Report No. 80-78 A 728/85

COPYRIGHT STATUTES AND CONGRESSIONAL ACTIVITIES: SELECTED ISSUES

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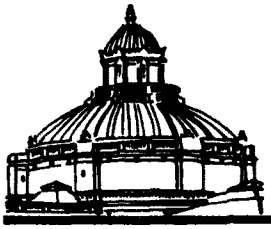

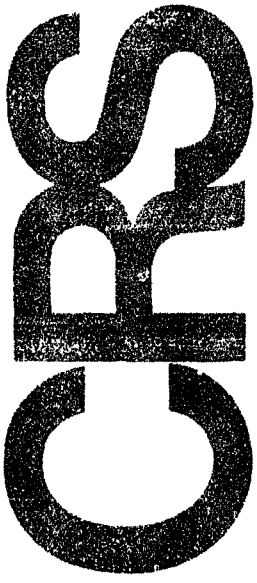

April 7, 1980

CONGRESSIONAL RESEARCH SERVICE
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Abstract

This report examines the application of copyright laws to congressional activities, including the use of copyrighted materials in government publications and the copyrighting of work of government employees, fair use of copyrighted materials, individual and governmental liability for infringement, and legislative immunity.

COPYRIGHT STATUTES AND CONGRESSIONAL ACTIVITIES: SELECTED ISSUES

The purpose of this report is to provide a brief discussion of selected issues involving the application of copyright statutes to congressional activities. Among the questions which have arisen in this area are the following:

1. Can governmental employees copyright their work?
2. Do copyright laws apply to the use of copyrighted materials in government publications?
3. How do doctrines of legislative immunity, official immunity, and sovereign immunity affect liability under the copyright law?
4. If copyright laws do apply to congressional activities, what use may legitimately be made of copyrighted materials?

Article I, §8 of the United States Constitution grants authority to the Congress "To promote the Progress of Science and the Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Pursuant to this grant of authority Congress enacted Title 17 of the United States Code governing copyrights. These statutory provisions are designed to protect and promote "works of authorship" [1/] by providing exclusive rights for certain uses of copyrighted materials. [2/]

1/ Matters subject to copyright are discussed in §102 of Title 17. It provides:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

2/ Under the statute the owner of the copyright has exclusive rights to do and to authorize any of the following:" (2/ continued)

I. COPYRIGHT AND WORKS FOR THE GOVERNMENT

One question which frequently arises is whether a federal government employee can copyright his work. The answer depends upon the nature of the work and for whom it was done. Under the Copyright Act protection "is not available for any work of the United States Government." (17 U.S.C. §105). The term "work of the United States Government" is defined in the Copyright Act as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." (17 U.S.C. §101).

(2/ Continued)

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.
>
> 17 U.S.C. §106

These exclusive rights are subject to statutory limitations (17 U.S.C. §§107-118), including "fair use," a concept discussed below.

While the legislative history of the Copyright Act makes it clear that this prohibition was not intended to extend to works produced for the United States under grant or contract, the legislators believed that in instances where the public need for free use of the materials outweighed the needs of the author it would be possible to limit copyrighting through "specific legislation, agency regulations, or contractual restrictions."[3/] Furthermore, the prohibition in Section 105 is not intended to prevent a government officer or employee from securing a copyright for "a work written at his own volition and outside his duties, even though the subject matter involves his Government work or his professional field."[4/] It does, however, apply to any work prepared by an officer or employee of the Government "as part of that person's official duties," and it makes no difference whether the work is "unpublished" or "published" by the government.[5/]

The following examples illustrate the operation of this prohibition.

Example A. An economist employed by the Joint Economic Committee is asked to prepare a report on the effect of a wage and price freeze on American agriculture. The Committee, which requested the study, does not publish it, but it is furnished freely to others on request. Can the economist copyright the study and arrange to have it published and sold? No, the work was done by

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3/ S. Rep. 4. 94-473 at 56; H. Rep't. 94-1476 at 58-9. The House Report suggests that where a contract or grant involves the normal work of an agency the agency will not permit a copyrighting of the work.

4/ Id., the contract of employment may, however, impose limitations.

5/ Id.; see generally Smith, "Government Documents: Their Ownership and Copyright," 22 ASCAP Copyright L. Symp. 147-96 (1977).

him as part of his "official duties," and it is not subject to copyright under §105 even though it is "unpublished."[6/]

Example B. The same report is prepared by the economist-employee of the Committee on his own time and initiative. Although it may relate to his work for the government, it was not prepared as part of his "official duties," and so it is not subject to the prohibition against copyright in §105.

II. INFRINGEMENT BY GOVERNMENT PUBLICATION

The copyright laws do not contain an exemption for unauthorized republication of copyrighted materials by the United States government. Indeed federal statutes and the statutory and legislative history of federal copyright law indicate that, as a general rule: (1) permission of the copyright owner should be obtained before including copyrighted materials in a government publication; (2) there may be a cause of action for infringement if such materials are published without consent; (3) while government publications are not generally subject to copyright, the inclusion of copyrighted material in a government publication does not make that material part of the public domain, and the rights of the owner of the copyright as against other prospective publishers is not affected.

The obligations of the government with respect to the use of copyrighted materials and the effect of the inclusion of such material in a government

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6/ A similar prohibition was contained in the prior act (17 U.S.C. §8 1970 ed.)). Congress has clearly viewed these prohibitions as applicable to officers and employees of all three branches of the government. In a few instances legislation has been adopted giving special permission to copyright work done for Congress. (See, e.g., Pub. L. No. 92-386, 86 Stat. 559; Pub. L. No. 789, ch. 675, 62 Stat. 1052 (1948)).

publication were discussed in the report of the Senate Judiciary Committee on revision of the copyright law.[7/]

> "Section 8 of the statute now in effect includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. There is no need to restate this principle explicitly in the context of section 105: there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work, and publication or other use by the Government of a private work could not affect its copyright protection in any way.

This obligation is recognized in notices appearing in the Congressional Record. At the bottom of the last page of each Daily Congressional Record there is a notice which contains the following sentence: "With the exception of copyrighted articles, there are no restrictions on the republication of materials from the Congressional Record." (emphasis added). The following notice was printed in the Extension of Remarks for January 11, 1977 (daily ed., at E 144):

> When privately copyrighted material is reprinted in a Government publication, notice of copyright is essential in order that the public not be misled.
>
> Whenever Congressional Record reprints are planned to include copyrighted material, the Congressional Record Clerk should be so advised and permission should be obtained from the copyright holder.

The obligation of the government to include a notice of copyright when reprinting copyrighted materials is also recognized in regulations governing government printing and binding.[8/]

7/ S. Rep't 94-473 at 57; see also H. Rep't. 94-1476 at 60.

8/ A statement identical to that in the first sentence quoted above is contained in Government Printing and Binding Regulations, No. 24 (Joint Committee on Printing of the Congress April 1977) at paragraph 17. Regulations governing government printing are adopted by the Committee pursuant to statutory authority (44 U.S.C. §§103, 501, 502).

The legislative history of the statute, notices in the Congressional Record, and the regulations governing government printing and binding indicate that a notice of copyright should be included when copyrighted material is reproduced in government publications, including congressional publications. The general requirement and form of the notice are prescribed in the Copyright Act which provides: 9/

> **(a) General requirement**
> Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.
>
> **(b) Form of notice**
> The notice appearing on the copies shall consist of the following three elements:
> (1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and
> (2) the year of first publication of the work; in the case of compilations, or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Even though an infringement action based on the inclusion without permission of copyrighted material in a congressional publication may be barred by the immunity of the Speech or Debate clause of the Constitution, 10/ a notice of copyright should still be included to avoid misleading the public. The notice

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9/ 17 U.S.C. §401.

10/ See the discussion in Part III, below.

makes it clear that, although the material appears in a government publication, it is not a work of the government and part of the public domain but a work of authorship protected by copyright.[11/] If the congressionally related activity is one falling outside the protective scope of the Speech or Debate Clause, the owner may, depending upon the circumstances, have a cause of action either against the government or the responsible individuals for injunctive relief and actual or statutory damages. The only limitation imposed by the state insofar as remedies for infringement by the United States or its officers acting on its behalf are those contained in §505 of Title 17 allowing an award of costs, including attorney's fees, except where the government is a party.[12/]

III. OFFICIAL, SOVEREIGN, AND LEGISLATIVE IMMUNITY

Under the doctrine of sovereign immunity, the United States is immune from suit except insofar as it gives it consent. The former copyright law, like the present, contained no special exemption for the reprinting of copyrighted materials in a government publication. It had been held, however, that a suit for infringement could not be brought against the United States because the

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11/ When a private publisher publishes materials which are preponderantly works of government, the copyright act requires a statement in the notice of copyright "identifying, either affirmatively or negatively those portions of the copies or phonorecords embodying any works protected under this title." (17 U.S.C. §403). The portions of the publication which are works of the government are not within the copyright. The function served by such a notice is essentially identical to that included in a government publication incorporating copyrighted material in that it enables the user to distinguish between those materials that are and are not protected by copyright.

12/ On copyright infringement and remedies see generally 17 U.S.C. §§501-510. Under §504(c) the owner may elect to recover statutory damages "of not less than $250 or more than $10,000 as the court considers just." If the infringement was willful up to $50,000 in statutory damages may be awarded.

sovereign was immune.[13] The doctrine was held no bar to suits against individuals (employees) acting within the scope of their governmental employment.[14] In 1960 Congress amended 28 U.S.C. §1498 to permit a suit against the United States for infringement of copyright in the Court of Claims.[15] As amended it provides, in pertinent part, that "whenever the copyright laws of the United States shall be infringed 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 in the Court of Claims for the recovery of his reasaonable and entire damanges for such infringement, including minimum statutory damages ...."[16]

Article I, §6 of the United States Constitution provides that "for any Speech or Debate in either House, they [Members of Congress and their aides when acting on their behalf in performing a legislative function (Gravel v. United States, 408 U.S. 606 (1972))] shall not be questioned in any other place." While the question of whether Congress can constitutionally waive this immunity by a narrowly drawn statute remains open,[17] it is clear that Congress did not do so when it amended §1498 to give its consent to suits

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13/ Turton v. United States, 212 F.2d 354 (6th Cir. 1954).

14/ Towle v. Ross, 32 F. Supp. 125 (D. Ore. 1940); see generally M. Nimmer, 3 Nimmer on Copyrights §12.01 [E] (1979); Treasansky, "Impact of the Copyright Act of 1976 on the Government," 37 Fed. B.J. 22, 28-36 (Spring 1978).

15/ Pub. L. 86-726, §1; 74 Stat. 855.

16/ 28 U.S.C. §1498(b).

17/ United States v. Helstoski, _____U.S._____, 61 L. Ed. 2d 12, 256 (1979).

for copyright infringement against the United States. Section 2 of the amending act contained a proviso stating that: "Nothing in this Act shall be construed to in any way waive any immunity provided for Members of Congress under Article I, §6 of the Constitution of the United States."[18/]

It must be emphasized that in applying the immunity of the Speech or Debate Clause the Supreme Court has limited it to those activities which are an integral part of the legislative process. In Gravel v. United States the Supreme Court enunciated the following standard:

> Legislative acts are not all encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[19/]

In United States v. Brewster the Court noted:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities

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18/ Pub. L. 86-726, §2; 74 Stat. 855.

19/ 408 U.S. 606, 625.

> has grown over the years.... Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things 'generally done in a session of the House by one of its members in relation to the business before it,' Kilbourn v. Thompson, ... or things 'said or done by him, 'as a representative, in the exercise of the functions of that office,' Coffin v. Coffin, 4 Mass. 1, 27 (1808).20/

The immunity conferred by that Clause clearly would extend to a speech given on the floor which incorporated copyrighted materials and to the printing of that speech in the Congressional Record.[21] Judicial decisions suggest that the inclusion of such materials in a hearing record[22] or committee report would be protected.[23] No decisions have been found involving another common congressional publication, the committee print. Prints are generally less directly related to the legislative function than reports or hearings, and while a strong argument can be advanced that these publications are protected by the Speech or

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20/ 408 U.S. 501, 512-13 (1972).

21/ Although the Supreme Court has not addressed the precise question (Hutchinson v. Proxmire, _____ U.S. _____, 61 L. Ed. 2d 411, 419, n. 3 (1979)), it seems likely that Speech or Debate immunity extends to materials not spoken but merely inserted in the Congressional Record. In Gravel, supra, most of the materials involved were inserted in the hearing record, and the conduct of the hearing was held to fall within the protective scope of the Speech or Debate Clause. In McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960) a lower federal court found the Speech or Debate Clause applicable to material inserted in the Extension of Remarks with the consent of the House.

22/ Gravel v. United States, 408 U.S. 606.

23/ Doe v. McMillan, 412 U.S. 306 (1973).

Debate Clause, the question has not yet been definitively addressed by the judiciary.[24/]

While committee reports, hearings, and possibly committee prints, may fall within the protective scope of the Speech or Debate Clause, the decision of the Supreme Court in Doe v. McMillan indicates that this protection does not extend to every general, public distribution of such materials. The case involved an action for invasion of privacy based on materials contained in a committee report. The court affirmed the dismissal of the suit against members of the House District of Columbia Committee and its staff, holding that the acts of authorizing an investigation of D.C. schools, collecting the materials and presenting them at the hearing, preparing the report and voting to authorize its publication and distribution were protected legislative activities. Distribution of the report for legislative purposes to "Members of Congress, congressional committees, and institutional or legislative functionares" was also held to fall within the protective scope of the Speech or Debate Clause.[25/] On

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24/ Committee prints are for committee "use" and generally involve subjects within the legislative jurisdiction of the committee. The Gravel case involved a meeting of a subcommittee of the Senate Public Works Committee where the Senator read portions of the "Pentagon Papers" relating to Vietnam and inserted the entire classified study in the public record. The conduct of the Senator and aide at that hearing was held protected. Arguably, if Gravel's conduct was protected, the production of a committee print involving subjects within the legislative jurisdiction of a committee would also be protected. But cf. Steiger v. Superior Court for Maricopa County (112 Ariz. 1, 536 P. 2d 689 (1975)), where the Arizona Supreme Court suggests that an nexus based on subject matter jurisdiciton alone may not be enough to support a claim of immunity under the Speech or Debate Clause. Even if prints are not protected by Speech or Debate, it may constitute "fair use," a concept discussed in Part IV, below.

25/ Doe v. McMillan, 412 U.S. 306-310, 312-313.

the other hand the Court said that this protection did not extend to a "general, public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the 'due functioning of the [legislative] process.' United States v. Brewster, 408 U.S., at 516."[26/] Because a general, public distribution by the Public Printer and Superintendent of Public Documents would not be protected by the Speech or Debate Clause or by the official immunity doctrine, which the Court equated with Speech or Debate immunity in this context,[27/] the Court reversed the dismissal as to those defendants and remanded for further proceedings saying, "we are unaware, from this record, of the extent of the publication and distribution of the Report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity have been exceeded. These are matters for the lower courts in the first instance."[28/]

26/ Id. at 317.

27/ Id. at 318-324.

28/ Id. at 324-25. On remand the lower courts found that the report had not only been distributed to Congress and its agencies but also to administrative agencies and to some outside government with standing orders for such materials. Noting that this was not an extensive, (general) public distribution, involving special promotion and the filling of special orders, but "'routine and ordinary' and quite limited in scope," the Court of Appeals concluded that" the district court did not err in holding that the distribution did not exceed the 'legitimate needs of Congress." (566 F. 2d 713, 716-718 (D.C. Cir. 1977), cert. denied, 435 U.S. 969 (1978)). As an alternative basis for their decision affirming the trial courts' judgment for the defendants, the Court of Appeals held that the Public Printer and Superintendent of Documents were protected by a qualified immunity for their actions in preparing and distributing the report where, as here, they had acted "in good faith and with a reasonable belief in the legality of their actions." (Id. at 719). There is at least some reason to question where the Supreme Court would accept the

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Congressional offices routinely engage in a variety of activities which, although legitimate and expected, are not considered "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage of proposed legislation or with respect to other matters which the Constitutition places within the jurisdiction of either House."[29/] Among the unprotected activities where copyright questions are most likely to arise are preparation and distribution of newsletters or reprints of congressional publications. The protection of the Speech or Debate Clause does not extend to consitituent newsletters (or press releases or news conferences) even where they are, in effect a repetition or republication of materials previously published in a protected area.[30/] For example, a floor statement published in the Congressional Record may not be actionable, even though copyrighted material is used in a manner violative of the exclusive rights of the copyright owner, because of the protection afforded by the Speech or Debate Clause. If, however, a congressional office

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(28 Continued) conclusion of the Court of Appeals applying the Speech or Debate Clause to a limited distribution outside the congressional community. (Cf. Hutchinson v. Proxmire, ____U.S.____ 61 L. Ed. 2d 411 (1979), where the Court draws a distinction between informing the public and informing Congress in applying the Speech or Debate Clause. (Id. at 429-430)).

29/ Gravel v. United States, 408 U.S. at 625. In Brewster, supra n. 20 and accompanying text, the Court refers to these activities as "political in nature rather than legislative."

30/ Hutchinson v. Proxmire, 61 L. Ed. 2d 411; cf. Long v. Ansell, 293 U.S. 76 (1934), where the Court rejected the contention that the Freedom from Arrest Clause of the Constitution immunized a Member of Congress from service of process in a civil suit for libel based on circulation of an excerpt from the Congressional Record. The Court of Appeals in the Long case said in dictum that Speech or Debate was also inapplicable. (63 App. D.C. 68, 71, 69 F. 2d 386, 389 (1934)).

orders reprints of that material from the Record for public distribution or includes it in a constituent newsletter the Speech or Debate Clause is inapplicable and an action for infringement is not thereby barred.[31/]

As indicated above, in the context of congressional activities the Supreme Court has indicated that Speech or Debate immunity and official immunity are, in effect, equivalents.[32/] Furthermore, the doctrine of official immunity is designed to protect "governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."[33/] Under the statute waiving sovereign immunity in infringement cases, that interest is protected by making a suit against the United States in the Court of Claims the exclusive remedy where a person is "acting for the Government and with the authorization and consent of the Government"[34/] On its face that statute would appear to apply to work for the legislative branch in any case where an action for infringement would lie and the Speech or Debate Clause is inapplicable. If the court finds that a particular activity is not for the government, an action against the individual could be maintained.[35/]

31/ The notice in the Congressional Record quoted on p. 5, supra, makes it clear that permission from the copyright owner should be sought in such cases.

32/ Doe v. McMillan, 412 U.S. 306.

33/ Barr v. Mateo, 360 U.S. 564, 565 (1959).

34/ 28 U.S.C. §1498(b).

35/ Of course, not every action taken by or on behalf of a Member of Congress is for the government, e.g., the printing and distribution of campaign materials. However, it would seem that many routine activities in congressional offices which are unprotected by Speech or Debate might be for and with the consent or authorization of the government. For example, a number of representative activities are classed as "official" under the franking statutes

IV. FAIR USE

The legislative history of the Copyright Act indicates that the doctrine of "fair use" is applicable to congressional publications incorporating copyrighted materials.[36] That doctrine of judicial origin was incorporated into the new Copyright Act.[37] It provides:

(35/ Continued) which would be considered "political" and unprotected by Speech or Debate as interpreted by the Supreme Court. (39 U.S.C. §3210). Logically, acts classed as "official" under the franking statute would seem to involve work for the government for the purpose of applying 28 U.S.C. §1498(b), protecting a government worker from personal liability for copyright infringement and providing the owner a remedy against the government. No reported judicial decisions have been found which directly address this issue, and it is not always clear that particular material is "official" under the franking statute. Regardless, the prudent course in any case where a potentially infringing use is contemplated is to seek permission from the copyright owner. (Cf. Hoellin v. Annunzio, 468 F. 2d 522 (7th Civ. 1972), where the Court rejects the argument that Speech or Debate bars an inquiry into whether a mailing was for "official business.").

36/ In its report on the new Copyright Act the House Judiciary Committee said:

> The Committee has considered the question of publication, in Congressional hearings and documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use. (H. Rep't. No. 94-1476 at p. 73 (1976); see also S. Rep't. No. 94-473 at pp. 61-62 (1975)).

37/ 17 U.S.C. §107.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

The determination of whether a particular use is a fair use involves application of these four statutory factors to the facts of the case. While in many cases such a determination will be difficult, the following examples should prove helpful.

Example A. In discussing a question of public policy a Member of Congress includes in an issue discussion in a newsletter a brief quote from a copyrighted article for purpose of criticism, support, or illustration of a position. In all probability such use would be held to be a "fair use", since it is not likely to compete with the copyrighted material in the market so as to affect its value; "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" is apparently minimal; and the use by the Member is not commercial.[38/]

38/ See generally Freid, "Fair Use and the New Act," 22 N.Y.L. Sch. L. Rev. 497-519 (1977); M. Nimmer, 3 Nimmer on Copyright §13.05.

Example B. A Member has a subscription to a copyrighted research organization publication, containing three to four page summaries and analyses of their research into the market for specific agricultural products, the effect of federal law and regulation on the market, and forecasts based on those analyses. Desiring to make these available to his rural constituents, the Member begins devoting a page in each newsletter to an abstract of one or two of those reports of particular interest to his consitituents. Those abstracts are substantially identical to the original reports, paraphrased with numerous quotations. Should an infringement action be filed it is quite possible that court would find this is not a "fair use", since "the amount and substantiality of the portion used in relation to the copyrighted material as a whole" is significant; the distribution of the newsletter apparently involves potential subscribers to the original and may adversely effect the market; and the use was not supplemental to any independent research and analysis.[39/]

V. SUMMARY

The Copyright Act applies to governmental activities, including activities of the legislative branch. Work for the government is in the public domain and may not be copyrighted.[40/] When substantial use of copyrighted material is contemplated, permission should be sought from the copyright owner and a notice of copyright included in the publication to make it clear to the public

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39/ This example is based on Wainwright Securities v. Wall Street Transcript Corp., 558 F. 29 91 (2nd Cir. 1977), cert. denied 434 U.S. 1014 (1978).

40/ Part I, supra.

that the material is copyrighted, even though included in a government publication. A suit for infringement may be based on the unauthorized inclusion of copyrighted materials in a government publication in violation of the exclusive rights of the copyright owner.[41/] Congress has adopted a statute waiving sovereign immunity in copyright cases and providing for an exclusive remedy by suit against the United States in the Court of Claims where the infringement involves work for the government.[42/]

In the context of congressional activities, if the infringment involves an official publication which is "an integral part of the deliberative and communicative processes" by which Members perform their constitutional functions, primarily legislating, the Speech or Debate Clause may immunize Members and staff from suit.[43/] Such publications would include the Congressional Record, committee reports, committee hearings and perhaps other official congressional publications. It should be emphasized that numerous, legitimate congressional activities are not subject to Speech or Debate immunization, including ordering and circulating reprints of official publications and newsletters. If the infringement occurs in a publication outside the protected legislative sphere, an action may be brought against the United States or the individual infringer, depending upon the circumstances.[44/] Under the waiver statute if the infringe-

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41/ Part I, supra.

42/ 28 U.S.C. §§498(b); see Part III, supra.

43/ Gravel v. United States, 408 U.S. at 625.

44/ Part III, supra.

ment occurs when a person is "acting for the Government and with the authorization and consent of the Government" the exclusive remedy is a suit against the United States. Not every action taken on behalf of a Member of Congress is "for the Government." Regardless of whether the infringing act is "for the Government" or the Member individually, an action seeking injunctive relief and damages, including statutory damages will lie.

Not every unauthorized use of copyrighted material constitutes an infringement. The Copyright Act recognizes certain limitations on the exclusive rights of the copyright owner, including "fair use." Minimal and incidental uses of quotes and or paraphases from copyrighted materials for purposes of illustration, support, or criticism will generally fall within this exception.[45/] When more extensive use is contemplated, permission of the copyright owner should be sought and a notice of copyright included in the publication.[46/] This is particularly important where the publication or its distribution may exceed the protective scope of the Speech or Debate Clause.

45/ 28 U.S.C. §1498(b); see Part III, supra.

46/ Part IV, supra.