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Action: INTRODUCED BY MR. SIMON AND MR. LEAHY

By Mr. SIMON (for himself and Mr. LEAHY):

S. 2370. A bill to amend section 107 of title 17, United States Code, relating to fair use, to clarify that such section applies to both published and unpublished copyrighted works; to the Committee on the Judiciary.

CLARIFICATION OF FAIRNESS DOCTRINE UNDER THE COPYRIGHT LAWS

● 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. The issue in a nutshell is this: How do we balance the interests of accurate scholarship or journalism against the right of authors to control the publication of their own unpublished work?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 an historical event.

Of course, there can be abuse of this kind of citation. No one would argue that I could publish a draft of Stephen King's next thriller on the pretext of "reporting" the results of my "research." There 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. That test already includes factors relevant to the consideration of unpublished works, such as the nature of the copyrighted work, and the effect of the use upon the potential market for the work.

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 The case of New Era Publications versus Henry Holt involves the use of unpublished letters and diaries in a critical biography of L. Ron Hubbard, founder of Scientology.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 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 scoop 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 the Salinger case, or, just recently, the New Era case.

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 spectre of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals appears to have already had a chilling effect. Books that quote letters, even those written directly to the authors, have been changed to omit those quotations. At least one other lawsuit has been filed against a biographer. If scholars and historians can be prohibited from citing primary sources, their work would be severely impaired. Ultimately, I think it's no exaggeration to state that if this trend continues, it could cripple the ability of society at large to learn from history and thereby to avoid repeating its mistakes.

Mr. President, this is a simple bill which would merely 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 infringing. This bill is not intended to allow unlimited pirating of unpublished materials. Just as it does now, the law would still generally prohibit a writer from copying the expressive content of an author's work; it would still prevent a writer from quoting more than a minimal amount of an original work; a work could still not be quoted for other than limited purposes.

Nor is the bill intended to render the unpublished nature of a work irrelevant to fair use analysis under the four statutory factors. Courts would still consider the unpublished nature of a work in assessing the nature of the work, or in determining the effect of the use upon the potential market for the work. Courts should generally retain full flexibility in applying the fair use test to various particular situations that may arise. All the bill says is that the unpublished nature of a work alone should not determine whether a particular use of it is fair. I hope only to forestall the adoption of a broad and inflexible judicial rule against fair use of unpublished works.

It may be that the Supreme Court, or the second circuit itself, will eventually modify these decisions by limiting their application to a narrower category of cases. I would welcome that development. Nonetheless, we should not rely on the possibility that they will

act. The modest language in this legislation can help to direct their actions.

A broad coalition of individual authors, publishers, and trade organizations has reached a general consensus in support of this bill. As they have strong interests in protecting authors' copyrights as well as in encouraging scholarly research, I believe this approach is a balanced one. I have also heard from parties who are concerned about the unintended consequences this bill might have on certain unpublished scientific works that embody trade secrets, such as computer source codes. This bill is not intended to provide new fair use access to those works, and I will work closely with those who have concerns to see that it does not. Congressional hearings will flesh out the record regarding the need for legislation. I am open to suggestion as to how this bill can be improved, and I welcome hearing from all parties involved in this important issue.●

Mr. LEAHY. Mr. President, I am pleased to join the distinguished Senator from Illinois in the introduction of this important legislation. This bill would strike a fair balance of the right to privacy, the rights ensured by the first amendment and the protections designed to foster the creative spirit of our Nation.

American copyright law has its origins in the Constitution, which gives to Congress the power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Our Founding Fathers recognized that in the absence of legal protection, ingenuity and, in turn, progress would wither. The Constitution and laws of the United States protect that ingenuity and the result has been two centuries of innovation and unmatched creativity.

Copyright, however, is not an absolute right. It is an attempt to balance the rights of the author or inventor with the "progress of science and useful arts." One exception to exclusive copyright protection is the fair use doctrine, which allows subsequent authors to build on the work of others. The Copyright Revision Act of 1976 provides that "the fair use of a copyrighted work * * * for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." (17 U.S.C. section 107)

Should the fair use doctrine apply to unpublished materials? A series of decisions in the second circuit pinpoint the difficulties raised by this question. In New Era Publications versus Henry Holt, the court suggested that almost any quotation or use of unpublished material would constitute a copyright infringement. The Supreme Court declined to review this second circuit decision.

In an earlier decision, the Supreme Court found copyright infringement when Nation magazine published a leaked copy of President Gerald Ford's memoirs immediately before they were scheduled for publication by Time magazine. The Court held that the Court of Appeals erred in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use." *Harper & Row* v. *Nation Enterprises*, 471 U.S. 539, 569 (1984).

In Salinger versus Random House, the second circuit relied on the Harper & Row decision in holding that "Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances.'" 811 F.2d 90, 100 (1987). In this decision, the court found that the balance tipped in favor of Salinger's right to privacy as well as the right of his heirs to retain the option to profit from the publication of his materials.

This trend toward restricting the use of unpublished works must be examined carefully because it implicates significant competing interests. I commend the distinguished Senator from Illinois for his commitment to this debate.

Senator SIMON's proposed legislation would clarify current copyright law by specifically including unpublished material in section 107 of the Copyright Act. It would not remove copyright protection from unpublished material. It would require that courts determine whether the use of unpublished material qualifies as a fair use under the act. Thus, the same standard would apply to both published and unpublished material: The purpose of the use, the nature of the copyrighted work, the amount of the work used, and the effect of the use upon the potential market for the copyrighted work would be examined by the court.

I believe that this approach is a reasonable effort to balance the competing interests of the creator's copyright, the public's right to the broadest dissemination of information, and the original author's right to privacy.

Members of the computer industry have expressed concern that the protection of their computer source codes might be jeopardized by this legislation. That is not our intent with this legislation and we will work with the industry to ensure that it is not the effect.

As Justice Brennan once said, "A broad dissemination of principles, ideas, and factual information is crucial to * * * robust public debate and [an] informed citizenry." *Harper & Row* v. *Nation Enterprises*, 471 U.S. 539, 582 (1984) (Brennan, J., dissenting). I look forward to working with Senator SIMON to ensure that our basic first amendment liberties and our privacy rights are preserved. The chilling effect of recent court decisions cannot be permitted to censor journalists and authors. The richness and breadth of our history is too important to the future of the country—it helps to define us by educating our children and reminding our leaders of their place in history.