

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2003

5
6 (Argued November 19, 2003 Decided April 20, 2004)

7
8 Docket No. 03-7952
9

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12 NXIVM CORPORATION and FIRST PRINCIPLES, INC.,

13
14 Plaintiffs-Appellants,

15
16 -- v.--

17
18 THE ROSS INSTITUTE, RICK ROSS also known as RICKY ROSS, JOHN
19 HOCHMAN, and STEPHANIE FRANCO,

20
21 Defendants-Appellees,

22
23 PAUL MARTIN and WELLSRING RETREAT, INC.,

24
25 Consolidated-Defendants-Appellees.

26
27 -----x

28
29 B e f o r e : WALKER, Chief Judge, JACOBS and STRAUB, Circuit
30 Judges.

31 Appeal from the denial of a preliminary injunction in the
32 United States District Court for the Northern District of New
33 York (Thomas J. McAvoy, District Judge) on plaintiffs-appellants'
34 claims of copyright infringement and trademark disparagement.

35 AFFIRMED.

36 Judge Jacobs concurs in the majority opinion and in a
37 separate concurring opinion.

38
39 ARLEN L. OLSEN, Schmeiser,
40 Olsen & Watts, LLP, Latham, NY

1 (Kevin A. Luibrand, Tobin and
2 Dempf, LLP, Albany, NY, on the
3 brief), for Plaintiffs-
4 Appellants.

5
6 THOMAS F. GLEASON, Gleason,
7 Dunn, Walsh & O'Shea, Albany,
8 NY (Douglas M. Brooks,
9 Martland and Brooks LLP,
10 Saugus, MA, on the brief), for
11 Defendants-Appellees The Ross
12 Institute, Rick Ross also
13 known as "Ricky Ross," and
14 John Hochman, and for
15 Consolidated-Defendants-
16 Appellees Paul Martin, and
17 Wellspring Retreat, Inc.

18
19 HAROLD KOFMAN and ANTHONY J.
20 SYLVESTER, Riker, Danzig,
21 Scherer, Hyland & Perretti
22 LLP, Morristown, NJ (Hinman,
23 Howard & Kattell LLP,
24 Binghamton, NY, on the brief),
25 for Defendant-Appellee
26 Stephanie Franco.

27
28 JOHN M. WALKER, JR., Chief Judge:

29 This case presents us with an opportunity to examine the
30 import of the Supreme Court's holding in Harper & Row Publishers,
31 Inc. v. Nation Enters., 471 U.S. 539 (1985), that "'the propriety
32 of the defendant's conduct'" is relevant to the "'character'" of
33 the use under the first factor of the statutory fair use test for
34 copyright infringement. Id. at 562 (quoting 3 M. Nimmer,
35 Copyright § 13.05[A], at 13-72 (1984)); see 17 U.S.C. § 107
36 (enumerating the fair use factors). Because a full balancing of
37 the statutory fair use factors of § 107, including an evaluation
38 of the propriety of defendants' conduct, favors the relevant

1 defendants-appellees in this case, we affirm.

2 Plaintiffs-appellants NXIVM and First Principles, Inc.
3 (collectively, "NXIVM"), producers of business training seminars,
4 appeal from the decision of the United States District Court for
5 the Northern District of New York (Thomas J. McAvoy, District
6 Judge), denying a preliminary injunction against various
7 defendants-appellees who were alleged to have infringed NXIVM's
8 copyrighted course materials by posting part of it on the
9 internet. Although we find that the district court erred in its
10 application of the first statutory fair use factor, we ultimately
11 agree that NXIVM cannot show a likelihood of success on the
12 merits. Accordingly, we affirm. See Adirondack Transit Lines,
13 Inc. v. United Trans. Union, Local 1582, 305 F.3d 82, 88 (2d Cir.
14 2002) ("[W]e are entitled to affirm . . . on any ground for which
15 there is support in the record, even if not adopted" by the
16 district court); see also AmBase Corp. v. City Investing Co.
17 Liquidating Trust, 326 F.3d 63, 72 (2d Cir. 2003) (same); Wright
18 v. Giuliani, 230 F.3d 543, 547 (2d Cir. 2000).

19
20 **I. BACKGROUND**

21 NXIVM provides a course manual for the paid subscribers to
22 its exclusive and expensive seminar training program known as
23 "Executive Success." The 265-page manual contains a copyright
24 notice on virtually every page and all seminar participants sign

1 non-disclosure agreements, purporting to bar them from releasing
2 the manuscript or proprietary techniques learned in the seminars
3 to others. It is unpublished in the sense that it is not
4 available to the general public. NXIVM claims to have developed
5 a proprietary "technology" called "Rational Inquiry,"™ a
6 methodology to improve communication and decision-making.

7 Defendant Rick Ross runs nonprofit websites,
8 www.rickross.com and www.cultnews.com, in connection with his
9 work as a for-profit "cult de-programmer." The websites provide
10 information to the public about controversial groups, about which
11 complaints of mind control have been lodged. Ross allegedly
12 learned of NXIVM's activities in the course of his de-programming
13 services, obtaining the manuscript indirectly from defendant
14 Stephanie Franco, a one-time NXIVM participant.

15 Two reports authored separately by defendants John Hochman
16 and Paul Martin, self-styled experts on groups such as NXIVM,
17 were commissioned by Ross; they analyze and critique the
18 materials from the manual. The reports quote sections of the
19 manual in support of their analyses and criticisms and were
20 ultimately made available to the public through Ross's websites.
21 One of the reports plainly acknowledges that NXIVM has
22 "intellectual property rights" in its materials and that NXIVM
23 makes an effort to keep its manual "confidential." This report
24 seems to appreciate that its access to the copyrighted materials

1 was unauthorized, although this is likely a disputed issue of
2 fact.

3 NXIVM sued Ross and various co-defendants for copyright
4 infringement under 17 U.S.C. §§ 106 & 106A, trademark
5 disparagement under the Lanham Act, 15 U.S.C. § 1125(a), and
6 interference with contractual relations under state law (because
7 the materials were allegedly procured through defendant Franco's
8 purported violation of her non-disclosure agreement).

9 Principally on the basis of the copyright infringement claim,
10 NXIVM moved for a preliminary injunction to require that
11 defendants remove the copyrighted information from Ross's
12 websites.

13 The district court denied the preliminary injunction,
14 finding no likelihood of NXIVM's success on the merits because
15 defendants' fair use defense was likely to succeed. See Random
16 House, Inc. v. Rosetta Books LLC, 283 F.3d 490, 491 (2d Cir.
17 2002) (per curiam). However, the district court preliminarily
18 enjoined Stephanie Franco from any further release of NXIVM's
19 materials. NXIVM appealed.

21 II. DISCUSSION

22 A. Legal Standards

23 We review the denial of a preliminary injunction for an
24 abuse of discretion. See Zervos v. Verizon New York, Inc., 252

1 F.3d 163, 171 (2d Cir. 2001). But we may affirm on any ground
2 supported by the record. AmBase Corp., 326 F.3d at 72. A party
3 seeking a preliminary injunction in this circuit must show: (1)
4 irreparable harm in the absence of the injunction and (2) either
5 (a) a likelihood of success on the merits or (b) sufficiently
6 serious questions going to the merits to make them a fair ground
7 for litigation and a balance of hardships tipping decidedly in
8 the movant's favor. ABKCO Music, Inc. v. Stellar Records, Inc.,
9 96 F.3d 60, 64 (2d Cir. 1996). In a copyright case, the
10 irreparable harm requirement can be met by proof of a likelihood
11 of success on the merits. Id.

12 To demonstrate a likelihood of success on the merits of its
13 copyright claim, NXIVM must establish that it owns a valid
14 copyright and that defendants have engaged in unauthorized
15 copying. See id. Defendants can defeat this prima facie showing
16 of infringement, however, by demonstrating that their copying is
17 protected by the fair use doctrine. See Tufenkian Import/ Export
18 Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d
19 Cir. 2003); Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 107
20 (2d Cir. 1998). The factors relevant to determining whether fair
21 use applies to a particular case are set forth in 17 U.S.C.
22 § 107, which provides:

23 Notwithstanding the provisions of sections 106 and
24 106A, the fair use of a copyrighted work . . . for
25 purposes such as criticism, comment, news reporting,
26 teaching . . ., scholarship, or research, is not an

1 infringement of copyright. In determining whether the
2 use made of a work in any particular case is a fair use
3 the factors to be considered shall include -

4 (1) the purpose and character of the use,
5 including whether such use is of a commercial
6 nature or is for nonprofit educational
7 purposes;

8 (2) the nature of the copyrighted work;

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

12 (4) the effect of the use upon the potential
13 market for or value of the copyrighted work.

14 The fact that a work is unpublished shall not itself
15 bar a finding of fair use if such finding is made upon
16 consideration of all the above factors.
17

18 Although defendants bear the burden of proving that their use was
19 fair, see Infinity, 150 F.3d at 107, they need not establish that
20 each of the factors set forth in § 107 weigh in their favor.

21 Wright v. Warner Books, Inc., 953 F.2d 731, 740 (2d Cir. 1991).

22 Instead, all factors must be explored and the results weighed
23 together in light of the purposes of copyright and the fair use
24 defense. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569,
25 578 (1994).

26 **B. Defendants' Fair Use Defense**

27 At the core of this appeal is the proper weighing, in a
28 copyright infringement suit, of the first of the four statutory
29 fair use factors after Harper & Row, 471 U.S. at 539. We must
30 decide whether the district court should have more fully and
31 explicitly considered, in its analysis of the first factor, that
32 defendants must have known (or at least very likely knew) that

1 the unpublished manuscript from which quotations were taken and
2 disseminated on the internet was acquired in an unauthorized
3 fashion. We conclude that the district court did not fully
4 analyze the impact of defendants' alleged misappropriation of the
5 NXIVM manual in assessing fair use. Accordingly, we cannot adopt
6 the district court's fair use analysis in whole. However,
7 following our own review of the relevant factors, including the
8 subfactor that the district court failed to address fully and
9 explicitly within the first factor, we conclude that the doctrine
10 of fair use still defeats any likelihood of plaintiffs' success
11 on the merits. Accordingly, we affirm the denial of the
12 preliminary injunction.

13 We turn to the four-factor test for fair use.

14 **1. The "purpose and character" inquiry**

15 The court's function, in inquiring into "the purpose and
16 character of the use," 17 U.S.C. § 107(1), is:

17 to see, in Justice Story's words, whether the new work
18 merely 'supersede[s] the objects' of the original
19 creation, or instead adds something new, with a further
20 purpose or different character, altering the first with
21 new expression, meaning, or message . . . , in other
22 words, whether and to what extent the new work is
23 'transformative.' . . . [T]he goal of copyright, to
24 promote science and the arts, is generally furthered by
25 the creation of transformative works. Such
26 [transformative] works thus lie at the heart of the
27 fair use doctrine's guarantee of breathing space . . .

28
29 Campbell, 510 U.S. at 579 (citations omitted) (alterations in
30 original). We agree with the district court that the websites'
31 use of quotations from the manual to support their critical

1 analyses of the seminars is transformative. As we held in
2 Wright, “there is a strong presumption that factor one favors the
3 defendant if the allegedly infringing work fits the description
4 of uses described in § 107.” Wright, 953 F.2d at 736. Where the
5 defendants’ use is for the purposes of “criticism, comment ...
6 scholarship, or research,” 17 U.S.C. § 107, factor one will
7 normally tilt in the defendants’ favor.

8 This presumption, moreover, is not necessarily rebutted by a
9 concurrent commercial purpose on a defendants’ part, here the
10 fact that Ross and Martin also run for-profit businesses in
11 connection with their criticisms. The Supreme Court in Campbell
12 rejected the notion that the commercial nature of the use could
13 by itself be a dispositive consideration. The Campbell opinion
14 observes that “nearly all of the illustrative uses listed in the
15 preamble paragraph of § 107, including news reporting, comment,
16 criticism, teaching, scholarship, and research ... ‘are generally
17 conducted for profit,’” Campbell, 510 U.S. at 584 (quoting Harper
18 & Row, 471 U.S. at 592) (Brennan, J., dissenting), and that
19 Congress “could not have intended” a rule that commercial uses
20 are presumptively unfair. Id. The commercial objective of the
21 secondary work is only a subfactor within the first factor.
22 “[T]he more transformative the new work, the less will be the
23 significance of other factors, like commercialism, that may weigh
24 against a finding of fair use.” Id. at 579. Finding the work
25 substantially transformative, the district court properly

1 discounted the secondary commercial nature of the use.

2 What the district court did not fully and explicitly
3 consider, and what NXIVM correctly urges that it should have
4 considered, is "the propriety of [a] defendant's conduct," as
5 directed by Harper & Row, 471 U.S. at 562-63 (citations omitted).
6 Our circuit has recognized that this is an integral part of the
7 analysis under the first factor. Wright, 953 F.2d at 737; see
8 also Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119,
9 1122 (9th Cir. 1997) (finding analysis of the defendant's conduct
10 to be relevant "at least to the extent that [the defendant] may
11 knowingly have exploited a purloined work for free that could
12 have been obtained for a fee"). While some have commented that
13 this inquiry is counter-indicated by the policy interests
14 supporting copyright and fair use protections, see, e.g., Pierre
15 N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105,
16 1126-28 (1990) (arguing against considering the defendants' good
17 or bad faith), Harper & Row directs courts to consider a
18 defendant's bad faith in applying the first statutory factor.

19 Thus, to the extent that Ross, Martin, or Hochman knew that
20 his access to the manuscript was unauthorized or was derived from
21 a violation of law or breach of duty, this consideration weighs
22 in favor of plaintiffs. Moreover, it has been considered
23 relevant within this subfactor that a defendant could have
24 acquired the copyrighted manuscript legitimately; in this case,
25 the relevant defendants could have paid the requisite fee to

1 enroll in NXIVM's seminars.¹ See generally William F. Patry,
2 The Fair Use Privilege in Copyright Law 109, 130-32 (2d ed.
3 1995). The district court should have more fully and explicitly
4 considered defendants' bad faith within its analysis of the first
5 factor and did not. For the purposes of our analysis here, we
6 assume defendants' bad faith and weigh this subfactor in favor of
7 plaintiffs.

8 But just how much weight within the first factor should a
9 court place on this subfactor of bad faith? Some courts have
10 found Harper & Row to stand for the broad proposition that "[t]o
11 invoke the fair use exception, an individual must possess an
12 authorized copy of a literary work." Atari Games Corp. v.
13 Nintendo of Am. Inc., 975 F.2d 832, 843 (Fed. Cir. 1992). Since
14 we assume defendants' copy of the NXIVM manuscript was
15 unauthorized, the rule enunciated in Atari would foreclose the
16 fair use defense altogether based upon defendants' bad faith.

17 However, we read Harper & Row's holding more narrowly than
18 the broad proposition suggested by Atari. In Harper & Row, the

¹ With the district court, we decline to rule on the enforceability of the particular non-disclosure agreement NXIVM requires its participants to sign; nothing here turns upon it and the issue is not properly before us. We do note, however, that even if the non-disclosure agreement were enforceable, a violation of that agreement would be a breach of a contractual duty but would not ipso facto be a copyright infringement. On the other hand, such a violation of a contractual duty, if it were found to be an enforceable duty, would be relevant in assessing the bad faith subfactor within the first factor.

1 defendants knowingly acquired a "purloined manuscript" for the
2 very purpose of preempting the plaintiff's first publication
3 rights, rights already sold by the copyright owner to the
4 plaintiff, for which the defendants had an opportunity to bid.
5 The Court wrote that the defendants' "use had not merely the
6 incidental effect but the intended purpose of supplanting the
7 copyright holder's commercially valuable right of first
8 publication." 471 U.S. at 562. Ultimately, the Court rejected
9 the fair use defense in Harper & Row, not just because of the
10 defendants' bad faith, but also because the defendants had failed
11 to make any substantial transformative use of the copyrighted
12 work. Id. at 543. Here, while NXIVM urges that its first
13 publication rights were similarly "scoop[ed]," id. at 542, 556,
14 562, defendants' use in this case was quite plainly critical and
15 transformative. See also Chicago Bd. of Educ. v. Substance,
16 Inc., 354 F.3d 624, 628 (7th Cir. 2003) (distinguishing Harper &
17 Row on the basis that Harper & Row did not involve criticism of
18 the copyrighted work).

19 Because the Harper & Row Court did not end its analysis of
20 the fair use defense after considering and ascertaining the
21 defendants' bad faith there, we believe that the bad faith of a
22 defendant is not dispositive of a fair use defense. Instead, we
23 agree with the court in Religious Tech. Ctr. v. Netcom On-Line
24 Communication Servs., Inc., 923 F. Supp. 1231, 1244 n.14 (N.D.
25 Cal. 1995), that "[n]othing in Harper & Row indicates that [the

1 defendants'] bad faith [is] itself conclusive of the fair use
2 question, or even of the first factor." Moreover, "[a]fter
3 Campbell, it is clear that a finding of bad faith, or a finding
4 on any one of the four factors, cannot be considered
5 dispositive." Id.; see also Campbell, 510 U.S. at 578
6 (emphasizing that no single fair use factor is dispositive and
7 warning against the application of "bright-line rules" in fair
8 use analysis); 4 Melville B. Nimmer & David Nimmer, Nimmer on
9 Copyright § 13.05[A][1][d] (2003) (noting that "knowing use of a
10 purloined manuscript militates against a fair use defense," but
11 not suggesting that bad faith is an absolute bar to fair use).²

12 Thus, while the subfactor pertaining to defendants' good or

² Campbell provides further support for the proposition that while the good or bad faith of a defendant generally should be considered, it generally contributes little to fair use analysis. See Campbell, 510 U.S. at 585 n.18. In Campbell the Court found, in the context of a parody made by the defendants, that the defendants' request for permission to use the original copyrighted work and the plaintiffs' denial of that permission could not - as an evidentiary matter - be used to show that the defendants believed that their use was not fair. The Court wrote that "regardless of the weight one might place on the alleged infringer's state of mind," and that "[e]ven if good faith were central to fair use . . . being denied permission to use a work does not weigh against a finding of fair use." 510 U.S. at 585 n.18 (citing Harper & Row, 471 U.S. at 562) (citation omitted). We believe this analysis further supports our conclusion that a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis. The Court recognized the continuing relevance of Harper & Row, but clarified that the bad faith subfactor can be de-emphasized and will not be dispositive of the first factor or fair use. We follow Harper & Row and await from the Supreme Court a clearer renunciation than the Campbell footnote of bad faith's relevance (however attenuated) to the fair use inquiry.

1 bad faith must be weighed, and while it was error for the
2 district court not to have fully and explicitly considered it, we
3 find that even if the bad faith subfactor weighs in plaintiffs'
4 favor, the first factor still favors defendants in light of the
5 transformative nature of the secondary use as criticism. If no
6 statutory factor can be dispositive after Campbell, neither can a
7 single subfactor be, a fortiori.

8 **2. The "nature of the copyrighted work" inquiry**

9 The parties do not dispute that because the copyrighted
10 work is unpublished, the district court properly found the second
11 factor, "the nature of the copyrighted work," to favor
12 plaintiffs. See Harper & Row, 471 U.S. at 564 ("The fact that a
13 work is unpublished is a critical element in its 'nature,'" and
14 "the scope of fair use is narrower with respect to unpublished
15 works.") (citations omitted); but see 17 U.S.C. § 107 ("The fact
16 that a work is unpublished shall not itself bar a finding of fair
17 use if such finding is made upon consideration of all the above
18 factors.").

19 **3. The "amount and substantiality" inquiry**

20 Consideration of the third factor, "the amount and
21 substantiality of the portion used in relation to the copyrighted
22 work as a whole," 17 U.S.C. § 107(3), "has both a quantitative
23 and a qualitative component," New Era Pubs. Int'l, ApS v. Carol
24 Publ'g Group, 904 F.2d 152, 158 (2d Cir. 1990). The factor
25 favors copyright holders where the portion used by the alleged

1 infringer is a significant percentage of the copyrighted work, or
2 where the portion used is "essentially the heart of" the
3 copyrighted work, Harper & Row, 471 U.S. at 565 (internal
4 quotation marks omitted). Courts have also considered "whether
5 the quantity of the material used was reasonable in relation to
6 the purpose of the copying." Am. Geophysical Union v. Texaco
7 Inc., 60 F.3d 913, 926 (2d Cir. 1994) (internal quotation marks
8 omitted).

9 The district court found that this factor was "at best,
10 neutral," because: (1) defendants copied from only 17 pages of a
11 manual 500 pages long; (2) the "heart" of the work for which
12 plaintiffs were seeking protection, the actual process or idea of
13 "Rational Inquiry," is not copyrightable expression under 17
14 U.S.C. § 102(b); and (3), in any event, this "heart" could not be
15 summed up in the 17 pages that were copied. As to (3), the
16 district court essentially found that there was no "identifiable
17 core that could be appropriated," Maxtone-Graham v. Burtchaell,
18 803 F.2d 1253, 1263 (2d Cir. 1986).

19 NXIVM takes issue with the district court's analysis.
20 First, plaintiffs claim that the district court erred in its
21 counting that defendants quote from 17 pages of "over 500 pages
22 of course materials." NXIVM argues that the proper count is 25
23 pages out of a total of 191 pages because the court below
24 mistakenly included in its count schedules, promotional
25 materials, and duplicated pages, using a Bates-stamping proxy

1 instead of investigating each page.

2 While plaintiffs are correct that the district court over-
3 counted the denominator (the total number of pages), it is plain
4 that the district court also substantially over-counted the
5 numerator (the number of pages copied) by attributing as entire
6 pages quotes as short as a single sentence. Taking these
7 adjustments into account, the quantity of the copyrightable work
8 copied does not weigh in favor of plaintiffs.

9 Second, plaintiffs emphasize that much of defendant Martin's
10 article is simply quotation from plaintiffs' work. They urge us
11 to consider the ratio of copied material included in Martin's
12 article to original material in the article. However, we decline
13 to do so; the statutory enumeration of the third factor plainly
14 requires only an analysis "in relation to the copyrighted work,"
15 not the infringing work. 17 U.S.C. § 107(3).

16 Third, plaintiffs offer yet another argument in support of
17 their analysis of the quantity inquiry within the third factor.
18 They seek to narrow the denominator, the total page count of
19 plaintiffs' work, by conceptualizing the single course manual as
20 separate "modules," each of which they urge is a separate
21 denominator. NXIVM claims support for this approach citing the
22 United States Copyright Office's willingness to register
23 copyrights to plaintiffs at the "module" level. Applying this
24 analysis, plaintiffs allege that defendants copied some entire
25 works. Plaintiffs analogize their theory to a defendant who

1 copies individual articles from a magazine containing separately
2 copyrighted articles. See Am. Geophysical Union, 60 F.3d at 925.
3 We cannot accept this analogy.

4 If plaintiffs' argument were accepted by courts - and, not
5 surprisingly, plaintiffs cite no authority to support it - the
6 third factor could depend ultimately on a plaintiff's cleverness
7 in obtaining copyright protection for the smallest possible unit
8 of what would otherwise be a series of such units intended as a
9 unitary work. The proper analogy in this case is not to separate
10 articles in a magazine, but instead to a book by a single author
11 containing numerous chapters, which are not separately
12 copyrightable. See id. at 925-26 (treating individual articles
13 in a journal as the level of copyright protection when the author
14 of each article is different). The "modules" in this case were
15 written by the same author and they combine to produce one
16 unitary work.

17 Finally, plaintiffs argue that the district court did not
18 engage in the required qualitative analysis at all in looking to
19 see if defendants copied the core of plaintiffs' work. We agree
20 that from the transcript of Judge McAvoy's decision it is unclear
21 whether the district court performed this analysis
22 satisfactorily; to the extent that it did not, we fill the gap
23 here and conclude that the qualitative component of the third
24 factor does not favor plaintiffs.

25 While Harper & Row found that copying only 300 words of an

1 entire book could capture the "heart" of it, 471 U.S. at 564-65,
2 that case arose under distinguishable facts. In Harper & Row,
3 the plaintiffs copyrighted an autobiography of Gerald Ford that
4 was principally of interest for its treatment of the Watergate
5 scandal. Thus, when the defendant magazine in that case
6 published, with virtually no commentary, the very section of the
7 book containing Ford's views on Watergate, the Court could easily
8 identify it as the core of the manuscript.

9 Here, by contrast, there is no objective core of expression
10 in the course materials that can be similarly identified. Even
11 plaintiffs reveal their appreciation of this fact when they
12 charge defendants principally with copying the heart of their
13 "services." Such services, however, are not copyrightable
14 expression. See 17 U.S.C. § 102(b) (withholding copyright
15 protection from any "idea, procedure, process, system, method of
16 operation, concept, principle, or discovery"). Moreover, by
17 pressing their "module" argument, plaintiffs virtually concede
18 that defendants could not have taken the core of the copyrighted
19 work, because they do not see the manual as having a core, but
20 rather as an assemblage of "modules."

21 Finally, we agree with the district court that, in order to
22 do the research and analysis necessary to support their critical
23 commentary, it was reasonably necessary for defendants to quote
24 liberally from NXIVM's manual. Accordingly, we find that the
25 third factor does not favor plaintiffs.

1 **4. The "market" inquiry**

2 _____The fourth statutory fair use factor requires us to evaluate
3 the economic impact of the allegedly infringing use upon the
4 copyright owner. The focus here is on whether defendants are
5 offering a market substitute for the original. In considering
6 the fourth factor, our concern is not whether the secondary use
7 suppresses or even destroys the market for the original work or
8 its potential derivatives, but whether the secondary use usurps
9 the market of the original work. Campbell, 510 U.S. at 593. As
10 we stated in Wright, the relevant market effect with which we are
11 concerned is the market for plaintiffs' "expression," and thus it
12 is the effect of defendants' use of that expression on
13 plaintiffs' market that matters, not the effect of defendants'
14 work as a whole. Wright, 953 F.2d at 739. That the fair use,
15 being transformative, might well harm, or even destroy, the
16 market for the original is of no concern to us so long as the
17 harm stems from the force of the criticism offered. See
18 Campbell, 510 U.S. at 591-92 ("[A] lethal parody, like a scathing
19 theater review, kills demand for the original, [but] does not
20 produce a harm cognizable under the Copyright Act.").

21 This factor weighs heavily in defendants' favor. It is
22 plain that, as a general matter, criticisms of a seminar or
23 organization cannot substitute for the seminar or organization
24 itself or hijack its market. To be sure, some may read
25 defendants' materials and decide not to attend plaintiffs'

1 seminars. Indeed, the record reflects that soon after the
2 dissemination of defendants' material, actress Goldie Hawn
3 cancelled a visit with NXIVM's leader, Keith Raniere. But that
4 sort of harm, as the district court properly recognized, is not
5 cognizable under the Copyright Act. If criticisms on defendants'
6 websites kill the demand for plaintiffs' service, that is the
7 price that, under the First Amendment, must be paid in the open
8 marketplace for ideas. See, e.g., New Era, 904 F.2d at 160
9 (citing the "fundamentally different functions" of a critique and
10 a copyrighted original by virtue of their "opposing
11 viewpoints") (citing Maxtone-Graham, 803 F.2d at 1264); Campbell,
12 510 U.S. at 591-92.

13 **5. Summary**

14 Recognizing that "[a]ll [factors] are to be explored, and
15 the results weighed together, in light of the purposes of
16 copyright," Campbell, 510 U.S. at 578, and that no one factor
17 should dominate the analysis, the district court properly denied
18 the preliminary injunction. We agree with the district court
19 that defendants' writings "are undoubtedly transformative
20 secondary uses intended as a form of criticism. All of the
21 alleged harm arises from the biting criticism of this fair use,
22 not from a usurpation of the market by . . . defendants."
23 Accordingly, we affirm the denial of the preliminary injunction
24 on the copyright infringement claim because plaintiffs are not
25 likely to succeed on the merits. Even a finding of bad faith by

1 defendants would not automatically preclude finding that their
2 use was fair use.

3 **C. The Trademark Disparagement Claim**

4 We have carefully considered plaintiffs' arguments that they
5 are entitled to a preliminary injunction on their trademark
6 disparagement claim and find them to be without merit. "[T]he
7 touchstone of whether a defendant's actions may be considered
8 'commercial advertising or promotion' under the Lanham Act is
9 that the contested representations are part of an organized
10 campaign to penetrate the relevant market." Fashion Boutique of
11 Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 57 (2d Cir.
12 2002). As we have already observed in connection with the
13 copyright claim, defendants are not trying to get into the
14 relevant market that is NXIVM's central business concern.
15 Accordingly, we affirm the district court's rejection of the
16 plaintiffs' application for a preliminary injunction on their
17 trademark disparagement claim.

18
19 **III. CONCLUSION**

20 For the foregoing reasons, the district court's denial of a
21 preliminary injunction is affirmed.