United States General Accounting Office

GAO

Congressional Record, 101st Congress, House

Bill	Date	Page(s)
H.R.4263	Mar 14, 1990 (27)	H805-07

Action: INTRODUCED BY MR. KASTENMEIER

CLARIFICATION OF FAIR USE DOCTRINE UNDER THE COPYRIGHT LAW

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Wisconsin [Mr. KASTENMEIER] is recognized for 5 minutes.

Mr. KASTENMEIER. Mr. Speaker, today I am introducing a bill to resolve a serious issue relating to copyright and the first amendment. This issue arises because of a series of cases decided by the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit.

Last month, the Supreme Court denied certiorari in New Era Publications versus Henry Holt, a copyright infringement case involving the use of the late L. Ron Hubbard's unpublished writings in an unflattering biography. The case the High Court refused to hear involved a dispute between two authors. The first author—Scientology head Hubbard—wrote certain materials that his estate did not want publicly released. The second author sought to use those materials in a biography critical of Mr. Hubbard.

The Court refused to review a decision of the second circuit, in whose jurisdiction most of the publishing community is based. The second circuit found that the materials used were unpublished within the meaning of the Copyright Act. Its opinion suggests that an author's copyright in unpublished materials is infringed by subsequent uses, such as in histories or biographies, that those uses are not fair use under the 1976 Copyright Act, and that an injunction is appropriate to prevent publication.

Hubbard's representatives lost the case because they waited too long to sue, but the Supreme Court's failure to disapprove the lower court's language has caused an uproar in the academic and publishing communities. It has led distinguished authors to raise the spectre of outside censorship, or worse, to predict unwillingness even to take on controversial but important critical writing. Scholars across the country fear that the copyright laws will be used to prohibit them from quoting primary sources, the basic building blocks of history and biography, that their ability to fully explore controversial topics will be limited, and that in the end the public will be the loser.

The second circuit's decision in New Era was only one of a series of cases dealing with the appropriate uses of unpublished works. These cases implicate important copyright, first amendment, and privacy concerns. The Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Administration of Justice, which I chair, has jurisdiction over all of these issues.

I am deeply concerned about the situation arising out of the New Era case. In particular, it appears that the second circuit has adopted a virtual per se rule against fair use of unpublished works and has, moreover, treated unpublished work in a monolithic fashion.

In addition, it appears that the court has also established a similar rule requiring that an injunction be issued when unpublished material is used. This raises troubling questions of prior restraint on publications, which may well violate the first amendment.

My bill is intended to give the courts sufficient flexibility in making both a fair use determination and a decision about whether injunctive relief is appropriate. Some of the difficulties courts have had about the application of fair use to unpublished works may stem from a conflict between the statutory fair use language and the legislative history to the 1976 act.

New Era's genesis was the U.S. Supreme Court's decision in Harper & Row versus Nation, where the Nation magazine published excerpts from President Gerald Ford's memoirs just before Harper & Row was scheduled to publish them in book form. The Court concluded that:

[I]t has never been seriously disputed that "the fact that the plaintiff's work is unpublished * * * is a factor tending to negate the defense of fair use." Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works. * * * We conclude that the unpublished nature of a work is "[a] key, though not necessarily determinative, factor" tending to negate a defense of fair use. * * * The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term "news value" to be gained from premature publication of the author's expression.

The second circuit expanded upon the opinion in the Nation case in Salinger versus Random House, which involved the use of the author J.D. Salinger's unpublished letters in a biography. The court concluded that if a biographer "copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined." It therefore preliminarily enjoined the galleys of the biography.

In New Era, the second circuit once again extended the high court's Nation opinion, finding that:

The fair use doctrine encompasses all claims of first amendment in the copyright field [and that, citing *Salinger*] copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction * * *.

In a denial of a rehearing in New Era, its author did clarify his original opinion, stating that an "injunction is not the automatic consequence of infringement and that equitable considerations always are germane * * *." He amended the opinion so that it now reads:

* * * *under ordinary circumstances* the copying of "more than minimal amounts" of unpublished expressive material calls for an injunction * * * [added words italic.]

In addition, the author of the Salinger opinion used the same opportunity to clarify that opinion. The original language he used was: "If [the biographer] copies more than minimal amounts of (unpublished) expression, he deserves to be enjoined." Instead, he wrote, the latter phrase should have read "he deserves to be found liable for infringement."

While these clarifications are important, they have not stemmed the controversy. The concerns continue to be ardently expressed.

At its core, these cases implicate important societal conflicts. In the Nation case, the Supreme Court noted that

The Framers intended copyright * * * to be the engine of free expression [and that it] is intended to increase and not impede the harvest of knowledge.

The constitutional mandate to create copyright laws represents a careful balance between the rights of authors, publishers, and the public. That mandate, and those laws, encourage free and open expression, and the fullest possible public access to that expression. Sometimes these goals are inherently in conflict, and those conflicts are seemingly irreconcilable. Moreover, we cannot ignore cherished rights of privacy that may also be affected.

The approach to the fair use doctrine taken in this series of cases appears to be at odds with Congress' intent in codifying the fair use doctrine in the 1976 Copyright Act. Copyright law encourages creativity by granting authors a limited monopoly in their works. Through the "fair use" doctrine, however, some copyrighted material may be used despite the wishes of the copyright owner. Fair use (17 U.S.C. 107) is an equitable doctrine, promoting society's interests by encouraging a second author's use of reasonable portions of a first author's work. Its application is to be decided case-by-case, taking into account various, and often conflicting, interests, including the nature of the work and its subsequent use, the amount used by the second author, and the harm to the first author's market.

At the heart of the controversy is the struggle to formulate a flexible yet articulate standard of fair use. We want fair use to be broadly defined so that judges can apply it to fit the facts of a particular case. Yet the laws must also give citizens a concrete idea of what is permissible behavior and what is not. In the current controversy, authors claim that the courts have been too rigid in excluding unpublished works from application of the fair use doctrine. There is a fear that the uncertainty engendered by this series of cases will lead to self-censorship to avoid lawsuits and restraints on publication.

I understand that a broad consensus within the publishing community has developed in support of the legislation I am introducing today. Individual authors, and representatives of PEN, the Authors League, the Association of American Publishers, and others similarly situated, have joined together to urge an amendment to section 107. This amendment would clarify that section 107 applies equally to unpublished as well as published works. It does not mean that all uses of unpublished works will be considered fair use, just as not all uses of published works are now considered fair use. It does, however, mean that the same guidelines, set forth in section 107, will apply to published works and to unpublished works, and that these factors apply equally to all such works.

While I have heard from a great many members of the publishing community, I have not heard from all parties who might have an interest in this legislation. Therefore, I am introducing this legislation not only because I believe that these decisions warrant legislative review, but also because hearings will permit the Congress to hear all views and to consider many important questions. For example, should the term "unpublished" be specifically defined? How does this proposed amendment square with the Berne Convention, the international copyright treaty to which the United States adhered just last year? In what instances is injunctive relief appropriate, especially when the first amendment is implicated? Most importantly, how do we balance the interests protected by the copyright laws with legitimate privacy concerns, and with the dictates of the first amendment?

James Madison once noted that "knowledge will forever govern igno-

rance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." We can all agree that free access to information is essential to democracy. I believe that this country's long held tradition against publication restraints is well founded and that limits on access to information are hallmarks of totalitarian societies, not of democracies. While there is no specific first amendment exception to the copyright law, there are important first amendment interests, and other equally important equitable principles, that must be considered in deciding whether to enjoin an infringing publication.

Whether or not the laws have been correctly interpreted, the chilling effect of the New Era decision is obvious and it is real. My subcommittee will soon hear from all sides in this matter to determine how best to protect and encourage scholarly efforts, while still acknowledging the copyright and privacy interests involved. We cannot condone a situation where our finest writers are deterred from doing what they do best, and from what we, as a free and self-governing country, want them to do. I introduce this legislation to start this important debate, and I look forward to hearing the views of all interested parties.