GAO

Congressional Record, 102nd Congress, Senate

1. Bill	2. Date	3. Pages
H.R.4412	Oct 7, 1992 (143-II)	S17358

4. Action:

Fair Use of Copyrighted Works: Senate passed H.R. 4412, to amend title 17, United States Code, relating to fair use of copyrighted works, clearing the measure for the President.

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CLARIFICATION OF FAIR USE DOCTRINE

Mr. FORD. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 4412, a bill to clarify the application of the fair use doctrine to unpublished copyrighted materials received from the House, that the bill be deemed read three times, passed and the motion to reconsider be laid upon the table; that a statement jointly singed by Senators SIMON, LEAHY, KENNEDY, GRASSLEY, METZENBAUM, and KOHL be insert in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

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

STATEMENT BY SENATORS SIMON, LEAHY, KENNEDY, GRASSLEY, METZENBAUM, AND KOHL

Last September, the Senate approved S. 1035, a bill introduced by Senator Leahy and Senator Simon, that clarified the application of the fair use doctrine to unpublished, copyrighted, materials. In August of this year, the House approved a similar bill, H.R. 4412, which is before us now for consideration.

We endorse the House bill. H.R. 4412 serves the same goals and achieves the same objectives as S. 1035. While the House version contains slightly different language, the effects of the two bills are identical. Thus, the Senate Report interpreting the objectives of S. 1035 and discussing the history of fair use can be applied in all respects to H.R. 4412, as well.

In order to remove any question about the scope of the bill, a few additional comments may be helpful. As Senators Leahy and Simon noted when they introduced the Senate version in May of 1991, the fair use bill was triggered by two Second Circuit decisions, *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 denied, 110 S.Ct. 1168 (1990), that severely narrowed the scope of the fair use doctrine as applied to unpublished works. These cases threatened to establish a virtual per se rule against the fair use of any unpublished materials, such as letters or diaries. As the court said in New Era, unpublished works "normally enjoy complete protection" against copying.

Since the vast majority of publishing and magazine companies are based in the Second Circuit's jurisdiction, the effect of the Salinger and New Era decisions has been profound, resulting in chilling uncertainty and serious apprehension in the publishing community regarding fair use of unpublished works. We think it no exaggeration to say that if the trend were to continue, it could severely damage the ability of journalists and scholars to use unpublished primary materials. This would be a crippling blow to accurate scholarship and reporting.

H.R. 4412, like its Senate counterpart, is thus designed to undo the harm caused by the overly restrictive standards adopted in Salinger and New Era, and to clearly and indisputably reject the view that the unpublished nature of the work triggers a virtual per se ruling against a finding of fair use. While the fact that a work is unpublished is "an important element which tends to weigh against a finding of fair use," the unpublished nature of the copyrighted material is not necessarily determinative of whether or not a particular use is considered a fair use.

By rejecting the per se approach, this bill serves to reaffirm the general principles regarding fair use of unpublished works as set forth in the Supreme Court's landmark decision *Harper & Row* v. *Nation Enterprises*, 471 U.S. 539 (1985). That decision makes clear that, rather than considering only one factor, a finding of fair use must be made upon a full consideration of all the factors under section 107 of the copyright laws. The review of these factors must be complete and meaningful. A more detailed discussion of Harper is set forth in the Senate report.

To some observers, one Second Circuit decision handed down after the Senate's passage of S. 1035, *Wright* v. *Warner Books*, 953 F. 2d 731 (2d. Cir. 1991), seems to portend a more reasonable approach by the Second Circuit. However, since the *Wright* decision did not explicitly disavow the narrow formulation of the fair use doctrine espoused in Salinger and New Era, the pall that the latter two cases cast over the publishing world remains. Moreover, as the Senate noted in its report: "[S. 1035] 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 & Row." S. Rep. 102-141, 102nd Cong., 1st Sess., at 5. Consequently, the bill rejects dicta in Wright to the extent that such dicta is premised upon the disapproved language of Salinger and New Era. The bill requires the courts to make a carefully reasoned and complete consideration of each of the fair use factors set forth in Section 107 of the Copyright Act.

Finally, as the Senate Report makes clear, this legislation does nothing to broaden the fair use of unpublished computer programs. Nor does it reduce the protection afforded to secure tests. And, the legislation is effective on the 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.

The bill (H.R. 4412) was deemed to have been read three times and passed.