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INTRODUCED BY MR. HUGHES

THE COPYRIGHT AMENDMENTS ACT OF 1991

HON. WILLIAM J. HUGHES

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 16, 1991

Mr. HUGHES. Mr. Speaker, I am today introducing, for myself and the ranking Republican member of the Subcommittee on Intellectual Property and Judicial Administration, Mr. MOORHEAD, the Copyright Amendments Act of 1991.

Title I relates to the fair use exception to the exclusive property rights that Congress has extended to holders of copyright.

Under this exception, copyrighted material may be used without permission or payment if the use is fair and for a purpose identified in the law as in the public interest.

Uses cited in the law as examples of purposes entitled to special consideration are criticism, comment, news reporting, teaching, scholarship, and research.

Fair use originated as a judicial doctrine, which was codified in the 1976 Copyright Revision Act. In application, it continues as a judicial doctrine, applied on a case-by-case basis.

Title I of the bill deals with one of the many considerations which govern fair use analysis. Decisions of the Circuit Court of Appeals for the Second Circuit regarding this consideration—whether the work in question is published or unpublished—threaten to create a per se rule. Under a per se rule, if the work is unpublished, there can be no fair use.

Biographers, historians, literary critics, and other writers and creative artists frequently quote from unpublished letters and other unpublished works. Under the multiple factor analysis called for under the fair use doctrine, this has been permitted. However, writers are now being told by their lawyers that they can no longer do so without the approval of the author of the work in question.

These decisions seem to have strayed from the balancing of interests approach embodied in the fair use doctrine. They suggest that there is an absolute and unlimited property right in the owner of an unpublished work, and that all other fair use considerations are meaningless.

This is not consistent with the purpose and direction of American Intellectual Property Law, nor with the lengthy jurisprudence which shaped the fair use principles codified in section 107 of the Copyright Act.

Title I of the bill is designed to clarify the intent of Congress that the fact that a work is unpublished should continue to be only one of several considerations that courts must weigh in making fair use determinations. The fact that the work is unpublished ordinarily weighs against a fair use finding, but it does not end the analysis.

Title II of the bill provides an automatic renewal of copyrights secured on or after January 1, 1963, and before January 1, 1978, the effective date of the Copyright Revision Act of 1976.

The 1976 revision abandoned the affirmative renewal requirement for copyrights created after January 1, 1978. As a general rule, these copyrights now exist for the life of the author plus 50 years.

Under previous law, failure to apply for and renew a copyright in the 28th year meant that protection was forever lost.

Copyrights in their first term on January 1, 1978, were given a statutory term of 28 years from the date originally secured. After this period, they can be renewed for an additional 47 years, but this must be an affirmative renewal.

The copyright office is of the opinion, and I agree, that the public interest would be best served by making the 47-year renewal automatic when the original 28-year term begin to expire on January 1, 1992.

The public interest is served by affirmative registration of renewal. For example, registration facilitates the location of current copyright owners so that interested parties may negotiate licensing or other use.

However, the harshness of the sanction for failure to affirmatively renew—permanent and irretrievable loss of protection—and the high probability that many innocent parties will inadvertently suffer such a loss, convince me that the better course of action is to provide automatic renewal.

This is particularly true because a remedy of equitable restoration of inadvertently and unjustly lost protection is not available to us.

The Constitution provides that exclusive rights such as those found in copyright may only be granted "for limited times." If they expire, for whatever reason, they pass irretrievably into the public domain.

The third title of the bill consists of a proposal submitted by the Librarian of Congress to revise and extend the National Film Preservation Act of 1988.

That act provides for the designation and preservation of U.S. made films which are culturally, historically, or esthetically significant. It authorizes a seal which may be displayed in the distribution of the original version of films which have been so designated, and requires the labeling of any such film which has been substantially altered from the original version, such as by colorization.

The 1988 legislation was the end product of an unsuccessful effort to secure proprietary rights in films for American film directors and screen writers similar to those enjoyed by their counterparts in some European countries.

In essence this called for the creation of copyright interests and remedial rights on the part of persons other than holders of copyright. If traditional intellectual property rights are to be expanded in such a manner, it should occur only after careful consideration in the appropriate legislative committees of the Congress. This was not possible in the context of a legislative amendment offered during mark-up of an appropriations bill, the forum in which these issues were considered in the 100th Congress.

Film preservation is an important and valuable undertaking which has broad support in the film industry as well as with the public at large. It should not be jeopardized by linkage to the highly controversial issues which have shown to reside in the debate over moral rights for film directors, screen writers, and other creative participants in the film making process.

The proposal developed by the Librarian addresses both these concerns. It is limited to matters of film preservation. When introduced and given appropriate legislative committee referral, it will be positioned to receive timely consideration under the process we refer to as "regular order." For these reasons, I am pleased to introduce the Librarian's proposal.