacy independent applications, with the relevant rules separately applied. Instead, privacy concerns are incorporated subtly into the fair use formula.

The Salinger and Hubbard analyses do not even expressly refer to privacy law. The courts instead followed the four statutory criteria of fair use, butunderscored Salinger’s obsessive privacy and Hubbard’s stringently controlled public image.27 The Salinger decision especially notes that quotations in a biography impair the market value for publishing Salinger’s letters, even if Salinger disavows any such prospect.28 Nevertheless, by protecting his privacy and restricting access to his personal life, Salinger has boosted the economic value of his correspondence; he has stimulated curiosities and inflated demands for his personal writings. His original letters command premium prices, and a published collection would most certainly sell well.29 In addition, the Salinger court affirmed that market value is the most important fair use factor. Thus, by endorsing a relationship between privacy and market value, and by stressing that value, the court has allowed privacy concerns to limit the scope of fair use.

The challenge for archivists is that fair use now depends not only on the four factors, but also on the substantive content and related circumstances of the materials in question. Legitimate privacy concerns should be analyzed directly and not be entangled with copyright law.30 Privacy is a serious right to be respected, but privacy law and copyright have conflicting objectives. Privacy secures confidential actions, thoughts, and writings; copyright, by contrast, seeks to promote the growth of knowledge through public dissemination of information.31 These worthy goals must be balanced, not confused. When privacy and manuscript content affect the scope of fair use, archivists and researchers may find themselves facing a new and impractical obligation to examine each item and to set individual standards for quotations. Single copyright standards governing all materials no longer address full legal realities.

With the law becoming increasingly complicated, and with sharp judicial language restricting the use of manuscript collections, archivists must adopt new strategies to control intellectual barriers in the aftermath of Salinger and Hubbard. This article proposes four strategies rooted in the belief that manuscript collections
do not exist for their own sake, but are to serve public information needs. Collections are to be open to researchers to the fullest extent allowed under law and under agreements with donors. They are also to be available for dissemination to the public by researchers and publishers within those same limits, whether through quotations, analyses, or sometimes substantial reprinting. These strategies are flexible in order to serve widely varying donor needs, including rights of privacy and express restrictions, even though privacy and donor restrictions do not apply to every collection. But copyright applies to nearly every document; thus, a meaningful response to copyright is essential.

**STRATEGY 1: Distinguish the Cases**

Distinguishing cases is a mainstay of legal analysis. Courts base decisions on existing law and the unique facts presented. Thus, a ruling in favor of Salinger or Hubbard may not necessarily mandate the same ruling for a different writer or for different uses of the same materials. The Second Circuit was unquestionably influenced by the prominence of Salinger and Hubbard and their obsessive protection of privacy. Their writings also have an identifiable value, which they may have been willing to exploit under proper circumstances—or at least their heirs and executors may be willing. Indeed, the *Hubbard* case emphasizes that the copyright owners were planning to release the materials under their own terms; extensive fair use would degrade the value of future publications.

Most archival records lack the notoriety, value, or peculiarities of the Salinger and Hubbard papers. Many works of history and biography rely on unpublished materials from less famous or less sensitive writers. Writings with a non-personal content, or from little-known persons, or from writers long dead or otherwise well-examined in the public light, or from writers who thrust themselves into public exposure—such as politicians and celebrities—should be subject to a broader scope of fair use. The *Salinger* and *Hubbard* decisions do not necessarily foreclose those possibilities.

**STRATEGY 2: Confirm the Public Domain Status of Materials**

Copyrights expire. The former common law may have lasted in perpetuity, but under the 1976 Act, copyrights generally last for the life of the author plus fifty years. When Congress eliminated perpetual rights for unpublished works, however, it chose not to shift older materials abruptly into the public domain. When the law took effect in 1978, the unpublished writings of authors already deceased for fifty years were not immediately opened to unlimited use. Instead, the new law postponed the earliest release to December 31, 2002. Thus, at the beginning of the year 2003, the unpublished writings of authors who died before 1953 will enter the public domain. The limits of fair use will no longer apply, and the writings may be quoted and even
reprinted in full without copyright restrictions. Each subsequent year will place the writings of authors who died fifty years before into the public domain. The general rule will have full force: most copyrights—whether in published or unpublished works—will expire fifty years after the death of the writer. The year 2003 is not far away. A thorough biography or history in process today may not be published until then.

This development places a practical burden on archivists to record the deaths of writers represented in their collections. Major correspondence collections include writings from numerous individuals, but the most prevalent writers are ordinarily obvious, and a full inventory or guide should include their dates of death. Repositories should also assemble biographical and genealogical resources to confirm those dates, and archivists should regularly review obituaries and other current reports. Death dates can determine copyright privileges, particularly after a wealth of unpublished material begins entering the public domain only twelve years from now.

**STRATEGY 3: Document the Ownership of Copyrights**

Ownership of the artifacts—the letters, diaries, and other writings—does not include ownership of the copyrights. The donation or sale of a collection—even if made by the writer and copyright owner—does not include the transfer of copyrights, unless expressly stated in writing. Prominent individuals or authors may recognize copyright implications, but most donors probably have neither awareness nor concern about copyright. They may not know their rights, or that the utility of their collections is limited. They may in fact prefer the broadest access, without legal constraints. These donors may be willing to contribute copyright ownership along with the collection, but only if they are asked. So ask. Archivists should include a written assignment of copyrights among their forms for gifts and purchases. Archivists may also record the assignment with the Copyright Office to make the ownership part of the public record and to deter ownership challenges.

Archivists also have a crucial role regarding copyrights that donors keep. The identity of copyright owners should be included in the collection files, and archivists should discuss the implications with donors. In particular, upon the death of a writer, copyrights may pass under the terms of his or her will, but few wills include any reference to copyrights. After specific bequests of identified belongings for particular individuals, a typical will devises the "residue" of the estate to a variety of children, grandchildren, friends, or other relatives and heirs. If copyrights are not specified, they may be divided proportionately among the residue beneficiaries. Control of the copyright is shared among the entire group. When permission for quoting or reprinting is required from the copyright owner, everyone must grant consent. The impracticalities are obvious.
The challenge multiplies when these beneficiaries are unaware of their copyrights, and when they in turn pass their fractional rights to the next generation. Archivists can inform donors about specific copyright bequests in their wills. If donors want multiple parties to benefit, they may name a copyright trustee to retain nominal copyright title and control. The trustee may be the one contact for permissions, and the trustee can distribute income among the desired beneficiaries. Professional associations could take the lead in preparing literature and sample will provisions.

**STRATEGY 4: Assert the Full Right of Fair Use Allowed**

This strategy may seem simplistic, but oppressive decisions, such as *Salinger* and *Hubbard*, often prompt the hasty conclusion that fair use for unpublished works is gone. Uncertainty in the law and concerns about potential liability often drive researchers, archivists, and publishers alike to avoid the exercise of remaining fair use privileges. In fact, fair use is far from eliminated. By dramatic example, news reports on the *Salinger* decision often quoted the same materials that Ian Hamilton was barred from using. At least one review of the book which Hamilton eventually wrote attacked his characterizations of Salinger. To support a contrary view, the reviewer reprinted some of the quotations expunged from the full biography. Is fair use for reviews broader than fair use for biographies? Or did the reviewer simply tempt fate, hoping that Salinger would be unwilling to pursue more litigation? Salinger’s silence is not legally conclusive, but continued quoting from unpublished writings reflects the survival of fair use.

Archivists should develop policies that identify conditions affecting fair use of unpublished materials, beyond merely reiterating the four statutory factors. Policies may range from detailed position statements to simple reminders for researchers that some unspecified fair use exists. Many archives require researchers to sign agreements acknowledging certain rules and principles, including limits on copying or quoting. If copyright restrictions are mentioned, so should fair use privileges. Useful policies could describe examples where fair use realistically may and may not apply. They could detail additional user rights, such as library copying in Section 108 and the eventual expiration of copyrights. They could also describe how to seek permissions when fair use is insufficient. A thorough policy that identifies fair use can also facilitate its preservation. In the words of a former Register of Copyrights: “If you don’t use fair use, you will lose it.”

Librarians and archivists frequently write fair use policies affecting activities from quoting to software duplication. But librarians and archivists are also criticized for their cautious perspectives. Historian Michael Les Benedict wrote recently of their tendency to construe fair use narrowly—constraining utilization of manuscript collections. The challenge, therefore, is not just to write policies, but also to adopt a legally supportable and more accommodating understanding of fair use rights.
These strategies represent opportunities for archivists to grasp the significance of *Salinger* and *Hubbard* and to avoid overbroad applications of their language. Archivists have a duty to obey the law. They have a duty to avoid copyright infringements and liabilities. They have a duty to protect the legal and agreed rights of donors. But they also have a duty to make their collections as useful as possible. The law will set limits, and donors may restrict access. These standards must be followed. But the reason for maintaining the collections is to provide public access to the information they contain. Researchers use the collections and gather information, and they publish their findings to convey that information to a broader audience; fair use is essential for that information access. Archivists must comprehend the relationship of fair use to their information-access mission. Only by identifying and preserving optimal fair use rights can the keepers of manuscripts better fulfill their "ethics of access."\(^{47}\)

NOTES


3. For simplicity of reading, this article generally uses the terms "archivist" and "archives," but the discussion applies to all custodians and repositories of unpublished manuscript collections.


8. 811 F.2d at 95.


10. Id. at 564.

11. Id. at 567.

12. 811 F.2d at 95, 97.

16. One trial in progress as of this writing is an action brought by a group of textbook publishers against Kinko’s Graphics Corporation, alleging that “anthologies” of photocopied book chapters are an infringement of copyright. The decision will most certainly have great influence on campuses throughout the country. Basic Books, Inc. v. Kinko’s Graphics Corporation (S.D.N.Y. filed May 1989).
18. Id. at 97-99.
23. The Salinger decision affirms that fair use applies to all exclusive rights of owners, including the right of first publication, although the court would most certainly construe that fair use narrowly. 811 F.2d at 95.
24. Id. at 94.
29. The court noted that Salinger would likely receive $500,000 for the sale of rights to his letters. Id. at 99.
30. Pierre N. Leval, “Fair Use or Foul?” Journal of the Copyright Society of the USA 36 (April 1989): 178-179. Leval was the District Court judge whose findings of fair use were overturned by the Second Circuit in both Salinger and Hubbard.
32. Many of the letters in the Salinger case were available for research only after users signed agreements provided by the libraries and setting restrictions. 811 F.2d at 93.
33. J.D. Salinger himself had disavowed any intention to publish the letters. Id. at 99.
34. 873 F.2d at 583.
41. A bill in Congress would have amended § 107 of the 1976 Act simply to specify that fair use applies to published and unpublished works, but without explaining the scope of fair use. H.R. 4263, 101st Cong., 2d Sess. (1990). The bill did not pass, but a form of the bill will likely be reintroduced in the near future.
44. Some of these issues have been addressed in local institutional policy statements, and some appear in guidelines and statements issued in the late 1970s by the Society of American Archivists and the American Library Association. Most of these documents are currently undergoing complete revision.