A MODEST PROPOSAL TO STREAMLINE FAIR USE DETERMINATIONS

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An Act

To clarify the fair use doctrine of U.S. copyright law, and for other purposes:

WHEREAS, the safeguard of fair use constitutes a vital and indispensable part of our copyright laws,

WHEREAS, its application in the current litigation process seems at times wholly indeterminate,

WHEREAS, the time, expense, and uncertainty of that application chills users from engaging in plainly fair uses and concomitantly chills copyright owners from protecting their rights,

WHEREAS, the Congress believes that an expedited, voluntary, inexpensive, non-binding procedure to obtain an impartial indication as to fair use would be a valuable adjunct to our copyright laws, offering guidance to prospective plaintiffs and defendants alike, and

WHEREAS, the Copyright Office possesses the institutional competence to facilitate those determinations from disinterested third parties,

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 101. SHORT TITLE.

This title may be cited as the "The Fair Use Determination Given Expeditiously under the Statutory Indicia for Calibrating Liability and Enforcement Act ("The FUDGESICLE Act").

SECTION 102. NON-BINDING FAIR USE ARBITRATION.

The following is added to the end of section 107 of title 17, United States Code:

"(b)(1) Within three months after adoption of this Act, the Register of Copyright shall promulgate a panel of no less than twenty qualified Fair Use Arbiters who have demonstrated expertise in copyright law.

"(2) Anyone who wishes to use material believed to be subject to protection under this title and who has not successfully concluded licensing arrangements with the proprietor may petition the Register to convene a Fair Use Arbitration.

"(A) The petition shall be made on such form as the Register may designate, as part of general regulations that the Register may promulgate under this section.

"(B) The petition shall include:

"(i) a detailed description of the usage that petitioner intends to make, and if possible an exemplar of the subject work that it intends to produce;

"(ii) a statement of the identity of the copyright proprietor as determined via a search of the records of the Copyright Office or as otherwise determined by petitioner in the exercise of good faith;

"(iii) a copy of the full copyrighted work that is to be the subject of the putative fair use, specifically delineating in as much detail as possible the portions that are to be copied as part of the putatively fair use;

"(iv) an accompanying letter of no more than six pages (or such other length as the Register

may set by regulation) setting forth the petitioner's rationale;

"(v) a description of any related petition that the petitioner has filed;

"(vi) an objection to the service of one or more of the duly appointed members of the panel under subparagraph (b)(1), *provided that* any objection to more than 40% of the members of the panel shall be disregarded; and

"(vii) any other information required under subparagraph (A).

"(C) The petition shall be disregarded unless the petitioner simultaneously remits $1,000 to convene the Fair Use Arbitration.

"(D) Simultaneous with filing the petition with the Register, petitioner shall serve a copy thereof on the proprietor of the copyright who is identified in subparagraph (B)(ii).

"(3) Within two weeks after receipt of that petition, the copyright proprietor may serve on the Register a response thereto.

"(A) The response shall be made on such form as the Register may designate.

"(B) The response shall include:

"(i) a reply, if indicated, to any of the claims presented by petitioner set forth in subparagraphs (2)(B)(i)–(iii) and (v);

"(ii) an accompanying letter of no more than six pages (or such other length as the Register may set by regulation) setting forth the respondent's rationale;

"(iii) an objection to the service of one or more of the duly appointed members of the panel under subparagraph (b)(1), *provided that* any objection to more than 40% of the members of the panel shall be disregarded; and

"(iv) any other information required under subparagraph (A).

"(C) The response shall be disregarded unless the respondent simultaneously remits $1,000 to convene the Fair Use Arbitration.

"(D) Simultaneous with filing the response with the

Register, respondent shall serve a copy thereof on the petitioner.

"(4) One month after the petition has been filed, the Register shall designate one member of the panel to whom neither party has objected as the Fair Use Arbiter for this matter to consider the petition and response (if any), *provided that* if, one week prior to that time, either party shall indicate to the Register that this is a complex matter, and shall simultaneously remit an additional $9,000 to the Register, then the Register shall designate three members of the panel to whom neither party has objected as the Fair Use Arbiters for this matter.

"(5) One month after being selected, the Fair Use Arbiter(s) for this matter shall issue their report. It is up to Fair Use Arbiter(s), in their discretion, to meet with the parties (and with each other) individually, collectively, or not at all, in reaching their determination, pursuant to whatever rules and procedures that the Fair Use Arbiter(s) may adopt. In any event, their report shall include:

"(A) an opinion that the subject utilization fails to qualify as fair use, along with an explanation of the reasons leading to that conclusion; or

"(B) an opinion that the subject utilization amounts to fair use, along with an explanation of the reasons leading to that conclusion.

"(6) As complete compensation for their services, the Fair Use Arbiter(s) shall receive the full amounts remitted by the parties pursuant to subparagraphs (2)(c), (3)(c), and (4).

"(7) The Register of Copyrights shall make publicly available, on a website or otherwise, all petitions, responses, and rulings submitted pursuant to paragraphs (3), (4), and (5).

"(8) Regardless of whether a proceeding is brought to the Fair Use Arbiter(s) and how they rule, any determination subsequently to be made in a court of competent jurisdiction concerning the applicability of fair use will proceed *ab initio*.

"(A) The court shall not be obligated to accord any weight to the ruling of the Fair Use Arbiter(s).

"(B) To the extent that either or both parties failed to avail themselves of the arbitration process, the court shall not accord any weight to that circumstance.

"(9) Nonetheless, the ruling of the Fair Use Arbiter(s) shall be

weighed in calibrating the appropriate remedy to be imposed in any subsequent litigation as follows.

"(A) To the extent that that the usage is determined not to be fair use, then:

"(i) if the Fair Use Arbiter(s) had ruled against fair use, that ruling is admissible in the context of determining the defendant/petitioner's willfulness;

"(ii) if the Fair Use Arbiter(s) had ruled in favor of fair use, then the remedies available against the defendant/petitioner shall be limited to those forth in section 514(b) of this title.

"(B) To the extent that that the usage is determined to be fair use, then the Fair Use Arbiter(s)' decision may be considered in the context of ruling on any request for the award of attorney's fees.

"(C) This system relies on full and honest disclosure.

"(i) The court may consider any false or incomplete statement made by petitioner or respondent and, in its discretion, may elect to discount part or all of the determination by the Fair Use Arbiter(s) on that basis and may otherwise consider that circumstance in determining the appropriate remedy.

"(ii) The court may also consider, in determining the appropriate remedy, whether petitioner has filed numerous petitions geared at similar conduct, in order to overcome the effect of one or more adverse rulings."

SECTION 103. TECHNICAL AMENDMENT

Section 107 of title 17, United States Code, is amended—by replacing the first word: "Notwithstanding" with the following: "(a) Notwithstanding".

APPROVED FEBRUARY 15, 2006

LEGISLATIVE HISTORY

Section-by-Section Analysis

First WHEREAS clause. Ringing endorsements of fair use are

legion. The bill reiterates Congress's commitment to balance within the law of copyright. The rights of copyright owners must be respected—meaning that the boundaries of fair use should be well marked too, inasmuch as fair use lies outside the rights of copyright owners. *See* David Nimmer, "*InacCSSibility*," *in* BENJAMIN KAPLAN ET AL., AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) (Iris C. Geik *et al.*, eds., 2005).

Second WHEREAS clause. The boundaries of fair use are anything but clear at present. The result is that nobody can know what fair use is until the full process of litigation has run its course. As has been observed, "The malleability of fair use emerges starkly from the fact that all three [fair use cases that were litigated to the United States Supreme Court] were overturned at each level of review, two of them by split opinions at the Supreme Court level." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2005).

Third WHEREAS clause. Director Jon Else wished to use a particular segment in *Sing Faster: The Stagehands' Ring Cycle* (1999). That documentary adopted the unusual perspective of showing Richard Wagner's epic operas through the eyes of the union stagehands. At one point, while Brünnhilde was belting it out onstage with the Walkürie, the camera showed the union hands backstage with rapt attention. As the camera pulled back, it turned out that they were watching television—*The Simpsons*, to be precise.

Mr. Else asked Fox to quote him a license fee. The company asked for an astronomical amount; so the erstwhile director explained that his was a simple non-profit venture, so could Fox please quote him the appropriate amount for that type of exploitation. That was the reduced rate, Fox replied; you would have had to pay ten times that for true commercial exploitation.

In the event, Mr. Else decided to look somewhere else; his finished product shows a different scene, with a basketball game on the television. The public was therefore deprived of this delicious moment contrasting high culture with low culture. For Mr. Else was unwilling to rely on fair use and entrust his project to the litigation process. In our estimation, that is an example of a potential user being chilled from engaging in plainly fair use. This is not to say that Mr. Else acted irrationally; to the contrary, given the uncertainties of fair use as currently applied, his decision to switch rather than fight might have been eminently sensible. For

general background on this matter, see NEIL NETANEL, COPYRIGHT'S PARADOX: PROPERTY IN EXPRESSION/FREEDOM OF EXPRESSION (Oxford University Press, forthcoming 2006)

Fourth WHEREAS clause. The sense of the Congress is that we can do better. We have perfect confidence in the United States Copyright Office as the institution to lead us out of the fair use wilderness into the promised land.

Section 107(b)(1). The Register must appoint a minimum of twenty individuals to a panel of Fair Use Arbiters. Nonetheless, your committee believes that more would be better, such that a panel consisting of one hundred names or more would be optimal. Pursuant to sections 107(b)(2)(B)(vi) and 107(b)(3)(B)(iii), both petitioner and respondent may reject up to 40% of the panelists. If each exercises the maximum discretion and there is no overlap, then 80% of the panelists will be disqualified. Assuming that the minimum twenty members serve on the panel, then the remaining 20% will still constitute four individuals, providing adequate numbers even for a panel of three to serve in complex cases. Obviously, if there are a hundred panelists, then the non-disqualified 20% will amount to twenty individuals, affording more leeway to appoint multiple panels.

Section 107(b)(2)(B)(iv). The legal statement submitted along with a petition can be no more than six pages long. These six pages are to be devoted entirely to legal argumentation, inasmuch as the requisite factual statements will already have been made pursuant to section 107(b)(2)(B)(i) through (iv). Although counsel retained by petitioners will undoubtedly maintain that a minimum of fifty pages is required to ventilate the issue, your committee maintains that brevity is superior; certainly, the experienced individuals who serve as Fair Use Arbiters will not routinely require more.

If experience demonstrates that six pages are not enough, the amount can be adjusted by regulation adopted pursuant to section 107(b)(2)(A). Thus, it will not be necessary for Congress to amend the law to adjust the page lengths. It is perfectly appropriate for the last sentence of the six-page submission to state that the space has been inadequate to ventilate the complex issues presented and to request additional pages. In a particular case, the Fair Use Arbiters may benefit from a longer recitation. Given that they have full authority to guide the proceedings as they see fit, as set forth in section 107(b)(5), to the extent that they believe ten or

fifty pages of briefing is indicated in a particular instance, they have every discretion to order supplemental briefing. Your committee simply wanted to ensure that, in the first instance, a brief statement would initiate the petition.

Given that that Fair Use Arbiters are compensated in amounts far less than the value of their services, your committee has concluded that the appropriate reaction to oversize submissions is for them to be placed in the trash and not considered. But, at the end of the day, the Fair Use Arbiters are given discretion as to how they wish to proceed.

Of course, simply limiting parties to six pages will not deter some from taking fifty pages' worth of text and reproducing it in fine print on six billboard-size sheets. It is recommended that the rules promulgated by the Register include guidance specifying formatting requirements of six single-spaced pages on 8 1/2 x 11 inch stationery in 12-point type, in order to discourage excessive filings. *See* section 107(b)(2)(A).

Section 107(b)(2)(B)(v). This provision becomes crucial in the context of preventing parties from "gaming" the system, as discussed below in the context of section 107(b)(9)(C)(ii).

Section 107(b)(2)(C). After deliberating figures large and small, your committee has concluded that a petitioner should be required to pay $1000 to initiate a proceeding. Less might inundate the panels with too many petitions; more might chill worthwhile causes from proceeding. We believe that Director Jon Else would have paid that amount to vet *Sing Faster* rather than simply discarding the offending segment from *The Simpsons.*

When a petition is filed without the requisite $1,000, the Register of Copyrights should discard it. To the extent that a proceeding is underway when it is belatedly discovered that payment has not been made (as could happen, for instance, if a check bounces), it should terminate forthwith.

Section 107(b)(2)(D). The goal of the petition process is to expedite proceedings. Towards that end, it is essential for petitioner to serve the affected copyright owner. Failure to serve that party no later than filing the petition with the Copyright Office is grounds for denying it summarily

Section 107(b)(3). The same considerations apply here to the respondent as were canvassed above with respect to the petitioner,

in such particulars as filing six pages, objecting to Fair Use Arbiters, remitting $1,000, service on opposing party *etc.*

Note that there is no obligation on respondent to reply. If it so chooses, whether to avoid incurring the $1,000 fee or to avoid the bother of composing a reply, respondent may choose to do nothing. In that event, the Fair Use Arbiters should still render a determination on the merits under section 107(b)(5). To the extent that they believe the subject utilization fails to qualify as fair use, they should so state, regardless of the circumstance that no reply was filed.

Section 107(b)(4). The proceedings should unfold on an expedited basis. Let us imagine that Mr. Else files a petition with the Copyright Office on March 1. For the petition to be valid, he must have simultaneously served a copy on Fox. *See* section 107(b)(2)(D). By March 14, Fox will need to file its response on both Mr. Else and the Copyright Office. *See* section 107(b)(3)(D). Under this subparagraph, the Copyright Office will designate one member of the panel as the Fair Use Arbiter no later than April 1.

Nonetheless, as of March 21, either petitioner or respondent may designate the proceeding as a complex matter. Unless accompanied by a supplemental payment bringing the party's total payment to $10,000, that designation is to be ignored. If either or both parties so designate and pay, then the Copyright Office will choose three members of the panel as the Fair Use Arbiters, no later than April 1. The Register may promulgate appropriate regulations to cover circumstances in which checks bounce or it is otherwise discovered that the requisite payment has not been made.

Note that the parties may designate a matter as complex on their own say-so, without having to certify any particulars. Your committee realizes that if enough money is at stake, a party might choose that designation just to avoid having panel member X—who, for the sake of argument, was not among the 40% of panelists that the party already challenged—serve as the sole Fair Use Arbiter of the matter. Nonetheless, having designated the matter as complex, that party should feel constrained from arguing that the matter is trivially simple in its favor.

Section 107(b)(5). Continuing the foregoing example, the Fair Use Arbiters will issue their report no later than May 1. During the month of April, they may choose to ask for more briefs, to schedule meetings with the affected parties, to meet among themselves, and

all other particulars. They may decide to follow the Federal Rules of Evidence or not, in their own discretion.

When the parties do not cooperate with the Fair Use Arbiters, your committee believes that the ruling should still issue by May 1, adversely to the recalcitrant party if necessary. To the extent that three Fair Use Arbiters cannot agree among themselves how to handle the proceedings during April, they should so notify the Copyright Office. The Register may promulgate appropriate regulations to cover those circumstances.

In the event that the three members of a complex panel cannot agree among themselves, then two of them may issue a report. That majority ruling will be considered for all purposes the report of the Fair Use Arbiters.

Section 107(b)(5). A solitary arbitrator will receive $1,000 for a petition or $2,000 if a response is filed. A panel of three arbitrators will evenly split $11,000 or, if both parties designate the matter as complex, $20,000. Conceivably, a petitioner could file and not receive a reply within two weeks, but still designate the matter as complex at the three-week mark. In that event, the panel of three will evenly split $10,000.

Section 107(b)(7). This provision helps to serve the goal of avoiding abuse of the system, as set forth more fully below in the context of section 107(b)(9)(C)(ii).

Section 107(b)(8). This provision is a key component of the legislation. It clarifies that the determination of the Fair Use Arbiters carries no force in the context of subsequent judicial determinations of liability. In other words, regardless of which determination the Fair Use Arbiters reach, the court might conclude the opposite.

Section 107(b)(9). Concomitantly, however, the determination of the Fair Use Arbiters does carry force in the context of subsequent judicial determinations of remedy. The determination depends on whether the court agrees or disagrees with the determination of the Fair Use Arbiters.

Section 107(b)(9)(A). The first situation unfolds when the Fair Use Arbiters had made a determination against fair use. The losing petitioner is still free to argue in subsequent court proceedings that its usage is fair.

Section 107(b)(9)(A)(i). If the ultimate judgment reached is in

accord with the determination of the Fair Use Arbiters against fair use, then there are "two strikes" against petitioner. It therefore becomes fair to heighten the remedies against petitioner. The first strike "is admissible in the context of determining the defendant/ petitioner's willfulness." First, the reference to "defendant/ petitioner" applies, in the context of declaratory judgment actions and otherwise when necessary, to a "plaintiff/petitioner." To the extent that a jury assesses statutory damages against defendant, for example, it may wish to heighten awards from $30,000 to an additional amount up to $150,000, on the basis that defendant already had an indication, when losing its petition, that its conduct would not ultimately qualify as fair use. *See* 17 U.S.C. § 504(c)(2).

This is not to say that the jurors are obligated to find willfulness under these circumstances. Even if they deny fair use as to petitioner who likewise previously lost before the Fair Use Arbiters, the jury still may determine that defendant should be assessed less than $30,000 in statutory damages, for example.

Section 107(b)(9)(A)(ii). If the ultimate judgment reached is against fair use, but is contrary to the determination of the Fair Use Arbiters who had voted in favor of fair use, then a different dynamic unfolds. Under these circumstances, not only are there not two strikes against petitioner, but to the contrary petitioner proceeded in the good faith expectation that it would prevail at trial—which circumstances have upset.

Under these conditions, your committee has decided that the remedies against petitioner should be severely circumscribed. To avoid re-inventing the wheel, the bill refers to the proposed section 514 to be added to the Copyright Act, as suggested in UNITED STATES COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 127 (January 2006).

Section 107(b)(9)(B). If the ultimate judgment reached vindicates fair use, then no damages will be assessed against defendant. Nonetheless, the determination of the Fair Use Arbiters may still be relevant.

If the Fair Use Arbiters had voted against fair use, then plaintiff was reasonable in proceeding, even though it ultimately lost. The judge should keep that circumstance in mind in deciding whether to deny any award of attorney's fees against plaintiff.

By contrast, if the Fair Use Arbiters had voted in favor of fair use, then there are "two strikes" against respondent. It therefore appears that plaintiff may not have acted reasonably in proceeding.

The judge should keep that circumstance in mind in deciding whether to award attorney's fees against plaintiff.

The further question arises whether the fees paid to the Fair Use Arbiters should be counted as part of attorney's fees. Your committee decided that those fees, on balance, should be considered "sunk costs" that neither party should be in a position to recover.

Section 107(b)(9)(C). As stated in the bill, "This system relies on full and honest disclosure." These final provisions are aimed at bolstering that honesty.

Section 107(b)(9)(C)(i). For instance, a given usage may be deemed fair by the Fair Use Arbiters, but the ultimate utilization by petitioner may exceed the quantum of respondent's work discussed in the petition. Under those circumstances, the court may decide to give no weight to the determination of the Fair Use Arbiters, reached on what is now recognized to be an incomplete record.

In the previous paragraph, the word "court" is to be understood as the same term is used in 17 U.S.C. § 504(c)(1). As held *in Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), for purposes of the Seventh Amendment, it includes a jury when required.

Section 107(b)(9)(C)(ii). In order to avoid "gaming the system," the bill is structured such that the all petitions and rulings are made publicly available, so that both the Fair Use Arbiters and the courts may consider the full picture. For instance, if petitioner X files one petition for usage of cartoon character A, a second for character B, a third for character C, *etc.*, it may simply choose not to use those characters for which it receives an adverse ruling from the Fair Use Arbiters, limiting itself to instances in which it has received a favorable ruling. Under those circumstances, the court could choose, in its discretion, to deny petitioner X the legal consequences of that positive ruling.