Calendar No. 187

102D CONGRESS
1st Session

SENATE

REPORT
102-141

FAIR USE OF UNPUBLISHED WORKS

AUGUST 29, 1991.—Ordered to be printed

Filed, under authority of the order of the Senate of July 23 (legislative day July 8), 1991

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1035]

The Committee on the Judiciary, to which was referred the bill (S. 1035) to clarify the application of the fair use doctrine to unpublished works, having considered the same, reports favorably thereon, and recommends that the bill do pass.

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I. PURPOSE

The purpose of the proposed legislation is to clarify the application of the fair use doctrine to unpublished works, in response to

recent decisions of the United States Court of Appeals for the Second Circuit.

II. Legislative History

This legislation derives from a proposal originally introduced in the 101st Congress. Senator Simon introduced S. 2370, on March 29, 1990, together with Senator Leahy. Companion legislation, H.R. 4263, had been introduced in the House of Representatives by Representative Kastenmeier. A joint hearing was held on July 11, 1990, before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks and the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice, cochaired by Senator DeConcini and Representative Kastenmeier, and subsequently by Senator Simon.

Testimony was heard from: William Patry, on behalf of Ralph Oman, U.S. Register of Copyrights; the Honorable Pierre Leval, U.S. District Court Judge for the Southern District of New York; the Honorable Roger J. Miner, judge, U.S. Court of Appeals for the Second Circuit; the Honorable James L. Oakes, chief judge, U.S. Court of Appeals for the Second Circuit; Taylor Branch, author; J. Anthony Lukas, author; Floyd Abrams, Esq., on behalf of the American Historical Association, the Organization of American Historians, the National Writers Union, the Author's Guild, Inc., PEN American Center and the Association of American Publishers; Barbara Ringer, Esq., former U,S. Register of Copyrights; Jonathan W. Lubell, Esq.; A.G.W. Biddle, president, Computer and Communications Industry Association; and James M. Burger, chief counsel, Government, of Apple Computer, Inc., on behalf of the Computer and Business Equipment Manufacturers Association and the Software Publishers Association. Additional written testimony was submitted by: Kenneth M. Vittor, Esq., on behalf of the Magazine Publishers of America; the American Library Association; Dr. Bruce Perry, author; Andres J. Valdespino; Irwin Karp, Esq.; the Educational Testing Service, along with several testing organizations; and FairTest, the National Center for Fair & Open Testing.

S. 2370 was not considered by the Subcommittee on Patents, Copyrights and Trademarks before the conclusion of the 101st Congress.

In the 102d Congress, after extensive consultation with representatives of interested industry groups, Senators Simon and Leahy introduced S. 1035 on May 9, 1991. Senators Hatch, DeConcini, Kennedy, Kohl, and Brown also joined as original cosponsors. S. 1035 was unanimously polled out of the Subcommittee on Patents, Copyrights and Trademarks on May 17th, 1991. It was ordered favorably reported by the full Judiciary Committee on June 13th, 1991, by unanimous consent.

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 584.) 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 & Row*. 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 *Sal-*

inger 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.

IV. Vote of the Committee

On June 13, 1991, with a quorum present, the Committee on the Judiciary, by unanimous consent, ordered the bill, S. 1035, favorably reported.

V. Text of S. 1035

[102d Cong., 1st sess.]

A BILL To amend section 107 of title 17, United States Code, relating to fair use with regard to unpublished copyrighted works

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."

VI. Section-by-Section Analysis

The sole provision of this bill is described above.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 30, 1991.

Hon. Joseph R. Biden,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman. The Congressional Budget Office has reviewed S. 1035, a bill to amend section 107 of title 17, United States Code, relating to fair use with regard to unpublished copyrighted works, as ordered reported by the Senate Committee on the Judiciary on June 13, 1991.

CBO estimates that enactment of S. 1035 would result in no significant additional costs to the Federal Government based on information provided by the Copyright Office. The bill would clarify the criteria for determining whether the use of unpublished materials is an infringement of copyright.

Enactment of S. 1035 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill. No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb, who can be reached at 226-2860.

Sincerely,

Robert D. Reischauer,
Director.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that S. 1035 will not have any direct regulatory impact.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

* * * * * * *

TITLE 17, UNITED STATES CODE

* * * * * * *

CHAPTER 1. SUBJECT MATTER AND SCOPE

§ 107. Limitations on exclusive rights; Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

(2) the nature of the copyrighted work;

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

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

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.

X. ADDITIONAL VIEWS OF MR. HATCH

I agree entirely with the committee report's summary outlining the problems and uncertainties associated with the fair use quotation of unpublished works. I also support its statement of the intent of the committee in passing S. 1035 and its view of the need for enactment at this time.

I do, however, view the historical development of this area of the law in terms different from those reflected in the committee report. Because it is my belief that the power of Congress to legislate in this area is limited, and because alternative proposals to address the fair use issue appear to exceed the scope of congressional authority, it may be useful to set out my views at this time.

The most troubling aspect of the debate on this subject has been the unstated assumption, by witnesses and writers alike, that authors' rights somehow represent a corpus of rights that may be distributed or redistributed from one group of authors to another in the discretion of Congress. The view seems to be that if a sufficiently convincing reason why one author should have the right previously thought to be the property of another author, Congress is free to redistribute the right for that reason. This, I submit, is inimicable to the true nature of authors' rights as property protected by the fifth amendment, and it is incompatible with our international obligations under the Berne Convention for the Protection of Literary and Artistic Works. Moreover, in the specific context of Federal copyright law, this perspective ignores the limited nature of Congress' legislative powers under the Constitution and further ignores the specific limiting language of the Patent and Copyright Clause. Art. I, sec. 8, cl. 8.

While I believe that S. 1035, as passed by the committee, is free from any constitutional deficiency, I raise these cautions because, in my view, previous drafts of this bill, as well as other suggested compromises that may yet be offered as amendments to this bill, contain serious constitutional flaws.

PROPERTY RIGHTS PROTECTED AT COMMON LAW

As former Register of Copyright Barbara A. Ringer reminded the two congressional subcommittees at their joint hearing last summer, any effort to alter the existing protections afforded unpublished works through amendment of the Copyright Act raises fundamental questions concerning the law of personal property. As she stated at that time, "There are historical reasons why unpublished works cannot simply be treated the same as published works with respect to fair use." (Testimony, p. 1.)

The most important of these historical reasons is the fact that an author's interest in his or her unpublished works is a property right that was recognized at common law, that predates the ratifi-

cation of the Constitution, and that does not derive from any congressionally granted entitlement such as copyright. *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 590, 654-656 (1834). The common-law property rights of authors are thus entitled to the full protection of the fifth amendment. Indeed, the Constitution itself suggests this conclusion by empowering Congress to "secure" rather than to "create" authors' rights. (The Constitution echoes the language of earlier copyright statutes in Massachusetts, Connecticut, New York, and Virginia, all of which purported to "secure" preexisting common-law rights of authors.) The Constitution, and the statutes passed under its authority, thus "pre-suppose the existence of a right, which is to be secured, and not a right originally created by the statute." *Wheaton, supra* at 684 (Thompson, J., dissenting).

The Copyright Act of 1976 extended the Federal law of copyright to unpublished works (section 102(a)). In so doing, it subjected those works to the same limited quotation exception—fair use—that had previously been recognized for published works. The right to quote, even under fair use principles, from unpublished works did not exist to any significant extent prior to the enactment of the Copyright Act of 1976. 2 M. Nimmer, *Copyright*, sec. 8.23, at 8-273.

By this expansion of copyright, the 1976 act, in the view of many, deprived the owners of common-law copyright of their absolute and perpetual rights in unpublished works. Whether that is a reading of the act that can be squared with the Constitution is an open and, for me, problematic question. (See testimony of former Register of Copyrights Barbara A. Ringer, p. 3.) I believe the better view to be that passage of the 1976 act did not completely abolish the common-law right.

The committee's statement that, "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" is useful as a shorthand expression of the major effect of the 1976 act on unpublished works. There are scholars who make the larger claim that the 1976 act entirely abolished common-law copyright, bringing the right of first publication under the exclusive jurisdiction of Federal copyright law. But because both views fail to recognize the constitutional limitations on the congressional power to legislate in this area, as well as the narrowness of the preemption standard set forth in section 301 of the act itself, they are misleading. (It is not necessary to say anything further on the preemption question except to note the truism that the power of Congress to preempt State law, on any subject, is coterminous with its power to legislate on that subject.)

Even if Congress did intend, in 1976, to abolish common-law copyright or to subject unpublished works to the exclusive jurisdiction of Federal copyright law, its ability to do so is not unlimited. I submit that neither of these ends can be entirely achieved under either the commerce clause authority of Congress or under the copyright clause. It is true that the range of human conduct not reachable by the commerce clause, as presently interpreted, is extremely limited. But if any activity can be viewed as having no perceivable effect on interstate commerce then surely the action of a solitary writer who locks his or her manuscript in a desk never intending it for publication must be such an activity. One must look

elsewhere than the commerce clause to find the authority for Congress to act in this area.

Turning to the copyright clause (art. I, sec. 8, cl. 8), the following questions arise. Is the regulation of the rights of authors in unpublished works a proper subject of copyright? Can one who has not sought to profit from the Government-granted monopoly that we know as copyright—since he or she has failed even to publish their work—be characterized as a proper object of the goals of the copyright clause? And is there any value in the copyright in an unpublished work for so long as it remains unpublished? Is it thus a "right" under the meaning of the copyright clause at all? If the claim is that an existing property right has been abolished by Congress on the authority of its copyright clause powers, one is entitled to ask how the progress of science and the useful arts is promoted by thrusting unasked for rights on authors of unpublished works, when the grant of the illusory new "right" may have the effect of extinguishing a real and valuable preexisting common-law right.

The specific limitations contained in the copyright clause must also be recognized by Congress. Clause 8 of article I, section 8, limits congressional discretion by specifying that rights granted under the authority of the copyright clause must be of limited duration, that those rights must be "exclusive," and that the rights created must go, in the first instance, to "authors and inventors" and not to third parties. The fair use issue engages all three limitations.

The limited duration requirement prohibits Congress from replacing the common-law right with anything approaching the perpetual right that unpublished works once enjoyed. Thus the life of the right beyond the term of congressional protection will always be a matter of common-law protection, if it is to be protected at all. To the extent that congressional legislation provides the sole basis for a secondary author to exercise, to some degree, an original author's right of first publication, the "exclusive right" limitation of the copyright clause may also be infringed. Finally, it is clear that, to the extent that congressional legislation allows a secondary author to exercise, and by so exercising destroy, a right (e.g., the right to first publication) before the original author has chosen to exercise it, the third limitation of the clause—that "authors and inventors" shall be the beneficiaries of the rights created under the copyright clause—is ignored.

All of these limitations on the power of Congress to act to protect unpublished works in the manner to which they have been legally protected since the founding of the Republic convince me that no complete abolition of the common-law right, and the protections that only the common law can afford, was intended, or even permitted, by enactment of the Copyright Act of 1976.

If it were true that the common-law right no longer exists in any significant way, a question would arise as to the purpose of the 1976 codification of the principle of "fair use" in section 107. As the committee report notes, the House Judiciary Committee report on S. 22 in the 94th Congress stated that "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." The House report reflects the prevailing view that fair use was and would continue to be exclu-

sively a product of judicial decision, with broad guidance provided by section 107. This development ensured, as Barbara Ringer testified before the subcommittee—

> that the legal norms governing the fair use of unpublished works would still be governed by existing case law, and that the right to control first publication * * * would not be destroyed by a statutory fair use provision equating unpublished and published works for all purposes.

Conflicting assertions as to the effect of the codification of section 107 make explicit the constitutional tension that underlies this area of the law. It is the possibility of a common-law right having been destroyed through adoption of section 107 that raises now, even if it did not raise in 1976, a question concerning the constitutionality of Federal fair use legislation under a fifth amendment takings analysis. It seems inevitable that the more that section 107 is viewed as an engine for the reordering or other redistribution of property rights in copyright, rather than as a reflection of the broad guidelines developed through the case law on fair use, then the more its constitutionality will be called into question.

Because I believe that the compromise language adopted by the committee stops short, but just short, of this constitutional precipice, I support it. By recognizing that unpublished works enjoy a strong presumption against fair use quotation, but can in some cases be appropriately quoted, S. 1035 clarifies a question that has become needlessly confused in the case law. It is my hope that any future legislative alteration of the fair use doctrine will also respect the constitutional restraints that bind our legislative judgment.

PRIVACY INTERESTS PROTECTED BY THE COMMON-LAW RIGHT OF FIRST PUBLICATION

I agree with the committee that the Supreme Court in *Harper & Row* v. *Nation Enterprises,* 471 U.S. 539 (1985), struck the proper balance between encouraging the broad dissemination of ideas and safeguarding the rights to first publication and privacy. It is for this reason as well that I resist the view that the common-law right has been entirely abolished and that this area of the law has been "federalized" by the enactment of the 1976 act. But for the continued existence of the common-law right, the Supreme Court would have, in the context of the private relations of citizens, no right of privacy to protect. Because the protection of individual privacy is so important, particularly in this technologically advanced age, it is too important to be left solely within the necessarily limited control of the Federal Government.

Judge Roger Miner, of the second circuit, reminded the subcommittees who heard testimony on this subject in 1990 that the common-law right of first publication protects substantial privacy interests of the author. Judge Miner viewed privacy as one of several rights embodied in the right of first publication:

> The ability of an author to withhold a work from public dissemination just as long as he or she deems it proper to do so implicates notions of privacy, freedom to refrain

from speaking and control of material. At bottom here is a substantial property interest.

The fundamental privacy interests of individuals in their unpublished writings have been recognized by most American common-law jurisdictions. Only in this context are individuals protected from private as well as public infringements of their privacy. Moreover, the common-law right has the distinct advantage of being embodied in explicit case law, recognized for over two centuries. See, e.g., *Miller* v. *Taylor,* 4 Burr. 2303 (1769) (per Mansfield, C.J.); *Wheaton* v. *Peters,* 33 U.S. (8 Pet.) 591, 657 (1834).

As has been noted by others, the seminal Harvard Law Review article by Warren & Brandeis on the right of privacy specifically illustrates its point by reference to the common-law right of authors to control their unpublished works. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 205 (1890). No fair use dispute brought to the attention of the subcommittees involved state action, the proper subject of the privacy right protected by the Federal Constitution. Instead, all of the cases related to the private rights of individuals against one another. Privacy in this situation is protected not by the Constitution, but by the common law.

The fair use debate presents a rare opportunity for Congress to recognize the importance of long-standing privacy interests. I am pleased that this compromise has been drafted in a manner that protects those interests.

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