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HOUSE

BILL: H. R. 8419
ACTION:

DATE: May 19, 1958
PAGE: 8048 to 8049

## INFRINGEMENTS OF COPYRIGHTS BY THE UNITED STATES

The Clerk called the bill (H. R. 8419) to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States.

There being no objection, the Clerk read the bill, as follows:

*Be it enacted, etc.,* That section 1498 of title 28 of the United States Code is hereby amended by inserting the letter "(a)" at the beginning of the section and adding at the end thereof a new subsection "(b)" reading as follows:

"(b) Whenever after December 31, 1956, the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101 (b) of title 17, United States Code: *Provided,* That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however,* That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further,* That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

"Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than 3 years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the 3 years, unless suit is brought before the last-mentioned date."

SEC. 2. The act of August 1, 1953 (ch. 305, sec. 609; 67 stat. 350 (31 U. S. Code 649b)) is amended to read as follows:

"Appropriations for the military departments available for procurement or manufacture of supplies, equipment, and materials shall hereafter be available for the purchase or other acquisition of (a) copyrights, letters patent, applications for letters patent, (b) licenses under copyrights, under letters patent, and under applications for letters patent, and (c) designs, processes, and manufacturing data; and shall also be available for the purchase or other acquisition of releases, before suit is brought, for past infringement of letters patent or copyrights. Any such purchase or other acquisition shall pertain to supplies, equipment, materials, copyrighted matter, or processes produced or used by or for, or useful to, the department concerned."

SEC. 3. The catchline of section 1498 of title 28, United States Code, is amended to read—

"§ 1498. Patent and copyright cases."

The item identified as

"1498. Patent cases"

in the chapter analysis of chapter 91 of title 28, United States Code, is amended to read—

"1498. Patent and copyright cases."

With the following committee amendments:

Page 1, line 7, change "1956" to "1958."

Page 3, line 15, to page 4, line 5, strike out all of section 2 and substitute the following:

"SEC. 2. Title 10, United States Code, section 2386 (4) is amended by adding after 'patents' the words 'or copyrights'."

The committee amendments were agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

Mr. NIMTZ. Mr. Speaker, H. R. 8419, to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States, passed the House as H. R. 6716 on July 2, 1956—84th Congress, 2d session. It was introduced by my distinguished predecessor, Honorable Shepard J. Crumpacker, who was a member of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary. During his tenure in Congress he worked hard and diligently in this field and became an expert in regard to such legislation. He helped revise much of the law that is existent in these fields.

Following its passage by the House it was not referred to a committee by the Senate because of its passage late in the session, and no further action was taken in regard to this measure in the 84th Congress.

PURPOSE AND STATEMENT

The purpose of this bill is to provide a remedy in the Court of Claims for the infringement by the United States Government, or by any contractor acting with its consent, of any work protected under the copyright laws of the United States. To put it another way, the bill would waive the sovereign immunity of the United States for infringement of copyrights by extending the provisions of section 1498, title 28, United States Code, to permit an action in the Court of Claims for copyright infringements.

It has long been an established principle that the Federal Government should not appropriate private property without making just compensation to the owner thereof. For most types of property, the principle has been implemented by legislation permitting a property owner to bring suit against the Federal Government when he believes that just compensation has not been made, for example, in the field of patents—title 28, United States Code, section 1498. Other fields include admiralty, contracts, and torts.

There is, however, one form of property—property in copyrights—for which existing law does not provide a definite workable and equitable procedure for the property owner. There has been no specific legislative provision authorizing suits against the Government for infringement of copyrights as there has been for patents.

When the Government deliberately publishes a copyrighted, article without obtaining the prior consent of the copyright proprietor, the general assumption would be that the holder, pursuant to the principles of "just compensation" under the fifth amendment of our Constitution, should be entitled to an action against the Government for infringement. Yet no such infringement cases have been reported, so far as this committee can determine. The reason appears to be that the Government, under still another established concept, that is, "sovereign immunity," must consent to be sued for this particular type of wrong, and as yet has not so consented. Recently there has been some discussion to the effect that the Federal Tort Claims Act may have removed this prohibition against suing the Government, but a consideration of the legislative history of that act indicates that the prohibition has not been affected.

While the Government enjoys this immunity against suit for infringements in copyright actions, it should be pointed out that Government employees, even though acting within the scope of their employment, do not. This is for the reason, according to the decisions of our courts, that "sovereign immunity" covers only the Government and does not extend to its employees. As stated by the Supreme Court in *Belknap* v. *Schild* (161 U. S. 10), a patent case:

> The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property have been wrongfully invaded or injured, even by authority of the United States * * *. Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent.

Again, in *Towle* v. *Ross* (32 Fed. Supp. 125), defendants, acting as employees of the Government, made photographic reproductions of plaintiff's copyrighted map. The court found for the plaintiff and against the defendants, even though they ceased publication and the reproductions were never used. Regarding the *immunity defense*, the court observed:

> The position of the defendants as employees of the United States cannot protect them from the award of damages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the Government by the employees thereof. The foundations of arbitrary power would be firmly laid if the agents could violate the rights of citizens and themselves escape unscathed.

It seems inequitable, that employees of the United States, acting for the benefit of the Government, are now personally liable for copyright infringement and that the Government is not. It appears proper to this committee that the Government should assume responsibility for such acts. Furthermore, it seems illogical to treat copyright infringements by the United States differently from patent infringements, in view of the established principle that the Federal Government should not be appropriating private property without just compensation, which principle was long ago adopted with regard to infringement of patents. The instant bill is designed to correct this situation both with respect to the copyright owner and to Federal officers and employees, and to the public generally.

EXPLANATION OF BILL

The bill is based, generally, upon provisions similar to those now existing in Federal law for patents, but with modifications appropriate to the nature of copyright property. Provision is made for suits in the Court of Claims. In addition, it affords the right of recovery for copyright infringements by contractors and subcontractors who perform work for the United States where such contractor infringes with the consent of the Government. It protects the Government employee, acting in the scope of his employment, by providing that the copyright owner's only remedy is by action against the United States Government. The bill further provides that a Government employee shall also have a right of action against the Government, except in those instances where he was in a position to order, influence, or induce use of the copyrighted work by the Government. The bill does not, however, confer a right of action on any copyright owner or any assignee with respect to any copyrighted work prepared by a person while in the employment of the United States where the copyrighted work was prepared as a part of the official functions of the employee or in the preparation of which Government time, material, or facilities were used. The bill also provides for compromise settlement of any claim which the copyright owner may have against the Government by reason of its infringement.

The bill provides a 3-year statute of limitations for filing infringement actions against the Government. The 3-year period of limitation was adopted in order to conform this bill to Public Law 85–313, 85th Congress, which sets up a uniform statute of limitations of 3 years on civil actions involving copyright infringements. Where there is a claim against the Government for infringement, the legislation provides for the tolling of the statute of limitations during the time negotiations are underway for the compromise settlement of the claim.

Section 2 of the bill, as amended, amends section 2386 (4) of title 10, United States Code, an appropriation section, which provides generally that appropriations for the military departments available for the procurement of supplies and equipment, shall also be available for the purchase or acquisition of certain listed rights in the patent, copyright, and technical data fields.

Section 3 of the bill contains technical provisions and was adopted in order to amend the section catchline and chapter analysis of title 28, United States Code. Title 28 is one of the United States Code titles which has been enacted into positive law.

Mr. Speaker, the enactment of this legislation is favored by the Librarian of Congress, the United States Information Agency, and the American Bar Association. I urge favorable consideration of this legislation.