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INFRINGEMENT OF COPYRIGHTS BY THE UNITED STATES

AUGUST 22, 1960.—Ordered to be printed

MR. HART, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4059]

The Committee on the Judiciary, to which was referred 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, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 3, after line 18, insert the following new section:

   SEC. 2. Nothing in this Act shall be construed to in any way waive any immunity provided for Members of Congress under article I of section 6 of the Constitution of the United States.

2. Page 3, line 19, strike out "2" and insert in lieu thereof "3".
3. Page 3, line 22, strike out "3" and insert in lieu thereof "4".

PURPOSE OF AMENDMENTS

The purpose of the amendments is to emphasize the fact that no immunities provided for Members of Congress under article I of section 6 of the Constitution shall be waived by the enactment of this legislation.

PURPOSE

The purpose of the proposed legislation, as amended, is to provide a remedy in the Court of Claims for the infringement by the U.S.

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

STATEMENT

This legislation was the subject of a hearing on June 2, 1960, at which interested parties appeared and testified. At that hearing, the question arose as to the possible waiver of the immunity of Members of Congress under article I of section 6 of the Constitution. In this regard, there is hereto attached and made a part hereof a memorandum from Benjamin W. Rudd, Copyright Office of the Library of Congress, to Arthur Fisher, Register of Copyrights. In order to safeguard against such legislation amounting to a waiver of such immunity, the bill has been amended to take care of that type of situation.

Further question was raised as to whether the bill would relieve willful infringement by contractors, or others, and transfer such liability to the U.S. Government by making the remedy against the United States the exclusive remedy. The committee, after a study of the language of the bill, believes that such is not the case. The language of the bill is to the effect that the exclusive remedy of the owner of the copyright against the United States shall be only in those cases in which the infringement was made with the authorization or consent of the Government. It would, therefore, follow that all other infringements would not transfer liability to the U.S. Government.

The history of and justification for this legislation are contained in House Report 624 on H.R. 4059, which report states, in part, as follows:

> The purpose of this bill is to provide a remedy in the Court of Claims for the infringement by the U.S. Government, or by any contractor acting with its consent, of any work protected under the copyright laws of the United States. To put it another way, the bill would waive the sovereign immunity of the United States for infringement of copyrights by extending the provisions of section 1498, title 28, United States Code, to permit an action in the Court of Claims for copyright infringements.
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> It has long been an established principle that the Federal Government should not appropriate private property without making just compensation to the owner thereof. For most types of property, the principle has been implemented by legislation permitting a property owner to bring suit against the Federal Government when he believes that just compensation has not been made, for example, in the field of patents (28 U.S.C. 1498). Other fields include admiralty, contracts, and torts.
>
> There is, however, one form of property—property in copyrights—for which existing law does not provide a definite workable and equitable procedure for the property owner.

There has been no specific legislative provision authorizing suits against the Government for infringement of copyrights as there has been for patents.

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

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

"The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property have been wrongfully invaded or injured, even by authority of the United States * * *. Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent." Again in *Towle* v. *Ross* (32 Fed. Supp. 125), defendants, acting as employees of the Government, made photographic reproductions of plaintiff's copyrighted map. The court found for the plaintiff and against the defendants, even though they ceased publication and the reproductions were never used. Regarding the immunity defense, the court observed:

"The position of the defendants as employees of the United States cannot protect them from the award of damages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the Government by the employees thereof. The foundations of arbitrary power would be firmly laid if the agents could violate the rights of citizens and themselves escape unscathed." It seems inequitable that employees of the United States, acting for the benefit of the Government, are now personally liable for copyright infringement and that the Government is not. It appears proper to this committee that the Government should assume responsibility for such acts. Fur-

thermore, it seems illogical to treat copyright infringements by the United States differently from patent infringements, in view of the established principle that the Federal Government should not be appropriating private property without just compensation, which principle was long ago adopted with regard to infringement of patents. The instant bill is designed to correct this situation both with respect to the copyright owner and to Federal officers and employees, and to the public generally.

EXPLANATION OF BILL

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

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

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

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

The committee, after a study and consideration of the foregoing, recommends that the bill, H.R. 4059, as amended, be considered favorably.

In addition to the memorandum of Benjamin W. Rudd, hereinbefore referred to, there are also attached hereto reports submitted by the Department of Commerce; the Department of State; the Library of Congress; the U.S. Information Agency, and the Department of the Navy concerning the subject matter of this bill.

THE SECRETARY OF COMMERCE,
Washington, D.C., January 30, 1959.

Hon. SAM RAYBURN,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There are attached four copies of a proposed bill to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States.

There are also attached four copies of a statement of purpose and need in support thereof.

We are advised by the Bureau of the Budget that it would interpose no objection to the submission of this proposed legislation.

Sincerely yours,

LEWIS L. STRAUSS,
Secretary of Commerce.

STATEMENT OF PURPOSE AND NEED FOR LEGISLATION TO AMEND TITLE 28 OF THE UNITED STATES CODE RELATING TO ACTIONS FOR INFRINGEMENTS OF COPYRIGHTS BY THE UNITED STATES

The proposed legislation would amend title 28, United States Code, to provide that in those cases where a copyright has been infringed by the Federal Government or its agents, the exclusive remedy by the holder of the copyright would be by action against the United States in the Court of Claims unless an administrative settlement of the claim was made by the department or agency concerned.

At present, the only remedy available to a copyright holder in such circumstances is a suit against Government employees who take part in the infringement. Generally the employees in such cases are merely following the orders of their superiors in the general interest of the department or agency concerned, and it therefore is illogical and inequitable for the employees to be held personally accountable. Recovery of compensation from subordinate Government employees as though they were independent contractors of malefactors for doing as they have been directed is not, in our opinion, the correct way to compensate the copyright owner for infringement. Although actual recoveries for Government infringement have been rare, the increasing

use of desk photocopying machines in the routine administration of the departments makes possibility of infringement an ever-increasing danger.

Since the benefits of copyright infringement under such circumstances flow directly to the Government, it would appear that the Government should bear the cost of reimbursing copyright holders for the damages arising from the infringement. The proposed bill would so provide, and would relieve the employee of liability. It also would permit administrative settlement of claims, and would provide a 3-year limit within which claim for recovery could be instituted.

THE SECRETARY OF COMMERCE,
Washington, D.C., February 27, 1959.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is with reference to H.R. 4059, a bill to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States, which you introduced pursuant to the recommendation of this Department and which has been referred to your committee.

This legislation would amend section 1498 of title 28, United States Code, to add a new subsection providing that in the event of copyright infringement by the United States, the sole remedy of the copyright holder would be by action against the United States.

After this legislation was submitted to the Congress, we were informed that the Department of State suggested that it might be interpreted as subjecting the U.S. Government to suit if it committed an act of infringement in a foreign country, and pointed out that the same interpretation might apply with respect to the present section 1498 which relates to actions against the United States for infringement of patents.

There are attached copies of a report which the Department of State submitted to the Committee on the Judiciary of the U.S. Senate on June 5, 1958, with respect to a proposal similar to our draft legislation. That report fully explored this question and proposed language to avoid liability for claims arising out of infringements of patents or copyrights in a foreign country.

The Department concurs in the views expressed by the State Department and accordingly requests that H.R. 4059 be amended as follows: On page 1, lines 5 and 6, strike "a new subsection '(b)'" and insert in lieu thereof "new subsections (b) and (c)." On page 3, add immediately after line 14 the following:

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

The Bureau of the Budget has advised that it would interpose no objection to the submission of this letter to your committee.

Sincerely yours,

FREDERICK H. MUELLER,
Under Secretary of Commerce.

DEPARTMENT OF STATE,
June 5, 1958.

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

DEAR SENATOR EASTLAND: H.R. 8419, to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States, was passed by the House of Representatives on May 19, 1958, on the Consent Calendar, and has been referred to the Judiciary Committee of the Senate.

The principal purpose of this bill is to provide a remedy in the Court of Claims or in any district court for the infringement by the U.S. Government of any work protected under the copyright laws of the United States.

While the effect of the bill would be primarily domestic in character, and therefore not of primary concern to this Department, there is one aspect of the bill which is related to this Department's functions. As the Department understands the bill, if a work is protected under the copyright laws of the United States and is infringed by the United States, the copyright owner can sue the U.S. Government in the Court of Claims or in any district court for damages. There is no indication or suggestion in the bill that such action would not lie if the acts of infringement by the United States occurred abroad. Thus, if this bill were to become law, it might be interpreted as subjecting the U.S. Government to suit if it committed an act, for example, in France, infringing upon a work of a French national which, in addition to having other copyrights, happened to be protected under the U.S. copyright laws as well. The occurrence of such an act is not unlikely in view of the numerous projects of this Government abroad in which infringements might inadvertently take place. In addition, there is an increasing number of foreign works entitled to protection under U.S. law pursuant to the provisions of the Universal Copyright Convention of which the United States is a member.

While the Department believes that the United States should respect the property rights of foreign nationals in their copyrighted works and should provide due recompense whenever such rights are utilized, it is questionable whether it is desirable to create a remedy for infringements of foreign rights in the manner set forth by H.R. 8419. The Department is unaware of any serious problems relating to actions of the United States abroad infringing copyrights which necessitate remedial action of this type. Moreover, the creation of a statutory right of suit against the United States for acts committed abroad in the form and context of H.R. 8419 would open an avenue of legal action which could give rise to further problems in related and similar fields.

For these reasons the Department recommends that H.R. 8419 be amended to remove the possibility of its being interpreted as applying to acts of infringement in foreign countries. This might be done by adding a new subsection providing that the remedial action may not lie with respect to infringements occurring abroad. In this connection it is pertinent that subsection (a) of section 1498 of title 28 of the United States Code contains a parallel right of suit with respect to

infringements of patent rights committed by the U.S. Government. Since the patent infringement provision contains the same ambiguity with respect to infringements occurring abroad, it is believed desirable and appropriate that the proposed limiting amendment apply to both the patent infringement provision and the copyright infringement provision.

To this end the Department recommends that H.R. 8419 be amended by adding a new subsection "(c)" reading as follows:

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

This recommendation has been discussed with representatives of the U.S. Patent Office and of the U.S. Copyright Office, and the Department has been advised that there is no objection to this amendment to the bill.

Sincerely yours,

WILLIAM B. MACOMBER, JR.,
Assistant Secretary
(For the Secretary of State).

THE LIBRARIAN OF CONGRESS,
Washington, November 25, 1955.

Hon. EMANUEL CELLER,
House of Representatives,
House Office Building, Washington, D.C.

DEAR MR. CELLER: This will acknowledge receipt of your request, dated November 16, 1955, for my views in connection with H.R. 6716, a bill to amend title 28, United States Code, relating to actions for infringement of copyrights by the United States.

The bill would amend section 1498 of title 28, United States Code, which provides for actions, against the United States for patent infringement, by adding a new paragraph designed to provide a right of action against the United States in the case of copyright infringements. It would give a right of action to an aggrieved copyright proprietor in the Court of Claims, any district court, or, if the amount were under $1,000, the right to pursue the administrative remedies set forth in the Federal Tort Claims Act. The statutory damage provisions of the copyright law are made applicable to the infringements. The statute of limitations is that made applicable to "civil actions" against the Government under section 2401(2) of title 28, United States Code (that is, 6 years). In addition, one subsection of the Federal Tort Claims Act is made inapplicable as a defense by the Government.

The matter of relaxing the immunity of the Government from suit has been the subject of specific legislative enactments over the years. As a result, suits may now be filed against the Government in the field of contract, admiralty, torts, and patents. However, in one field, legislative action has failed to materialize. There has never been specific legislation authorizing actions against the Government for copyright infringement. The present bill would remedy this long-existing inequity and it would appear as a matter of principle to be worthy of favorable consideration by your committee.

From an administrative viewpoint the enactment of the proposed bill would also be welcome. The Library operates a Photoduplications Service which receives thousands of requests annually from the public for photo reproductions of various works in the Library's collections. While the Service endeavors to respect the copyright law, there is always the possibility that legal action may be instituted against a Library employee for the accidental and unintentional infringement of a copyrighted work. Although this has never materialized, the proposed bill would lay a basis for a settlement of any such claims which might arise and thus remove the threat of legal action against individual employees.

With regard to the one subsection of the Federal Tort Claims Act which is made inapplicable to the Government as a defense, section 2680(a), title 28, United States Code, excludes from the authorization of suit against the Government any claim which is based upon an act or omission of a Government employee, exercising due care, in the execution of a regulation, whether or not the regulation be valid. The Supreme Court in the case of *Dalehite* v. *U.S.* (346 U.S. 15 (1953)) commented extensively upon the history, purpose, and function of such a provision of law. In view of that opinion and the extensive consideration heretofore given by the Congress of the problem, it may be inadvisable to deprive the Government of the defense envisioned by the above section of the Tort Claims Act.

Sincerely yours,

L. QUINCY MUMFORD,
Librarian of Congress.

GOVERNMENT PRINTING OFFICE,
November 29, 1955.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C

DEAR MR. CELLER: Reference is made to your letter of November 17, 1955, requesting an expression of my views on proposed legislation re H.R. 6716 to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States.

We understand that the proposed bill would permit the United States to be sued for infringement of copyrights in the Court of Claims in the same manner as for infringement of patents. In general, we see no difficulty as far as the Government Printing Office is concerned. The normal practice of the Government Printing Office is to require the consent of the copyright holder prior to printing known copyright articles.

A possible exception would be the printing of copyright articles in the Congressional Record if quoted by a Congressman, as the Government Printing Office would not be in a position to know when it might print such a copyright article and cause the Government to be sued. It is believed, however, that this is a question that may have already been considered by your committee.

Very truly yours,

RAYMOND BLATTENBERGER,
Public Printer.

U.S. INFORMATION AGENCY,
OFFICE OF THE DIRECTOR,
Washington, December 3, 1955.

Hon. EMANUEL CELLER,
House of Representatives.

DEAR MR. CELLER: I refer to your letter of November 23, 1955, requesting the views of the Agency on H.R. 6716 to amend title 28 of the United States Code relating to actions for infringement of copyrights by the United States, which letter was acknowledged on November 30, 1955.

We are of the view generally that the proposed legislation is sound and equitable. The Federal Government should pay for the use of property of private persons, including copyrights protected under the laws of the United States, and should permit itself to be sued for unauthorized use of such copyrights. We do, however, have objections or reservations regarding certain possible application of the legislation.

As you know, this Agency uses materials from all available sources in the overseas information program and frequently must acquire copyrights. While the Agency does not knowingly use materials without the permission of the copyright owner, it is not always possible in this extremely complex field to know the exact status of all outstanding rights. When rights protected by the copyright laws of the United States are unintentionally infringed through use of materials in the program, we believe that an opportunity for recovery of just compensation should be available to the rights holder, and the proposed legislation would provide for such recovery in case of infringement of statutory copyrights.

It appears, however, that the proposed legislation does not cover infringements of common law property rights in unpublished works. Such rights are recognized in section 2 of title 17 of the United States Code. They are not expressly protected by the copyright laws and accordingly there is considerable question as to whether infringement by the Government of an unpublished work would be within the purview of the proposed legislation.

While we believe the proposed legislation is equitable and favor its enactment in modified form, we are of the opinion that the legislation may be too sweeping in its coverage in that it makes the Government liable for infringements of copyright "by a contractor, subcontractor, or any person or corporation pursuant to a contract with or authorization by the Government." We believe the liability of the Government should be limited to infringements directly by the Government since the control of those intangible rights through license operations would be most difficult.

The copyright owner under the proposed legislation is entitled to such damages as the copyright owner may have suffered due to infringement "in accordance with the procedure and terms, including the minimum statutory damages set forth in section 101(b) of title 17 of the United States Code." The last sentence of subsection 101(b) provides that "* * * the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law." Other subsections of the code provide injunctive relief, impounding of alleged infringing materials during a suit, and for their subsequent

destruction. We strongly recommend that the proposed legislation clearly make inapplicable any and all of the above remedies against the Government and provide only for monetary compensation as damages.

The proposed legislation is not by its terms limited to infringements in the United States. On the other hand, the Federal Tort Claims Act, the provisions of which are made available for settlement of copyright infringement, does not apply to claims arising abroad (as to the impracticability of extending the jurisdiction of such type of statutes to incidents occurring on foreign soil, see the decision of the U.S. Supreme Court in the case of *Spelar* v. *United States*, 338 U.S. 217). We are of the view that the proposed legislation should be applicable only to infringements occurring in the United States.

Finally, the proposed legislation provides a remedy for infringement of "any work protected under the copyright laws of the United States." Section 9 of title 17 of the United States Code, as amended, provides that the copyright secured by this title shall "extend" to the work of an author or proprietor who is a citizen or subject of a foreign state or nation with whom the United States has a treaty or convention, including the Universal Copyright Convention. Accordingly, unless specifically limited, the legislation may be considered as applicable to infringements abroad of materials copyrighted by an alien in any country signatory to the Universal Copyright Convention or to any other copyright agreement. This Agency is opposed to such application of the legislation.

Sincerely,

ABBOTT WASHBURN, *Acting Director.*

DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, D.C., May 23, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: Your request for the comments of the Department of Defense on H.R. 6716, a bill to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States, has been assigned to this Department by the Secretary of Defense for the preparation of a report thereon expressing the views of the Department of Defense.

H.R. 6716 would waive the sovereign immunity of the United States for infringement of copyrights by extending the provisions of section 1498, title 28, United States Code, to permit an action in the Court of Claims or the U.S. district court for copyright infringements as well as patent infringements. It would further permit the owner of a copyright to pursue administrative remedies available under the Federal Tort Claims Act (28 U.S.C. 2671–2680) in cases where the claim for damages for infringement does not exceed $1,000.

Inasmuch as employees of the United States acting for the benefit of the Government are now personally liable for copyright infringement, it appears proper that the Government assume responsibility for such acts. Furthermore, it seems illogical to treat copyright

infringements by the United States differently from patent infringements, in view of the common philosophy which sustains copyright and patent protection on the part of the Federal Government.

However, it is believed that any administrative recovery made available for copyright or patent infringement should not fall under the Federal Tort Claims Act. The Federal Tort Claims Act is the established remedy against the United States for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. Section 2671 contains definitions of "Federal agency" and "employee of the Government" which, when read together, indicate that torts of contractors and their employees are not included thereunder. The proposed bill, however, contemplates liability on the part of the United States for copyright infringements "by a contractor, subcontractor, or any person or corporation pursuant to a contract with or authorization of the Government." The Federal Tort Claims Act has been the subject of numerous court opinions and there has been established therefrom a body of case law which, if applied in the administrative disposition of copyright cases, might conflict with the apparent purpose of the proposed bill. Rather than trying to adapt the Federal Tort Claims Act procedures to copyright claims it would appear preferable to provide administrative settlement authority separate and distinct from the Federal Tort Claims Act. Further, as in the case of the statute permitting purchase of releases for past infringement of patents (31 U.S.C. 649b (1954 Supp.)), there should be no monetary limit on the administrative settlement authority. Illustrative statutory provisions conferring authority to settle administrative patent claims are title 35, United States Code, section 91 (1946), title 22, United States Code, section 1758(c) (1954 Supp.), and title 35, United States Code, section 183 (1952).

It is believed desirable, in order to parallel the statutory framework for patent infringement by the Government, to include in the statement of applicable statute of limitations a provision tolling the statute during the pendency of an administrative claim similar to that included in title 35, United States Code, section 286 (1952) and title 22, United States Code, section 1758(e) (1954 Supp.).

The statute should, as in the case of the patent infringement statute (second paragraph, 28 U.S.C. 1498), have a strict clause providing that governmental liability for acts done by contractors shall attach only to infringing acts done with the authorization or consent of the Government. If this is not done, the Government will have no control over the acts of contractors which would create governmental liability. In addition, the statute should, as in the case of the patent statute (fourth sentence, 28 U.S.C. 1498), limit the situations in which a Government employee may sue the Government for copyright infringement.

Finally, the bill should be amended by insertion of the world "exclusive" before the word "remedy" in line 2, page 2, of the bill. The purpose of this suggestion is to make clear the absence of civil or criminal liability on the part of employees who actually carry out the infringing acts, and to avoid the problem of Government procurement being held up by suits for injunction against Government con-

tractors based on alleged copyright infringement. In this way, the bill will parallel existing law (28 U.S.C. 1498) with respect to governmental infringement of patents.

Your attention is invited to title 31, United States Code, section 649b (1954 Supp.), which provides in general that appropriations for the military departments available for procurement or manufacture of supplies, equipment, and materials shall be available for the purchase or other acquisition of certain listed rights in the patent, copyright, and technical data fields. If H.R. 6716 becomes law, it should be accompanied by an amendment to title 31, United States Code, section 649b, so as to insert the words "copyright or" before the words "letters patent" at the end of the first sentence of that section. This amendment would make funds available for the administrative settlement of claims for copyright infringement which would complement the administrative authority proposed in H.R. 6716.

The Department of the Navy, on behalf of the Department of Defense, recommends the enactment of H.R. 6716 provided it is amended to remedy the deficiencies noted above.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Department of the Navy has been advised by the Bureau of the Budget that there would be no objection to the submission of this report to the Congress.

Sincerely yours,

IRA H. NUNN,
Rear Admiral, U.S.N.,
Judge Advocate General of the Navy,
(For the Secretary of the Navy).

RESOLUTION ADOPTED BY THE AMERICAN BAR ASSOCIATION RE H.R. 6716 (GOVERNMENT LIABILITY FOR COPYRIGHT INFRINGEMENT)

The board of governors of the American Bar Association has adopted the following resolution on H.R. 6716:

"*Resolved*, That the American Bar Association approves the principle that the Government and agencies should be liable for copyright infringement and that copyright proprietors should have an appropriate remedy (or remedies) against the Government and its agencies for such infringement on a basis comparable to those available in actions against private citizens.

"Specifically, the association approves H.R. 6716 insofar as it embodies this principle."

MAY 26, 1958.

Re Government liability, congressional privilege, and the Nimtz bill.

To: Arthur Fisher, Register of Copyrights.

From: Benjamin W. Rudd, Copyright Office, Library.

This memorandum is submitted in response to your request for a brief statement on the questions involved therein.

I have made no effort to prepare a comprehensive study on the subject, even though there are many facets of the problem which might be reviewed in a more complete study.

CONSTITUTIONAL IMMUNITY

Freedom of speech and debate by Members of Congress is guaranteed by the Federal Constitution which confers the following immunities upon them:

"They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their representative Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" [1] [Emphasis added.]

All the States have similar provisions in their constitutions.[2]

This constitutional protection "is not limited to words spoken in debate but is applicable to written reports presented in either house by its committees, to resolutions offered, which though in writing must be reproduced in speech * * * *In short to things generally done in a session of the house by one of its members in relation to the business before it.*" [3] [Emphasis added.]

PUBLICATION OF COPYRIGHTED MATERIAL IN THE CONRGESSIONAL RECORD

There have been a number of cases holding that infringement of a copyright is a tort.[4] The congressional immunity is comprehensive and extends to all torts. It has been enforced in cases involving libel and slander,[5] and has also been invoked in cases of false arrest. Although there have been no reported cases involving copyright infringement actions against Members of Congress, congressional immunity is broad enough to constitute as complete a defense to such actions as to any other actions sounding in tort. An eminent authority on United States copyright law expressly declares that Members of Congress "may quote ad libitum from copyrighted material in the course of debates on the floor," and that this privilege "safeguards the quoted material when it appears subsequently in the Congressional Record." [6] Further corroboration may be found in a note on Government publications and copyright law [7] in which the writer quotes the following excerpts from a debate in the House of Repre-

[1] U.S. Constitution, art. 1, sec. 6, clause 1.
[2] See, e.g., Massachusetts constitution 1780, bill of rights, art. 21: "The freedom of deliberation, speech and debate in either house of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court."
[3] U.S.C.A., Constitution, art. 1, sec. 6, clause 1 at 157, citing *Kilbourne* v. *Thompson*, 103 U.S. 204, 26 L. Ed. 377 (Dist. Col. 1881).
[4] See, e.g., *American Code Co.* v. *Bensinger*, 282 Fed. 829 at 834 (2d Cir. 1922); *Ted Browne Music Co.* v. *Fowler*, 290 Fed. 751 at 754 (2d Cir. 1923).
[5] See, e.g., *Cochran* v. *Couzens*, 42 F. 2d 783 (D.C. App. 1930).
[6] Howell, "The Copyright Law," 44 (3d edition 1952).
[7] Stiefel, "Piracy in High Places," G.W. Law Rev. 423 at 429 et. seq. (1956).

sentatives over the reading by one of the Congressmen of several chapters of Henry George into the Record to support his position on the tariff:[8]

"Mr. BURROWS. Is it in order under the rule * * * to print remarks into the Record, a printed volume?

"Mr. STONE * * * [I] inserted it in order that it might go into the country under the frank of Members of the House *in order that their constituents might be able to read this argument without having to buy it.* [Emphasis added.]

"Mr. DOLIVER * * * [C]an the House see no difference between the publication of a brief extract from a public newspaper [which Doliver had read into the Record] and this concerted publication of a copyrighted volume in the Record? [Clarification added.]

"Mr. GOODNIGHT * * * [A]ll Members have general leave to print. Every gentleman upon this floor * * * has the right to print as his speech whatever he pleases * * *."

The writer adds: "The net result was that the resolution to strike Henry George's work from the Record was tabled. There does not appear to have been any serious attempt to question the scope of the privilege since."

CONGRESSIONAL IMMUNITY AND THE NIMTZ BILL

It seems clear that the use by a Member of Congress of copyrighted material for insertion into the Record or any congressional document is privileged and therefore not a copyright infringement. Since the Nimtz bill is designed to provide a cause of action against the United States for copyright infringement, its enactment would in no way subject the Government to liability for such use.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

(28 UNITED STATES CODE)

CHAPTER 91.—COURT OF CLAIMS

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[1498. Patent cases.]
1498. Patent and copyright cases.

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§ 1498. [Patent cases.] *Patent and copyright cases.*

(*a*) 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

[8] 23 Congressional Record, pp. 3299–3305 (1892).

the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

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. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a 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 in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(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 counter claim for infringement in the action, except that the period between

the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the 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. Nothing in this Act shall be construed to in any way waive any immunity provided for Members of Congress under Article I of Section 6 of the Constitution of the United States.

(10 UNITED STATES CODE)

§ 2386. Copyrights, patents, designs, etc.; acquisition

Funds appropriated for a military department available for making or procuring supplies may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:

(1) Copyrights, patents, and applications for patents.

(2) Licenses under copyrights, patents, and applications for patents.

(3) Designs, processes, and manufacturing data.

(4) Releases, before suit is brought, for past infringement of patents *or copyrights.*

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