INFRINGEMENTS OF COPYRIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 4059

TO AMEND TITLE 28 OF THE UNITED STATES CODE RELATING TO ACTIONS FOR INFRINGEMENTS OF COPYRIGHTS BY THE UNITED STATES

JUNE 2, 1960

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INFRINGEMENTS OF COPYRIGHTS

THURSDAY, JUNE 2, 1960

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND
COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2300, New Senate Office Building, Senator Philip A. Hart presiding.

Present: Senator Hart.

Also present: George S. Green, professional staff member; Robert L. Wright, chief counsel, Patents, Trademarks, and Copyrights Subcommittee; Clarence Dinkins, assistant counsel, and Richard M. Gibbons, of the staff of Senator Wiley.

Senator HART. The committee will be in order.

This hearing is to consider H.R. 4059. The chairman of the subcommittee, Senator O'Mahoney, has expressed the hope that he might be able to attend, and surely all of us hope this may be possible. However, in his absence at this hour, I suggest that we proceed.

Mr. Gibbons is representing Senator Wiley. The record should show what all of us know, that the Committee on Foreign Relations today is engaged in a very serious set of hearings, and quite properly Senator Wiley is in attendance at that committee.

In the absence of George Green, we are fortunate that Mr. Wright is present, and I am sure is thoroughly familiar with H.R. 4059. My silence implies that I read it first this morning.

(H.R. 4059 follows:)

[H.R. 4059, 86th Cong., 1st sess.]

AN ACT To amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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 new subsections "(b)" and "(c)" reading as follows:

"(b) Hereafter, whenever 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 three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period betwen 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 three years, unless suit is brought before the last-mentioned date.

"(c) The provisions of this section shall not apply to any claim arising in a foreign country."

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

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."

Passed the House of Representatives July 20, 1959.
Attest:

RALPH R. ROBERTS, *Clerk.*

Senator HART. I would ask Mr. Wright to proceed with the list of witnesses. As acting chairman, I have no statement to make. If any member of the subcommittee has given a statement, we would be glad to insert it at this point in the record. Mr. Wright.

Mr. WRIGHT. Thank you, Senator. Mr. Dodds.

Mr. DODDS. Good morning, gentlemen.

STATEMENT OF ROBERT J. DODDS, JR., GENERAL COUNSEL, DEPARTMENT OF COMMERCE; ACCOMPANIED BY KENNETH McCLURE, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. WRIGHT. You are the General Counsel of the Commerce Department?

Mr. DODDS. Yes, Mr. Wright. My name is Robert J. Dodds. I am General Counsel, Department of Commerce, and I am accompanied this morning by Assistant General Counsel Kenneth McClure.

And any help that we can be to this subcommittee in its deliberations respecting H.R. 4059, why we will be most glad to offer whatever is requested of us. We have no prepared statement.

The bill passed the House, and as you recall, in July of last year. We are very interested in the Department of Commerce in having this bill enacted. We feel that it will serve a definite purpose.

The law of copyright is not afforded the same protection that is found in the patent field of suit against the Government because, of course, the sovereignty of the Government of the United States exists until by statute it in effect consents to suit.

We feel that with respect to infringement of copyrights, the Government properly should be subject to liability.

Senator HART. May I ask why the change was made with respect to patents and yet not to copyrights? Are you familiar with that? Maybe it is so obvious that I should know, but I do not.

Mr. DODDS. I would like to know the answer to that myself, Senator, but I do not. May I ask Mr. McClure?

Mr. MCCLURE. It was just that the other did not occur at the time.

Mr. DODDS. I was afraid that was the case.

Mr. MCCLURE. I have asked that question myself before, and this is the only answer that I have ever heard, that patents occurred and people were provided the remedy, and copyrights did not at the time.

Mr. DODDS. That seems rather surprising because one usually thinks of patent rights and copyrights in the same connotation.

Mr. WRIGHT. It is true, isn't it, that the patent statute was really a product of defense requirement policy? That is, that the military, the Defense Department wanted the right to, in effect, seize patents that they needed in connection with defense procurement?

Mr. DODDS. Yes. As Mr. McClure says, the need came up and it was met by legislation. But since I got into this, it has been surprising to me that copyrights were not handled the same way—reproduction of documents whether by Defense or by any other agency. To me it is a surprising omission.

Mr. WRIGHT. In that connection, I was wondering why you had in this statute here the double proviso over the second page of the bill which in terms undertakes to define the situation in which Government employees shall and shall not have a right to copyright certain material. There is no comparable provision defining governmental and employee rights as to patents in section 1498, and I wondered why it was thought necessary or desirable to put those definitions in here in the form of those provisos?

Mr. DODDS. I think it is more apt to come up in the case of copyrights. And if I may say so, speaking personally, I think it is an omission in the patent case, although I think it would not be as likely to arise. We feel that the Government employee, by virtue of being a Government employee, should not be deprived of his right of action if a copyright owned by him is infringed by his agency, or by anyone in the Government. On the other hand, if it is a copyright that he worked on and he helped prepare as an official of the Government, he did not have the rights of the owner of the copyright. He should not be able to bring suit. That is why the two provisos.

Mr. WRIGHT. I wondered if in connection with those provisos any thought has been given to their possible effect upon the pending litigation in the U.S. Court of Appeals for the District of Columbia here between Admiral Rickover and the Public Affairs Press?

Mr. DODDS. That in no way has entered into our thinking in the Department of Commerce.

Mr. WRIGHT. And there I suppose that it is this definition of copyrighted work prepared by someone employed by the United States with the aid of Government time and facilities. The definition here suggests that if those facts are true, there can be no private copyright by the man who prepared the material, and is contrary to the position that the admiral is now asserting, and the position which Judge Holtzoff upheld and which, of course, the admiral is attempting to sustain in the court of appeals.

Mr. DODDS. Well, by analogy, Mr. Wright, if the Secretary of Commerce were to direct me to prepare a paper for him, in the course of my duties, and in the course and scope of his duties as Secretary of Commerce, and I were to seek to register that copyright, I think that I should not be able to sustain an action again the Government of infringement because it essentially is the Government's property. If during the hours of 9 to 5 I am preparing it in the court of my employment, I think that I should not have property rights on it.

Mr. WRIGHT. But, of course, that whole question is one that is controversial throughout the Government at the moment. I wondered why it was necessary to have those first two provisos in the bill at all. Wouldn't you have a perfectly workable bill without them?

Mr. MCCLURE. Mr. Wright, isn't there something of a comparison with existing law with respect to patents in section 1498?

For example, in that section there it says a Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. Now, it seems to me that that is something of a parallel to the proviso that is found on page 2, starting at line 7.

Mr. WRIGHT. Yes; I agree. However, the parallel ceases when you go on with the second proviso to describe the instances when an employee should or should not have title to copyrighted work.

Mr. MCCLURE. The second proviso in the bill reads:

> That this subsection shall not confer a right of action on any copyright owner, or any assignee of such owner with respect to any copyright 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.

Then it seems to me that it is very similar——

Mr. WRIGHT. That is the part I do not think is paralleled in section 1498—is it?

Mr. MCCLURE. Well, what I was thinking about is this sentence of section 1498 that says this section shall not confer a right of action on any patentee or any assignee, and so forth, with respect to any invention discovered or invented by the person while in the employment or service of the United States, where the invention was related to the official functions of the employee in cases where such functions included research and development, or in the making of which Government time, materials, or facilities were used. It seems to me that that is a rather close parallel.

Mr. WRIGHT. Well, you feel that this definition is substantially the same as the patent one? I had thought that there was a deliberate choice of somewhat different words there to define the copyrights——

Mr. MCCLURE. I think the purpose was identical.

Mr. WRIGHT. There was no intention to establish a somewhat different standard with respect to——

Mr. MCCLURE. No, sir.

Mr. WRIGHT. To employee ownership of copyright material?

Mr. MCCLURE. This is my understanding, Mr. Wright.

Mr. WRIGHT. Because you will note section 1498 does refer to the nature of the duties of producing that kind of material.

Mr. MCCLURE. As will be involved in research and development.

Mr. WRIGHT. And I gather you did not feel, or whoever prepared the bill did not feel, there was any need to parallel that language with respect to copyrighted work.

Mr. MCCLURE. That is my understanding, Mr. Wright.

Senator HART. I would think it might be helpful to those who are reading the record, including the members of the Judiciary Committee, if at this point the language of this patent section was inserted in the record.

Mr. WRIGHT. I am sure it would, Senator. What I had reference to was the two provisos which begin at lines 7 and 12 and read as follows:

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 specifically the contention of Admiral Rickover with reference to his claim that even though in his case there was the material, the speeches, that were prepared while he was an employee of the Government, and there was some time or material used in connection with the preparation, that he has a right to copyright that material and assign it to a publisher.

Mr. DODDS. Excuse me, Mr. Wright. I believe there is no existing prohibition comparable to the patent one in section 1498 with respect to copyright. I believe there is no restriction at the present time preventing a Government official from proceeding to enforce a copyright he may have. There is one with respect to patents. We have just read it.

Mr. WRIGHT. You are telling us that the enactment of the legislation would have no effect on the admiral's suit?

Mr. DODDS. Well, it would have to be retroactive for it to have any effect.

Mr. WRIGHT. Well, it would. I suppose the court might seize on it just as an expression of congressional intent that they might relate back. I see on its face, of course, it does not purport to apply, except to infringements occurring after enactment.

But I wondered——

Mr. DODDS. That is right. I think it in no way affects Admiral Rickover's suit pro or con.

Mr. WRIGHT. That is your position on that?

Mr. DODDS. That is my opinion.

Senator HART. Have you any other questions, Mr. Wright?

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Mr. WRIGHT. I have none, Senator.

Senator HART. I take it that the Department does recommend the enactment of the House bill as amended, is that not correct?

Mr. DODDS. Yes, Senator, it does, indeed. It is hopeful that this legislation will be favorably received.

I would like to call the attention of the subcommittee to a case decided in Federal court in Oregon called *Towle* v. *Ross*. The case was decided in 1940. The gist of that case was that the owner of the copyright could obtain redress only against employees of the Government. Now those employees innocently, but actually, had reproduced a copyrighted work.

It happened to be a map of the Bonneville project in Oregon. Logically, the Government should have been responsible in damages. As a matter of fact, the damages were very modest and the damage to the copyright holder was very modest. However, the principle of the case established that the injured party could not sue the Government because it had never waived right of sovereignty. Therefore, he sued the employees who were acting purely in the scope of their employment.

We think that is wrong. We think that the owner of a copyright should be able to obtain satisfaction from the United States, and not be limited just to employees of the United States, which roughly is the same case which now exists in the patent field.

Senator HART. Thank you.

Mr. McClure, do you have anything you would like to add?

Mr. MCCLURE. No, sir.

Senator HART. Anything to add that you think might be helpful to the committee?

Mr. MCCLURE. No, sir.

Mr. WRIGHT. I have just one more question, Senator. We have received complaints from inventors from time to time with respect to section 1498, that they feel that this section in peacetime, at least, unfairly deprives them of an injunction remedy against the Government contractor which they might otherwise have.

And the suggestion has been made to us that section 1498 ought to be amended to, in effect, provide a dual remedy, not merely a suit against the Government, but also preserve the right of action against the contractor for injunctive relief in cases where the patent owner thinks that is more desirable.

I wondered if any thought had been given in this legislation to preserving the injunctive remedy against the contractor in addition to the right to sue the Government in the Court of Claims; whether you regard that as feasible, to have in effect a dual remedy, instead of having the remedy against the Government exclusively, permitting the copyright owner to sue the offending contractor in cases where the work is being done for the Government by a contractor as well as through the Government?

Mr. DODDS. I have not looked at this particular point, but my recollection is, and I can check it in a minute, that the copyright law right now provides for injunctive relief in favor of the aggrieved registrant of the copyright.

Mr. WRIGHT. Yes. He would normally have the right to proceed directly against the contractor or private individual who would in-

fringe his copyright. This bill, I take it, would quite clearly take that right away from him in case the infringement were committed by someone in the course of performing a contract for the Government; isn't that correct?

Mr. McCLURE. Would you repeat the question, Mr. Wright?

Mr. WRIGHT. I say, it is a fact, is it not, that this bill is intended to, and does, deprive the copyright owner of a suit for injunctive relief which he might otherwise have against an infringing contractor who committed the infringement in the course of performing a contract for the United States?

Mr. McCLURE. I suppose so, by creating this right——

Mr. WRIGHT. I mean the same exclusively as here. The remedy is in section 1498, isn't it?

Mr. McCLURE. But I must say, Mr. Chairman, in that respect I would be so weary of any notion of enjoining anyone who was undertaking to do anything for the Government. I know that Mr. Wright has been very cautious, and he said this was going to take place only in times of peace. I understand that perfectly, Mr. Wright.

However, it just seems to me that the notion of spelling out these rights of injunction against the Federal Government, or anyone who is acting for the Federal Government, just is wrong as a matter of principle. It seems to me the Government has created this right. The Government creates the copyright right, and the Government finds occasion to use something to further its interests, and it does, and we are urging here that having done this, why it compensates, where it has created a right in someone else.

But please let us stop there and not allow the Government, in its efforts to do what it wants to do, to be faced with this sort of injunction.

Mr. WRIGHT. But you are cutting off a remedy which he now enjoys in that sense, and substituting a Government remedy which you say is adequate, but with which he may disagree with you about.

Mr. McCLURE. Well, as I say again, I want our Government to be as free as possible to move.

Mr. DODDS. But to clear the record, Mr. Wright, the bill in its present form does exclude injunction proceedings.

Mr. WRIGHT. Yes.

Mr. DODDS. The exclusive remedy is by an action for damages for infringement.

Mr. WRIGHT. In the Court of Claims, against the Government, yes, I understand. Thank you.

Senator HART. Thank you very much.

Mr. DODDS. Thank you, Senator Hart.

Mr. WRIGHT. Is the representative from the book publishers association here?

Mr. FRASE. Yes, sir.

STATEMENT OF ROBERT FRASE, ASSOCIATE MANAGING DIRECTOR, AMERICAN BOOK PUBLISHERS COUNCIL

Senator HART. If you would identify yourself for the record?

Mr. FRASE. I am Robert W. Frase and I am associate managing director of the American Book Publishers Council. My office is in Washington, but the main office of the council is in New York City.

The American Book Publishers Council is the trade and professional association of the general book publishers in the United States. Its 156 members include the major general commercial publishers, book clubs, university presses, publishing departments of religious denominations, and publishers of inexpensive paperbound books.

I am also appearing here today on behalf of the American Text Book Publishers Institute, which is a similar organization of 81 publishers of elementary, secondary, and college textbooks.

The members of the two associations publish well over 90 percent of the total books sold in the United States. Both associations support the enactment of H.R. 4059 as it passed the House, which would clarify the present legal situation with respect to the use of copyrighted materials by U.S. Government agencies and contractors working for such agencies in cases in which the permission of the copyright owner to use the material has not been secured.

I won't go into any detail about supporting arguments, because I think this is very well covered in detail by the report of the House committee and the letters in support which appear in that report, and going back further, the hearings which were held some years ago.

Senator HART. May I say for identification in the record that Mr. Frase is speaking of House Report No. 624 of the 1st session of the 86th Congress.

Mr. FRASE. It was our expectation that the provisions of this bill, if enacted into law, would not actually be used very frequently, but they would be available for use in the exceptional case.

Authors and publishers, the owners of copyrights, are always willing to entertain requests for the use of copyrighted material in exchange for reasonable fees. These fees, or permissions, as they are called in the trade, are an important subsidiary source of income to copyright holders. The sale of reprint rights, foreign translation rights, radio, television, motion picture rights, and other permissions, bring in a substantial part of the income of authors and of publishing firms.

Government agencies now purchase permission rights from copyright owners for a variety of materials. If, however, the situation is such in a particular case, as, for example, in time of war or national emergency, that a Government agency feels that time does not permit seeking out and negotiating with the copyright owners, or if the fee requested does not seem reasonable, the bill provides a kind of eminent domain procedure under which copyright property may be used immediately and the matter of equitable payment left to the determination of the courts.

Mr. Chairman, as I am sure you realize, this bill has passed the House on three separate occasions. Subsequent to hearings in the House, considerable negotiation and discussion with Government agencies concerned and groups representing the copyright owners and authors has taken place.

Unfortunately, on these three occasions, it passed the House rather late in the session and got caught in the logjam in the Senate Judiciary Committee. I hope this time, this will be the third time up, your committee will take favorable action and the bill will be enacted.

Senator HART. As far as you are aware, has the failure of passage in the Senate been because of time alone?

Mr. FRASE. That has been substantially the factor involved, I think. It has been a month or so before the end of the session, and the committee has been frequently tied up with numerous bills, and sometimes there have been other situations in the committee, where the committee did not meet during the last month or so of the session.

Senator HART. Mr. Wright?

Mr. WRIGHT. I have no questions, Senator.

Senator HART. This question will disclose the total absence of a copyright law background by the acting chairman, but the time to begin your education, I suppose, is when you have the chance, so I might as well ask the question.

You have explained this bill would create, in effect, or nonlegally speaking, an eminent domain action.

Mr. FRASE. That is right.

Senator HART. And you say that it would be used, or might be used, where negotiations were unduly extended, or urgency of time was a factor that would induce the Government to use the copyrighted material, and then expect to respond under this provision.

Mr. FRASE. That is right.

Senator HART. How often, if ever, is innocent use made of material which later it is discovered infringes a copyright, and if so, is the obligation to respond only when it is willful use?

Mr. FRASE. No. Innocent use would be covered, but there are general considerations under the copyright law, and court decisions would apply. If it was a small quote, it would probably be not an actionable infringement. But I do think, with respect to that question, that the existence of the statute would probably increase the knowledge in governmental circles of the rights of copyright owners, and it would probably reduce the number of these innocent violations.

Actually, in agencies which use a good deal of copyrighted material, such as the U.S. Information Agency, which buys rights in great quantities, there is no problem. It is in agencies where this practice is not so frequent that it occurs.

Senator HART. Do you really think it would increase the awareness of the rights of the copyright holder to adopt this when, without this law, the Government employee himself is liable—as I understand the testimony here?

Mr. FRASE. Yes. Because I think the legal departments of the Government agencies would make this known in regulations and so on whereas now I do not think they do, because it is the personal employee's liability rather than the Government.

Senator HART. Thank you.

Anything else, Mr. Wright?

Mr. WRIGHT. I was just wondering, in connection with this matter of liability, which seems to be something of a problem on photocopying by Government libraries, and which seems to be a controversial matter now between some of the technical publishers and the scientists and the librarians to want to give scientific and other technical people quick service by photocopying library materials—in making them available in that form, do you feel that this bill would result in any suits by publishers against the Government as a result of this photocopying activity that is now in question, and that some of them are now complaining about?

Mr. FRASE. Well, it is my understanding that the Library of Congress, for example, is very meticulous about this because the Copyright Office is a part of the Library.

But Mr. Fisher and Mr. Cary can speak better to that point. But it is my impression that Government agencies, libraries, are quite meticulous about this.

There is a problem here that is being studied by a number of committees, and I would expect some resolution would come out of it either by private agreement or some future amendment of the copyright law.

But I do not think it is really pertinent to this bill.

Senator HART. Thank you very much.

Mr. FRASE. Thank you.

Mr. WRIGHT. Mr. Fisher, perhaps you can tell us something about the bill.

STATEMENT OF ARTHUR FISHER, U.S. REGISTRANT OF COPYRIGHTS, COPYRIGHT OFFICE, LIBRARY OF CONGRESS

Senator HART. Will you identify yourself for the record, please?

Mr. FISHER. Arthur Fisher, U.S. Registrant of Copyrights.

I would only support and reiterate what the representatives of the Department of Commerce have said, and I would also concur with what Mr. Frase, speaking for the book publishers, has said.

We believe, and the Library of Congress believes, that this is an omission in the law and should be corrected, both to provide a means where the Government can clearly pay for such taking as it does of copyright matters, and also to protect employees.

Dealing with Mr. Wright's earlier question to counsel for the Department of Commerce, as to how this ommission occurred, my belief is, from my knowledge of the history of this situation, it was purely accidental, and it has already been suggested in numerous situations where the problems in the patent field have been more active and acute and the patent law has supported the amendment. I can mention examples in the field of taxation and also, perhaps, in the statute of limitations, and the copyright problem has come along late.

I do not believe there is any other explanation of the omission.

I might also comment on the suggestion as to the exemption of contractors. I would just like to emphasize that the bill, as I read it, only deals with those contractors who are operating pursuant to Government instructions or on behalf of the Government. It is an entirely independent contract operation that would not come within the language of the bill.

In other words, we are dealing with a situation here that has developed with increasing rapidity in recent years, where a large part of Government procurement is handled through private contractors, where the contractor is simply operating in place of the Government.

And I would also say that in our discussions with the Defense Department, and as you will see in the Defense Department-Navy Department letter, where they represent the whole Defense Department, after months of negotiation they were particularly sensitive to the suggestion that there would be any other remedy than damages because of fear that injunctive relief against a contractor who was

operating pursuant to Government instructions on procurement might delay Government procurement, both in times of peace and times of war, and the bill follows that suggestion.

With reference to the question that was raised as to the Rickover case and the situation where an employee of the Government might or might not be acting pursuant to Government instructions, it seems to us, and we have been very close with the Rickover case, which has been of great interest to us, that that is essentially a factual situation as to whether the Government employee or officer was operating in his individual capacity or as a governmental employee.

And I believe nothing in this bill would change that factual situation.

In addition, as Mr. Wright has already suggested, the bill is perfectly clear that it has no retroactive effect and only looks to the future, and would have no effect whatsoever back to that case.

The real crux to that case, as I see it, is a factual situation. For example, we have been asked, I might say, to participate in the case, amicus curiae, or otherwise, and we felt this was a matter of fact as to this particular work and it was not for us to express a view on a factual situation as to the admiral of the Navy. That is really the crux of the case and that would be totally unaffected by this bill, even if it did look to a case already in being, which it does not.

Mr. Wright also asked a question with respect to this problem of photocopying and fair use. I would like to stress that, as Mr. Frase has already suggested, this equally is a very important problem. It is of great concern to the Library. In the report of the House committee, there is particular reference to this point in the letter of the Librarian of Congress, and we feel that whatever is the law of fair use, as to whether making a single copy for scholarship does or does not constitute an infringement, this would be completely unaffected by the bill.

In other words, the test of what constitutes limited fair use, that is not an infringement, is part of the law of copyright and is totally unaffected by this bill. This bill simply says that where there is an infringement under the law as it exists today, or as it may develop, there the Government shall assume the responsibility rather than the employee.

I would like to emphasize one other point in this connection; namely, that a number of the Government agencies, and I suppost perhaps most conspicuous with the Defense Department, one of the largest operators in this field, has often been faced, as we know, for a good many years, with the problem where they would like to settle the case, or take work and protect their employee and make reasonable payment, but their liability not being clear, and the general policies of the Government Tort Claims Act not applying, they have not felt free up to now to do the very thing that they want to do and think ought to be done. And you will find that, I think, in the letter of the Defense Department, and you will find it in the bill itself.

You will note that in the bill, the last thing, section 2 amendments, title 10, section 2386, by adding the words "or copyrights," the procurement appropriations will make it possible, where there is a reasonable amount of taking, to make payment.

Today, even agencies that want to pay to protect their individual employee, because they have used the copyright work, the same as they

might have used the patent, do not feel free to make an adjustment of the case as they would in any other situation.

This is one of the things also that this bill would correct.

Senator HART. Mr. Fisher, at that point, is it possible to make any sort of estimate of the money which would become an obligation of the Government if this was adopted?

Mr. FISHER. I think it would be so minimal, probably, that it is—as I see it now, from operations, only in the rarest case would any money be paid at all. Today what happens to a very large degree is free permission to secure for Government use. In the Library of Congress we have a very extensive system of free permissions by major periodical publishers and book publishers. Where the Government is using, particularly in the Legislative Reference Service, and I know this is true of other departments, it is very common to give free permissions.

Now in other areas, as Mr. Frase suggested, USIA, where they may be using popular music or something, there there is more of a tendency to pay the given rates in a cultural program, and I do not think that would be affected by this because they now commonly make arrangements for purchase and use of their materials.

Senator HART. Mr. Fisher, did I understand you to say that following infringement it is not permissible for a department to make a settlement, why is USIA permitted to make payment in advance?

Mr. FISHER. They simply make a contract for the purchase.

Mr. FRASE. They have authorization in the appropriation, the appropriation act.

Senator HART. They do. Thank you.

Mr. FISHER. This is a different field. We are only dealing now where there has been an infringement. With other authorities, where people buy in advance, you have another situation.

I would like to say along the same lines there is the provision of the bill that was put in after considerable discussion with USIA and the State Department, providing in section (c):

> The provisions of this section shall not apply to any claim arising in a foreign country.

We had much discussion of this over the several years when the bill was in development in the House with all the agencies of the Federal Government. I believe it was originally felt this was unnecessary, that a tort committed abroad would not be subject to suit under the act.

But the State Department felt, and I think the USIA also felt, it was desirable to make this additionally clear, and this provision has been added. This is the first time in the three times the bill has passed the House this has been in.

But in any event, I think it is quite clear that whatever is the situation with respect to infringements committed abroad, this act leaves the situation in status quo; it does not affect it.

The provision simply says this setcion shall not apply to torts committed abroad, and leaves it at that. So if there is any argument as to whether it should or should not apply to an infringement committed abroad, the situation remains the same.

There are two or three other questions that Mr. Cary is more prepared than I am to answer, and I would hope you would call upon him.

But I would simply say it seems to us, to the Government, in the Copyright Office of the Library of Congress—there were several meetings with principal committees of the American Bar Association, and I believe the house of delegates has endorsed the bill, and that appears on the House report—that this is something that really should have been done long ago.

It is not, perhaps, as important as in the field of patents, but nevertheless, it is a hole and it is simply normal and reasonable that if that hole is not plugged by the policies of the Tort Claims Act, it ought to be dealt with by this bill. And it seems to me it is to the advantage of everyone that this be done.

Senator HART. It is your judgment that this is not plugged by the Tort Claims Act?

Mr. FISHER. Yes. The best opinions we have had, and several of the counsels of Government agencies have looked at that, and have felt that the Government Tort Claims Act would not plug it. And there has been some doubt about that. But the other agencies have not felt safe in operating under the Government Tort Claims Act, and that we should simply follow along with substantially a parallel position to the patent law.

I might add, to the patent law, in addition to what I have said before, the reason that was acted on first, that there is a different situation. That is one reason for the slight discrepancy in language. I think the purpose, as I replied to Mr. Wright's question, of this provision in this law, and the patent law, is the same, but of course in patent development there is more organized research. The writing of the copyrights is rather different, especially where Government employees are concerned.

And also, the situation of the employees in patent work is much more likely to be covered by special departmental regulations and contracts with the employees will enter into the work in the copyright field. It is much broader in scope and probably much minor in the amount of damages of individual infringement actions, and that is the reason why I think it is appropriate to try to clarify the situation, as has been done with great care after several years of work with all the agencies concerned in this bill.

I would be glad to answer any questions.

Senator HART. In recent weeks, and I think we should raise this for the record, there has been discussion and criticism of the practices with respect to patents derived from research and development work financed by the Government.

The chairman of this subcommittee, Mr. O'Mahoney, held hearings on a bill introduced by him.

Mr. GREEN. S. 3156.

Senator HART. S. 3156. And as you all know, the argument there is whether the Government ought not to have title to, and there be released to free and public use, patents resulting from research activities financed by Government grant.

What is the practice with respect to materials copyrighted as a part of work done by outside contractors for the Government?

Mr. FISHER. Senator Hart, the situation in the copyright law, in the copyright field, in the United States is rather distinctive and is different from the patent law, and different from the copyright laws

in many other countries of the world with respect to work performed by Government agencies.

We happen to be working under a 3-year appropriation on the comprehensive revision of the U.S. copyright law and we have had occasion recently to make a study of the particular point your question raises.

The U.S. copyright law provides that there shall be no copyright in the Government publications. We have recently reviewed this with most of the Federal agencies, and we find that despite the unique position of the United States, they in general wish to retain this provision with the possible escape clause under very strict provisions for peculiar situations.

In other words, the feeling is that a Government publication in the United States should be in the public domain and there should be no claim. And one of the considerations is also so the United States, in case of copyrights, will not get into the problem of having to handle, license, dispose of, patents, which has become a great problem in itself, merely as a matter of administration and compensation.

This argument of simplicity, as well as the public interest, is one reason that has led to that decision, and I believe in our report we are going to recommend a continuance of that policy.

Now you do come upon cases where a Government contractor may be involved in the question of the definition of publication. This is a question drawing a more precise line. In general, my feeling would be that the Government policy, being not to have copyright in Government publications, where the research work was exclusively financed by the Government, the same policy should apply and should be carried over into the contract.

But at any rate, the policy on copyright is very broad and very distinct. There should be no property in such work.

Now I believe also the bill before us undertakes to preserve that situation. One of the provisos says that this subsection shall not confer a right on any copyright owner, and so on. It is, of course, true that there may be institutions not operating strictly under Government instructions and policy, where a different situation would arise, but certainly this whole problem is minimized in the case of the copyright as compared to patents.

Senator HART. Do I understand, sir, that this bill would provide that materials copyrighted by a Government employee, or by a contractor, working under Government grant, would be in the public domain?

Mr. FISHER. I think if you read the——

Senator HART. You have reference to the proviso beginning on line 12?

Mr. FISHER. Beginning on line 12:

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—

now here is the broader section—

or in the preparation of which Government time, material, or facilities were used:

In other words, this is intended to be very broad, to carry over into the field we are concerned about, and I think quite properly, with the section which is now part of the U.S. Copy Act.

Mr. GREEN. Does that mean, though, Mr. Fisher, right of action against the United States and anyone else?

Mr. FISHER. I do not believe it affects whatever would be the factual situation, other than with respect to actions against the United States.

Mr. GREEN. The purpose of this bill generally is to allow actions against the United States; is it not?

Mr. FISHER. Yes; and limited to that.

Mr. GREEN. So would this proviso be limited to action against the United States, actions by an employee who had a copyright, against an individual?

Mr. FISHER. Where the employee actually did the work on his own time, his rights would be unaffected. Where he acted as a Government employee——

Mr. GREEN. Where he used Government time, material, or facilities?

Mr. FISHER. Yes. If he did this on weekends, wrote a work on bird banding, he would still have the same rights he would have as an individual, as any other copyright owner would have.

But the general policy of the law, Mr. Green, is as you stated, namely, this is limited to the situation of actions against the United States, and whatever other rights would exist I do not believe is in general affected by the bill.

Mr. GREEN. Well, in your experience, where certain matters of this nature were financed by the U.S. Government, have copyrights been issued to the individual contractors or employees, as the case may be?

Mr. FISHER. As I tried to say earlier, you get into a question of whether the prohibition of the present law against copyrighting Government publications, works authored by Government employees, shall extend to cases where it was mere financing, subsidy. In general, our test is whether this is a Government publication in the sense it was authored by a Government agency or employee.

I see that Mr. Kamin Stein, head of my Examining Division, is here. He works in this field every week. He could probably tell you exactly how the Examining Division functions with respect to the case of contractors who might merely receive a subsidy.

We take a pretty stiff line on the whole and decline to issue copyrights in a case where the publication is a Government publication. Where it becomes a factual issue, as it is in the *Rickover* case, as to whether the admiral was operating as a Government employee or on his own time, dealing, say, with his papers on education, we sometimes give the benefit of a reasonable doubt on the theory that our certificate is only prima facie evidence.

But where it is clear to us that this is a Government publication authored by a Government employee in the course of his duties, we decline to issue a certificate.

We happened to have a very important case in the Library of Congress in recent weeks, while I have been away, where we have been quite firm in declining to issue a certificate for copyright because we felt this came within the prohibition of the present law.

Mr. GREEN. That is what I wanted to get to, not necessarily whether or not a copyright should issue if it is a Government publication, but whether or not in fact they have issued.

Mr. FISHER. I can only say what I have told you, what I think the law is, how we apply it. And I think that, however, it is a separate problem again, as a problem of fair use, from anything in this law. The question whether we should issue certificates for a contractor who was merely subsidized would depend upon what Congress does as to a change or clarification of the present prohibition; the copyright law, unlike the patent law, against issuing copyrights for Government publications.

Mr. GREEN. Well, if I understand you correctly, then, there is consideration given as to whether or not a particular article or document of that type is a Government publication, and on the basis of that finding it is determined whether or not a copyright will or will not issue; is that correct?

Mr. FISHER. Yes.

Mr. GREEN. And that is made in each individual instance?

Mr. FISHER. That is right.

Senator HART. Well, if a Government agency engaged an educational institution to prepare this work on bird banding that you mentioned, and the work was prepared, and the Government pays for the time and talent that went into it, would that institution, or would the authors of the document, nonetheless be able to get a copyright against all save the Government?

Mr. FISHER. If they operated as a Government author and it was a Government publication, they could not get a copyright against anyone. We would not issue a certificate. Now we issue a great many certificates. We issue a thousand certificates a day and act upon the information before us in the application.

However, as I understand it, this bill has in the case of what is fair use, these minimum cases you spoke about, or what constitutes an infringement—this bill would not affect whatever the law was there. I only was bringing out, in answer to your question, in the copyright field you do not have the problem in the patent field, and it is a minimal problem because there is this doctrine in copyright where we do not issue certificates for Government publication.

However, that carries forward where, say, the Government partially assisted in education of a young scientist, and gave him a percentage. That would make him a Government employee. This becomes an issue of fact, just as it is an issue of fact as to whether Admiral Rickover was or was not acting in his capacity as an admiral or writing as a private author. And we cannot decide all those questions of fact. Every case is different. We only know what the broad line of the law is.

Senator HART. Perhaps most important, then, for the purpose for which we assembled this morning, is the question, and I think I understood your answer as "No," that whatever the law is with respect to the bird banding work done by contract, H.R. 4059 does not affect it?

Mr. FISHER. I think that is true so far as the general issuance of copyrights. That would remain exactly the same. Only on occasion where there was a certificate issued and it was held an infringement would there be a right of action against the Government, rather than one against the private employee who infringed.

Senator HART. But so far as H.R. 4059 is concerned, it would not affect the law so far as the right of the educational institution, or the authors of that bird banding work, is concerned?

Mr. FISHER. Yes, exactly. And that is equally the same answer with respect to fair use, constituting an infringement, and several other issues of the copyright law as a whole. This law only says, this bill only says, that where under the law as it is now, or as it may develop, there is an infringement, there may be a suit in the Court of Claims, rather than against the employee, and the Government will have authority, as in this Defense Department bill, to pay a settlement.

Senator HART. Well, in explanation for what may have seemed then an irrelevant track that we were heading down, I think it is important that the record show that this bill does not affect this other situation because there is increasing interest on the part of the committee, and I am sure on the part of Congress, with respect to the general proposition, what the Government should do with respect to both inventions and written material developed on contract.

Mr. FISHER. I think it was very desirable to bring that out.

Senator HART. You indicated, sir, that Mr. Cary might care to comment.

Mr. FISHER. He has certain other points that he is prepared to make.

STATEMENT OF GEORGE D. CARY, GENERAL COUNSEL, COPYRIGHT OFFICE, LIBRARY OF CONGRESS

Mr. CARY. My name is George Cary. I am General Counsel, Copyright Office.

First of all, I would like to just bring into focus an aspect of this bill which probably may have been overlooked in our discussion of general technicalities, and that is this:

This is essentially a bill to waive the sovereign immunity of the Government in copyright infringement cases. In the past this sovereign immunity has been waived in other fields. We are all familiar with the patent provision which Mr. Dodds has mentioned. If I remember correctly, the date of that enactment was about 1910.

In other words, some half century ago. We all, of course, are familiar with the Tucker Act, which is even older, I believe. There are provisions also of waiving immunity in case of admiralty actions. So what we are in effect doing here, I believe, is merely putting the copyright owners in a status which patent owners and owners of tort claims, contract claims and admiralty claims, have had for some many years.

I forgot to mention, of course, the Tort Claims Act. So this is merely plugging a very small, tiny loophole in this whole field of rights. I think if it is looked at in that light, the equity and justice of the bill becomes quite apparent.

I might also add that this bill, or a predecessor of it, was first brought to light back about 1955, I believe, by Congressman Crumpacker, and the hearings that we have here, the ones Senator Hart referred to, Report No. 624 of the House, is based on the original report back in those 1955 hearings.

At that time the bill was somewhat different than it is now. It contained, for example, a provision, I believe, that you could either go to the Court of Claims or you could bring action under the Tort

Claims Act. This was a specific provision. And the Department of Defense at the hearings pointed out some valid objections to that.

The USIA testified at length on this problem, and in the House hearings at that time there was considerable discussion of all of the various aspects. So the bill that finally was reported out by the House, and which the present bill is merely a successor to, does incorporate all of these points that the various Government agencies have brought to light.

So the bill that we have before us this morning is one that has been considered by all of the Government agencies involved, and this represents, I believe, their best views.

I would like to make one other diversion, if I may. This is in connection with the point which I do not believe has been discussed today, but which has, from time to time, been raised.

That is whether or not this bill would have any effect upon the congressional immunity clause. There has been some fear expressed, I believe, that if a Congressman or Senator makes a statement on the floor and incorporates in the statement a copyrighted article, that this might, in itself, under this bill, permit a suit to be brought.

I do not believe that that is the case here. I think in brief the congressional immunity clause of the Constitution, which is article I, section 6, as interpreted by the Supreme Court over many years, affords a broad immunity, not only for the words spoken during congressional debate, but for matter contained in committee reports, and other general business coming before the Congress.

Although I do not believe there has been any specific case that has dealt specifically with the copyright aspect of this problem, I would have no doubt that the insertion in the Congressional Record by a Member of Congress of a copyrighted work would be judicially interpreted as coming within this provision.

In that connection, I may add that just about 2 months ago, here in the District of Columbia, there was a case, *McGovern* v. *Martz* being the title, which came before Judge Youngdahl, an action brought by a Member of the House against a publisher for liability.

In the case the publisher counterclaimed for libel by a statement the Congressman had made in some extension of remarks. And Judge Youngdahl strongly asserted in that case that the congressional immunity does not extend only to material that has been stated on the floor of the House, or in the Congressional Record, but also to material that is inserted in the Congressional Record with the consent of the body. He made it very clear that that privilege is absolute.

Of course, this was a libel action, but I think this is quite analogous to the problem we have here, that the privilege of congressional immunity is one that is quite broad and quite absolute.

And I do not think this bill in any way would interfere with that right.

Mr. GREEN. May I ask a question at this point, sir?

Senator HART. Yes.

Mr. GREEN. It is true, I believe, under the Constitution, that such immunity does exist, but would the passage of this legislation amount to a waiver?

Mr. CARY. I do not see that it would at all, no. I do not think there is any intent. Furthermore, if you look at the language of the bill, it

says it has to be infringed by the United States, or then they go on down further, by contract with a subcontractor or a person acting for the Government, and with the authorization and consent of the Government.

And I do not see how a Congressman or Senator would fit into that provision. So the bill, by its language, it seems to me, would exclude any inference that the congressional immunity is in any way affected.

Senator HART. What if you inserted something in the Record, and had obtained unanimous consent to do it, would there be any basis for arguing that you were a person acting with the consent of the Government?

Mr. CARY. I should not think so, no, sir. I think Judge Youngdahl's statement of the privilege of immunity as being absolute would come into play right here.

Senator HART. You feel so strongly in the position that you are taking, that you would recommend to the committee that there is no need for the addition of an experss exemption?

Mr. CARY. I do not think the bill would have to be changed in any way. I do see no harm, if the committee so desires, in putting a statement in the committee report making it clear that in the committee's mind this is not intended to. It would be good legislative history.

Senator HART. All right.

Mr. CARY. That is about the extent of my remarks. If you have any further questions I would be glad to answer them.

Senator HART. Mr. Green?

Mr. GREEN. No further questions.

Senator HART. Mr. Wright.

Mr. WRIGHT. I just have one question with respect to a followup on Senator Hart's question as to the extent of the probable liability under the statute here.

I gather the principal liability contemplated is probably innocent infringement, and there was some reference to some legal principles which might minimize that liability for innocent infringement. What are those principles; what is the extent of liability for innocent infringement?

Mr. CARY. I assume you have reference to the doctrine of fair use. The doctrine of fair use is not written into the copyright laws. It is a doctrine that has been adopted by the courts. In effect, it says if you use a small amount of the work, not the whole work, and it is for a legitimate purpose, there is no liability.

Mr. WRIGHT. I was not referring to that. I assume in cases of fair use you have a finding of no infringement really. What I was talking about were cases where there is infringement, but there is not willful infringement, a so-called clear infringement, but nonmalicious, let us say, nonwillful.

You still may have substantial liability for damages, may you not, even though you do not willfully intend to infringe, if you do in fact infringe?

Mr. CARY. Well, the damage provisions of the copyright law which would apply, incidentally, to this legislation, in certain cases give the judge the right to determine damages, and if it is an innocent infringement, I think it is highly likely that the judge is not going to slap on any maximum damages. He will use minimum damages. This has been done in the past.

As a matter of fact, I recall once a case where there was innocent infringement involved, and the court held they were bound to say that the copyright had been infringed. They gave the minimum amount of damages possible.

Mr. WRIGHT. You do not think there is anything about the Court of Claims' jurisdiction which would prevent it from applying these same applicable principles that might apply in private actions?

Mr. CARY. No. The bill specifically states that the claimant may recover his entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17. So this is the provision of the copyright law about which I was speaking. So this would be applicable.

Mr. WRIGHT. Even in the case of innocent infringement, the Government would not be relieved, would it, of liability for the minimum statutory damages, right?

Mr. CARY. Well, it would depend on the facts, I would think. They could get it.

Mr. FRASE. If I might interject there, it would not be worth the copyright owner's time, probably, to file suit in a court for a claim of minimum damages.

Mr. CARY. The minimum damage is $250.

Mr. FRASE. The legal fees and so forth would be excessive.

Mr. CARY. This, I think, illustrates the wisdom of another provision of the bill, and that is the administrative settlement here.

Mr. WRIGHT. Thank you. I have nothing further.

Senator HART. Thank you very much.

Mr. WRIGHT. Are there any other witnesses here who wish to be heard?

Anyone from the Attorney General's Office? Any of the other agencies?

Then you are Mr. Curtis?

Mr. CURTIS. Yes, sir.

Senator HART. Before proceeding, Mr. Curtis—does the Department of Justice have a report?

Mr. GREEN. No, sir. I talked to the people down at the Justice Department, Senator, and they informed me that they would not appear, but would attempt to have a report to us by this time. As yet I have not seen it, sir.

Senator HART. I assume we will keep the record open for the usual period of 5 days?

Mr. GREEN. I would suggest a week.

Senator HART. Seven days.

Mr. GREEN. Yes, sir.

Senator HART. I would hope they would have a report.

Mr. GREEN. Yes, sir; I will check on that again, sir.

Senator HART. Excuse me, Mr. Curtis.

STATEMENT OF ARTHUR S. CURTIS, ATTORNEY, NATIONAL PRESS BUILDING

Mr. CURTIS. Mr. Chairman, I would like permission to distribute some stuff first. This is for the chairman, and I will give a comparable set to anyone else—any of the other Senators, I mean.

Mr. Chairman, before I begin with my statement, there were two or three problems——

Senator HART. First, Mr. Curtis, would you identify yourself for the record?

Mr. CURTIS. My full name is Arthus S. Curtis. I am an attorney, with an office in the National Press Building. I own and operate the A. S. Curtis Feature Syndicate. In a sense, I am an author. I have written for the Sunday papers. And prior to doing this work I was an instructor at the U.S. Naval Academy in the Department of English, History, and Government.

I have two law degrees from Georgetown University.

Mr. Chairman, with reference to the question put to Mr. Frase as to the relationship between book publishers and photostat companies, I believe Mr. Frase will probably be able to bear me out that there is a gentlemen's agreement between the book publishers association and the photostat companies to the effect that as to copies not for sale, the photostat companies can cause to be created certain copies for internal use.

Mr. FRASE. No; that is not the case. There was something called a gentleman's agreement by the predecessor organization of the American Book Publishers Council, which no longer exists, setting forth certain minimum photocopying activities which the members of that association would not consider as copyright violations, and would not take action against, with libraries, and not with commercial users of any kind.

As I say, this gentleman's agreement is a defunct institution and no longer exists in any way and has no meaning except of historical interest.

Mr. CURTIS. With reference to Mr. Fisher's remarks that settlements cannot be made, it is always possible, Mr. Chairman, as you know, to have the Justice Department settle a case. The agency itself cannot settle the case, but once the suit is filed, the Justice Department has authority to make a settlement.

Senator HART. Even though, as I understand it, there is no doubt but that the action could be dismissed upon motion?

Mr. CURTIS. Well, Mr. Chairman, I had this case that came up, which I argued in front of the Court of Claims, and at one point Judge Jones reached over and said to Mr. Kendall Barnes who is Chief of the Court of Claims Section of the Justice Department—"Settle with him." And this is my recollection now.

And he said, "We cannot settle with them. We have no authority."

However, this may be undercutting what I say. And it would seem to me if they had come with a settlement at this point, and I certainly approached them with a settlement, I do believe that Judge Jones would have, and the court would have, consented to it.

Now the Justice Department always has authority to settle a claim. I subsequently had a settlement conference in the Office of the Assistant Solicitor General; the certiorari was pending at the time. So it seems fairly clear to me, having gone through a court proceeding, and having to my recollection heard the Chief Judge of the Court of Claims say, "Settle with them," that there is authority to settle.

Now they did not want to settle because the Treasury Department did not want them to settle. So if the Department wants a settle-

ment, Mr. Chairman, it seems to me the authority is already present in the Justice Department to settle.

With reference to the third point as to the amount of money involved, and the chairman appeared to be interested, I will show in a moment there is an enormous amount of money involved in any one of these cases on any equitable or legal principle.

I would now like to read my statement if I may, sir.

Senator HART. Yes.

And may I indicate the practice of the committee is to print in full in the record the statement, so if there are sections which you feel you can omit, they will, nonetheless, be incorporated fully in the record.

Mr. CURTIS. Yes, sir.

May I thank this committee for the opportunity to present my views of H.R. 4059, which deals with rights of copyright holders against the United States. Particularly I want to thank Senator O'Mahoney and go on record as saying that in my opinion he is a great American whose work on behalf of authors is arduous and sincere. If it were not for Senator O'Mahoney, I would personally not be here.

And this bill before you now, which passed twice in the House without hearing—I requested a hearing and was not given a hearing—otherwise I would not now be before this committee.

Freedom of the press at this moment means that the Government is free to take any product of the press, and even unpublished works of authors, without paying anything to anyone. This is clearly the law set forth by the U.S. Court of Claims in 200–57, a case which I took to the Supreme Court without success. An American Shakespeare or Beethoven could starve in the streets while Uncle Sam distributed his work to every person in the whole wide world under the present law, as the courts construe it.

The Constitution says that a copyright holder may get an exclusive right. The Copyright Act gives an exclusive right—the dictionary defines exclusive as excluding everyone—but the courts say that exclusive does not apply to the Government.

I have prepared an outline of proposed statements and exhibits including a case history of a recent litigation against the Government. In that case Uncle Sam used a program which netted 50 billion and the author got nothing—had to take the case through the last stage, before the Supreme Court, in forma pauperis, because of the costs involved. There were about 80 pounds of exhibits that would have had to be reproduced.

Also, I have a bill for the relief of the author in that case which I would like to submit to this committee and ask that this be given favorable consideration.

And finally, I have an alternative bill after I complete my remarks on this bill. I believe, Mr. Chairman, that you will see this bill is in order.

The weaknesses of the present bill are as follows:

First, the scope of the present bill is too narrow. I am going to omit all of the outline except point 5 here, Mr. Chairman, because point 5 is not covered in the remarks below.

Now point 5 refers to page 2, line 2–4, of the bill, and if you will read page 2, line 4, it says there is an exclusive remedy against the court and the court claim against the U.S. Government.

Now because of the immunity from suit, this bill is a free hunting license to the Advertising Council. In other words, it seems to me from having gone through litigation with this, Mr. Chairman, and being in this field, that someone is wrong. I am wrong, or these gentlemen are wrong.

The Advertising Council can use literary property even over the objection of the copyright holders, as well as to raid the Treasury of the United States by taking some wornout item from a pal agency and requiring the United States to pay for the same. Because of the vastness of the Federal operation, as I will show in a moment, one agency could put a million or so of taxpayer money into the pocket of a pal agency, and the agency that did the deed would not be responsible.

Now this committee should take judicial notice that the members of the Advertising Council are advertising agencies whose clients are now under fire for misleading advertising, if we are to believe Mr. Earl Kintner, who is Chairman of Federal Trade Commission.

Now misleading advertising is only one form of dishonesty. This bill makes possible other forms of dishonesty.

I wish now to skip to the bottom of page 2 and take up the points in detail.

First, the scope of the bill is too narrow.

Copyright is the subject of the bill. This covers only a part of the creative efforts through which individuals earn their livelihood by intellectual efforts. The bill should protect, not only copyrighted material, but also all forms of intellectual property. This is merely an extension of the equitable principle that one who sows a field should also be permitted to reap the harvest.

The property to be protected could be described as follows—and I have there a definition which I have put together and primarily it says that if this is something which any State or Federal court says is property, then that is what should be protected.

Now this follows the doctrine of the *Erie Railroad* v. *Tompkins*. I think you gentlemen who are lawyers in this room recognize that case. The *Erie Railroad* v. *Tompkins* states that in substantive law the Federal Government follows the law of the forum.

I wuold like to pause a minute while this is looked over. I do not feel there is any point in reading any long paragraph.

However, the substance of it is that, if someone has put forth intellectual effort and created something, this is just as much his as if the corn created were not on a piece of paper, but were on a stalk.

Now, coming to the second point, this bill whitewashes existing wrongs. The fifth amendment of the Constitution provides that Uncle Sam shall pay whenever it takes private property for public use. Uncle Sam should apply this doctrine to manufacturers of words as well as those who manufacture bullets or other armament. In the cold war, the battle is waged with words, as well as with bullets, on a standby basis.

Uncle Sam cannot logically proclaim that his legal system is better because it protects individual right and personal property from the sovereign, while at the same time the courts of the sovereign States do not protect the product of the intelligentsia. Nor can he say that he is willing to pay for what he does in the future, but wants to keep what he has taken in the past without paying.

Great sovereigns have encouraged creative minds to the extent of subsidizing them as patrons of the arts. Unless Uncle Sam wishes to pay for what he has taken, whenever or wherever taken, this Nation is placing itself in a separate category among nations.

Now I am referring there to the word "hereafter" on page 1, Mr. Chairman, line 7. I still have an action pending against the advertising agency which closed its doors and moved out of this town. I do not think I am going to win that case, Mr. Chairman, because my case against the United States has gone up to the Supreme Court. I think the only remedy I have here is a private bill.

Now as this bill is written, with the word "hereafter" here, and on page 2 the word "exclusive," I would be out of court with the agency. I could not even sue the agency. In other words, I am just as dead as if someone shot me through the head.

Now the word "exclusive" on page 2 is a thieves' pardon in advance. The Advertising Council is today bringing out program after program for the Government. The task force agency which does the work may well be an agency which is also putting out advertising which Mr. Kintner is calling false advertising. We can hardly expect an agency which on the surface is being paid nothing to work for the Advertising Council, to use a higher standard of ethics in its unpaid work than when it is working for clients who pay.

This committee must expect that things will be stolen and that Uncle Sam must pay again and again, and to require the agency to accept responsibility for its own actions is one way of insuring that the thievery will be kept as much as possible at a minimum.

Point 4 is that clause (c) is unconstitutional.

Clause (c), Mr. Chairman, refers to page 3, which reads:

The provisions of this section shall not apply to any claim arising in a sovereign country.

Now, Mr. Chairman, the State Department's request to be able to distribute overseas without payment or liability is fantastic. American authors have wide overseas markets. This is true of great and small authors. I have just been in correspondence with a gentleman in Holland who wants to represent me and my little syndicate in Belgium and Holland.

I have the letters and he is willing to give me my copyrights, international copyrights, over there and sell my product. Now the State Department and I have come to them with some of my material, and under this bill they could take my stuff, distribute it in Holland to the same newspapers, and pay me nothing. And though I might collect from the Dutch Government under my arrangement with this fellow on international copyright, I could not collect from my own Government.

So this request of the State Department is ridiculous. Now if the State Department could give away my work product and that of others, the literary field would be even more deplorable incomewise than it is. The Government, in that case, then would spend thousands of dollars for ink and paper and labor and other aspects of printing, or releasing something, and the only person who would not be paid would be the one whose words were being used.

In other words, the Government official who makes $17,000 a year would decide that he would steal this or that they and everybody

would make money except the author. This is just as ridiculous as saying everybody would make money distributing an automobile except General Motors.

Legally, article I, section 8, provision 8, of the Constitution and 17 U.S.C.A. 1 already gives to an author an exclusive right. The fifth amendment carries this right forward against the United States, and on this basis, no bill would be needed if it were not for the fact that the courts have been unwilling to follow this line of thought.

This is the argument I made to both the Court of Claims and the Supreme Court, but they did not uphold me.

The administrative settlement provision violates the separation-of-powers doctrine.

The bill provides that the Government agency can pay out of its unused funds, in settlements, unlimited sums. The scope of the programs of the United States is so vast that millions of dollars may be involved in one program, as I'll show in the case history, where the United States used more than 1 million mats, distributed to publishers, which normally would never bring less than $5 per mat.

Senator HART. We shall suspend for just a moment.

Excuse me.

Mr. CURTIS. In this case, the Government, speaking only about publishers' mats, now, not about radio or television, billboard advertising, or the other forms of expression in which they express the idea, gave away more than a million mats, for which I received no less than $5 a mat. You have at this point a sum of $5 million. Traditionally, expenditures are voted by the Legislature; obviously, I am sure, Mr. Chairman, you would agree that any sum of $5 million must be voted in advance by the Legislature, and it cannot be given away because of the statute by any administrative office. Determination of liability is a matter for the judicial branch. There is no reason here to depart from our separation-of-powers principles and lump all the power in the Executive.

Mr. Chairman, I should like to point out again a pitfall here, which I do not have in my remarks, that two advertising agencies, working together with a Government executive, could bring about a quiet sale. One of them could take something that belonged to another and then the Government agency would be liable and would agree to settlement and the money would be paid for the object—the object would be bought without Congress legislating the appropriation. This is nothing but a way of getting around an appropriation.

Mr. Chairman, I would like to point out that the statute of limitation of 3 years is in favor of thievery. The Copyright Act gives a 28-year right, which is renewable for another 28 years. A statute of limitations cuts the right down to its own size. Since all copyrighted material is in the Library of Congress, it is available to be taken, changed a little, and used; thus being stolen. An author who spends the time needed reading over everything that has been printed to find out whether what he has done has been stolen would not have any time at all, Mr. Chairman, to be an author. He would be doing nothing but reading what has been printed. Consequently, I should like to suggest not only that this 3-year statute of limitations be stricken, but that the bill also state that there is no statute of limitations at all.

Recently, as a rider to an appropriations bill somebody got through a 3-year limitation on the Copyright Act. I was told this by long-

distance telephone by a publishers' representative in New York, a lawyer, whom I have known for years. This 3-year limitation should be taken out. There is now a 3-year limitation on copyright matters which did not exist in the original act. This should not be so.

There should also be an alternative forum. The Court of Claims is not a court in the true sense. It has no juries; appeals from its decisions are in the form of certiorari to the Supreme Court, and very few are granted to individuals.

I should like to point out and emphasize my written remarks here. That if this committee will check the certiorari book of the Court of Claims, they will see that individuals are almost never given a certiorari. A large number of cases filed in the Court of Claims are dismissed without a trial by that court on what is known as a motion for summary judgment made by the Department of Justice. Thus the Court of Claims is a little supreme court in itself, with power to decide cases without granting discovery to private parties, or to permit them to put on their full cases with expert witnesses, and so forth. The only real literary property court in this country, in so far as I am able to determine from the publications and the books put out by Mr. Fisher's office is the southern district of New York, where the publishing industry is located. Here the courts are not awed by publishers or governmental units, nor do advertising agencies appear to get favored treatment. The largest publisher in the land, Hearst loses there again and again. It seems to me this bill should make an alternative forum available in any district court, with a clear right of appeal, not only to the circuit court of appeals, but an absolute right of appeal to the Supreme Court. We should amend the certiorari rights because of the thing at stake.

I have here a case history in this field, which I handled myself, and I should like to briefly read a prepared statement.

The author in this case history created a literary feature, using as a base the press releases of the Defense Department on military citations, and added to this literary conception art work and sales effort section 7 of the Copyright Act is a copyright for "compilations of abridgments, adaptations, arrangements, dramatizations, translations, or other versions in the public domain," which "shall be regarded as new work subject to copyright." That is, taken out of public domain, apply your thought and effort to it, change it somewhat, and get a copyright out of it.

The author, beginning with a mimeographed citation, beginning with this press release, developed something which appeared in the newspapers.

I pause just one moment to indicate that. Here is a copy of the Pittsburgh Press. I do not want to leave this, but I do want to show it. This is a boy from Texas. I began with something that looked like a mimeograph citation, and I ended up with a funnies strip.

Now, I believe, Mr. Chairman, that anybody who saw that and saw the mimeographed citation would agree that Mike Arens and I—Mike was on the staff of Snow White before he came with me—had created something.

This series became a true story about heroes, and it ran for a number of years in the Boston Globe, the Pittsburgh Press, the Seattle Times, and other papers, and the author sought new outlets through the Government and through advertising agencies.

I hope the chairman will permit me to speak in the third person here.

The author produced for the Army the "Outstanding Soldier" series, which ran in 500 papers for a week for 13 weeks, in 1948. One of the author's stories was used by the Naval Reserve and sent out by the Navy to 11,000 papers; his story of the Tokyo raid was sent out by the Air Force to 1,100 papers, syndicates, and so forth on the fifth anniversary of Tokyo raid.

The literary series appeared in "Editor and Publisher Yearbook of Syndicate Directory" as the only literary feature by that title for a number of years. About 2 billion impressions on paper were printed of the feature by this title prior to suit by this author against the Government. A number of copyrights have been issued to him by the Government for his feature, by Mr. Fisher's office. As a matter of fact, the author sued the Government before. I let the Government borrow a story of the Tokyo raid featuring General Doolittle. They sent it down, sat it up where General Doolittle was at the Deauville Stratford Hotel in Miami on the fifth reunion of Tokyo raid. The condition was that I would get the original back. I never got it back. They said, file a claim. I filed a claim. A Colonel Crowe sent me a letter and said that because the original was lost in Florida and not in Washington, they could not pay me. I filed a claim for $11,500. I eventually settled that for $450 to get it off the books. I had to pay Mike to draw it. Certainly the Government knew that I existed.

Now, the author made the rounds of the advertising agencies with his feature, and also made various suggestions for its use, for private clients and the Government. The State Department, which now asks for the right to use copyrighted material, had me write a presentation. I presented this as a way of showing that American boys were willing to die for the flag, and I thought this was a good program for press relations. They did not take it at that time.

Now, in 1950, when the Korean war broke out, I was working for the Senate of the United States as a staff member of the Banking and Currency Subcommittee, under Senator Fulbright. At this time, one of the advertising agencies went to the Government with the idea of producing a series to sell war bonds.

There is an exhibit here, Mr. Chairman, which shows that this agency, prior to this, had had submitted by me this whole series. I argued before the Court of Claims that I had come to the Treasury Department with this very idea. The Treasury Department did not take it from me; Treasury dealt with the agency. The Court of Claims would not let me interrogate any of the officials there.

Now, this agency then produced as a free mat service to all of the publications a Medal of Honor series by the same title, with the same center character, the same general theme, the same plot. The primary difference was that they took the newspaper style presentation and turned into a magazine presentation. In other words, they had fewer cartoons. They even used the same symbols.

I argued this before the Court of Claims, but in their decision, they say that they have no jurisdiction because of the fact that this is copyrighted. Thus, the publishers of the country were faced with a choice between a free product which was sponsored by the Government—they did not even have to pay for the mat—or a professional

job for which they had to pay. During Korea, even those newspapers which previously had used my service no longer used it.

The author then sued the Government in the U.S. Court of Claims, asking $1½ million. This is with reference to the question put forward, Mr. Chairman, by you as to how much money would be involved. Upon learning by the search of the vastness of the program, he added $10 million more. But now the author was asking $11½ million for the use of a literary advertising idea supposedly controlled by a copyright. This was enough in itself to make the claim ridiculous, except for the fact that even $11½ million on a reasonable damage basis would not have compensated the author. You had $5 million in mats alone. Then you had, according to the exhibits I have given to you, Mr. Chairman, radio; there was television, there was a billboard service. In other words, the Government used this program in a saturation way and carried the series.

Now, the Government received in return $150 million in free advertising. These are reports of the Advertising Council, and they took in $50 billion from the sale of bonds through the use of this program.

The Court of Claims threw the case out of court, on a motion by the Justice Department, stating that it had no jurisdiction—this among other things. Prior to hearing this motion, the Court of Claims denied to the author the normal discovery proceedings. It also refused the author the right to interrogate, as in a normal proceeding, the officials of the Treasury Department who worked in this field, said that I might not ask them, did you or did you not see me in your office; did you or did you not tell me to make a presentation to you; did you or did you not tell me that if you used this idea, I would be paid? The Court of Claims refused to let me do this, apparently because they knew what their decision was going to be.

The author then took the case to the Supreme Court. There were approximately 80 pounds of paper here which had to be reproduced, and I simply did not have the money to pay for the printing of it, so I had to take this case to the Supreme Court in forma pauperis. So the Supreme Court refused to hear the case and I was out of court.

Having gone through the judicial branch, I now looked for the legislative remedy, and I went to a U.S. Senator for a private bill. This Senator eventually told me that he was not a member of this committee, that I should find a member of this committee, that his efforts would be ineffectual, and furthermore, he had checked with the Budget Bureau, which apparently is an executive agency, and they would not approve the payment, as there is no legal basis for approving the payment. This means that the executive, which I fought over in the Court of Claims, is sitting in judgment, now having won the case, on whether the legislature should pay me through a private bill.

I have a private bill which I am going to submit at the close of this, Mr. Chairman, and ask that this committee sponsor this bill and place on it any figure that it wants. I am merely seeking justice in this case.

At today's rates, the cost of preparing the plates, and promoting the feature, which is the investment of the author in his enterprise would be about $75,000. This is apart from the loss of reputation, the necessity for finding a new occupation—which I did; I became a lawyer. I am a practicing lawyer now.

In the interests of justice, I believe that this committee should recommend a private bill, and I shall submit the proper exhibits.

As to experience of foreign nations with this problem, I have touched on this. In the exhibits which I have given you, Mr. Chairman, there are some from foreign countries. As part of the preparation of the case for the Supreme Court, a circular letter was addressed to all the Embassies. This letter appears with replies in the case as presented to the Supreme Court. Four nations—Switzerland, Finland, China, and Japan—have already provided relief in such cases. In most nations, Mr. Chairman, probably because the sovereign has traditionally been the patron of the arts, the notion that an author would have to sue his sovereign to be paid was so novel that they had never even heard of it. In no country was there any case in a legal sense which the Embassy could show that there was a litigation between an author and a government on the subject.

Mr. Chairman, prior to the opening of this session, I discussed with one gentleman here just what the Government wanted, and they said that they wanted the right to duplicate for internal use 8 or 10 copies without being sued. If this is what the Government wants, Mr. Chairman, all they have to do is say it. The Japanese system is just exactly that.

If the material is used for internal use, they do not have to pay the individual. As a matter of conscience for Uncle Sam, the individual should be paid. He may need the money, and with an $80 billion budget, certainly $15 or $20 or a few hundred dollars is a worthwhile token.

In conclusion, Mr. Chairman, I wish to thank this committee and Senator O'Mahoney for calling me as a witness. Legislation is definitely needed to give brain workers in nonpatent fields a clear right to the fruits of their labor as against the Government. That right should be a full right, and not a partial right which takes away more than it gives. The committee should keep in mind that the person sought to be protected, in the minds of the framers of the Constitution, was not the American Book Publishers Association, not the owner of the press, not the seller of the literary product, but the creative personality, Mr. Chairman, whose intellectual output is the center of many industries and the dynamo which sets them into motion. This is a personality, Mr. Chairman, which, through the ages, has had a history of impecuniousness, and which needs all the protection the sovereign can possibly give.

I have as an appendage to these remarks, Mr. Chairman, an act in which I incorporated another bill which I drew up for myself and certain members of the National Press Club, who participated with me in the petition which I believe made these hearings possible.

That is the extent of my remarks, Mr. Chairman.

Senator HART. They will be received and, where appropriate, made a part of the record, and where more appropriate, a part of the files of the committee.

(The complete statement of Mr. Curtis is as follows:)

STATEMENT OF ARTHUR S. CURTIS, ATTORNEY AND AUTHOR, A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES

May I thank this committee for the opportunity to present my views of H.R. 4059, which deals with rights of copyright holders against the United States.

Particularly, I wish to thank Senator O'Mahoney and go on record as saying that in my opinion he is a great American whose work on behalf of authors is *arduous and sincere.*

Freedom of the press at this moment means that the Government is free to take any product of the press, and even unpublished works of authors, without paying anything to anyone. This is clearly the law set forth by the U.S. Court of Claims in 200–57, a case which I took to the Supreme Court without success. An American Shakespeare or Beethoven could starve in the streets while Uncle Sam distributed his work to every person in the whole wide world under the present law, as the courts construe it. The Constitution says that a copyright holder may get an exclusive right, the Copyright Act gives an exclusive right, but the courts say that exclusive does not apply to the Government.

I have prepared an outline of proposed statements and exhibits, including a case history of a recent litigation against the Government. In that case, Uncle Sam used a program which netted $50 billion and the author got nothing—had to take the case through the last stage, before the Supreme Court, in forma pauperis because of the costs involved. Also, I have a bill for the relief of the author in that case which I would like to present to this committee and ask that this be given favorable consideration.

The outline is as follows:

1. Exhibit No. 1, letter to Senator O'Mahoney on H.R. 8419, predecessor to the present bill; exhibit No. 1A, petition for public hearings.
2. Exhibit No. 2, letter to Senator O'Mahoney on H.R. 4059, setting forth 10 weaknesses to the present bill.
3. Exhibit No. 3, case history of a litigation against the United States in a literary matter—
   (*a*) Decision of the U.S. Court of Claims in 200–57, stating that there is no right of action against the United States.
   (*b*) Petition for certiorari, response by the Justice Department for the United States; petition for rehearing:
      1. Exhibits showing experience of foreign nations with this problem.
   (*c*) Presentation of the case to a U.S. Senator:
      1. Letter outlining the case, plus exhibits.
      2. Reply by the U.S. Senator.
   (*d*) Private bill for consideration of this committee.
4. Alternative bill incorporating suggestions of this witness:
   1. The scope of the present bill is too narrow.
   2. The word "Hereafter" (p. 1, line 7), whitewashes all takings of literary property up to the date of passage of the bill, leaving the claimants emptyhanded.
   3. The "exclusive" remedy against the United States (p. 2, lines 2–4) is an immunity clause for the real culprit who takes the literary property, while saddling Uncle Sam with the load of paying for what was done. The author loses his right to sue the individual who has done the wrong, and is required by the bill to square off against the biggest law office in the world, the Justice Department. The real culprit can now take a seat on the sidelines and enjoy the fight.
   4. Clause (c), page 3, lines 17 and 18, is clearly unconstitutional as contrary to the fifth amendment. Congress does not have power to give to any agency of Government, not even the State Department, the right to take property overseas without liability for payment by the United States.
   5. Because of the immunity from suit in page 2, lines 2–4, this bill is a free hunting license to the Advertising Council to use literary property even over the objection of the copyright holders, as well as to raid the Treasury of the United States by taking some wornout item from a "pal" agency and requiring the United States to pay for same. Because of the vastness of the Federal operation, one agency could put a million or so of taxpayer money into the pocket of a "pal."

   This committee should take judicial notice that the members of the Advertising Council are advertising agencies whose clients are now under fire for misleading advertising, if we are to believe Mr. Earl Kintner, Chairman of the Federal Trade Commission. Misleading advertising is one form of dishonesty. This bill makes possible other forms of it.

   6. The 3-year statute of limitation favors thievery in quiet ways at the expense of honest authors, composers, artists.

7. The administrative settlement provision, without ceiling on the amount, violates the basic concept of separation of powers.

8. To limit the forum to the U.S. Court of Claims would work a hardship and possible injustice on the parties injured. An alternative forum in the U.S. district court, with right of a jury trial on issues of fact, should exist, together with an unequivocal right of appeal not only to a circuit court of appeals, but also a clear right of appeal to the U.S. Supreme Court.

I wish now to take up in more detail some of the weaknesses enumerated.

1. THE SCOPE OF THE BILL IS TOO NARROW

Copyright, the subject of the bill, covers only a part of the creative efforts through which individuals earn their livelihood by intellectual efforts. The bill should protect not only copyrighted material, but also all forms of intellectual property. This is merely an extension of the equitable principle that one who sews a field should also be permitted to reap the harvest. The property to be protected could be described as follows:

"There shall be a cause of action against the United States whenever an intellectual product in which the creator has a property right is taken and/or used by the United States in any form, anywhere. The intellectual product or property herein protected includes not only copyrighted materials, but also unpublished manuscripts, advertising program ideas, musical, artistic, and other creative works which are the product of human thought and would be regarded as property in any State or Federal court. This cause of action against the United States shall not prevent an individual from bringing a second action against the person(s) actually responsible for the taking, but the United States shall be reimbursed for its damages from a second verdict against a person(s) if that verdict is greater than that against the United States, in such manner as the chief judge of the court rendering the second verdict shall determine after a separate proceeding before him."

2. EXISTING WRONGS ARE WHITEWASHED

The fifth amendment provides that the United States shall pay whenever it takes private property for public use. Uncle Sam should apply this doctrine to manufacturers of words as well as those who manufacture bullets or other armaments. In the cold war, the battle is waged with words, as well as with bullets on a standby basis. Uncle Sam cannot logically proclaim that his legal system is better because it protects individual rights and personal property from the sovereign, while at the same time the courts of the sovereign States that the product of the intelligentsia is not protected. Nor can he say that he is willing to pay for what he does in the future but wants to keep what he has taken in the past, without paying. Great sovereigns have encouraged creative minds to the extent of subsidizing them as patrons of the arts. Unless Uncle Sam wishes to pay for what he has taken, whenever or wherever taken, this Nation is placing itself in a separate category among nations.

3. THE EXCLUSIVE REMEDY AGAINST THE UNITED STATES

This is a thieves pardon in advance. The Advertising Council is today bringing out program after program for the Government. The task force agency which does the work may well be an agency which is also putting out advertising which Mr. Kintner is calling false advertising. We can hardly expect an agency, which on the surface is being paid nothing to work for the Advertising Council, to use a higher standard of ethics in its unpaid work than when it is working for clients who pay. This committee must expect that things will be stolen and that Uncle Sam must pay again and again, and to require the agency to accept responsibility for its own actions is one way of insuring that the thievery will be kept as much as possible at a minimum.

4. CLAUSE (C) IS UNCONSTITUTIONAL

The State Department's request to be able to distribute overseas without payment or liability is fantastic. American authors have wide overseas markets. This is true of great and small authors. This witness is constantly receiving letters from overseas requesting materials. If the State Department could give away my work product and that of others, the literary field would be even more

deplorable incomewise than it is. The Government in that case would spend thousands of dollars for ink and paper and labor and other aspects of printing or releasing something, and the only person who would not be paid would be the one whose words were being used.

Legally, article I, section 8, provision 8, of the Constitution, and 17 U.S.C.A. 1 (the Copyright Act) already give to authors an exclusive right. The fifth amendment carries this right forward against the United States and on this basis no bill would be needed if it were not for the fact that the courts have been unwilling to follow this line of thought.

5. This section has been adequately discussed above.

6. THE 3-YEAR STATUTE OF LIMITATIONS FAVORS THIEVERY

The Copyright Act gives a right for 28 years, renewable for 28 more. A statute of limitations cuts the right down to its own size. Since all copyrighted material is in the Library of Congress, it is available to be taken, changed a little, and used—thus being stolen. An author who spent the time needed to read the thousands of publications in which some form of his work might be pirated would have no remaining time to be an author. This bill should contain a clause that the remedy is as long as the right and should, in fact, repeal the 3-year limit recently placed on copyright as a rider to another bill a few years ago.

7. THE ADMINISTRATIVE SETTLEMENT PROVISION VIOLATES THE SEPARATION OF POWERS DOCTRINE

The bill provides that the Government agency can pay out of its unused funds, in settlements, unlimited sums. The scope of the programs of the United States are so vast that millions of dollars may be involved in one program, as is shown by the accompanying case history, 200–57 U.S. Court of Claims, where the United States used more than a million mats to publishers which normally would never bring less than $5 per mat. Traditionally, expenditures are voted by the legislature; determination of liability is a matter for the judicial branch; there is no reason here to depart from our separation of powers principles and lump all the power in the executive.

8. THERE SHOULD BE AN ALTERNATIVE FORUM

The Court of Claims is not a court in the true sense. It has no juries. Appeals from its decisions are in the form of certiorari to the Supreme Court, and very few are granted to individuals. A large number of cases filed in the Court of Claims are dismissed without a trial by that court on what is known as a motion for summary judgment made by the Department of Justice. Thus the Court of Claims is a supreme court in itself, with power to decide cases without granting discovery to private parties, or permitting them to put on their full cases with expert witnesses and so forth. The only real literary property court in the land is the southern district of New York, where the publishing industry is located. There, the courts are not awed by publishers or governmental units nor do advertising agencies appear to get favored treatment. An individual who wishes to bring a case should be free to sue the Government in any Federal court, including the U.S. Court of Claims, but should not be limited to one.

CASE HISTORY OF A LITERARY PROPERTY CASE INVOLVING THE U.S. GOVERNMENT

In order to show the field of operation of the present bill, I have for this committee a case history of a literary property matter in which the United States was a party, 200–57, U.S. Court of Claims.

The author in this case history created a literary feature using as a base the press releases of the Defense Department on military citations, and added to this literary conception, art work and sales effort. Section 7 of the Copyright Act gives a property right for "Compilations of abridgments, adaptations, arrangements, dramatizations, translations or other versions of work in the public domain," which "* * * shall be regarded as new works subject to copyright * * *." The author, beginning with mimeographed press releases, developed something which appeared in the color Sunday section of the large daily newspapers, known as the comic section, as a true story about heroes. This series ran for a number of years in the Boston Globe, Pittsburgh Press, Seattle Times, and other papers, and the author sought new outlets through the Government and through ad-

vertising agencies. He produced for the Army the "Outstanding Soldier" series, which ran in 500 papers weekly for 13 weeks in 1948; one of his stories was used by Naval Reserve and sent to 11,000 papers; his story of Tokyo raid was sent out by Air Force to 1,100 papers, syndicates and so forth on the fifth anniversary of Tokyo raid. The literary series appeared in "Editor and Publisher Yearbook of Syndicate Directory" as the only literary feature by that title for a number of years. About 2 billion impressions on paper were printed of the feature by this title prior to suit by this author against the Government. A number of copyrights have been issued to him by the Government for his feature.

This author made the rounds of advertising agencies, with his feature and various suggestions for its use, for private clients and the Government. In 1950, the Korean war broke out, and one of these agencies came to the Government with the idea of producing a series to sell bonds. This was approved by the Government, it was produced by the agency and given away in mat form free to all newspapers, magazines and so forth. More than a million mats were given away, for which normally the author would receive $5 minimum each. This feature had the same title, same general theme, same central character, same plot as the earlier feature, but differed in that a newspaper style presentation was varied into a magazine-type presentation, which is to say, there were fewer cartoons. Even the symbols used were the same in both series. Thus the publishers were asked to choose between a free product under Government sponsorship and a paid product by an individual. The author was crowded off the market and during Korea could not even hold the papers he had had before.

It is interesting that the agency which produced the series had earlier considered it from the author, but had written that it had no present use for his idea. There is an exhibit to this effect.

The author sued the Government in the U.S. Court of Claims, asking $1½ million. Upon learning by research of the vastness of the program, he added $10 million more. This meant that he was asking $11½ million for use of a literary idea supposedly controlled by copyright—enough in itself to make it ridiculous except that the actual damages on a factual basis were far in excess even of that amount, considering the saturation use made. The Government received more than $150 million in free ads and took in $50 billion for the sale of bonds through use of this program.

The Court of Claims threw the case out of court on a motion by the Justice Department, stating that it had no jurisdiction, after first denying to the author normal discovery proceedings to see what the Government had in its files on the matter. The author then took the case to the Supreme Court, including about 80 pounds of exhibits the cost of reproduction of which would have been so expensive that he was forced to file his petition forma pauperis. The Supreme Court refused to hear the case. The author then took it to a U.S. Senator for a private bill, and was told that the Senator was not a member of this committee and thus would be ineffectual, and further that the Bureau of the Budget would not approve so nothing would happen. This means that the executive, and not the legislature, would pass on whether this author would be paid at all, after the courts had held that he had no right.

I have the private bill for this committee and am submitting it. Please place any figure on it this committee believes just. The cost of preparing the plates and promoting the feature, that is the investment of the author in his enterprise, at todays rates, would be about $75,000. This is a part from the loss in reputation, the necessity for finding a new occupation, and so forth.

In the interest of justice, I believe this committee should recommend a private bill in this case.

The exhibits attached will bear out the case history and I ask that they be placed in the appendix.

EXPERIENCE OF FOREIGN NATIONS WITH THIS PROBLEM

As part of the preparation of the case for the Supreme Court, a circular letter was addressed to embassies, which appears with replies in the case as presented to that Court. Four nations—Switzerland, Finland, China, and Japan—have already provided relief in such cases. In most nations, probably because the sovereign has traditionally been the patron of the arts, the notion that an author would have to sue his sovereign to be paid was so novel that they had never even heard of it. In no country was there any case in a legal sense which the embassy wished to submit.

CONCLUSION

I wish to thank this committee and Senator O'Mahoney for calling me as a witness. Legislation is definitely needed to give to brainworkers in nonpatent fields a clear right to the fruits of their labor as against the Government. But that right should be a full right, and not a partial one which takes away more than it gives. The committee should keep in mind that the person sought to be protected, in the minds of the framers of the Constitution, was not the owner of the press, not the seller of the literary product, but the creative personality whose intellectual output is the center of many industries and the dynamo which sets them into motion—a personality which through the ages has had a history of impecuniousness, and which needs all of the protection the sovereign can possible give.

(An alternative bill is included as an appendix.)

[84th Cong., 2d sess.—Amendment to H.R. 4059]

AN ACT To amend title 28 of the United States Code relating to actions for infringement of copyright by the United States, and other matters

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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) 1. Jurisdiction. The United States Court of Claims shall have jurisdiction over all cases dealing with literary property where the United States is a defendant, including cases arising in equity, the common law and the Copyright Act of 1909 as amended. This jurisdiction shall not be an exclusive jurisdiction and the remedy set forth in this bill shall not be an exclusive remedy, but shall be a right in addition to other legal rights of an owner of literary property against parties other than the United States in any U.S. District Court which courts are herewith given equal jurisdiction with the U.S. Court of Claims in the above-described subject matter. Judgment against a private party shall not extinguish a right against the United States nor vice versa. The chief judge of any court in which the second proceeding is brought may after judgment for the plaintiff, in a separate hearing, determine whether a credit is to be given the United States from the two judgments, in order that the plaintiff shall not be enriched by collecting twice for the same wrong.

"2. Damages. Judgment may be rendered against the United States only, in the U.S. Court of Claims, unless upon motion by either party the Chief Justice consents to having joined as a defendant some private individual. No private individual shall be required to pay costs in any litigation under this Act in the U.S. Court of Claims. In considering the amount of damages, and also wherever relevant in considering the issue of liability, a Court hearing a case under this Act may consider evidence on anything it considers relevant to the issues in law, equity, or good conscience, including: the reasonable value of the property taken; the computed cost of an authorized use of the same scope by a private firm; injuries to the professional career of the author as a result of the unauthorized use and to the business of the owner of the enterprise of which the literary property taken was a part; the measure damages set by the common law, by the Copyright Act of 1909 as amended or its succors; the value to the United States of the use made of said literary property.

"3. Evidence. In any case in which the United States is involved, the presiding federal judge shall have authority to compel discovery of any information needed to prosecute plaintiff's case; and if the United States raises the issue of secrecy in the nation's interest, then the Chief Justice of the instant court or his proper designee shall view the controversial evidence in chambers and determine whether it is in the national interest not to disclose it and in such a case the Chief Justice or his designee shall write a report stating whether the material is favorable to plaintiff's case and if so to what extent.

"4. Action over against the guilty party. Within one year from the rendering of a final judgment in favor of plaintiff in a literary property action under this Act, there shall be a proceeding before the same judges who rendered said verdict and judgment, or their alternative judges if these are retired or deceased or unavailable, to determine whether the United States shall take action against the person or persons actually responsible for the taking of plaintiff's

literary property. At this proceeding the Justice Department shall be represented by one attorney from the Civil and one attorney from the Criminal Division, the Plaintiff shall be represented and the fee of his counsel shall be paid by the United States, and at the discretion of the Chief Judge the tort feasor may be personally represented or by counsel.

"5. Rights protected. There shall be a cause of action against the United States, and against any person, jointly or severally, whenever any intellectual product in which the creator has a property right is taken and/or used by the United States in any form, anywhere. The intellectual product or property herein protected includes not only copyrighted materials, but also unpublished manuscripts, advertising program ideas, musical, artistic and other creative works which are the product of human thought and would be regarded as property in any State or Federal court. The filing of an action under this Act against one of the defendants shall not be construed as an election to waive the right to sue other defendants in the same or other courts.

"6. Statute of limitations. There shall be no statute of limitations in any copyright action or other action in literary or intellectual property and any statement in any statute to the contrary is hereby superseded.

"7. Section 2: Title 10, United States Code, Section 2386 (4) is amended by adding after the word 'patents' the words 'copyrighted and other literary and intellectual property.'

"8. Section 3: The catchline of section 1498 of title 28, United States Code is amended to read: '1498: Patent, copyright, literary and other intellectual property 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, copyright, literary and other intellectual property cases.'

"9. Section 4. The rights given above shall be retroactive to 1909."

(NOTE.—this proposed bill has been prepared largely by Arthur S. Curtis, 816 National Press Building, Washington 4, D.C.)

(The exhibits referred to in Mr. Curtis' statement were placed in the committee files.)

Senator HART. Mr. Green, do you have any questions?

Mr. GREEN. No, I have no questions.

Mr. WRIGHT. I have no questions, Senator.

Mr. FISHER. May I make just a brief comment, Mr. Chairman?

Senator HART. Yes.

Mr. FISHER. Mr. Curtis has referred to the statute of limitations of this bill as 3 years and to the 3-year statute of limitations as a rider to civil actions in copyright.

This is not a rider. This is a separate act of Congress of September 7, 1957, which had been debated for several years in various bar committees and other groups. It had open hearings, and did not become effective until a year later.

I should also like to say on the question of power to settle cases in the Department of Justice, I am not familiar, after a good many years, that any such settlement has ever occurred. It may be due to the fact that no such recommendation was ever received, or it may be on the broader ground that, there being no right of action on the part of the Government, there was no appropriate case.

Mr. Curtis makes the point, essentially, that the bill should be broader and cover all forms of literary property or intellectual property. It is true that the bill is narrow and deals with the copyright statute. There is a great fringe area of law dealing with literary property that does not arise under the statute, such as unfair competition, the right of privacy, common law literary property, where the works are not registered, and it is true that this bill does not deal with that area. It deals with the narrow specific area of rights under the copyright statute.

It also discusses the problem of nonretroactive provision, and I may only say that there has been a long tradition in our office, in making recommendations or amendments to the law, not to make them retroactive. It seems wrong in policy, and particularly wrong in this field.

In respect to Mr. Curtis' own case, I can express no view about it, and whether it should be dealt with as a private bill, I do not feel that that bill should be made a rider in any form to this legislation. I cannot express any view as to some desired bill with a view to remedy in this long-drawn-out case.

Senator HART. Certainly some of the observations of Mr. Curtis, which have been presented in the style which, even if you had not told us, I would have suspected that you are an author as well as a writer, are interesting. Whatever the action with respect to H.R. 4059, which is, as Mr. Fisher indicated, aimed at a narrow target. Whether or not the bill should be broadened—some of the points you raised strike me as the sort that would require, before a conclusion is reached, a much more thorough study than we have before us now.

Mr. CURTIS. Mr. Chairman, I agree wholeheartedly. There is no point in giving to an author a crumb of bread and taking away the slice of bread to which he is entitled. It is hard enough being an author. I had to go to law school under the GI bill of rights. I had something here. I left the Naval Academy to produce this series. It took 5 years. It was getting to the point where it was beginning to pay for itself, when interest in war stories slackened off. Just yesterday, I had a letter from a Chicago newspaper editor asking me for some samples.

A New York newspaper editor, to whom I spoke when I got this inquiry, said that apparently some of this stuff may be coming back.

Now, having spent one war and the aftermath of a war developing a literary feature, I should have been able to reap my own harvest in 1950 when the Korean war came along. I am not talking about making money out of dead heroes, or anything like that. I am not thinking of any such thing.

I offered the Medal of Honor Society my drawings anytime they wanted them for exhibit purposes. I gave the Government free use of the Tokyo raid story, on the condition that they would give it back after they sent it up to General Doolittle. This is a difficult type of story, I have been told—a New York syndicate once said to me, "Arthur, find another subject."

I said: "No, I think this is a worthwhile subject. I have talked to the committees. I think this stuff should be before the public."

Now, after going through this starvation period, all of a sudden to have an advertising agency come and snatch it away and have the Government take in $50 billion and get nothing, you see, I must say I do not want these rights that the Government is about to give me in this bill. I want broader rights. I want to be protected. I do not want the State Department to be able to come in and say, "Curtis, this letter you have from this gentleman in Holland, you have to forget about that. They think the 'Medal of Honor' series is so well done that we are going to take your stuff and give it to all the papers in Holland as a public relations venture and, by the way, we cannot pay you, it is overseas; the statute says so. There was a hearing in the

Senate, you were present." There was a distinguished Senator sitting as chairman. The State Department says, "We cannot pay you, we have no authority; the Justice Department has made no settlement; you are out in the cold; starve; practice law."

Senator HART. Are you not concluding such a claim would be construed as having arisen overseas then, in fact, the negotiations were here? I mean, this was just an exchange among lawyers at this point. I do not know what the answer will be, but I certainly would not estop myself from doing that.

Mr. CURTIS. Mr. Chairman, this Report, No. 624, Infringment of Copyright by the United States, the State Department has pointed out in a letter of June 5, 1958, that the State Department is unaware of any serious problems relating to actions of the United States abroad infringing copyright which necessitates remedial action of the type contained in this bill. Moreover, they refer in this sense to acts committed abroad.

Now, the sample I gave to you, Mr. Chairman, shows that I do sell myself abroad. I have had Chuck Thorndike stuff in 20 newspapers. They—the State Department—might like "Oddities of Nature." Chuck is a man who is in "Who's Who in American Art," "Who's Who in America," and so forth.

Now, they might like "World of Tomorrow" and say this is good stuff. We like "Medal of Honor," we like "World of Tomorrow." I had another one called "Academy of Fame." They might say, "Curtis, we like that too, but we cannot pay you; that is all; starve."

It seems to me that if the State Department wants this stuff, I am just as much entitled to be paid for the fruits of my labor—this is an old equitable principle, Mr. Chairman, that the man who labors should reap his harvest. Would I have given this to the Government if the Government had come to me, instead of stealing it through the Advertising Council? I think I would have considered it. However, they did not ask me.

Senator HART. You would harvest the domestic use if this became law?

Mr. CURTIS. No; I am dead here.

Senator HART. Well, because of the fact that it predates this change in the law?

Mr. CURTIS. Yes, sir; the word "hereafter" kills me dead.

Senator HART. I understand that.

Mr. CURTIS. However, I shall find this letter and give it to the committee clerk from this gentleman in Holland, and one of the things he asked for is the "Medal of Honor." He would like to see if he can sell the "Medal of Honor" to Dutch and Flemish papers, Belgian and Holland papers, among other things. The State Department specifically states here that for any infringement arising overseas they do not have to pay anything. I do not agree with Mr. Frase that the American Book Publisher's Association represents everybody. If they want to give their money away, let them do it. I cannot afford to do it. But if the Government wants my stuff, they will find me very easy to deal with. All of us are. You cannot tell a man who manufactures words that he is not entitled to be paid, whereas a man who manufactures bullets is entitled to be paid.

Authors are just like lawyers, in the sense that they work with words. They have to find concepts and sell them to a market. You

have to sell them to an editor the way a lawyer has to sell them to the court.

Furthermore, you cannot get in all the time to see the editor. You have a right to get into court. The editor might not want to see you. One of the magazines in New York has a line, and you stand in that line. On a certain day at a certain time, they come out and all of the geniuses will be there and he will decide whom he is going to spend his money with.

If you are a big book publisher and you have a couple of million dollars invested in presses, you will print something. But, Mr. Chairman, the copyright law is not designed to protect that fellow. And that fellow is going to make money some way. The copyright law is designed to protect this unfortunate person who has been given the talent. It is like a light that does not burn all the time. It is like that light over there; it burns out eventually.

Senator HART. Let me remove the discussion of the conclusion from your own particular case and move it to the general composition, and I shall ask you to make that switch, difficult as it might be.

Would you not agree that adoption of H.R. 4059 would improve the lot of those persons who do spin words together and obtain a copyright?

Mr. CURTIS. Mr. Chairman, I think it would injure the rights, rather than improve them, for this reason: that there is enough stuff in H.R. 4059 that takes away more than it gives. I know, Mr. Chairman, that you do not want to see the Government have to reach into its pocket and pay out a couple of million dollars to somebody because an advertising agency has stolen something through the guise of Advertising Council. I think these people should be responsible.

Now, as to the specific question of enhancing the rights of authors, this bill by itself is not it. For example, in my case, I still own some property that I can sell overseas. The "Medal of Honor," you might say, is about dead. But I might still sell it overseas. I have just had an injury. Under this bill the State Department could take this stuff and distribute it to the very same publishers and pay me nothing. Where am I going to sue my own Government? Only in a domestic court.

Mr. GREEN. Mr. Curtis, what is your relief at the present time without this bill?

Mr. CURTIS. Without this bill, I have no relief.

Mr. GREEN. Then how does this bill take away anything from you?

Mr. CURTIS. It takes away from me the right to sell what I still have to private individuals overseas.

Mr. GREEN. You have that right now, and you would still have it, would you not?

Mr. CURTIS. No, I would not, because they would not buy from me if the Government has a right to take a verbatum copy and distribute it to these people free.

Mr. GREEN. And can they not do that now, and what can you do about it?

Mr. CURTIS. No, I do not think they can do that now.

Mr. GREEN. What would you do about it if they could do it?

Mr. CURTIS. I do not know what I could do.

Mr. GREEN. There is no action against the United States presently, is there?

Mr. CURTIS. However, I might get in touch with my representative overseas and have him bring an action in his court.

Mr. GREEN. Against whom?

Mr. CURTIS. Against somebody; I do not know. We shall have to check into that. I shall have to see whether I have a remedy.

At the present time, I may not have a remedy against the United States now, but I certainly do not want that lack of remedy written into a statute so that it is clear that Congress has spoken that I have no remedy.

Mr. GREEN. The point I am trying to get to is that if this bill only gives the rights of action against the United States on infringement, which right does not exist at the present time, what does it take away from any individual author or copyright owner?

Mr. CURTIS. Well, a positive statement that an individual does not have a right is a lot worse, because legislation will be passed. Now, my Dutch representatives might get together and sue his own publisher in Holland on the grounds that there is an international copyright. If he made that fellow pay over there then they would not accept the American copy.

Mr. FISHER. May I make one comment on the foreign situation?

Senator HART. Yes.

Mr. FISHER. This bill's language says merely that this bill does not extend to the tort committed abroad. It doesn't take away anything that now exists. I should like to make that clear.

I should like to say some other things. We have many discussions with the State Department and the USIA on this. It has already been said that the impact of this bill is already very limited. When you start submitting suits against the United States based on torts or infringements committed abroad, you immediately raise the question of knowledge of laws of 85 or 90 states of the world, including domestic laws, treaty law, and so forth.

The next thing you raise is the possibility of not suits by Americans, not have their action here that might have arisen in Holland, but you also raise the possibility of suits by foreigners which may be more numerous, against the United States. In the belief that this is the present situation without any law, it is for this that this paragraph (c) is added and the form of it is merely to let the present situation alone. It does not take away a thing. It merely limits what now exists, and merely says that the effect of this law shall not extend to infringements of law committed abroad.

Mr. CURTIS. I have the answer now that I wanted to have. You threw that one at me cold, and I had not even considered this.

At the present time I have an action against the Government official who did it. I can take him into court, and under the doctrines of the *Ross* case, which was cited by Mr. Dodds, I can take into court this man and say, what is this, pay me, and the court can make him pay me. This is enough to stop it. If this bill passes, I no longer have that right. He is immune. He has been given a thief's part in advance; he can sit down and be immune.

Mr. FISHER. May I answer that to the extent that the employee—if the employee committed this offense abroad, he has no effective

remedy. So he would not take away even the right of the private individual if a U.S. agent situated abroad committed the infringement or tort abroad.

Mr. CURTIS. I should like to disagree with the Registrar of Copyrights on that. If he is in the pay of the U.S. Government, he is an agent of the U.S. Government; he is responsible for his own acts, and he is still under the sovereignty of the United States and I could haul him into court on this. I could have done this to these gentlemen, these individuals, but I thought this was such a vast thing I felt certain I would win it.

The Constitution is clear.

I thought this was so clear. The purpose of it was to introduce intellectual tradition. Our intellectual tradition is such that it has made us one of the leaders in the world. To tell an individual that as a part of this great culture his own Government, which stands as the bastion of private property, does not recognize him as owning any private property as against Government is futile. I thought I would win this case; the Constitution is clear, the Copyright Act is clear; it says exclusive. But I simply could not do it because of the decision of old Judge Whalley in that *Congressional Directory* case. So this is the second case that has come up in the Court of Claims on this subject, and in both cases the Court of Claims has held that there is no cause of action.

There is a third case, Turton against the United States, in which a district court said that if an individual had no cause of action against the United States in the Court of Claims, he has no cause of action in the U.S. district courts. It is because of this, this bill that I submitted, I suggested that this cause of action be given as a choice of forum.

Mr. Chairman, I want to say that I agree wholeheartedly with the suggestion of the chairman that the Senators set up a committee to study this bill thoroughly. It simply cannot let slipshod legislation go through and then be on the carpet for it. There is no reason why the Senators should want to hurt the rights of individuals or give to the Government their private property. The Government spends $80 billion. It could not possibly spend more than, say, a few million dollars to these authors.

It would seem to me you could set up if these oversea agencies want to use this stuff, they could set up a word bank, or some other scheme, whereby as they took a word, they would put money in the bank. Or some sort of a formula could be set up. This would be a great bounty to authors; they would think the Government was wonderful.

You can imagine, Mr. Senator, if you were a writer and you knew the Government could come in and take what you wrote or composed, you would not think so much of your Government. I do not think the Government wants to have this thought out among the writers and creative personalities of our day.

Senator HART. As I understand it, if this bill becomes law, the Government will respond in certain cases where it does not now. At least, there can be comfort derived from that approach, if that is the action of the committee.

I repeat, some of the ideas you have suggested here most certainly are challenging and cannot be resolved in the time that remains in this session, assuredly. But I would hope they would be the source of plenty of discussion and thought ahead.

Do you have any further questions?

Mr. WRIGHT. I have nothing, Senator.

Mr. GREEN. I have nothing, Senator.

Senator HART. I appreciate all of you coming in and the time you have given us and the kind of informal discussion we have had. I think it is the most helpful sort in a record like this.

We are adjourned.

(Whereupon, at 12:43 p.m., the subcommittee adjourned subject to the call of the Chair.)

APPENDIX

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 2, 1960.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (H.R. 4059) to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States, which passed the House of Representatives July 20, 1959.

Existing law provides that whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture (28 U.S.C. 1498). The bill would amend section 1498 by adding two new subsections providing that hereafter whenever 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. Under the bill a Government employee not in a position to order, influence, or induce use of a copyright work by the Government is allowed this right of action against the United States except where such work was prepared as a part of the official functions of the employee or where Government time, material, or facilities were used in the preparation of the copyrighted work.

The bill would vest authority for full administrative settlement and compromise agreement with the copyright owner in the head of the appropriate department or agency prior to the commencement of suit against the United States and authorizes such administrative settlement from available appropriations. Recovery for infringement occurring more than 3 years prior to filing a complaint or counterclaim alleging such infringement would be barred. The provisions of the bill would not apply to any claim arising in a foreign country.

The bill also would amend section 2386 of title 10 of the United States Code which provides generally that appropriations for the military departments may be used to acquire certain listed rights in the patent, copyright, and technical data fields. Subsection 4 of the section 2386 now authorizes the acquisition of releases, before suit is brought, for past infringement of patents. The bill would amend this subsection to include copyrights.

The subject of this legislation is not a matter for which the Department of Justice has primary responsibility, and accordingly we make no recommendation as to the enactment of the bill. There are, however, certain provisions of the bill to which the committee may wish to give further consideration.

It is suggested with respect to the title and language of the bill that it would be preferable to designate the unauthorized use of a copyright by the United States as a taking by the United States rather than an infringement (See *Gage* v. *United States*, 122 C. Cls. 160, cert. den., 344 U.S. 829; 124 C. Cls. 322). In the *Gage* case the court recognized that the unauthorized use of a patented invention by the United States was in law a taking by eminent domain.

The language of the bill withholding a right of action from copyright owners or assignees, where the copyright work was prepared by a person in Government service as a part of such person's official function, or involved the use of Government time, material or facilities, is narrower than the corresponding language in 28 U.S.C. 1498 relating to patents. With regard to patentees or assignees of inventions discovered or invented during periods of Government employment the language of 28 U.S.C. 1498 now merely requires that the invention have been "related to the official functions of the employee" to bar an action. A question is thus raised as to the liability of the United States to a Government employee who obtains copyright protection of a work which incorporates material, knowledge, and data which was readily accessible because of such Government position and directly involved in the discharge of such employees day-to-day duties but where the copyrighted work was not prepared as a part of the official functions of the employee as provided in the bill. Whether the language of the bill should be broadened to bar an action where the copyrighted work was merely "related to" the official function of the employee is a matter which the committee may wish to consider.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

JOHN D. CALHOUN,
Acting Deputy Attorney General.

NEW YORK, N.Y., *June 1, 1960.*

HON. JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Senate Judiciary Committee, Washington, D.C.:

In the best interests of scholarly publication in the United States of America, the Association of American University Presses strongly favors passage of H.R. 4059, and respectfully urges that your subcommittee report out favorably the above bill.

HAROLD E. INGLE,
President, Association of American University Presses.

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