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INTRODUCED BY MR. SIMON, ET.AL.

By Mr. SIMON (for himself, Mr. LEAHY, Mr. HATCH, Mr. DECONCINI, Mr. KENNEDY, Mr. KOHL, and Mr. BROWN):

S. 1035. A bill to amend section 107 of title 17, United States Code, relating to fair use with regard to unpublished copyrighted works; to the Committee on the Judiciary.

FAIR USE WITH REGARD TO UNPUBLISHED COPYRIGHTED WORKS

● Mr. SIMON. Mr. President, today I introduce a bill important to scholarly research and the preservation of history, involving both constitutional first amendment rights and copyright law. I am pleased to be joined in this effort by Senators LEAHY, HATCH, DECONCINI, KENNEDY, KOHL, and BROWN. The issue in a nutshell is this: How do we balance the interests of accurate scholarship and journalism against the right of authors and other copyright owners to control the publication or use of their unpublished work? Some Federal courts appear to have adopted a rule that would tip the scales against critical historical analysis. This bill is an attempt to restore the appropriate balance.

Mr. President, one of the fundamental tenets of sound scholarly research is this command: Go to the original source. As an amateur historian and author myself, I know how important it is for scholars to cite directly from authentic documents. Sometimes only a person's actual words can adequately convey the essence of a historical event.

Of course, there can be abuse of this kind of citation. No one would argue that I could publish a stolen draft of Scott Turow's next novel on the pretext of reporting the results of my research. Thre has to be a balance.

That balance has already been struck under the fair use clause of the Copyright Act of 1976 at section 107. By enacting that clause, Congress in effect ratified a doctrine that the courts have long recognized: That there can be limited fair use of copyrighted material for purposes such as scholarship or news reporting without infringing on the author's copyright. The courts have developed a complex and sophisticated test for interpreting whether a particular use is fair. Under that test, the fact that a work is unpublished is relevant and important—but not necessarily dispositive—in the determination of whether or not a particular use is fair.

Unfortunately, the Court of Appeals for the Second Circuit, which has jurisdiction over many of the Nation's major publishing houses, has recently issued decisions that begin to upset this careful balance. The case of New Era Publications versus Henry Holt involves the use of unpublished letters and diaries in a critical biography of L. Ron Hubbard, founder of Scientology. In that case, the court suggests that virtually any quotation of unpublished materials is an infringement of copyright and not a fair use.

This is an unfortunate interpretation of language from Harper & Row versus Nation Enterprises, an earlier case in which the Supreme Court held extensive quotation from the unpublished memoirs of President Ford to be an infringement of copyright. However, Harper & Row involved quotes from a purloined manuscript, that was soon to be published, in an article that was intended to scope the scheduled authorized publication of excerpts from the book in a competing news magazine.

In Salinger versus Random House, the second circuit expanded on the Supreme Court's decision in Harper & Row, barring the publication of an unauthorized biography of writer J.D. Salinger that quoted extensively from unpublished letters written by Salinger that were collected in university libraries. The Supreme Court declined to hear an appeal of either Salinger or New Era.

As chair of the Judiciary Committee Subcommittee on the Constitution, I am particularly concerned about the impact these cases will have on the first amendment right to free speech. These decisions have created something of an uproar in the academic and publishing communities. The specter of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals has already had a chilling effect. Books that quote letters, even those written directly to the authors, have been changed to omit those quotations. Other lawsuits have been filed against biographers. If scholars and historians can be prohibited from citing primary sources, their work would be severely impaired. Ultimately, I think it no exaggeration to state that if this trend continues, if could cripple the ability of society at large to learn from history and thereby to avoid repeating its mistakes.

Mr. President, this 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. This bill is not intended to allow unlimited pirating of unpublished materials.

Nor is the bill intended to render the fact that a work is unpublished irrelevant to fair use analysis under the statutory factors. In assessiong any particular use of an unpublished work, courts would still consider the fact that the work is unpublished as "an important element which tends to weigh against a finding of fair use * * *." Courts should generally retain full flexibility in applying the fair use test to various particular situations that may arise. The bill simpy makes it clear that the unpublished nature of a work should not create a virtual per se bar to its use.

It may be that the Supreme Court, or the second circuit itself, will eventually modify these decisions by limiting their application. I would welcome that development. Nonetheless, we should not rely on the possibility that they will act. The language in this legislation can help direct their actions.

At a joint hearing held in the last session before the Senate and House Subcommittees on Intellectual Property, we heard testimony from J. Anthony Lukas and Taylor Branch—authors, respectively, of "Common Ground" and "Parting the Waters," both prizewinning and important historical works. Each spoke convincingly of the damage that the courts' rulings could do and are doing to the practice of historical research and writing. A broad coalition of authors, publishers, and trade organizations supports this effort. As they have strong interests in protecting authors' copyrights as well as in encouraging scholarly research, I believe that this legislation is balanced.

Also testifying at the hearing were computer industry representatives concerned about the unintended consequences this bill might have on certain unpublished works such as computer source codes. As I noted upon introduction last year, this bill is not intended to provide new fair use access to those works through decompilation, and I have worked closely with those who have concerns to see that it does not.

Senator LEAHY and I have worked with interested parties for well over a year now on legislative language that

will provide the necessary protection that our Nation's historians and biographers urgently need, while at the same time not doing unintended damage to the computer industry. I am pleased to announce that through the conscientious efforts of a broad range of industry representatives, we have reached an agreement that accomplishes those goals. I congratulate all involved for their hard work on this issue. With each passing day, the livelihood of scholars around the Nation remains in peril. I hope and expect that this legislation will pass in a timely manner, and I urge my colleagues to join me in supporting it.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, 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. LEAHY. Mr. President, I am pleased to join the distinguished Senator from Illinois in the introduction of this important amendment to the fair use provision of the Copyright Act. That act, grounded in the Constitution, assures that "contributors to the store of knowledge (receive) a fair return for their labors." *Harper & Row* v. *The Nation Enterprises,* 471 U.S. 539, 546 (1985). The fair use doctrine balances the rights that copyright confers on an author against the public's first amendment interest in the dissemination of ideas.

Section 107 of the Copyright Act sets forth the factors to be considered in evaluating whether the use made of copyrighted materials is fair. In recent years, certain courts have applied this doctrine in an overly rigid manner to the use of unpublished materials, such as letters and diaries.

The seminal statement on the fair use of unpublished works is the Supreme Court's 1985 decision in the case of Harper & Row versus The Nation. In that case, the Nation magazine, using a leaked manuscript, published an article quoting from the soon-to-be released memoirs of President Ford, scooping an authorized article planned for Time magazine. The Supreme Court held that the Nation infringed Harper & Row's copyright and rejected the Nation's claim of fair use. In so doing, the Court said that the unpublished nature of a work is an important factor that "narrows the scope" of fair use and "tend[s] to negate" a fair use defense. At the same time, the Court underscored the importance of other section 107 factors and emphasized that courts considering fair use claims must consider all the factors listed in section 107.

These statements by the Court are fair and proper. Nothing in this legislation is designed to alter the Court's opinion in Harper & Row. The problem we face arose from two decisions of the Second Circuit Court of Appeals issued in the aftermath of Harper & Row.

In the first case, Salinger versus Random House, the court held that a biography quoting and paraphrasing J.D. Salinger's unpublished letters infringed Salinger's copyright. The Court said that "[unpublished works] normally enjoy complete protection against copying any protected expression." *Salinger* v. *Random House, Inc.,* 811 F.2d 90, 97 (2d Cir. 1987). Two years later, in a case involving a biographer's use of the unpublished letters and diaries of Scientology founder L. Ron Hubbard, the court repeated its "complete protection" formula. *New Era Publications Intern.* v. *Henry Holt & Co.,* 873 F.2d 576 (2d Cir. 1989).

This formulation goes too far. It creates a virtual per se rule against the fair use of unpublished material. It has provoked genuine turmoil in the publishing industry. Witnesses at the joint hearing we held last July in the Senate Patents Subcommittee and the House Intellectual Property Subcommittee made it clear that publishers and authors are now walking on eggshells, hesitant to quote the very unpublished material that is often the soul of first rate history and biography. We heard, for example, compelling testimony from Taylor Branch, author of "Parting the Waters" and Anthony Lukas, author of "Common Ground," Pulitzer Prize winners whose works underscore the importance of the first amendment values embodied in the fair use doctrine. Works like theirs educate us, enrich us, and enliven our national spirit. A formulation of the fair use doctrine for unpublished works that cripples the ability of writers like these to do their work cannot be right.

At the same time, we are mindful that a creator's rights of privacy and first publication deserve vigilant protection.

In particular, we heard from and have worked extensively with members of the computer software industry who were concerned that their unpublished source codes could be inadvertently jeopardized by fair use legislation. Computer software is an American success story and one of the few industries where American business is still head and shoulders above the pack. So I am pleased that we were able to craft a bill that will not put our software at risk. Nothing in this legislation is intended to broaden the fair use of unpublished computer software and I am confident that that will not be its effect.

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.

Our bill makes clear that the absence of publication is an important element which tends to weigh against a finding of fair use, but does not bar such a finding. In addition, our bill underscores that, in discussing the importance of nonpublication, we do not mean to diminish the importance that courts have traditionally accorded to any of the section 107 factors. For example, in discussing factor No. 1—the purpose of the use—the Court in Harper & Row states that "every commercial use of copyrighted material is presumptively * * * unfair." And the Harper court refers to the fourth factor—the effect of the use on the market—as the most important element of fair use.

The bill we introduce today—supported by Senators DECONCINI, HATCH, KENNEDY, BROWN, and KOHL—is the product of extended efforts to work with interested parties toward the common goal of fixing a very real problem for authors and publishers without creating a new one for the creators of computer programs.

I am confident that this carefully crafted legislation accomplishes that goal and I look forward to working with Senator SIMON and our Judiciary Committee colleagues to ensure swift action in the Judiciary Committee and on the Senate floor. I also look forward to working with our colleagues on the House Intellectual Property Subcommittee.

Finally, let me add my appreciation for the determined efforts of the staff members who have worked on this legislation: 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 fine piece of legislation.●

Mr. HATCH. Mr. President, I am pleased to be an original cosponsor of this bill to amend section 107 of the Copyright Act with respect to the fair use quotation of unpublished works. The negotiations that have led to the compromise language embodied in this bill have been arduous and long, but they have also been thoughtful, thorough, fair, and, ultimately, fruitful.

The bill that we introduce today clarifies an important area of copyright law, responds to legitimate concerns of scholars and authors of secondary texts, protects the common law property rights of original authors,

and guards against unintended consequences that might otherwise adversely affect the ability of computer software and other high-technology industries to preserve the integrity of their copyrights. That all of this is accomplished in a one-sentence-long bill says much about the delicate intricacy of the Copyright Act of 1976 and the careful draftsmanship that has gone into this compromise language. I would also note that the bipartisan support behind the introduction of this bill further attests to the reasonableness of the compromise that it embodies.

I look forward to swift action by the Subcommittee on Patents, Copyrights, and Trademarks on this important legislation.