

ORIGINAL

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WASHINGTON, D.C. 2054

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1632

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

PLACE Washington, D. C.

DATE November 6, 1984

PAGES 1 thru 47



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IN THE SUPREME COURT OF THE UNITED STATES

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HARPER & ROW, PUBLISHERS, INC. :

AND THE READER'S DIGEST :

ASSOCIATION, Inc., :

Petitioners :

v. : No. 83-1632

NATION ENTERPRISES AND THE :

NATION ASSOCIATES, INC. :

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Washington, D.C.

Tuesday, November 6, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:30 o'clock p.m.

APPEARANCES:

EDEWARD A. MILLER, ESQ., of New York, N. Y.;

on behalf of Petitioner.

FICYD ABRAMS, ESQ., of New York, N. Y.;

on behalf of Respondents.

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1 In February of 1977, shortly after leaving  
2 office, President Ford signed a publishing agreement  
3 with Harper & Row and the Reader's Digest to publish his  
4 memoirs. President Ford retained an experienced writer,  
5 Trevor Armbrister, to assist him in that task, and the  
6 work began almost at once on a project that was to take  
7 two years, that is, the writing of the book.

8 The District Court has detailed findings of  
9 the extensive work that went into that, and I'll just  
10 mention one or two of those facts.

11 Trevor Armbrister met with President Ford on  
12 200 separate occasions for interviews, and each of those  
13 interviews lasted two hours each. Those interviews were  
14 taped and they were typed up, and they resulted in 3600  
15 legal sized transcripts of those interviews.

16 Trevor Armbrister took that material --

17 QUESTION: Do you have any idea of how many  
18 words to the page?

19 MR. MILLER: No, Your Honor, I don't. I don't  
20 know how many there were.

21 Trevor Armbrister took that material and he  
22 took material of almost equal mass from his interviews  
23 with others, together with a mountain of material from  
24 public records and the like, and then cut of that he  
25 prepared a manuscript for President Ford.

1           President Ford reviewed that manuscript word  
2   for word, and he then reviewed three subsequent  
3   revisions word for word before finally giving his okay  
4   for the manuscript to be published. In March, 1979,  
5   approximately two years later, Harper & Row's subsidiary  
6   right department began to contact newspapers and  
7   magazines to ascertain if any of them were interested in  
8   publishing excerpts from this book prior to book  
9   publication, a right that is referred to in the book  
10   publishing trade as "first serial rights."

11           In circulating that manuscript, the subsidiary  
12   rights department secured a confidentiality agreement  
13   from each of the firms to whom it was given. Eventually  
14   an agreement was signed with Time Magazine whereby Time  
15   agreed to publish excerpts from Chapters 1 and 3 of the  
16   book, a 7500-word excerpt which was to appear in the  
17   Time Magazine issue that was to go on sale on April  
18   16th, 1979. That agreement was entered into in the  
19   middle of March, 1979.

20           The agreement also provided that if for any  
21   reason material from Chapters 1 and 3 of the manuscript  
22   were published prior to Time's publication, Time would  
23   have the right to renegotiate the second installment of  
24   the advance, which was \$12,500.

25           Approximately two weeks later, a copy of the

1 manuscript found its way into the hands of the editor of  
2 The Nation Magazine. The editor testified that he did  
3 not solicit it and did not pay for it. He has never  
4 revealed who the source was, but he has acknowledged  
5 that he knew that the source had no authority to give it  
6 to him.

7 Working quickly over a weekend, he rushed into  
8 print with an article that was derived almost  
9 exclusively from the memoirs. Eighty percent of it was  
10 from the memoirs, and what wasn't from the memoirs was  
11 either introduction or conclusion, or a few transition  
12 sentences.

13 The article quoted verbatim from several  
14 portions of the manuscript. It included President  
15 Ford's summary of the underlying philosophy for  
16 pardoning Nixon. It included a vivid description of --

17 QUESTION: You say, Mr. Miller, that it  
18 included President Ford's summary of his reasons for the  
19 pardon, do you mean by that that it quoted directly or  
20 that it simply paraphrased?

21 MR. MILLER: There was a quote in which  
22 President Ford summarized his overall philosophy. In  
23 fact, he predated to the time when he was in law school,  
24 and he said that the basic underlying philosophy that  
25 governed my decision here was the fact that public

1 policy sometimes has to take precedence over the rule of  
2 law, then he went on and expanded that somewhat, and  
3 that was quoted verbatim. That particular passage was  
4 quoted verbatim.

5 He also quoted verbatim a vivid description of  
6 Nixon's --

7 QUESTION: Was that material available  
8 anywhere else?

9 MR. MILLER: President Ford's --

10 QUESTION: In prior speeches, or articles?

11 MR. MILLER: That particular material was the  
12 material that President Ford created as he wrote the  
13 book, and that particular material was not available.

14 It also included President Ford's assessment  
15 of Nixon's character, which President Ford had written  
16 out in longhand during that interviewing process that I  
17 described, and that also was copied verbatim by Nation  
18 in the article.

19 QUESTION: Mr. Miller, do you take the  
20 position that the copyright allows President Ford to  
21 license publication of those facts, or just his written  
22 expression or choice of words in expressing?

23 MR. MILLER: Just his expression, Justice  
24 O'Connor, as that term has been defined traditionally in  
25 the copyright courts.



1 QUESTION: How many total words were quoted,  
2 actually quoted?

3 MR. MILLER: How many were quoted? There was  
4 approximately 1800 words altogether derived from the  
5 manuscript, and about 700, I think, were quoted and the  
6 balance were paraphrased.

7 QUESTION: Seven hundred were quoted?

8 MR. MILLER: Yes. The balance constitutes  
9 paraphrase of the material in the manuscript.

10 QUESTION: How many did the Court of Appeals  
11 think were quoted?

12 MR. MILLER: The Court of Appeals did a  
13 stripping away exercise, and ended up with 300 words  
14 that in their view represented copyrightable  
15 expression.

16 QUESTION: Whose word should we take?

17 MR. MILLER: Well, Your Honor, Justice White,  
18 I think --

19 QUESTION: Do we have to count them?

20 MR. MILLER: I think it is not a question of  
21 counting. I think that the problem is that the  
22 majority --

23 QUESTION: You say that it included a summary  
24 of his philosophy going back to law school, an  
25 assessment of President Nixon's character. If it gets

1 down to 300 words, that is getting pretty short to cover  
2 those fields, isn't it?

3 MR. MILLER: Your Honor, I think that 300  
4 words of expression should be protected, certainly in a  
5 manuscript that hasn't been published yet. But, if I  
6 can address your point, it is not really a question of  
7 counting words, I think, it is a question of the fact  
8 that the majority applied the wrong standards in  
9 determining copyrightability, and that is one of the  
10 major points we make on the copyrightability.

11 QUESTION: The copyright Act applies to works,  
12 as I understand it, not to words. Is that correct?

13 MR. MILLER: Yes, Justice Powell.

14 QUESTION: It uses the term "works," doesn't  
15 it?

16 MR. MILLER: I think the Copyright Act applies  
17 to protect expression, and expression has been defined  
18 in cases to include the following, this is a reading  
19 from a Second Circuit case: What is protected is the  
20 manner of expression, the author's analysis or  
21 interpretation of events, the way he structures his  
22 material and marshals his facts, his choice of words,  
23 and the emphasis he gives to the particular  
24 developments." That is a quote from the Second Circuit  
25 opinion in Wainwright, and that was the definition of

1 expression.

2 The majority in this case didn't follow that  
3 definition in determining what was copyrightable in the  
4 copied portions of the manuscript. What the majority  
5 did, was they said, expression is limited to barest  
6 elements, to literal copying, to the ordering and choice  
7 of the words themselves. We submit that traditional  
8 copyright cases have always recognized that copyright  
9 protection for expression goes beyond just the literal  
10 words themselves, to protect, as the dissent noted in  
11 this case, selection, arrangement, emphasis, and  
12 anything else that makes original.

13 QUESTION: Mr. Miller, it isn't just a  
14 question that he who reads may count as to how many  
15 words were copyrightable, is that the Court of Appeals  
16 had one view of copyrightability, and I take it that you  
17 have a somewhat broader view, and that is why you reach  
18 a higher number.

19 MR. MILLER: That's correct. That's correct,  
20 Justice Fenquist, that is the reason for the  
21 difference.

22 The majority applied, we submit, an incorrect  
23 standard in a second respect. They adopted a  
24 dissection --

25 QUESTION: I take it that you would say that

1 even there was not a single instance in this story that  
2 you could identify as a literal quote, you would think  
3 that there could be a violation of copyright.

4 MR. MILLER: I think it is certainly possible,  
5 Justice White, that there could be a violation in that  
6 situation, but that, of course, isn't the situation  
7 here. Here there was use of exact language. Indeed,  
8 the editor of The Nation Magazine testified that he took  
9 this passage, he said, because that was Ford's own way  
10 of saying it. He took another passage, he said, because  
11 of the absolutely certainty with which Ford addressed  
12 himself. He took still another passage because -- he  
13 quoted it because it was a much more powerful statement  
14 for the reader.

15 QUESTION: Mr. Miller, do you think that the  
16 fact that it was an unpublished work expands your  
17 definition of what is protectable under the copyright  
18 law, or is the fact that it was unpublished in your view  
19 just one element of determining Fair Use?

20 MR. MILLER: I think the fact that it wasn't  
21 published doesn't expand the scope of what is  
22 protectable, but it is certainly a very important factor  
23 in determining Fair Use.

24 QUESTION: Mr. Miller, it would be helpful to  
25 me, in trying to focus on the difference between your



1 two positions, if you could identify one or two of the  
2 passages that you think are clearly copyrightable, and  
3 they think are not, because talking in generalities, it  
4 is always a little hard to focus on what the difference  
5 is.

6 MR. MILLER: President Ford has a discussion  
7 in the book that describes his discussions with  
8 Alexander Haig during that eight-day period prior to the  
9 time that he became President. He covered a lot of that  
10 same material in the Hungate testimony, but the material  
11 in the book, if you compare the two, has quite a  
12 different emphasis from what it has in Hungate. The  
13 material in the book includes President Ford's subjective  
14 feelings about those events.

15 He tells how, for example, President Nixon had  
16 reassured him over many months that he would ultimately  
17 prevail, and that the facts would justify him. He says  
18 how hurt he was, the deep hurt that he had when that  
19 material was revealed. He includes also the reaction of  
20 his aides to Alexander Haig's discussion of the pardon,  
21 and how they reacted to that. All of that creates a  
22 subjective -- it gives the subjective feelings that Ford  
23 had during those things.

24 President Ford testified in his deposition  
25 that what he tried to add to the book was the more

1 subjective, the more personal feelings that went through  
2 his mind for the time the pardon became a possibility.

3 QUESTION: One of the examples that you have  
4 given, I guess, is this written statement that President  
5 Ford read to General Haig over the telephone, I guess it  
6 was. Is there a dispute between you as to whether that  
7 particular writing was copyrightable?

8 MR. MILLER: No, there really isn't because  
9 our position, and I think the District Court's position  
10 was that the totality of Ford's expression is  
11 copyrightable.

12 QUESTION: Just take the quote itself, is that  
13 in your view copyrightable?

14 MR. MILLER: The quote itself, Your Honor,  
15 don't I think it was copyrightable, but we are not so  
16 contending in this case.

17 QUESTION: Is see.

18 MR. MILLER: The reason why it is not  
19 copyrightable, and we are not contending it is, is that  
20 the quote itself was disclosed. It is the same thing  
21 that President Ford said in the Hungate testimony, and  
22 that would get into a very difficult question, copyright  
23 protection for government work.

24 QUESTION: Let me be sure I understand your  
25 entire position. You are saying that that statement as

1 a part of his general description of that particular  
2 event was copyrightable?

3 MR. MILLER: Yes.

4 QUESTION: I see.

5 MR. MILLER: Still another example, Your  
6 Honor, President Ford describes many factors that  
7 influenced him in granting the pardon, the advice that  
8 he received from various people, and the advice that he  
9 received from Henry Ruth, and so forth and so on.

10 Our position is that the totality of that  
11 expression, including the advice and the reaction that  
12 Ford had to it represents Ford's expression. The Nation  
13 position, as I understand it, is that what one should do  
14 in determining copyrightability is to look at each of  
15 those little pieces of advice separately and say, well,  
16 this is not copyrightable, and therefore that is not  
17 entitled to further consideration.

18 We both agree that the Ruth Memorandum per se  
19 is not copyrightable. We urge that President Ford's  
20 entire expression, including the Ruth Memorandum and the  
21 impact it had on him, represents copyrightable  
22 expression as it has been traditionally viewed by the  
23 courts.

24 QUESTION: Let me ask just one other question  
25 here. On some of these example, do you think the that

1 President Ford is not an ordinary author affects the  
2 determination of the copyrightability of some of this  
3 material? In other words, there is newsworthiness in  
4 the fact that he was the President of United States when  
5 he had these views, as distinguished from someone else  
6 who might just have been narrating about them.

7 MR. MILLER: Your Honor, I don't think that  
8 that fact should affect copyrightability. I think it  
9 might affect Fair Use, but after the book is published.  
10 I think our position is that before the book is  
11 published, President Ford ought to have the same right  
12 that any author has, the right of first publication.  
13 President Ford took two years to write this book. This  
14 harvest of knowledge that was so important to the  
15 majority in which we concur, that harvest of knowledge  
16 came about because President Ford spent two years  
17 writing the book. We submit that having put that  
18 effort, he's entitled to the right that the copyright  
19 laws have given him, namely, the right of first  
20 publication.

21 I would like to also just go back to the  
22 copyrightability point. The majority, in addition to  
23 the two other factors that I mentioned, also gave no  
24 consideration to the paraphrasing here, stating that  
25 paraphrasing is the equivalent of copying only if the



1 copier has copied virtually the entire work. We submit  
2 that the cases don't support that interpretation of a  
3 copyright.

4 In essence, the majority imposed these --  
5 applied these limited restrictions on copyrightability  
6 because of its belief that to do otherwise would give  
7 President Ford a monopoly over facts. We submit that  
8 that is not true. It would only give President Ford  
9 protection for his expression of those facts.  
10 Furthermore, that protection is not unlimited. It is  
11 protection that is subject to the requirements of the  
12 Fair Use doctrine.

13 On the Fair Use doctrine --

14 QUESTION: Do I understand you to say that if  
15 President Ford, in his memoirs, revealed that an event  
16 that no one had ever known about before and he described  
17 that event, do you say that no one could reveal that  
18 event without violating his copyright?

19 MR. MILLER: They could certainly reveal the  
20 information, but they couldn't take his expression.

21 QUESTION: Yes. It is just a question of when  
22 in the process of revealing the event, they are close  
23 enough to his expression to get in trouble?

24 MR. MILLER: That's correct. That's correct,  
25 Justice White, and we submit that the majority, in

1 making that determination, applied a number of standards  
2 that --

3 QUESTION: Such as it has to be a literal  
4 quote, or something.

5 MR. MILLER: It has to be a literal quote, and  
6 such as --

7 QUESTION: You say, it can also violate if it  
8 is just a paraphrase.

9 MR. MILLER: That's correct.

10 QUESTION: How do you recognize a paraphrase  
11 when you meet it on the street?

12 MR. MILLER: Justice White, I think it is a  
13 question of looking at the material and exercising  
14 judgment.

15 QUESTION: As to whether it is practically the  
16 same thing as the quote?

17 MR. MILLER: What I think the District Court  
18 did in this case was the District Court took the Ford  
19 material and compared it in its totality with what The  
20 Nation did, and said, overall this is substantially  
21 similar and, therefore, infringement.

22 QUESTION: Substantially similar, that is your  
23 test?

24 MR. MILLER: That is the test of infringement,  
25 yes, and I think that's the test that has to be applied

1 when you are dealing with paraphrase.

2 QUESTION: Paraphrase then includes the idea  
3 that even though there is not literal quotation, there  
4 is so much similarity in arrangement, the sentence  
5 structure, and that sort of thing?

6 MR. MILLER: That's correct. That's correct,  
7 Justice Renquist.

8 On the Fair Use branch of the case, we urge  
9 that the fundamental flaw of the court, or a fundamental  
10 flaw of the court was in its belief that in some way a  
11 decision was required in order to facilitate the harvest  
12 of knowledge so essential to a democratic state.

13 QUESTION: Mr. Miller, could I interrupt once  
14 more. I'm sorry, but I just want to be sure. Is there  
15 anything that tells us which 300 words the Court of  
16 Appeals and your opponent agree are copyrightable, and  
17 which words you agree are not copyrightable? Do we have  
18 anything that really tells us?

19 MR. MILLER: I think in The Nation sentence by  
20 sentence analysis, they have a chart, which is in the  
21 Joint Appendix, and they have a little red line  
22 underneath the stuff that they say or concede is  
23 possibly expression, or they are arguable expressions,  
24 or something like that. I think that that is probably  
25 where the 300 words comes from. It is probably the

1 count of the material that The Nation conceded was  
2 expression.

3 QUESTION: Conversely, everything in yellow  
4 you contend is copyrightable.

5 MR. MILLER: Really, everything in yellow is  
6 what we contend was copyrightable.

7 QUESTION: Is that the total question, that it  
8 is copyrightable? I thought there might have been an  
9 awful lot of things in the memoirs that were  
10 copyrightable, but the claim is there that there was no  
11 violation because it was a paraphrase. Isn't part of  
12 the holding below that there wasn't a violation of the  
13 copyright because it was only a paraphrase?

14 MR. MILLER: That was part of the holding  
15 below, and our contention is that the majority shouldn't  
16 have dismissed paraphrasing so lightly because it can  
17 indeed --

18 QUESTION: Do you say that -- The court below  
19 said 300, and you say 700?

20 MR. MILLER: No. I think that everything that  
21 is yellowed in our Appendix C to the cert petition,  
22 which comes to about 1800 words, was in fact copied from  
23 the --

24 QUESTION: You are just saying, because it was  
25 a violation of copyrightable material?



1 MR. MILLER: Yes, that is correct.

2 QUESTION: Eighteen hundred words.

3 MR. MILLER: Yes.

4 QUESTION: When you say 1800 words were  
5 copied, do you say that every one of those 1800 words  
6 was copyrightable?

7 MR. MILLER: Yes.

8 QUESTION: It is just as though President Ford  
9 used those words.

10 MR. MILLER: Yes, that's correct.

11 As I said, the court below acted on the  
12 premise or the underlying philosophy that the decision  
13 was necessary in order to facilitate the harvest of  
14 knowledge so necessary to a democratic state. But the  
15 material was about to be harvested by President Ford  
16 himself, and nothing that The Nation did in any way  
17 facilitated that.

18 What The Nation did was to arrogate to itself  
19 author's right of first publication. Author Ford had  
20 spent two years writing this book, and The Nation took  
21 it upon itself to be the first publisher or, to use The  
22 Nation's words, "to scoop the President on his own  
23 memoirs."

24 As I think I have already suggested, the  
25 majority believed that this policy of facilitating the

1 harvest of knowledge was somehow at odds with the  
2 Copyright Act. We submit that it is not. The Copyright  
3 Act indeed has that very same purpose, to reward authors  
4 so that authors will go out and spend the time and  
5 effort necessary to write their books so that the public  
6 will have the benefit of that.

7 QUESTION: So that they'll get some  
8 royalties.

9 MR. MILLER: And so that they'll get some  
10 royalties, too. But the Copyright Act provides an  
11 economic incentive, and the real underlying purpose of  
12 that is the purpose that the public will get the benefit  
13 of their writings.

14 I would like to just talk briefly about the  
15 legislative history of the Copyright Act because that  
16 makes clear that the fact that work is unpublished means  
17 that the Fair Use doctrine has narrow applicability.  
18 The court disregarded that completely. That statement  
19 that the author's right of first publication ought to  
20 prevail appears in committee reports, the 1966 and '67  
21 House report. It appears in the '76 -- the '75 Senate  
22 report.

23 It didn't appear in the final House report  
24 only for one reason, and that is that the parties had  
25 gotten together and agreed on specific guidelines. But

1 the House went out of its way to refer to its earlier  
2 discussion, and to say, we still think that that earlier  
3 discussion has validity, and it still has value for an  
4 analysis of the various aspects of the problem.

5 Mr. Chief Justice, if I have some time left, I  
6 would like to reserve it for rebuttal.

7 CHIEF JUSTICE BURGER: Very well.

8 Mr. Abrams.

9 ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.

10 ON BEHALF OF THE RESPONDENT

11 MR. ABRAMS: Mr. Chief Justice, and may it  
12 please the Court.

13 The copyright law protects works of  
14 authorship, and President Ford wrote a book which was  
15 properly copyrighted. We have never disputed the fact  
16 that the book was copyrightable in its totality, and  
17 copyrighted. The copyright law also, as Mr. Miller  
18 said, does not protect facts, and it doesn't protect  
19 certain other things as to which we seem not to be in  
20 disagreement, for example, government works. It does  
21 not protect other information of one sort or another.

22 QUESTION: It does protect, doesn't it, Mr.  
23 Abrams, a particular method of describing a fact.

24 MR. ABRAMS: It protects expression, Justice  
25 Renquist, which indeed is very often a way of describing

1 a fact. It doesn't protect ideas. It doesn't protect  
2 facts. It does protect, as the Second Circuit said, the  
3 structure and mosaic of a work, but it doesn't protect  
4 expression.

5 The Second Circuit went through a process of  
6 looking to see what part of what was before it was the  
7 sort of thing as to which President Ford could bring a  
8 law suit on against The Nation.

9 Let me give you, if I may, first the numbers,  
10 which some members of the court have asked for, in terms  
11 of quotations and the like. We deal here with a  
12 manuscript of 655 pages written by President Ford,  
13 approximately 200,000 words. We deal with an article by  
14 The Nation of three pages of a total of 2250 words.

15 QUESTION: So the real comparison is between  
16 300 words.

17 MR. ABRAMS: That is the starting cut, I  
18 think. There are cases in other areas in which a small  
19 amount of words has been held to violate the copyright  
20 law. There are other cases, Betamax, in which 100  
21 percent does not violate. It does depend upon the case,  
22 but we are starting out, I think, fairly, talking about,  
23 if we are right, and if the Second Circuit is right in  
24 saying that it is 300 words, in comparing the 300 words  
25 to the book or, if you will, to the chapters, which



1 relate to the --

2 QUESTION: How about to the Time excerpt?

3 MR. ABRAMS: The Time excerpt wasn't in  
4 existence, and never got written, Your Honor. Mr.  
5 Navasky didn't have that or knowledge of it, so I can't  
6 compare it to that.

7 QUESTION: So he never saw that.

8 MR. ABRAMS: Yes, sir, he never saw it, and so  
9 far as I know it never came into existence at all.

10 QUESTION: Do the 300 words represent just the  
11 direct quotes?

12 MR. ABRAMS: The 300 words represent direct  
13 quotes.

14 QUESTION: Do you not concede that  
15 paraphrasing other words could constitute a copyright  
16 violation?

17 MR. ABRAMS: I do concede that, Justice  
18 O'Connor. It seems to me, and indeed the law says, that  
19 if you track something slavishly enough, it can indeed  
20 constitute a copyright violation, and there are lots of  
21 cases in which parties have just about literally tracked  
22 what someone else wrote, and put in a little word here  
23 and there, the Wainwright case in the Second Circuit.

24 QUESTION: And perhaps this case.

25 MR. ABRAMS: I hope not, Your Honor.

1 (General laughter)

2 MR. ABRAMS: The Wainwright case in the Second  
3 Circuit seems to me an example of what is not involved  
4 here. The Wainwright case is a case in which a  
5 financial publisher went out and collected all the  
6 recommendations to prospective buyers by Kitty Peabody  
7 sayings and in the news article, so called, was Kitty  
8 Peabody said today this, they said that, they said that,  
9 and they said that. It was the totality of what they  
10 were saying. It was a practice of what they were doing  
11 again and again in article after article.

12 I think that there is a word or two words to  
13 describe what The Nation was engaged in today, it is  
14 news reporting. One may like it or not, but it is the  
15 sort of thing which for Fair Use purposes, which I  
16 haven't reached yet Congress defined as a paradigmatic  
17 example of what is protected.

18 QUESTION: Why are direct quotes or direct  
19 paraphrasing of an author's essentially to news  
20 reporting? Why can't they be rewritten?

21 MR. ABRAMS: It can be rewritten less well,  
22 less probingly, less meaningfully. There was expert  
23 testimony on that very subject. All the testimony was,  
24 both in the amount that was used, and in the nature of  
25 the quotations that were used, I mean literally all of

1 it thought that it was reasonable in journalistic terms,  
2 and that it was reasonable from the point of view of  
3 authors.

4 Mr. Halberstam, for example, testifying, as  
5 all the experts did, uncontradicted, gave examples of  
6 that.

7 QUESTION: Didn't Mr. Navasky himself testify  
8 that the words quoted had a definitive quality and were  
9 a more powerful statement than he himself could have  
10 written. Isn't that the very essence of what is  
11 protected?

12 MR. ABRAMS: Justice O'Connor, those words are  
13 protected, and we agree with that. That is where we get  
14 to 300 words, that at least is a common ground as  
15 regards some of the words. How Mr. Nixon looked in the  
16 hospital, for example, that is pure expression. We  
17 don't have any disagreement with that. What President  
18 Ford learned or says that he learned at Yale Law School  
19 is expression, and we don't have any quarrel with that.  
20 That is how we get to 300 words.

21 Where we disagree -- where we disagree on  
22 numbers or where the Second Circuit is not the same as  
23 what my brother here has said to you today is how to do  
24 the counting, how to do the analysis of that.

25 QUESTION: But you also say that that 300 can

1 be published under the rubric of Fair Use.

2 MR. ABRAMS: Yes, sir. As a matter of Fair  
3 Use, we argue that the 300 words, as a matter of law --

4 QUESTION: Even if it is the essence of the  
5 article.

6 MR. ABRAMS: It is not the essence of the  
7 article. The essence of the article, as all agree, is  
8 the story of the pardon by one president of his  
9 predecessor president, who in fact appointed him.

10 QUESTION: Mr. Abrams, did the editor of The  
11 Nation know that Time Magazine was going to publish an  
12 article on the book?

13 MR. ABRAMS: By the time the article was  
14 published in The Nation, he was aware that Time Magazine  
15 was going to publish something. He didn't know what,  
16 and he wasn't aware of that at the time that he received  
17 the manuscript.

18 QUESTION: He was trying to scoop the  
19 publication by Time in the vernacular of the news  
20 business?

21 MR. ABRAMS: In a sense, Mr. Navasky testified  
22 that he wanted to be first, yes, sir, and he testified  
23 that he wanted to be first because he wanted to put his  
24 own perspective on it.

25 QUESTION: Did Mr. Navasky contribute anything



1 to the article itself, beyond what he obtained from the  
2 Ford manuscript?

3 MR. ABRAMS: Yes, Your Honor.

4 QUESTION: Besides condensation.

5 MR. ABRAMS: Two things. One is summarized.  
6 If news reporting is presumptively protected.

7 QUESTION: Were any of his ideas incorporated  
8 into that?

9 MR. ABRAMS: In one way they were, Your  
10 Honor. Mr. Navasky testified that by his selection and  
11 choice of the material with respect to the pardon, he  
12 thought that a reader would come out, when you strip of  
13 expression, as Mr. Navasky did, when you strip what  
14 President Ford was saying of how he felt, which Mr.  
15 Navasky generally did, that you come out with a view of  
16 the pardon which involved at least a strong sense that  
17 it may have been the result of improper behavior.

18 QUESTION: You characterize this as objective  
19 reporting or editorializing?

20 MR. ABRAMS: I have to say, Justice Powell, I  
21 think it's some of both. It is a summary on the one  
22 hand, and it is a summary to make a point on the other.  
23 What I would certainly characterize it, as is news  
24 reporting. One of the areas that the District Court  
25 erred in was in passing a sort of judgment on it. He

1 said that it was "poor" journalism. One of the things  
2 that we have urged on you in our briefs is that, be that  
3 as it may, whatever Mr. Navasky might think or, if I  
4 may, what any of us might think here, that's not the  
5 business of courts.

6 QUESTION: Why did you have all the expert  
7 witnesses, then, in the District Court testifying that  
8 something was journalistically proper if courts can't  
9 review that?

10 MR. ABRAMS: What we called them for was to  
11 deal with various aspects of Fair Use. Courts can deal  
12 with the Fair Use factors, and anything that is relevant  
13 to Fair Use.

14 QUESTION: I thought you said they testified  
15 that something was done well from a journalistic  
16 standpoint.

17 MR. ABRAMS: They testified to the amount that  
18 was taken, for example, Part III of Fair Use, they  
19 didn't take any more than was necessary. It was  
20 honorable and reasonable. That, we thought, was a  
21 matter for expert opinion.

22 I went perhaps farther than I had to in having  
23 experts testify that the information wasn't only news,  
24 but was newsworthy. Maybe we didn't have to do that.  
25 But we were not making the case, and we made it very

1 clear to the court again and again, that our view at  
2 least was that the standard to be applied was not  
3 whether it was a great news story, but whether it was  
4 really a news story.

5 What the Second Circuit said was, the question  
6 is when a party comes before a court, and is arguing  
7 Fair Use and saying this is "news reporting," the  
8 question is, is that true or not? Is it a pretext or  
9 not to say that. In Wainwright, the Second Circuit said  
10 that it was a pretext.

11 You can't just say that it's news reporting  
12 and make it news reporting. It matters because news  
13 reporting is set forth by Congress, at least, as an  
14 example of what is presumptively protected as Fair Use.  
15 It doesn't answer all the questions, but it's a start  
16 once one gets to Fair Use analysis.

17 QUESTION: I hope you have a good litmus paper  
18 test to identify news as compared to what is  
19 newsworthy.

20 MR. ABRAMS: We got into, Justice White,  
21 arguments about whether something has to be news.

22 QUESTION: You suggest that there is a lot of  
23 news that's not newsworthy.

24 MR. ABRAMS: I suggest that news doesn't have  
25 to be new, and that was one of the areas we drifted off

1 on to at trial.

2 QUESTION: Did you say that this was also  
3 commercial valuable material that was taken?

4 MR. ABRAMS: As any book is, Your Honor,  
5 sure. I don't have any doubt that Harper & Row wanted  
6 to sell what it had, and that it did so.

7 QUESTION: The question is commercially  
8 valuable to The Nation?

9 MR. ABRAMS: I don't know if anything is  
10 really commercially valuable to The Nation, Your Honor.

11 (General laughter)

12 QUESTION: I am talking to the party to this  
13 action, and not the country with a small "n."

14 MR. ABRAMS: I am sorry, I meant the  
15 magazine. All I meant was the magazine.

16 I suppose in a sense, at least I would have to  
17 concede, there's nothing in the record, that Mr. Navasky  
18 may have hoped long range it would be a good thing for  
19 the magazine, and that eventually they would sell more  
20 copies. They sold 418 copies of this altogether on  
21 newsstands, so it's not the sort of thing one would  
22 ordinarily think of in terms of magazines or  
23 newspapers.

24 If I might, Your Honor, though, I'd like to  
25 continue a propos your question with the question of



1        what is copyrightable and what's not, because  
2        essentially what the Second Circuit did was to say, we  
3        look at this in two ways. First, we see what is it that  
4        we're supposed to count, so to speak. The whole work is  
5        copyrighted. I say again, there is no question about  
6        that, President Ford wrote a copyrightable work. But  
7        it's clear, and we don't disagree with our opponents,  
8        that we are entitled as a general matter to make what  
9        Professor Latman called "unlimited use" of material in  
10       that copyrighted work which is not copyrighted subject  
11       to however this court comes out on the issue of  
12       structure, mosaic, or whatever.

13                Justice Stevens asked earlier for some  
14       examples and, if I may, I would like to just cite one or  
15       two to give you an example of where we think the court  
16       can look to make a decision as to whether the Second  
17       Circuit approach was a correct approach.

18                At page 633 of the Joint Appendix, in the  
19       midst of our paragraph by paragraph analysis of the  
20       article, we quote from the article in paragraph 4 -- of  
21       The Nation article. Paragraph 4 of The Nation article  
22       says, and I will just paraphrase it now, that Ford's  
23       account contained significant new details on the  
24       negotiations and consideration when the subject was  
25       first breached to him by General Haig on August 1st,

1. 1974.

2 General Haig revealed that the newly  
3 transcribed White House tapes were the equivalent of the  
4 smoking gun, et cetera. That came from what we then  
5 annex immediately after page 633, which is pages 634,  
6 635, 636, and 637. It was, I would use the word, news,  
7 if you went to say condensed, paraphrased, it was a  
8 report about that aspect of what President Ford did.

9 The same thing is true of the example that Mr.  
10 Miller cited. I think it is a good example of the Ruth  
11 Memorandum. At page 654 of the Joint Appendix, there is  
12 a paragraph from The Nation article in which The Nation  
13 wrote that the precipitating factor in Ford's decision  
14 was a series of secret meetings. Then they go down to  
15 say that Ford's cites a memorandum from Henry Ruth as  
16 being especially persuasive. "Ruth had written."

17 Where we disagree is this. President Ford  
18 never owned the Ruth Memorandum, and we believe that he  
19 doesn't own it today. What the District Court said was  
20 that when you put the Ruth Memorandum together with how  
21 President Ford used it, the totality was protected, and  
22 that is why we get to 700 words, because they include  
23 the Ruth Memorandum in the 700 words.

24 Our position is that the totality doctrine is  
25 absolutely unprecedented in copyright law, and terribly

1 dangerous because that doctrine would, in fact, give  
2 Harper & Row a monopoly of the story of the pardon of  
3 President Nixon by President Ford.

4 I want to add one thing to it. They're right  
5 when they say that the monopoly they would get is the  
6 monopoly in President Ford's version of that story.  
7 That's true. Mr. Navasky could have gone out and  
8 written a whole article about the pardon, but his  
9 article was about President Ford's version of the  
10 pardon.

11 What I believe their argument comes down to is  
12 that that sort of article cannot be written about at  
13 least published work without violating the copyright  
14 law. That's what it is, because if you once say, you  
15 can't paraphrase, what you are saying is, you can't  
16 report what the books says about that, what happened  
17 next. There were events that happened one after  
18 another. If you say that the Ruth memorandum gets  
19 scores of --

20 QUESTION: Mr. Abrams.

21 MR. ABRAMS: Yes, Your Honor.

22 QUESTION: I didn't understand your opponent  
23 to go that far in his concept of paraphrasing, that  
24 simply a relating of the same of the factual account  
25 would would automatically be described as paraphrasing.

1 MR. ABRAMS: I don't understand him to go that  
2 far in paraphrasing, Your Honor. I understand that when  
3 you put together -- It is my view, at least, that when  
4 you put together their argument about paraphrasing with  
5 the lower court's ruling about the totality of the work,  
6 when you put all that together, what you are seeing is,  
7 for example, an entirety of the depiction of the  
8 pardon.

9 There are 19 paragraphs in The Nation article,  
10 all of that, they say, what, comes from, it is about  
11 President Ford's version of the pardon. It is one thing  
12 to say, we can't do that at all, but as Mr. Miller said  
13 in response to a question that he was asked by Mr.  
14 Justice White, it is not based on the amount of words  
15 that he is talking about. His position and the lower  
16 court's position was that when you looked at it all  
17 together, this was President Ford's version, this was  
18 his depiction of the pardon. Our position is that this  
19 was an article about President Ford's depiction of the  
20 pardon.

21 I agree that if this depiction had gotten so  
22 close at such length so that like Wainwright this was  
23 just a fraud, we would have a different case.

24 QUESTION: When you say, "at such length," do  
25 you mean that your client could have paraphrased that



1 chapter cut of the book and because he chose only one  
2 out of 30 chapters --

3 MR. ABRAMS: No, sir, that is exactly what I  
4 am conceding my client was not allowed to do, was to  
5 take a chapter out of the book and change a few words.

6 QUESTION: Or 300 words out of the book if he  
7 is simply --

8 MR. ABRAMS: When you start to get down,  
9 Justice Renquist, to 300 words, then I think you have to  
10 apply standard Fair Use analysis.

11 QUESTION: Okay. You say, a chapter, let's  
12 say, a chapter of ten pages, 300 words to a page, 3,000  
13 words. There you say that Harper & Row is protected.  
14 You say if you get down to one page, you have to apply  
15 the Fair Use analysis. Is there any line in-between  
16 there?

17 MR. ABRAMS: I should have said, I misspoke a  
18 moment ago, you have to use Fair Use analysis no matter  
19 what you get down to. All I am saying is that first you  
20 have to see what it is that you are looking at, what is  
21 the fair document, what is the fair amount of words, or  
22 whatever, that you are looking at, then you apply fair  
23 use analysis.

24 Is there a line that you use? I think you  
25 start with what Congress said. Congress gave four

1 factors to look at, they are not exclusive.

2 QUESTION: The first publication right is not  
3 a factor for consideration in Fair Use?

4 MR. ABRAMS: I think pre-publication, Justice  
5 O'Connor, can be a factor in a particular type of case.  
6 For example, if this were a case --

7 QUESTION: What about this case?

8 MR. ABRAMS: This case, no. We don't think  
9 the factor that it is pre-publication is a factor in  
10 this case. We read the legislative history differently  
11 than our friends, but not just that. We look at a  
12 statute which, when it wants to, distinguishes between  
13 published and unpublished works, and that is what the  
14 copyright law does in Section 104 and 108, 202 and 412.

15 Congress said in a number of situation, we are  
16 going to treat published and unpublished works in a  
17 different way, but that is not that they did here. We  
18 look at a statute which says, news reporting is a  
19 paradigmatic example of Fair Use. We think, and the  
20 Second Circuit on this was unanimous, that what was  
21 involved here was news reporting.

22 QUESTION: Do you think the right of first  
23 publication is a right encompassed under Section 106 of  
24 the law?

25 MR. ABRAMS: Yes. I have no doubt at all that

1 the right of first publication is a right subject to  
2 Fair Use. Everything is subject to Fair Use, that is  
3 what 106 says, that is is subject to 107. So when one  
4 applies Fair Use, it seems to me one looks at what  
5 Congress said. You look at the nature of the use, and  
6 our answer, and the Second Circuit's answer was news  
7 reporting.

8 If you look at the nature of the underlying  
9 work, it is heavily factual, the certainly heavily  
10 factual nature of the work in terms of what Mr. Navasky  
11 was looking at and using. No personal stories, no  
12 vignettes, no stuff which you can take from a book like  
13 that.

14 You look at the question of how much did he  
15 take for the use, and we have undisputed --

16 QUESTION: Do you look at the negative effect  
17 on the potential market and value?

18 MR. ABRAMS: Yes, that is the fourth factor,  
19 and you certainly look at that.

20 QUESTION: Wouldn't that be a factor here to  
21 worry about?

22 MR. ABRAMS: It is a factor here but only if  
23 the negative effect was caused by taking copyrightable  
24 material. If you once say that we are right, that they  
25 are allowed to write a summary, a news article, or

1 whatever, about the pardon, then if Time cancelled  
2 because the news was lost, that's not something that is  
3 compensable at law.

4 If Time cancelled because of the expression  
5 that is something which would be compensable, at least  
6 that would be a factor against us. What the Second  
7 Circuit said looking at this, looking at what it got it  
8 down to after it looked at what was copyrightable in  
9 terms of what was involved here, we had a situation, the  
10 Second Circuit said, in which it can't be the case.

11 What Time cancelled about was the description  
12 of President Ford's Yale Law School. Everyone agreed  
13 that what the article was about was about the pardon,  
14 and that the main thrust of the article that Time wanted  
15 was material about the pardon. So on that factor as  
16 well, we don't lose. In any event, we think we win, as  
17 the Second Circuit said, on the first three factors.

18 QUESTION: Would you repeat what you have said  
19 about the first factor, whether or not publication was  
20 for commercial purposes rather than for non-profit,  
21 educational purposes. This was certainly commercial,  
22 wasn't it?

23 MR. ABRAMS: This is commercial as opposed to  
24 educational, Your Honor.

25 QUESTION: Is it not commercial in every sense



1 in that you knew that the material would be published by  
2 Time in a matter of a couple of weeks?

3 MR. ABRAMS: I think the commercial relates to  
4 my client and not Time. But I would concede in any  
5 event, Justice Powell, that if the first factor requires  
6 a simple choice between whether it is commercial or  
7 educational, as the language is --

8 QUESTION: You flunk that test.

9 MR. ABRAMS: We don't flunk it, Your Honor,  
10 because we view it as a sort of a sliding scale  
11 necessarily. How can news reporting be stated by  
12 Congress to be a paradigmatic example of Fair Use in a  
13 case where the publisher would fail stage one.

14 QUESTION: Yours is educational for profit.

15 MR. ABRAMS: It is hopefully for profits,  
16 Justice Marshall, but it's news reporting. That is why  
17 I pause a little, Justice Powell, before saying that it  
18 is simply commercial. It is not like running it for an  
19 advertisement, for example.

20 It seems to me that when Congress comes right  
21 out and says that news reporting is presumptively  
22 protected, we have to give some meaning to that, and the  
23 meaning, we can't, it seems to me, say that  
24 notwithstanding that news reporting is listed in so many  
25 words by Congress in Section 107 as an example of Fair

1 Use, that every example of news reporting in every  
2 newspaper here today fails stage one if they sell it for  
3 a profit.

4 That is why I think the only sensible reading,  
5 if I may, of Section 1 is to say that what Congress did  
6 was to give two examples. On one side of the scale, it  
7 is pure commercial, and on the other side it is pure  
8 educational.

9 QUESTION: But you do start with copyrighted  
10 material, don't you, which is a little different from  
11 most news reporting.

12 MR. ABRAMS: It really isn't, Your Honor.

13 QUESTION: This was copyrighted, wasn't it?

14 MR. ABRAMS: I'm sorry.

15 QUESTION: Was the book copyrighted?

16 MR. ABRAMS: The book was copyrighted. What  
17 is not unusual is for -- President Ford uses the  
18 doctrine of Fair Use. His book is filled with  
19 quotations of what other people have said, and it is  
20 only protected because of the Fair Use doctrine.

21 If Mr. Ruth, for example, owned his memo -- he  
22 doesn't because it is a U.S. memo, the same with  
23 President Ford, he is not the owner of the memo -- it  
24 would only be Fair Use to allow President Ford to quote  
25 it, even though it may have been copyrighted.

1 QUESTION: Yes, but the kind of Fair Use  
2 example you give of President Ford is in the context of  
3 a work which bears the imprint -- the individual imprint  
4 of an author. Here this Nation thing didn't really add  
5 anything original to what is found in the Ford Memcirs.

6 MR. ABRAMS: Your Honor, if we are right for  
7 the moment, if I am persuasive for the moment with  
8 respect to the pre-publication and post-publication  
9 issue, if one just puts that to the side for the moment,  
10 it is inconceivable to me that anyone would say that  
11 this article, this very article, published after  
12 publication of the Ford Memcirs, violates the copyright  
13 law. It is inconceivable because of the amount quoted,  
14 because of all the factors which we ordinarily take  
15 account of in Fair Use.

16 I understand, it is more than a relevant, it  
17 is a very central question to this case when one talks  
18 about pre-publication and post-publication, but in terms  
19 of whether it is that unusual to have long quotations or  
20 to have an article like this. Book reviews are filled  
21 with much more in quotation than this.

22 QUESTION: Yes, but most book reviews contain  
23 the reviewer's appraisal of the work as a piece of  
24 literature.

25 MR. ABRAMS: News articles on books just

1 published frequently do not, new articles about books  
2 about politics in particular. A book like this is a  
3 political event. It is a president reflecting and  
4 stating what happened during his presidency. It is news  
5 in and of itself, and we have testimony on that. These  
6 things are not in dispute on this record at least.  
7 Everyone has testified as to that. There was no  
8 cross-examination. There were no counter-witnesses as  
9 to that.

10 It does happen, and it happens with some  
11 frequency that that a news article will be written about  
12 a book. The question, to be sure, the question is,  
13 supposed it happened before publication, what difference  
14 does that make? We cite our legislative history, and we  
15 cite more than legislative history. We cite the statute  
16 to you which doesn't say what Mr. Miller wants it to  
17 have said, but it doesn't say it.

18 We cite cases to you which say, in common law,  
19 that it didn't make any difference. The Hemingway case,  
20 for example. We cite Professor Nimmer's book to you  
21 which says, the leading authority on copyright, that at  
22 common law the fact was that pre-publication, Fair Use  
23 applied -- not that it did not apply, that it did apply  
24 in common law.

25 We cite more recent cases, the Am-Law case in



1 the Second Circuit just a few weeks ago, which rather  
2 routinely, Judge Winter went ahead with an unpublished  
3 work and applied the standard, and all the factors under  
4 Fair Use.

5 If we are wrong about published and  
6 unpublished work, if that's dispositive as Mr. Miller  
7 argues, we have a lot of troubles in this case, but if  
8 we are right about that --

9 QUESTION: I understood your opponent to  
10 concede that Fair Use was a proper question for inquiry  
11 here, but he takes the view that whether it is a first  
12 publication is a factor to be considered under Fair  
13 Use. You say, it's not.

14 MR. ABRAMS: I think he goes farther.

15 QUESTION: Is that the essence of the  
16 difference?

17 MR. ABRAMS: I don't think so, Justice  
18 O'Connor. His position in his brief is that Fair Use is  
19 precluded absent extraordinary circumstances in a  
20 pre-publication situation, and that is not our view at  
21 all.

22 If it were that, for example, under Section  
23 101 of the copyright law, every time a program was on  
24 television, or a play is performed, you would have to  
25 have extraordinary circumstances to have a review of it

1 because under the copyright law, that's not a  
2 publication.

3 So that's what we are saying here. We think  
4 what the Second Circuit did as a matter of analysis was  
5 right in first saying, what is copyrightable, what are  
6 we talking about here, and then saying, 300 words, in  
7 the circumstances of this factual book, is Fair Use.

8 QUESTION: Mr. Abrams, you got us up to 700  
9 words with that memorandum. Your opponent says that he  
10 is really talking about 1800 words. Are the 700  
11 included in the 1800 words, or is the 1800 in addition  
12 to that?

13 MR. ABRAMS: No. Of the entirety of the  
14 Nation article of 2250 words --

15 QUESTION: Yes.

16 MR. ABRAMS: -- the amount quoted is about 700  
17 words.

18 QUESTION: Yes.

19 MR. ABRAMS: Our opponents say that an  
20 additional 1100 words were paraphrased.

21 QUESTION: I got you.

22 MR. ABRAMS: There is no argument about 400  
23 words -- about the other 700 words.

24 QUESTION: Thank you.

25 Thank you.

1 CHIEF JUSTICE BURGER: Do you have anything  
2 further, Mr. Miller.

3 MR. MILLER: I have no rebuttal.

4 QUESTION: Mr. Miller, may I ask one question,  
5 please. If the article were published in The Nation  
6 after the publication of President Ford's book, would  
7 that be a copyright violation?

8 MR. MILLER: Justice C'Connor, if that  
9 happened, there would be one significant change in one  
10 of the Fair Use factors, and a possible change in the  
11 other.

12 QUESTION: Yes or no, a violation or not?

13 MR. MILLER: It could be, but I can't answer  
14 yes or no because it would depend upon the economic  
15 impact of the use.

16 A significant factor that would change is that  
17 it would be a published manuscript. If he did this  
18 after the book came out, I don't know whether it would  
19 have caused economic harm, and I think that would be a  
20 significant factor. By doing it before the book came  
21 out, he caused us to lose the benefit of the first  
22 serial license deal that we made.

23 It is possible that if he came out with his  
24 article after the book came out that it wouldn't receive  
25 very much attention because, after all, he didn't add

1 anything to what President Ford said in the article.

2 Thank you.

3 CHIEF JUSTICE BURGER: Thank you.

4 Gentlemen, the case is submitted.

5 (Whereupon, at 2:25 o'clock p.m., the Court

6 adjourned, to reconvene at 10:00 o'clock a.m.,

7 Wednesday, November 7, 1984.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
83-1632 - HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION,

---

INC., Petitioners v. NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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