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1. Bill	2. Date	3. Pages
H.R.4412	Aug 11, 1992 (118)	H7991-92

4. Action:

PASSED UNDER SUSPENSION OF THE RULES

Copyrighted works: H.R. 4412, amended, to amend title 17, United States Code, relating to fair use of copyrighted works;

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USE OF COPYRIGHTED UNPUBLISHED WORKS

Mr. HUGHES. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 4412) to amend title 17, United States Code, relating to fair use of copyrighted works, as amended.

The Clerk read as follows:

H.R. 4412

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section 107 of title 17, United States Code, is amended by adding at the end the following: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.".

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The SPEAKER pro tempore (Mr. MCNULTY). Pursuant to the rule, the gentleman from New Jersey [Mr. HUGHES] will be recognized for 20 minutes, and the gentleman from California [Mr. MOORHEAD] will be recognized for 20 minutes.

The Chair recognizes the gentleman from New Jersey [Mr. HUGHES].

Mr. HUGHES. Mr. Speaker, I yield myself such time as I may consume.

(Mr. HUGHES asked and was given permission to revise and extend his remarks.)

Mr. HUGHES. Mr. Speaker, H.R. 4412 amends the fair use provisions of the copyright law with respect to unpublished works. At the urging of historians, biographers, and publishers that decisions from the U.S. Court of Appeals for the second circuit were hampering their use of unpublished letters, diaries, and other materials, bills were introduced in the 101st and 102d Congresses. Joint hearings were held with the Senate in 1990. The Subcommittee on Intellectual Property and Judicial Administration, which I chair, held two hearings in 1991.

The fair use doctrine is codified in section 107 of the Copyright Act. Fair use is a judicial doctrine, and is intended to be applied in a flexible manner, based on the particular facts before the court. Fair use is an exception to the general rule that one may not use substantial parts of a copyrighted work without the permission of the copyright owner. The exception exists so that biographers, historians, teachers, drama critics, news reporters, and others may utilize portions of the copyrighted work for purposes of criticism and comment.

The concerns which prompted this legislation grew out of two decisions in the second circuit which suggested that the circuit was reading into the doctrine a degree of rigidity never intended by the Congress. The purpose of the bill is restore the desired flexibility to fair use. H.R. 4412 is straightforward legislation addressed to a specific problem.

H.R. 4412 accomplishes its purpose by adding a single sentence at the end of section 107 of title 17:

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

This language will clarify the intent of Congress that there be no per se rule barring the affirmative defense of fair use of unpublished works. The courts are directed to evaluate the defense by considering all the facts in a case according to all four statutory fair use factors and any others found relevant.

It is not, however, the intention of the Congress to direct the courts how much weight to give to any one factor in any particular case, nor to overrule or diminish in any way the Supreme Court's decision in Harper & Row, Publishers versus Nation Enterprises. Each factor should be separately weighed and then evaluated as a whole in conjunction with all the other factors. This totality approach is at the heart of the equitable rule of reason that characterizes the fair use defense.

H.R. 4412 should allay the concerns of some authors and publishers that they are absolutely prohibited from using any unpublished, copyrighted material for biographical or historical purposes. I urge your support of this modest but important legislation.

Mr. Speaker, I reserve the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I yield myself such time as I may consume. 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 the issue.

During our hearings it was suggested that the second circuit in Salenger versus Random House, Inc., and the New Era Publications, International Aps versus Henry Holt & 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 courts 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 life blood 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 effected 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' codification 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 author's 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.

Mr. HUGHES. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from New Jersey [Mr. HUGHES] that the House suspend the rules and pass the bill, H.R. 4412, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.