

**New Era Publ'ns Int'l, ApS v. Henry Holt & Co.,  
873 F.2d 576 (2d Cir. 1989)**

Year	1989
Court	United States Court of Appeals for the Second Circuit
Key Facts	Plaintiff New Era Publications International, ApS, (New Era) alleged defendant Henry Holt & Co. infringed its license for the published and unpublished writings of Church of Scientology founder L. Ron Hubbard. Plaintiff sought to obtain a restraining order prohibiting defendant from publishing a biography about Hubbard in the U.S. titled <i>Bare-Faced Messiah: The True Story of L. Ron Hubbard</i> . The author, who was not a party to the action, purported to contrast factual and fictional accounts of Hubbard's life, quoting liberally and extensively from Hubbard's published and unpublished writings, particularly unpublished early diaries and journals. The district court found that 66 of 69 quoted passages from published works and 91 of 132 passages from unpublished material were fair use. Plaintiff appealed.
Issue	Whether the district court properly denied New Era Publications an injunction preventing the publication of <i>Bare-Faced Messiah</i> .
Holding	<p>The Second Circuit upheld the denial of the injunction, but on different grounds, holding that "equitable considerations dictate denial of injunctive relief in this action." The court also disagreed with "some of the district court's views respecting the proper application of the four fair use factors in this case." Since the district court found all but three passages of the published material were fair use, the appellate court restricted its comments to the 41 passages from unpublished material that the lower court ruled were not permitted by fair use. The court agreed that defendant's use of the 41 unpublished passages was not fair use because all but one of the fair use factors favored plaintiff. The court noted that the purpose and character of the use weighed in favor of defendant because the unauthorized biography squarely fit into the purposes of criticism, scholarship, or research. But the court found that "[w]here use is made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here." The court agreed with the lower court that the author took a substantial amount of unpublished material, weighing against fair use. Turning to the effect on the potential market, the court held that "some impairment of the market seems likely" in light of plaintiff's intent to commission an authorized biography that would draw upon all of Hubbard's writings, both published and unpublished.</p> <p>Although the appellate court ruled in plaintiff's favor, it invoked the doctrine of laches to deny injunctive relief to plaintiff</p> <p><i>Note:</i> 17 U.S.C. § 107 was amended in 1992 to add the following sentence: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." The court's holding should not, therefore, be read to create a <i>per se</i> rule against finding fair use of an unpublished work.</p>
Tags	Second Circuit; Education/Scholarship/Research; Review/Commentary; Textual work; Unpublished
Outcome	Preliminary ruling, mixed result, or remand