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REMARKS BY MR. MOORHEAD

H.R. 4412, FAIR USE

SPEECH OF

HON. CARLOS J. MOORHEAD

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, August 11, 1992

Mr. MOORHEAD. Mr. Speaker, I rise in support of H.R. 4412 relating to the fair use of unpublished works. The purpose of H.R. 4412 is to clarify the intent of Congress that there be no per se rule barring claims of fair use of unpublished works. This legislation represents the culmination of work begun last Congress by the Subcommittee on Intellectual Property and Judicial Administration on the fair-use issue. To his credit the chairman of the subcommittee, the distinguished gentleman from New Jersey [Mr. HUGHES], took the time to schedule 2 days of very thorough hearings on this issue earlier this Congress and as a result I believe that we now have a better bill. I would like to commend the gentleman from New Jersey [Mr. HUGHES] for his diligent work on this issue as well as the members of the subcommittee for their excellent work on this issue.

During our hearings, it was suggested that the second circuit in Salenger versus Random House, Inc., and New Era Publications, International Aps versus Henry Holt and Co. had not absolutely barred the fair-use defense in the unpublished works context. But in my opinion this misses the point, which is whether or not the court's language has had a chilling effect on the production and publication of the works of historians, biographers, and journalists.

Evidence was presented at our hearings that reasonable attorneys, because of the specter of the second circuit decisions, are routinely advising publishers from relying on a fair-use defense when they are dealing with unpublished works. As a result, the public is being denied access to the raw materials that are the lifeblood of these authors. Therefore, I believe it is appropriate for Congress to intervene in this instance in an effort to restore the appropriate balance between the affected parties by clarifying that the fact a work is unpublished should continue to be only one of several considerations that courts must weigh in making fair-use determinations.

The House report on H.R. 4412 makes it clear that:

> The purpose of H.R. 4412 is to clarify the intent of Congress that there be no per se rule barring claims of fair use of unpublished works. Instead, consistent with Congress's codification of fair use in the 1976 Copyright Act, the courts are to determine claims of fair use of unpublished works on a case-by-case basis, after consideration of all the factors set forth in Section 107, title 17, United States Code, as well as other factors a court may find relevant.

It is not the intent of H.R. 4412 to in any way broaden the scope of fair use of unpublished works nor to overrule or modify the Supreme Court's decision in Harper and Row versus the Nation wherein the Court set out general principles regarding the fair use of unpublished works.

Mr. Speaker, numerous parties have played important roles in crafting H.R. 4412. They include representatives of authors' groups, book and magazine publishers, and the computer industry. They are all to be commended for their work on H.R. 4412 for which I urge my colleagues' support.