GAO Congressional Record, 102nd Congress, Senate

1. Bill	2. Date	3. Pages
S.1035	Sep 27, 1991 (136)	S13923-25

4. Action:

Fair Use With Unpublished Copyrighted Works: Senate passed S. 1035, to amend section 107 of title 17, United States Code, relating to fair use with unpublished copyrighted works.

Pages S13923-25

FAIR USE OF COPYRIGHTED WORKS

Mr. BUMPERS. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 187, S. 1035, regarding unpublished copyrighted works.

The PRESIDING OFFICER. The bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 1035) to amend section 107 of title 17, United States Code, relating to fair use with regard to unpublished copyrighted works.

Mr. GRASSLEY. Mr. President, let me state my support for this bill and applaud Senator SIMON and Senator HATCH for their leadership on the fair use issue.

Let me mention one important concern that should not be overlooked as the full Senate approves the bill. Our goal in this legislation is to ensure that historians, biographers, and other scholars will not be unduly chilled by copyright concerns in the course of doing their important work. It is certainly not our intention, however, to weaken the very strong protection that the courts have given to an important type of copyrighted work—secure tests such as the act, SAT, LSAT, and MCAT.

Our committee report wisely makes this point: it explains that the act is not intended "to reduce the protection of secure tests, whose utility is especially vulnerable to unauthorized disclosure." This language is derived from the testimony of the Ralph Oman, register of copyrights, who explained, at our June 6, 1991, hearing:

Secure tests are particularly vulnerable to having their utility obliterated by unauthorized disclosure. The courts have, accordingly, been particularly solicitous in protecting these works. Indeed, so far as we are aware, the courts have never upheld a fair use claim advanced by any private entity with regard to copying of secure tests or test questions.

So, this bill essentially incorporates the view courts have had with respect to this issue. As Register Oman noted, courts have recognized the special character of secure tests by rejecting fair use claims.

I urge the approval of this bill.

Mr. SIMON. Mr. President, today we pass legislation important to scholarly research and the preservation of history. I am pleased to have been joined in this effort by Senator LEAHY, as well as Senators HATCH, DECONCINI, KENNEDY, KOHL, GRASSLEY, HEFLIN, BIDEN, THURMOND, and BROWN.

The bill simply makes it clear that the fact that a letter, diary, or other work is unpublished should not create a virtual per se bar under copyright law to any direct quotation of that

work. Recent court decisions have called this into question. The ability to quote directly is vital to the important basic research that biographers, historians, and other scholars do.

A broad coalition of authors, publishers, and trade organizations supports this effort, including computer industry representatives. Senator LEAHY and I worked with interested parties for well over a year on legislative language that provides the protection that our Nation's authors urgently need, while at the same time not doing unintended damage to the computer industry.

With each passing day, the livelihood of scholars around the Nation remains in peril. I hope and expect that this legislation will become law soon. I thank all those involved for their hard work on this legislation. I am particularly grateful to Senator LEAHY and his staff for all of their hard work on this bill. I ask unanimous consent that the discussion section of the majority report prepared by the Judiciary Committee, which explains the bill in great detail, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

III. DISCUSSION

FAIR USE OF UNPUBLISHED WORKS

Prior to the 1976 Copyright Act, unpublished works were generally protected by common law rather than by Federal statute. For such works, common-law copyright was, essentially, the right of first publication: the right to control whether, when, and how the author would reveal his or her work to the public.

Under the judicially developed fair use doctrine, portions of an author's published work could be used by another in the creation of a new work. The fair use doctrine was premised on the author's implied consent to reasonable and customary use when he published his work. As a result, the doctrine traditionally was not applied to unpublished works. It was recognized that the use of an author's expression before he or she has authorized its dissemination could seriously impair the author's right of first publication. However, "[t]his absolute rule * * * was tempered in practice by the equitable nature of the fair use doctrine." *Harper & Row* v. *Nation Enterprises*, 471 U.S. 539, 551.

In 1976, Congress passed a broad revision of copyright law which generally preempted common-law copyright in favor of a unified system of Federal protection. As part of this revision, Congress codified the fair use doctrine in section 107 of title 17, announcing its intent to "restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way." S. Rep. No. 94-473, 94th Cong., 1st sess. (1975), H. Rep. No. 94-1476, 94th Cong., 2d sess. at 66 (1976). At the same time, Congress did not limit the fair use doctrine to published works.

In 1985, the Supreme Court addressed the issue of the fair use of unpublished works in its decision in *Harper & Row* v. *Nation Enterprises*, 471 U.S. 539 (1985). That case involved the unauthorized publication of excerpts from President Ford's then unpublished memoirs. The Court, after thoroughly considering all four statutory fair use factors, held that the quotations went beyond what was permitted as a fair use.

The Court rejected the contention that the fair use provision was intended to apply equally to published and unpublished works. It concluded that "the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a defense of fair use." The Court further stated that "the scope of fair use is narrower with respect to unpublished works," and that the author's right of first publication "weighs against" fair use. The Court did not impose a *per se* rule against fair use.

SALINGER AND NEW ERA

In two subsequent cases—*Salinger* v. *Random House*, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987), and *New Era* v. *Henry Holt*, 873 F.2d 576 (2d Cir.), reh'g denied 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S.Ct. 1168 (1990)—the U.S. Court of Appeals for the Second Circuit purported to interpret the Supreme Court's ruling in *Harper & Row*. Unfortunately, these two cases have cast a chilling uncertainty over the publishing community with respect to the fair use of unpublished works.

The rulings of the second circuit in this area of the law are particularly influential because this circuit has jurisdiction over the core of the Nation's book and magazine publishing industry. In *Salinger*, the second circuit ordered the lower court to issue a preliminary injunction barring the publication of a serious biography of author J.D. Salinger because it contained unauthorized quotations from Salinger's unpublished letters. In so ruling, the court of appeals, while formally applying each of the four statutory fair use factors, stated that unpublished works "normally enjoy complete protection against copying any protected expression."

In *New Era*, the second circuit stated that the publisher of a highly critical biography about L. Ron Hubbard, the founder of the Church of Scientology, had infringed copyrights in Hubbard's unpublished diaries and journals by publishing excerpts from them. The court made it clear that an injunction barring publication would have been ordered but for the plaintiff's unreasonable delay in commencing the lawsuit. The court cited with approval the *Salinger* formulation that unpublished works normally enjoy complete protection. The court also said that "[t]he copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use * * *." (873 F.2d at 534.) However, in denying the petition for rehearing en banc, the court retreated from the idea that an injunctive remedy necessarily flows from a finding of infringement. The Supreme Court denied certiorari in *New Era* on February 20, 1990.

The committee is aware that district courts in the second circuit have faced the question of the fair use of unpublished works after the *Salinger* and *New Era* cases. In *Wright* v. *Warner Books*, 748 F. Supp. 105 (S.D.N.Y. 1990), and *Arica Institute, Inc.*, v. *Palmer*, 761 F. Supp. 1056 (S.D.N.Y. 1991), the United States District Court for the Southern District of New York found fair use of unpublished materials for biographical or critical purposes. Nevertheless, the Court of Appeals for the Second Circuit has not renounced its basic formulation in *Salinger* and *New Era* that unpublished works "normally enjoy complete protection against copying." Consequently, the pall that those cases cast over the publishing world remains.

Although some commenters have discounted the significance of the *Salinger* and *New Era* decisions, it became clear from testimony at the congressional hearing that others, including publishers, authors, and their advisors, had great apprehensions, and were inhibited in pursuing their professions by these rulings. Witnesses testified that, in the wake of these two decisions, copyright counsel for historians, biographers, other authors and publishers routinely advise their clients that almost any unauthorized use of previously unpublished materials will subject them to a serious risk of liability for copyright infringement. Consequently, a copyright owner or the owner's estate may exercise virtual veto power over uses of unpublished materials—a veto likely to be exercised in precisely those cases where the materials could cast their author in an unfavorable light. Publishers and editors, confronted with the prospect of copyright litigation, have refrained from publishing works that quote from unpublished primary source materials such as letters, journals, and diaries. Some authors have been forced to produce two copies of works in progress: one fully supported with direct quotation from source material, and one sharply curtailed, with all direct quotation deleted.

In his prepared statement, Mr. Abrams testified that—

"[a]s a result of these rulings, history cannot now be written, biographies prepared, non-fiction works of almost any kind drafted without the gravest concern that even highly limited quotations from letters, diaries or the like will lead to a finding of copyright liability and the consequent issuance of an injunction against publication."

Author Taylor Branch testified that—

"[t]he practical implications of these rulings are so chilling that I don't know how the kind of work I do would continue to be done * * *."

Author J. Anthony Lukas emphasized that—

"* * * if [New Era] is permitted to stand as the guiding precedent in this area, [the people of America] will increasingly find fewer works of compelling history and biography available on their bookshelves and eventually in their libraries."

LEGISLATIVE INTENT OF S. 1035

S. 2370 from the 101st Congress was introduced as a starting point for discussion of the appropriate legislative remedy, and died at the end of the 101st Congress. S. 1035 as introduced in the 102d Congress is the result of extensive discussion and consultation with interested parties. In his statement of introduction, Senator Simon said:

"If scholars and historians can be prohibited from citing primary sources, their work would be severely impaired. * * * [I]f this trend continues, it could cripple the ability of society at large to learn from history and thereby to avoid repeating its mistakes. * * * [T]*his is a straightforward bill which* would direct the courts to apply the full fair use analysis to all copyrighted works, rather than peremptorily dismissing any and all citation to unpublished works as infringements

The bill is intended to overrule the overly restrictive language of Salinger and New Era with respect to the use of unpublished materials and to return to the law of fair use as it was expressed in Harper & Raw. It is intended to address a specific concern arising from particular language in Salinger and New Era. It establishes that, contrary to what some language in Salinger and New Era suggests, the unpublished nature of a work does not trigger a virtual per se ruling against a finding of fair use. In all cases, consistent with Harper & Row, while "[t]he fact that a work is unpublished is an important element which tends to weigh against a finding of fair use," that fact "* * * shall not bar a finding of fair use if such finding

is made upon full consideration of all the above factors."

In his statement of introduction, Senator Leahy said:

"The aim of this legislation, in brief, is to return the fair use doctrine to the status quo of Harper & Row. In that case, the Supreme Court struck the proper balance between encouraging the broad dissemination of ideas and safeguarding the rights to first publication and privacy. Thus, we intend to roll back the virtual per se rule of Salinger and New Era, but we do not mean to depart from Harper & Row."

Senator Leahy added, "Nothing in this legislation is intended to broaden the fair use of unpublished computer software * * *."

In order to ensure that the specific note taken of this element does not, by negative implication, alter the weight and interpretation given to other fair use considerations, the legislation makes clear that the fact that a work is unpublished "shall not diminish the importance traditionally accorded to any other consideration under this section * * *." For example, the Court in Harper stated that the effect of the use upon the potential market for or value of the copyrighted work "is undoubtedly the single most important element of fair use."

Furthermore, the bill makes clear that, rather than considering only one factor, any finding of fair use must be "* * * made upon full consideration of all the above factors." Here, "the above factors" refers to any factor that may properly be considered in section 107. The committee intends that the review of these factors be complete and meaningful. The bill makes clear that a finding of fair use of an unpublished work may be made on the basis of such a review and shall not be barred by the absence of publication. However, in saying that the unpublished nature of a quoted work "shall not bar a finding of fair use," the committee does not intend to imply that the absence of publication cannot be the element that persuades a court to rule against fair use. The absence of publication may, in a given case, be such an element, as may other elements under section 107, provided that the court must give full consideration to all the factors set forth in section 107.

The bill is not intended to affect the law of fair use with respect to unpublished business or technical documents, including materials containing scientific or technical descriptions of projects processes or products under research, study or development. Furthermore, the bill is not intended to reduce the protection of secure tests, the utility of which is especially vulnerable to unauthorized disclosure, nor to affect current protection of broadcast programming.

The Committee is well aware that serious concerns have been expressed in testimony and by members of the committee about decompilation of computer programs. Nothing in the bill is intended in any way to broaden fair use of unpublished computer programs.

This bill does not preempt, limit or otherwise change any trade secret law or other State law remedies for the protection of confidential business or technical documents that exist under the 1976 Copyright Act, as amended.

The bill is effective on its date of enactment. It applies to uses of letters, diaries and other unpublished copyrighted works created before, on or after that date. It governs all lawsuits filed on or after that date, whether the conduct at issue occurred before, on or after that date.

Mr. LEAHY. Mr. President, I welcome passage of S. 1035, a bill to amend the fair use provision of the Copyright Act, on which Senator SIMON and I have worked for more than a year. Recent court decisions—in particular, *Salinger* v. *Random House, Inc.*, 811 F. 2d 90 (2d cir. 1987) and *New Era Publications* v. *Henry Holt & Co.*, 873 F. 2d 576 (2d Cir. 1989)—established a virtual per se rule against the fair use of any unpublished materials, such as letters or diaries. The court of appeals in Salinger said that "[unpublished works] normally enjoy complete protection against copying any protected expression." 811 F. 2d at 97. And the court essentially repeated this formulation in New Era.

Those cases roiled the waters of the publishing and writing world. At the joint hearing we held in July 1990 in the Senate Patents Subcommittee and the House Intellectual Property Subcommittee, Pulitzer Prize winning authors Taylor Branch and Anthony Lukas testified that their work would be crippled if they were flatly barred from quoting unpublished materials. Such materials can give color and life to works—such as "Parting the Waters" or "Common Ground"—that illuminate our history and teach us about ourselves.

Because Senator SIMON and I did not believe that the Supreme Court, in the landmark case of *Harper & Row* v. *The Nation Enterprises*, 471 U.S. 539 (1985) intended to establish such a virtual per se rule, we introduced this bill. Senators DECONCINI, HATCH, KENNEDY, KOHL, BROWN, BIDEN, THURMOND, HEFLIN, and GRASSLEY joined us as cosponsors.

Upon introduction of the bill on May 9, I made a detailed statement explaining why the bill was necessary and what it was designed to accomplish. Further discussion of the legislation's purpose and intent is contained in the Judiciary Committee report on the bill (S. Rept. No. 102-141).

I will not repeat my earlier statement now except to reiterate our intention to roll back the virtual per se rule of the Salinger and New Era cases and to return the law of fair use to the status quo of Harper & Row.

Let me also say that we worked extensively with representatives of the computer software industry, who rightly were concerned that their unpublished source codes could be inadvertently jeopardized by earlier versions of this legislation. We intend to maintain fully the copyright protection that applies to computer software, including unpublished source codes. We took great care in drafting our bill to do nothing that could be interpreted as diminishing such copyright protection for unpublished computer codes, or as broadening the fair use of such codes. I believe that we have produced a bill that will fix the problem that the New Era and Salinger cases created for writers and publishers without creating any new problem for the creators of computer software.

I look forward to working with our colleagues on the House Subcommittee on Intellectual Property and Judicial Administration, Congressmen HUGHES and MOORHEAD, who have introduced similar legislation. I hope that a meaningful fair use bill can be brought to the President's desk for signature in the near future.

Once again, let me thank all those Judiciary Committee staff members who have worked so hard to see this bill through to Senate passage: Susan Kaplan and Brant Lee, with Senator SIMON; Karen Robb and Geoff Cooper with Senator DECONCINI; Darrell Panethiere with Senator HATCH; and Carolyn Osolinik with Senator KENNEDY. I also want to thank Todd Stern and Ann Harkins on my staff for all their efforts to develop this bill and bring it to this point of Senate passage.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 1035

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 107 of title 17, United States Code, is amended by adding at the end thereof the following:

"The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors.".

Mr. BUMPERS. Mr. President, I move to reconsider the vote.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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Message dent of the
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EX AGES

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REPC ITTEES

The following reports of committees were submitted: