The original documents are located in Box 66, folder "10/18/76 S22 Copyright Law Revision (1)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
OCT 19 1976

THE WHITE HOUSE

WASHINGTON

October 19, 1976

ACTION
Last Day: October 19

MEMORANDUM FOR: THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Enrolled Bill S. 22 - Copyright Law Revision

Posted 10/20/76

This is to present for your action S. 22, a bill which would comprehensively revise the Nation's copyright laws. The bill was sponsored by Senator McClellan (D) Arkansas.

archives 10/20/76

BACKGROUND

S. 22 conforms the U.S. copyright laws with the preponderance of foreign laws by providing a single Federal copyright system for all published and non-published works and by extending the length of protection from 56 years to the duration of the author's life plus 50 years. The bill also:

-- sets standards for fair use and reproduction of copyrighted material;

-- provides for compulsory licensing for cable television and jukeboxes;

-- modifies the royalty payment system for records;

-- preempts State laws governing certain copyright materials; and

-- repeals, as of 1982, the requirement that English language publications must be manufactured in the United States.

S. 22 passed the Senate by a vote of 75-0 and the House by voice vote.

Additional discussion is provided in OMB's enrolled bill report at Tab A.

ARGUMENTS FOR APPROVAL

1. The existing 1909 act must be revised to take account of the changes in the means of producing and disseminating information and entertainment that have occurred in the past 67 years.

2. The bill will eliminate copyright renewal processing and reduce Federal costs.

3. The Nation should benefit economically from the elimination of the requirement of manufacturing U.S. copyrighted material in the United States.

ARGUMENTS FOR DISAPPROVAL

1. The restriction of the "fair use" of copyrighted materials may inhibit scholarly research and teaching.

2. S. 22 may violate the separation of powers provisions of the Constitution:

   -- by creating new administrative and executive duties for the Register of Copyrights, and officers of the Legislative Branch; and

   -- by granting judicial power to the Copyright Royalty Tribunal, which is also part of the Legislative Branch.

OMB, Max Friedersdorf, Counsel's Office (Lazarus), and I recommend approval of S. 22.

RECOMMENDATION

That you sign S. 22 at Tab B.

Approve signing statement at Tab C (cleared by Doug Smith)

Approve _____ Disapprove JKF

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 14 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 22 - Copyright Law Revision
Sponsor - Sen. McClellan (D) Arkansas

Last Day for Action

October 19, 1976 - Tuesday

Purpose

Provides for the general revision of the copyright law, title 17 of the United States Code, and for other purposes.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Library of Congress	Approval
Department of Commerce	Approval
Department of State	Approval
National Science Foundation	Approval
Department of Health, Education, and Welfare	No objection (Informally)
Department of the Treasury	No objection (Informally)
Department of Defense	No objection (Informally)
Council of Economic Advisers	No objection
National Aeronautics and Space Administration	No objection
Office of Telecommunications Policy	No objection (Informally)
United States Information Agency	No objection (Informally)
Office of Science and Technology Policy	No objection
Council on Wage and Price Stability	No comment (Informally)
Federal Communications Commission	No comment (Informally)
Federal Trade Commission	No comment (Informally)
General Services Administration	No comment (Informally)
Small Business Administration	No comment (Informally)
Office of the Special Representative for Trade Negotiations	Defers (Informally)
Department of Justice	Does not recommend disapproval

Discussion

S. 22 would comprehensively revise the nation's copyright laws for the first time in 67 years. The 1909 copyright law has become outdated by technology. It takes no account of developments in such fields as commercial and educational radio and television, motion pictures, sound recordings, photocopying, printing, microfilming, and computer storage.

Since 1961, when the Library of Congress submitted the recommendations of its Register of Copyrights for general revision of the law, Congress has made several attempts to make changes in the light of new technology. The House in 1967 passed a general bill, but controversy over some provisions, especially the issue of royalty fees for works used on cable television, was strong enough to prevent the Senate from acting.

In 1971, Congress cleared a bill establishing a limited copyright to prevent unauthorized duplication and piracy of sound recordings. The legislation (P.L. 92-140) marked the first recognition of sound recordings in U.S. copyright law.

In 1974, the Senate passed omnibus copyright legislation, but the House failed to take action. As an interim measure, Congress in the closing days of the session passed a stopgap bill (P.L. 93-573) that provided only limited changes. The measure made permanent the protection for sound recordings enacted in 1971, increased maximum penalties for piracy and counterfeiting of sound recordings, and extended until the end of 1976 the duration of copyrights due to expire before then. That marked the ninth time since 1962 that Congress had extended copyrights in the expectation that it would shortly enact a general bill.

Major Provisions of S. 22

Much of this legislation is a restatement of existing law, both statutory law and judicial interpretation. S. 22, for example, retains the fundamental criteria for copyright protection that are required under existing law. It lists categories of works--literary, musical, dramatic, pictorial, and audiovisual--that may be copyrighted; these are intended to be illustrative and not be binding on the courts. S. 22 does add specific definitions of some of these categories,

however, in order to settle and clarify the law. It also adds specific categories of material to the copyright laws (e.g., material used in jukeboxes or in cable television transmissions).

S. 22 also brings U.S. law into conformity with the preponderance of foreign laws by:

-- giving protection to all unpublished works of foreign origin and to published works that meet certain conditions, and

-- extending the length of copyright protection from 56 years from publication to the duration of the creator's life plus fifty years. (Major reasons for lengthening the term of protection include a desire to protect the heirs of the author and a recognition of the growing commercial significance of the copyright grant.)

In addition to extending the length of copyright protection, S. 22 modifies the applicability of copyright protection in four major areas. The bill:

1. sets standards for fair use and reproduction of copyrighted material;

2. provides a new system of compulsory licensing for cable television and jukeboxes while modifying the existing system of performance royalty payments for records;

3. preempts State laws governing copyright material that comes within the scope of the federal law; and

4. repeals, as of 1982, an existing requirement that English-language books and periodicals must be manufactured in the United States.

1. Fair Use and Reproduction of Copyrighted Material

S. 22 for the first time enacts into statutory law the judicial doctrine of "fair use", the free use of copyrighted material for such purposes as quotation in other works, teaching, news reporting, scholarship, or research.

A major obstacle to passage of copyright legislation in the past had been a controversy between publishers and teachers over how much copying could be done for educational purposes under the fair use doctrine. At the urging of Congress, representatives of the two groups met in 1976 and worked out a detailed set of guidelines to govern classroom fair use. In addition to setting forth specific criteria to determine "fair use" in the bill, the legislative history incorporated the guidelines as "being a reasonable interpretation of the minimum standards of 'fair use'".

Libraries, which had also posed special copying problems, are permitted by S. 22 reproduction and distribution of not more than one copy or phono-record per person, provided both the reproduction and the library meet certain conditions. As in the case of the fair use restrictions on schools, the bill permits isolated instances of copying, but bars systematic reproduction that, for instance, substitutes photocopying for subscription or purchase.

The Department of Health, Education, and Welfare had expressed opposition to the original Senate bill which, depending on the interpretation of "systematic reproduction", could have made the inter-library loan program of the National Library of Medicine an infringement of copyright. This activity had been the subject of a Supreme Court decision in February 1975. By a 4-4 vote, the Court left intact a lower court decision affirming the right of the library to mass photocopy the copyrighted journals of a medical publisher.

The enrolled bill includes a provision, not in the original Senate bill, which permits a library to participate in inter-library arrangements for circulating copies as long as the practice was not done in "such aggregate quantities as to substitute for a subscription to or purchase of a work." It also requires the Register of Copyrights to study the effect of the provision every five years and recommend changes when necessary.

S. 22 exempts from liability limited reproduction and distribution of television news programs. It also establishes an American Television and Radio Archive in the Library of Congress as the principal repository for broadcast material.

To facilitate better quality broadcasts, S. 22 permits a broadcaster to make a single recording or tape of a performance provided it is used for the broadcaster's own transmissions within his own area and is destroyed after six months or preserved solely for archival purposes. Educational broadcasters are permitted to make up to 30 copies and use them for up to seven years after the performance.

2. Compulsory Licensing and Royalty Payments

S. 22 sets up a new system of compulsory licensing for cable television and jukebox operators, while modifying the existing system of performance royalty payments for records. In each case, the Register of Copyrights in the Library of Congress will collect the royalties and determine how best to distribute them to copyright owners. A Copyright Royalty Tribunal is established to review royalty rates. Other compulsory licensing and royalty payment provisions apply to public broadcasting and nonprofit institutions.

Cable Television and Jukeboxes. The major stumbling block to copyright legislation in the past had been the question of how to treat cable television systems, which pick up broadcasts of copyrighted programs and retransmit them to cable subscribers for a fee. Copyright owners long had contended that cable systems should pay a royalty for such use.

Consistent with that view, S. 22 sets up a system of compulsory licensing, whereby a system that transmits non-network programs from outside its local area will pay a semiannual fee based on a combination of the number of distant signals carried and the gross semiannual receipts of the system. To protect small systems, which rely heavily on distant signals, from excessive royalty burdens, S.22 sets separate, lighter schedules. In addition, some carriers (e.g., instructional transmissions) are exempted from royalty liability.

Jukebox operators, who under existing law have enjoyed a flat exemption from copyright liability, are brought under the same compulsory licensing system. Operators will pay an $8.00 per box annual royalty to the Register of Copyrights.

Performance Royalties. Addressing a long-standing dispute between composers and record-makers over the method and amount of royalty payment for records, S. 22 retains the existing compulsory licensing system, similar to that provided for cable television. It leaves to the Register of Copyrights, who collects and distributes royalties, the determination of how best to assure full and prompt payment to copyright owners.

S. 22, as enrolled, represents a compromise between the royalty provisions of the House and original Senate version of the bill. It raises the payment to 2.75 cents per record, or 0.5 cents per minute, whichever is less. The existing level of payment is two cents.

Copyright Royalty Tribunal. To set and review royalty rates for cable television systems, jukebox operators, and record-makers, the enrolled bill sets up a five-member Copyright Royalty Tribunal. The Tribunal is to be an independent entity with members appointed by the President for a term of seven years and confirmed by the Senate.

The Tribunal is to review rates for the recording and juke-box industries every 10 years and for cable systems every five years. In response to the views of the broadcast industry, S. 22 also provides that any future action by the Federal Communications Commission permitting cable systems to import additional distant signals or carry greater syndicated programming would trigger automatic review by the Tribunal of the cable rates.

Public Broadcasting. S. 22 sets tight restrictions on the use of copyrighted material by public broadcasting stations. Attempting to promote public broadcasting, the original Senate bill had established a compulsory licensing procedure for broadcast of non-dramatic literary and musical works, as well as pictorial, graphic, and sculptural works.

The enrolled bill instead establishes a system placing priority on private negotiations between copyright owners and public broadcasters and drops altogether the compulsory license for nondramatic literary works.

For nondramatic musical works and for pictorial, graphic and sculptural works, the bill sets up a compulsory licensing procedure only as a remedy of last resort. Under the bill,

public broadcasters and copyright owners are encouraged first to seek voluntary private agreements. Those that could not reach voluntary agreement by the end of 1982 would be subject to rates and terms to be established by the Copyright Royalty Tribunal.

Nonprofit Exemptions. Although it removes the existing blanket exemption from royalty payments for nonprofit performances and displays, S. 22 retains exemptions for certain educational, religious, and other uses.

3. Preemption of State Law

S. 22 preempts and abolishes any rights under the common law or statutes of a State that are equivalent to copyright and that extend to work coming within the scope of the federal copyright law. This will avoid "gray areas" between State and federal protection.

As long as a work fits within one of the general subject matter categories of S. 22, States may not protect the work even if it fails to achieve federal copyright protection. S. 22 also specifies areas that States would not be precluded from protecting (e.g., subject matter outside the scope of the revised federal copyright statute).

4. Manufacturers' Protection

Existing law requires that copyrighted English-language books and periodicals must be manufactured in the United States. It was designed as a trade barrier, discouraging importation of foreign publications. S. 22 substantially narrows this existing provision, and repeals it as of July 1, 1982. In the view of Congress, the once compelling economic justification for protection of American publishers is no longer valid, and, even if it were, it has no place in a copyright law, which is intended to protect authors and not publishers.

Specifically, S. 22 prohibits importation into the United States, before July 1, 1982, of nondramatic copyrighted material unless manufactured in the United States or Canada. Exceptions to this import restriction include material written by foreign authors, material for government use, material

for various educational and religious uses, and material of a dramatic, pictorial, or graphical nature. The elimination of this prohibition after 1982 does not apply to the unauthorized importation of copyrighted sound recordings or motion pictures. The blanket exception for Canadian publications was included in expectation of Canada providing reciprocal treatment for American publications.

Agency Views

In addition to the above substantive changes in the copyright laws, the enrolled bill makes several changes in the administration of these laws. These changes, in the view of the Department of Justice, "may create significant constitutional problems."

In a previous report to the House subcommittee considering this legislation, the Department noted that "separation of powers questions have already been raised with respect to the existing location of the Copyright Office within the legislative branch." S. 22 creates new duties for the Register which, in the view of Justice, raise these questions even more forcefully. The Department believes the duties of the Register are "an arrogation of administrative and executive responsibilities to a legislative officer which appears to be beyond the general grant of legislative powers to the Congress in Article I of the Constitution."

Justice raised similar problems in its report to the subcommittee with respect to the creation of a Copyright Royalty Tribunal. In spite of modifications made by Congress in earlier versions of the bill that will, for example, retain appointive powers with the President instead of with the Register of Copyrights, the Department states that "... the Tribunal acts as exchequer, paymaster, and court of chancery in matters respecting disputed royalties and payments... Its role is fundamentally judicial, tinged with the administrative, and incompatible with its purported placement in the Legislative Branch of the federal government."

In view of the serious constitutional questions, the Department urges that, if the bill is approved, you issue a signing statement calling attention to the problems and urging the next Congress to amend the relevant provisions before litigation ensues.

The Department of Commerce expresses disappointment that the enrolled bill does not include a provision in the House version of the bill that would, for the first time, have permitted the government to copyright certain publications. Specifically, that provision would have permitted the Secretary of Commerce to obtain five-year copyrights for research documents produced by the department's publishing arm, the National Technical Information Service (NTIS).

Commerce had requested the provision in order "to stop hemorrhaging of valuable American technological information overseas", and to recoup the cost of preparing and handling its publications disseminated both within the U.S. and abroad. Publishers and librarians had opposed the provision because it could for the first time force them to pay royalties for government material that traditionally had been in the public domain.

The National Aeronautics and Space Administration had also expressed their view that the law should provide that the government could obtain foreign copyright protection and be able to control and protect dissemination abroad. In dropping the NTIS provision, the conference committee indicated that this issue would be considered early in the next Congress.

Both Commerce and NASA agree that the issue needs further consideration, but NASA points out that the issue is broader than just copyright protection and the impact on NTIS's revenues. Rather, NASA believes the issue involves the overall impact that the ease of foreign access to, and use of, U.S. tax-funded technology has on U.S. industry and commerce.

While the Office of the Special Representative for Trade Negotiations defers on the bill as a whole, it believes the provision which exempts Canadian publications from the prohibition against importation into the United States of nondramatic copyrighted material before July 1, 1982, may violate articles 11 and 13 of the General Agreement on Tariffs and Trade (GATT). This is because it would exempt Canada from a provision that applies to all other countries in violation of commitments made under GATT. If this does become a problem, however, legislation to amend this provision can be submitted to the 95th Congress.

Recommendation

This legislation, over ten years in development, represents a balanced and desirable revision in our copyright laws. It passed both the House (by voice vote) and Senate (75-0) without opposition; few interest groups object to it; there do not seem to be any major undesirable economic effects; and there are some savings.

The legislation will save resources by eliminating copyright renewal processing and will reduce costs that are now devoted to resolving conflicts over dates of "publication". The change in copyright duration will aid authors and artists in planning their estates. The legislation clears up legal ambiguities regarding the application of copyright to phono-recordings and the retransmission of television programs. Elimination of the requirement to manufacture U.S. copyrighted material in the U.S. should result in net benefits to the nation as a whole.

There is concern, however, that restriction of the "fair use" of copyrighted materials, beyond established judicial doctrine, may inhibit scholarly research and teaching. There is also no clearly established justification for substituting government authority for free market contracts by setting statutory royalty rates and for creating the Copyright Royalty Tribunal to adjust them over time, although establishment of the Tribunal may be the only practical means at this time of dealing with the issue.

The constitutional problems raised by Justice concerning the Register of Copyrights and the Copyright Royalty Tribunal are of concern but, in our view, the many meritorious provisions in this bill and the urgent need for a revision of the law of copyright are overriding considerations. We agree with Justice that a signing statement should be issued if this bill is approved, calling attention to the problems and urging the next Congress to amend the relevant provisions of the bill.

On balance, the good in this bill appears clearly to outweigh the bad. We recommend, therefore, approval of S. 22. A signing statement is attached for your consideration.

James T. Lynn
Director

Enclosures

STATEMENT BY THE PRESIDENT

I am pleased to sign S. 22, the general revision of the Copyright Law. It is the first major change in copyright in 67 years and represents the culmination of more than a decade of legislative work by Members of Congress and the literary, musical and artistic creators of our land.

While copyright law itself is a complex field, its purpose is practical and essential. Its objective, simply put, is to stimulate creativity by securing for authors, composers, playwrights, publishers, film producers and other creative artists protection for their work and intellectual achievements. However, in conferring these rights on the creators, the bill at the same time protects the public from unwarranted restrictions on access to creative works.

It is not always realized that the framers of our Constitution specifically provided for a copyright law and among the first statutes to be enacted by the Congress in 1790 was a copyright act. This new law now brings our copyright statute into step with copyright laws of most of the free world.

Its principal provisions extend the duration of copyright to the life of the author plus fifty years, improves the access of libraries and teachers to copyrighted works, opens the door for the enjoyment of literary works to the blind and the deaf, provides for the greater use of copyrighted works by the public broadcasting media, and brings cable television operations within the scope of the copyright law for the first time.

There are, however, certain aspects of this legislation which raise constitutional problems.

Section 701(a) of the bill vests substantial administrative functions in the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register would continue to be appointed by the Librarian of Congress, within the legislative branch of government, and would preside over the agency charged with primary responsibility for execution and administration of the proposed copyright system.

Section 801 of the bill would create a Copyright Royalty Tribunal with extensive quasi-equitable and judicial powers. The Tribunal is established as an "independent" body in the Legislative Branch, composed of five commissioners appointed by the President with the advice and consent of the Senate. It acts as exchequer, paymaster, and court of chancery in matters respecting disputed royalties and payments.

Congress has the power to legislate respecting copyrights, and to establish bodies for the conduct of such rules as Congress may by legislation establish. I am unaware, however, of any clear constitutional justification for the creation of administrative agencies within the legislative branch. Congress may investigate problems, legislate toward a solution, and exercise oversight to ensure that the laws are adequate and faithfully administered. The Executive Branch, however, is charged with the actual administration of our laws.

I am also concerned that due process be assured to every claimant under our copyright laws. The broad grants of authority conferred by this legislation will have to be carefully implemented to guarantee the rights of all parties.

I am requesting that the Attorney General submit a report to the next Congress describing these issues in detail and suggesting appropriate action.

THE LIBRARIAN OF CONGRESS

WASHINGTON, D.C. 20540

October 12, 1976

Dear Mr. Frey:

This is in response to your request for the Library's views with respect to S. 22, a bill for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, which received final approval from both Houses on September 30, 1976.

This measure is the first general revision of our copyright law in over 67 years. Reform of the antiquated 1909 Act is needed not only to remedy deficiencies in that statute but also to take account of the revolutionary changes in the means of producing and disseminating information and entertainment that have occurred since the beginning of the twentieth century. Efforts to enact a general revision of the copyright law began in the mid-1920's, and the current revision program was inaugurated 22 years ago. The first bill for copyright revision that led to S. 22 was introduced in 1964. Bills for revision passed the House in 1967 and the Senate in 1974.

It is no exaggeration to describe the enactment of S. 22 as a monumental achievement. As a result of the new forms of creation and communication of copyrightable material brought on by technological developments since 1909, copyright law has increased tremendously in complexity and national importance. Literally hundreds of interests depend upon or are affected by copyright protection. The goal of the general revision program has been to reconcile all these interests in a way that will satisfy, in the years ahead, the fundamental Constitutional mandate: to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings.

I believe that S. 22 has fully and successfully achieved this goal. A number of controversies with respect to the general revision bill have arisen since its original introduction over twelve years ago, but it is gratifying to report that, through a great deal of hard work and a remarkable spirit of cooperation and good will among the representatives of the various affected interests, accommodations have been reached on virtually every issue. The degree to which this measure has achieved acceptance is shown by the votes in the two Houses: a unanimous vote of 97 to 0 in the Senate, and an overwhelming margin of 316 to 7 in the House.

The bill brings the copyright system of the United States into line with the systems prevalent throughout the rest of the world. It provides for a single Federal system of copyright for all published and unpublished works, with a basic term of protection lasting for the life of the author and fifty years after the author's death. A system giving authors or certain members of their families an option to terminate assignments and licenses after 35 years will be substituted for the present confusing, arbitrary, and often unfair revisionary renewal system. The formalities of American copyright law, including the notice appearing on published copies, the deposit of copies for the Library of Congress, and the registration of claims in the Copyright Office, are retained, but in ways that will accomplish the purposes of formalities without causing inadvertent or unjust forfeitures. The manufacturing clause, a feature of our copyright statutes since 1891, will first be liberalized, and will then be phased out entirely as of July 1, 1982.

Much of the controversy over S. 22 has arisen in connection with various provisions of Chapter 1, dealing with the exclusive rights of the copyright owner. Section 108, which concerns photocopying by libraries and archives, represents a compromise which has received general support. The existing compulsory royalty for recording music is raised from 2 cents per song per record to a rate of 2 3/4 cents or 1/2 cent per minute of playing time, whichever is greater. A compulsory licensing system governing performance on coin-operated machines with an annual rate of $8 per jukebox, and a different system of compulsory licensing for public broadcasting of music and graphic works, are established by sections 116 and 118 of the bill. Perhaps the most controversial issue in the revision program has been the status of performance on cable television systems, and the compromise solution for a compulsory license embodied in section 111 represents a major accomplishment. The royalty rates for all four compulsory licenses are subject to periodic review and possible adjustment by a newly-created Copyright Royalty Tribunal, which is also charged with distributing royalties from jukeboxes and cable television and settling disputes over distribution.

Presidential approval of the revision bill will be an epochal event in the development of United States copyright law, and will deservedly be viewed, now and in the future, as a major accomplishment of this administration. It is gratifying for me to urge the President's signature of S. 22.

Yours,

Daniel J. Boorstin
Librarian of Congress

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D. C. 20504

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

OCT 14 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in response to your request for the views of this Department on S. 22, Conference Report in lieu of enrolled enactment,

> "For the general revision of the Copyright Law, Title 17 of the United States Code, and for other purposes."

S. 22 is a comprehensive revision of the Federal copyright laws, Title 17 of the U. S. Code, some of whose principal provisions we highlight below.

S. 22 would retain the two fundamental criteria of copyright protection - originality and fixation in tangible form - that are required under existing law. The standard of originality does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them. If a work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, this is sufficient fixation for the purposes of copyright protection. The concept of fixation is important since it, and not publication, would trigger the application of Title 17 to a work.

The initial ownership of copyright in a work protected under Title 17 would vest in the author of the work. The bill lists the following categories of copyrightable works: literary works; musical work including any accompanying words; dramatic works including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audio visual works; and, sound recordings. The fundamental rights accorded to copyright owners are, generally, the exclusive rights of reproduction, adoption, publication, performance, and display.

The scope of performance rights in non-dramatic musical works would be extended to coin-operated phonorecord players (juke-boxes) for the first time. The legislation provides a royalty fee of $8 per year for each player to be paid by the operators of these players to the Register of Copyrights for distribution to copyright owners. A compulsory licensing scheme would also be established for secondary transmissions of broadcasts by cable television systems (CATV) and a scale of royalties, subject to review by a Copyright Royalty Tribunal, would be adopted. The bill also retains the existing compulsory licensing system for record royalties.

S. 22 would give statutory recognition to the judicial doctrine of "fair use" for the first time. That is, the fair use of a copyrighted work for such purposes as criticism, comment, news reporting, teaching, scholarship, or research, would not be an infringement of copyright. Libraries and archives would generally be given a limited exemption from the copyright laws for the reproduction or distribution of a single copy of a work on an isolated basis.

S. 22 would also effect a fundamental and significant change in the present law by adopting a single system of federal copyright law which would apply to any original work that, following the bill's criteria, had been fixed in a tangible medium. The existing dual system of common law copyright for unpublished works and statutory copyright for published works would be abolished. Common law copyright protection for works coming within the scope of the statute would be abrogated as of the effective date of the bill, January 1, 1978.

Another significant change that S. 22 would make in existing copyright law would be the extension of the term of copyright protection from the present 28 years plus a 28 year period of renewal to the life of the author plus 50 years. All copyright terms would expire on December 31 of the appropriate year.

Under S. 22, the so-called "manufacturing clause" -- which provides full U. S. copyright protection for English - language literary works only to those publications manufactured in the U. S. -- would be considerably limited and would terminate altogether on July 1, 1982. Canada would be exempted from the domestic manufacturing requirement as of the effective date of the Act.

Finally, the bill would establish an independent, Presidentially-appointed, five-member Copyright Royalty Tribunal to review royalty rates. The Tribunal would also review and resolve disagreements concerning the distribution of royalties collected.

In testimony before the Congress, and in proposed reports to the Congress on this legislation, the Department of Commerce, while generally supportive of copyright law revision, had identified three major areas of concern in S. 22 (and H.R. 2223): (1) the inclusion of an immediate exemption for Canada only from the U.S. manufacturing requirement, (2) the lack of copyright protection for certain Department publications (NTIS), and (3) the need for clarification of the extent of preemption of State law with respect to unfair competition.

The termination, in Section 601 of the bill, of the U.S. manufacturing requirement for all English language literary works as of July 1, 1982, lessens our concern with respect to the first issue. While we were disappointed with the failure of the Conferees to permit some limited copyright protection for NTIS publications, we were heartened by the Conferees' recommendation that this issue be considered at hearings early in the 95th Congress. (The Senate had held no hearings on the subject.)

With respect to the third issue, we still consider it unfortunate that the final bill fails to list examples of causes of action, such as types of unfair competition torts, that would not be preempted by Federal law. The bill includes, rather, a general exemption from Federal preemption for activities violating legal or equitable rights that are not equivalent to any of the enumerated exclusive Federal rights. This can only lead to misinterpretation and judicial confusion.

Although these concerns have not been resolved to our complete satisfaction, we recognize that S. 22 represents a compromise approach to copyright law reform and that Title 17 is in serious need of reform. This bill would essentially accomplish this and would also bring our laws into conformity with the Berne Convention, the international copyright agreement.

Accordingly, we recommend that the President approve S. 22.

DEPARTMENT OF STATE

Washington, D.C. 20520

OCT 13 1976

Dear Mr. Lynn:

I am writing in response to Mr. Frey's request of October 8, 1976, for the views of the Department of State on the Enrolled Bill S.22, General Revision of the Copyright Law, Title 17 of the United States Code. The Department of State's comments are limited to the foreign policy aspects of the legislation. Although we have reservations regarding one section in the bill, the Department supports the enactment of this important legislation and accordingly recommends that the President sign it into law.

The present Copyright Law is essentially the same as the Act of 1909. Since that date, great advances have been made in technology and technique for communicating printed matter, visual images, and recorded sounds. The Department of State believes that a modernization of the copyright law to take into account important technical advances in the copyright field is in the national interest. Areas of specific interest to the Department are as follows:

Section 104 is relevant to our international interest in that it specifies when foreign works will be granted U.S. copyright protection. Essentially, Section 104 continues the reciprocity standard contained in the present law with respect to published works; that is, the U. S. gives foreign citizens protection equal to that given by the foreign country to U.S. citizens. It is thus consistent with generally accepted international practice in most countries and the requirements of our international agreements on this subject, and has the support of the Department.

Honorable James T. Lynn,
Director, Office of
Management and Budget.

The enactment of this legislation would not involve any expenditure of funds by this Department.

Sincerely,

General Counsel

Section 302 deals with the duration of copyright protection. It is one of the most important provisions in the copyright bill. Essentially, Section 302(a) provides for a copyright term of the life of the author plus 50 years after his death. Such a term of protection would be more in line with the practice of most countries of the international copyright community and would also remove a major obstacle to the possible adherence of the U.S. to the Berne Convention for the Protection of Literary and Artistic Works. Our membership in the Berne Convention would facilitate and simplify international copyright protection for U.S. nationals. Therefore, we strongly support the term of copyright protection proposed in Section 302.

Section 601 concerns the so-called "manufacturing clause" which is designed basically to protect the U.S. printing industry. The manufacturing clause has heretofore severely limited the importation into or the distribution within the U.S. of English language books authored by U.S. nationals living in the U.S., or domiciliaries, unless the copies are produced in, or made from type set in, or plates made in, the United States or Canada. It is this provision which has been of most concern to the Department.

We are pleased that Section 601 would, on the whole, move in the direction of liberalizing the present manufacturing clause. Firstly, a violation of the manufacturing clause as regards a book would not affect the right of the copyright proprietor to authorize a motion picture version or other use of the book. It would only affect enforcement of copyrights with respect to publication as a book. Secondly, the number of copies of any work authored by a U.S. national, or domicile, and manufactured abroad that may be imported has been increased from 1,500 to 2,000. Thirdly, and most important, the manufacturing clause would expire on July 1, 1982. This latter provision represented a compromise which was acceptable to the Department.

During Congressional hearings on the copyright bill, the Department testified that continuation of the manufacturing clause would be a protectionist measure inconsistent

with basic U.S. policy in international trade. For several decades we have pursued a policy of reducing tariffs and non-tariff barriers in the interest of promoting an open international economic system. We believe that the broad trading interest of the United States and its people continues to be best served by a general reduction of trade barriers, including non-tariff barriers.

Furthermore, the exception to the manufacturing clause for Canada introduced by this bill would violate our obligations under the General Agreement on Tariffs and Trade (GATT) and various bilateral treaties. Specifically, the exception would violate our obligations under Article XIII of the GATT which requires non-discriminatory application of quantitative restrictions. Most of our bilateral Friendship, Commerce and Navigation treaties also require non-discrimination.

However, because an expiration date on the manufacturing clause has been written into the bill, the Department believes that there should be no significant difficulties encountered in the GATT and with countries with which we have bilateral trade agreements.

In conclusion, the Department of State believes that S.22 is a significant improvement over present legislation and its implications for our international relations are positive. Accordingly, we recommend that the President sign the bill.

Sincerely,

Kempton B. Jenkins
Acting Assistant Secretary
for Congressional Relations

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

OFFICE OF THE
DIRECTOR

October 13, 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

This is in reply to your communication of October 8, 1976, requesting the comments of the National Science Foundation on Enrolled Bill S. 22, the "General Revision of the Copyright Law, Title 17 of the United States Code."

The Foundation supports the approval of the Enrolled Bill by the President.

Sincerely yours,

R. C. Atkinson

Richard C. Atkinson
Acting Director

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

October 12, 1976

Dear Mr. Frey:

The Council of Economic Advisers has been asked for its views on S. 22, an amendment (in its entirety) to Title 17 of the U. S. Code, entitled "Copyrights."

The bill will save resources by eliminating copyright renewal processing. It will reduce costs that are now devoted to resolving conflicts over dates of "publication". The change in copyright duration will aid authors and artists in planning their estates. The bill clears up legal ambiguities regarding the application of copyright to phono-recordings and the retransmission of television programs. Elimination of the requirement to manufacture U. S. copyrighted material in the U. S. should result in a more efficient allocation of resources.

We are concerned that the bill restricts the "fair use" of copyrighted materials beyond established judicial doctrine, which may hinder scholarly research and teaching. We are also wary of setting statutory royalty rates and creating the Copyright Royalty Tribunal to adjust them over time. This appears to substitute government authority for free market contracts to establish certain royalty rates. There does not appear to be a compelling reason for Federal Government intervention in setting all royalty rates)e.g., television retransmission rates).

On balance, we do not object to the President signing S. 22, the copyright law revision.

Sincerely,

Alan Greenspan

Mr. James M. Frey
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

National Aeronautics and
Space Administration

Washington, D.C.
20546

Office of the Administrator

OCT 12 1976

Director
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Attention: Assistant Director
for Legislative Reference

Subject: Enrolled Enactment Report on S. 22, 94th Congress

This is an Enrolled Enactment report on S. 22 (as set forth in the Conference Report accompanying the bill), "General Revision of the Copyright Law, Title 17 of the United States Code." It is submitted pursuant to Mr. James M. Frey's memorandum of October 8, 1976.

Title I of the Bill provides for a general revision of the United States Copyright Law, title 17 of the United States Code. Title II establishes a new type of protection for original ornamental designs of useful articles.

The Office of Management and Budget cleared NASA's report on H.R. 2223, which is comparable to S. 22, on September 2, 1975, and that report was submitted to the Chairman, Committee on the Judiciary, House of Representatives, on September 5, 1975. A copy of that report is attached for easy reference. NASA's views on H.R. 2223 were directed to those provisions of the bill which would have a direct impact on NASA's activities and liability.

NASA has reviewed the Conference Report on S. 22 and has concluded that any of the provisions of Title I of the Bill which would have a direct impact on NASA's activities and liability are the same as those in H.R. 2223. Title II of the Bill (creating a new form of statutory protection for "original ornamental designs of useful articles") was deleted in its entirety in the Conference Report, and NASA has no objection to that change.

One area of concern to NASA has been, and still is, the widespread access to, and use of, significant results of U.S. tax-funded research and development by foreign sources. Thus, in its report on H.R. 2223, NASA proposed a change to section 105 to

limit the prohibition against copyrighting United States Government works to "within the United States." This was to assure that the Government could obtain foreign copyright and be able to control and protect dissemination abroad. When NASA made this recommendation, the proposed National Technical Information Service exemption to section 105 was not in H.R. 2223. While NASA would prefer its suggested change to section 105, it has no objection to the Conference substitute, which does not adopt the NTIS exemption, but indicates that this issue would be considered early in the next Congress. NASA does feel that the issue needs further consideration, but also feels that it is broader than just copyright protection and the impact on NTIS's revenues. Rather, we believe, the issue involves the overall impact that the ease of foreign access to, and use of, U.S. tax-funded technology has on U.S. industry and commerce.

Other than as indicated above, NASA has no comments on the proposed general revision of the Copyright Law as set forth in the Conference Report on S. 22, beyond those previously made in our report on H.R. 2223.

The National Aeronautics and Space Administration would have no objection to approval of the Enrolled Bill S. 22 as it is set forth in the Conference Report.

A. M. Low
for

James C. Fletcher
Administrator

Enclosure

SEP 5 1975

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the
Judiciary
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in further reply to your request for the views of the National Aeronautics and Space Administration on the bill H.R. 2223, "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes."

Title I of the bill provides for a general revision of the United States Copyright Law, title 17 of the United States Code. Title II establishes a new type of protection for original ornamental designs of useful articles. Set forth below are comments on specific provisions of the bill which would have a direct impact on NASA's activities and liability.

Title I

Government Works

The proposed legislation obviates some of the ambiguities present in the current copyright law with respect to Government works. Sec. 105 of the bill prohibits copyright in any "work of the United States Government," which is defined in Sec. 101 as "a work prepared by an officer or employee of the United States Government as part of his official duties." The present law prohibits copyright in a "publication of the United States Government" (Sec. 8), but does not define the latter term. The proposed legislation adequately reflects case law and customary practice within the executive branch, which have established that works prepared by Government officers or employees as part of their official duties are "Government publications" within the copyright prohibition.

Some previous copyright revision bills have defined a Government work as one prepared by an officer or employee "within

the scope of his official duties or employment." The latter was considered objectionable because it was ambiguous and subject to a much broader interpretation. For example, it could be construed as prohibiting copyright even where an officer or employee voluntarily wrote a book on his own time which was somehow related to his employment.

Sec. 105 also clarifies the right of the Government to receive and hold copyrights transferred to it by assignment, bequest, or otherwise, thus obviating another uncertainty in the current law.

Since H.R. 2223 abolishes common law copyright protection and extends statutory copyright protection to published and unpublished works (Sec. 104 and Sec. 301), in our view the copyright prohibition of Sec. 105 would apply to both published and unpublished Government works as this term is defined in Sec. 101.

NASA is still of the view, expressed in comments submitted to the Committee on previously proposed legislation (e.g., H.R. 4347, 89th Congress, 1st Session, 1965), that copyright protection should be available for Government works in exceptional circumstances. This would give NASA the opportunity to enter into competitive negotiations with private publishing firms in exceptional cases so that selected NASA publications could receive the widest possible distribution as required by Section 203(a) of the National Aeronautics and Space Act of 1958. The negotiating position of the Government depends on its ability to provide copyright protection for a period of time to the publisher in exchange for distribution and related services. If necessary, the rights of the Government to copyright in such exceptional cases can be limited to a shorter period of time; for example, 5 years (rather than the full term), which may be sufficient time for the publisher to regain his initial publishing costs. Accordingly, it is recommended that the following subsection be inserted in Sec. 105:

> "In exceptional cases, copyright may be secured in a published work of the United States Government where, because of the special nature of the work or the circumstances of its preparation, it is determined that copyright protection would result in more effective dissemination of the work or for other reasons would be in the public interest. The head of the Government agency for which the work was prepared shall make the determination in each case in

> accordance with regulations established by an administrative officer designated by the President, and shall publish a statement of the basis for its determination in each case in the manner specified by such regulations."

It is strongly urged that Sec. 105 be amended to specify that the copyright prohibition for Government works apply only to domestic copyright protection. This could be done by inserting the phrase "within the United States" after the word "available" in line 1 of Sec. 105. It is a commonly held opinion, although not established by case law, that the prohibition against obtaining copyright by the Government applies to domestic copyrights only. Thus, in this view, the Government may copyright abroad when that serves its best interests. While we feel that many foreign signatories to the Universal Copyright Convention would honor the copyright of the U.S. Government in their respective countries under the Convention, some nations might take the position that a U.S. Government work cannot receive copyright protection anywhere.

The basic rationale for prohibiting copyright protection for U.S. Government works is that American taxpayers have paid for these works through tax assessments and should have access to them free of copyright restrictions. This rationale does not require a giveaway of U.S. Government works to foreign nationals and foreign governments. Most foreign countries provide domestic copyright protection for publications of their governments, and publications of foreign governments are accepted for copyright registration in the United States, except for statutes, court opinions, and similar official documents which are considered inherently uncopyrightable. Among the benefits which would accrue from asserting copyright abroad in selected U.S. Government works are: (a) improvements of our negotiating position with certain countries; (b) royalties could be collected, thereby aiding our balance of payments; (c) protection of the integrity of U.S. Government works; and (d) greater dissemination if American publishers were licensed to distribute U.S. Government works through established distribution outlets abroad.

It is also recommended that a subsection similar to that appearing in the current law, 17 U.S.C. 8, be inserted in Sec. 105 of H.R. 2223, that is:

> "Publication or other use by the United States Government of any material in which copyright is existing does not impair the copyright or authorize any further use or appropriation of the material without the consent of the copyright owner."

It is believed desirable to retain such a provision in the statute to provide assurances to authors and to preclude the argument that deletion of this provision from the present statute implies that such protection is no longer available.

Pre-emption With Respect to Other Laws

A key provision of Title I of H.R. 2223 is Sec. 301, which would establish a single system of statutory protection for virtually all copyrightable works whether published or unpublished. Under Sec. 301, a work would obtain statutory protection as soon as it is "created" or, as the term is defined in Sec. 101, when it is "fixed in a copy or phonorecord for the first time."

Sec. 301(b) provides that nothing in the title annuls or limits any rights or remedies under the common law or statutes of any state that are not equivalent to any of the exclusive rights within the general scope of copyright, such as breaches of contract. No mention is made of Federal statutes such as the Tucker Act, 28 U.S.C. 1491, which permits suit against the Government for breach of an express or implied contract. Undoubtedly, it was not intended that such a Federal statute be preempted by the copyright revision. It is recommended, therefore, for clarification purposes, that Sec. 301(b) be amended by inserting the phrase "under Federal statutes or" after the word "remedies" on line 1.

A similar omission occurs in Sec. 117 and it is suggested that the phrase "title 17" be replaced by "this or other title of the United States Code."

Sec. 502(a) provides that any court having jurisdiction of a civil action arising under the title may, subject to the provisions of section 1498(b) of title 28, grant injunctions to prevent or restrain infringement (emphasis added). It is recommended that the phrase "subject to the provisions of" be replaced by "except in actions against the Government under" to clarify the exclusive jurisdiction of the Court of Claims under 28 U.S.C. 1498(b).

Unpublished Works

28 U.S.C. 1498(b) provides for a cause of action against the Government for infringement of "copyright in any work protected under the copyright laws of the United States." This waiver of sovereign immunity has been construed not to embrace common law copyright, i.e., unpublished works. See e.g. Porter et al. v. United States, 473 F 2d 1329, 117 USPQ 238 (CA 5 1973). Since H.R. 2223 protects unpublished as well as published works, the Government's liability will

be extended. It is urged that 28 U.S.C. 1498(b) be amended so that it continues to restrict the Government's liability for copyright infringement to "published" works only. Government agencies receive a voluminous amount of material from private sources which does not bear a copyright notice and which is reproduced, distributed, etc. in its day-to-day business activities, for example, under the Freedom of Information Act. It would be extremely difficult, if not impossible, to ascertain whether the material submitted has been published with no intent to claim copyright, or whether it is unpublished and the owner intends to claim copyright protection.

The effect of compliance with the Freedom of Information Act (FOIA) on the Government's liability for copyright infringement also needs clarification. If a document requested under the FOIA bears a copyright notice, the requester can be so advised and will usually be able to secure a copy elsewhere. Where the document requested contains no copyright notice, it may be an unpublished work subject to protection under the proposed copyright revision; and providing access or a copy may very well frustrate the copyright owner's desires and subject the Government to liability. We are concerned whether the furnishing of a copy of a document by the Government under the FOIA will be considered excusable, or a form of fair use. Of course, if a document is released under FOIA, the Government may not itself restrict its use by others. For clarification purposes, it is recommended that language be inserted in H.R. 2223 explaining the fair use doctrine's applicability to unpublished works and the Government's release of documents under the FOIA.

Innocent Infringers

Under Sec. 405(b) an innocent infringer who acts in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to any infringing acts committed before receiving actual notice of registration. No protection is spelled out in the proposed legislation for an innocent infringer who relies on an unauthorized copy or phonorecord of a published work from which the copyright notice has been omitted; or for an innocent infringer of an unpublished work, i.e., one who relies on a copy or phonorecord which has been published without authority of the owner.

Publications Incorporating Works in the Public Domain

Sec. 403 of H.R. 2223 provides that when a work is published in copies or phonorecords consisting preponderantly of one or more

Government works, the notice of copyright shall also include a statement identifying the portions embodying work protected under Title 17. It is NASA's opinion that Sec. 403 is too limited and that it would be in the public interest to require such a statement also where a work consists preponderantly of any material that is in the public domain. We recommend that Sec. 403 be amended by adding the phrase "or works in the public domain" after the word "works" in the heading and before the words "the notice" in line 3 of the body of the section.

Title II

Our remaining comments are directed to Title II of H.R. 2223. It is assumed that the word "title" in the various sections refers only to Title II dealing with ornamental designs. It is not apparent where Title II will appear in the United States Code. If Title II is placed under Title 17, difficulties in construction may ensue. For example, the definitions set forth in Title I of H.R. 2223 dealing with copyrights might be construed as being applicable to Title II also.

It is suggested that paragraph (b) of 28 U.S.C. 1498 be amended to include registered designs rather than paragraph (a). (See Sec. 232.) The process for creating rights in registered designs is more closely analogous to copyrights. Furthermore, the specific authorization for the administrative settlement of copyright infringement claims set forth in paragraph (b) [and not present in paragraph (a)] would be made applicable to registered designs, which in our opinion is highly desirable.

In the event 28 U.S.C. 1498(a) is amended as set forth in Sec. 232, it is recommended that the phrase "described in and covered by a patent of the United States" be inserted after the word "invention" in the first line. This will reinstate the language present in the current law with respect to patented inventions and which was probably inadvertently omitted. Omitting this language might be interpreted as a broadening of the Government's liability to cover unpatented inventions.

Subject to the foregoing, the National Aeronautics and Space Administration would have no objection to the enactment of H.R. 2223.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

9-4

Sincerely,

Original Signed by
JOSEPH P. ALLEN

Joseph P. Allen
Assistant Administrator
for Legislative Affairs

This report was cleared by Ina Garten/OMB on 9/2/75 - no objections.

C/JJLaux:dmw:9/3/75:58374:A-17786F
cc: AEM-3, A, AD, AA, ADA, G, GP, OMB
CONCURRENCE: ADA

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

October 13, 1976

MEMORANDUM FOR: James M. Frey
Assistant Director, Legislative Reference
Office of Management and Budget

SUBJECT: Comments on Enrolled Bill, S.22 -
"General Revision of the Copyright Law"

The OSTP has reviewed the General Revision of the Copyright Law, Title 17 of the United States Code, and has no adverse criticism of this bill. Following are our comments that relate to this legislation:

- In its present form, the Bill has achieved a relatively high degree of consensus from all parties affected. The last battle which engaged the publishing and library sectors has now ended and both parties are in accord.

- The major issue dealt with fair use of copyrighted materials. This has been resolved by permitting libraries and other information centers to copy up to five copies of any document, subject to non-commercial use for research purposes. This restriction does not apply to documents that are older than five years. Hence, it does not appear that scientific and technological publication will be negatively affected by the law.

- One controversial provision dealing with copyright authority for the National Technical Information Service, Department of Commerce, was not passed so that is not an issue.

- The burden for copyright law enforcement is largely the responsibility of the user rather than the supplier, which satisfies federal agencies.

- Finally, Section 108 i provides for a review of the law every five years to determine its effect on all groups for inequities.

H. GUYFORD STEVER
Director

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

October 13, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

In compliance with your request, I have examined a facsimile of the enrolled bill S. 22, General Revision of the Copyright Law, Title 17 of the United States Code.

The enrolled bill is the result of numerous proposals to revise the copyright law. These proposals were codified in a revision bill prepared by the Register of Copyrights in the early sixties which was developed from studies conducted by the Register pursuant to congressional authorization. Since that time, many bills have been introduced in the House and Senate incorporating with modifications the basic thrust of the original bill of the Register of Copyrights. Both the House and Senate have held extensive hearings on these bills and have issued several reports. The latest revision bill introduced in the House was H.R. 2223. Before consideration of this bill by the House, the Senate passed S. 22. Subsequently, the House passed a substitute for S. 22 which was different in some respects from the version passed by the Senate. The enrolled bill is a compromise between the two versions and resulted from a conference of the House and Senate.

Major alterations made by the bill to existing law would be:

1. The term for the duration of copyright is extended from a possible maximum of 56 years to "the life of the author and fifty years after the author's death." (Sect. 302). We thought the term too long but could not persuade the Congress otherwise.

2. Copyright protection is extended to performance of copyrighted musical works by jukeboxes and retransmission of copyrighted works by cable television. However, these entities will be entitled to compulsory license at reasonable fees. (Sects. 106, 111 and 116).

3. The royalty to be paid by record companies for the right to produce a recording of a work which has already been recorded is increased from 2 cents to 2 3/4 cents. (Sect. 115).

4. A national television archives is established in the Library of Congress. (Transitional and Supplemental Provision, Sect. 113).

5. The judicial doctrine of fair use is defined by statute, and provisions are included for photocopying by libraries. (Sects. 107 and 108).

In addition to these provisions, the enrolled bill would make several changes to the administrative structure relating to the law of copyright. These changes, we believe, may create significant constitutional problems.

Section 701(a) of the bill vests "[a]ll administrative functions and duties under this title,..." in the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register would continue to be appointed by the Librarian of Congress, within the legislative branch of government, and would preside over the agency charged with primary responsibility for execution and administration of the proposed copyright system. However, the bill would create new duties for the Register -- an arrogation of administrative and executive responsibilities to a legislative officer which appears to be beyond the general grant of legislative powers to the Congress in Article I, section 1 of the Constitution. Nor is it within the more specific grant of power to:

> ... promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ...
>
> Art. I, section 8, the Constitution.

Furthermore, the provision vesting the appointment power in the Librarian of Congress is inconsistent with the provisions of Article II, section 2 which authorize Congress to vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments."

A similar problem appears in section 801 of the bill which would create a Copyright Royalty Tribunal. The extensive quasi-equitable and judicial powers accorded the Copyright Royalty Tribunal are not ones which can properly be exercised within the Legislative Branch. The "Tribunal" is established as an "independent" body in the Legislative Branch, composed of five commissioners appointed by the President with the advice and consent of the Senate. We will not here review the Tribunal's proposed authorities to review and revise royalty rates and payments under S. 22; suffice it to say that the Tribunal acts as exchequer, paymaster, and court of chancery in matters respecting disputed royalties and payments. See, e.g., §§115, 116, 118, 801(b). Its role is fundamentally judicial, tinged with the administrative, and incompatible with its purported placement in the Legislative Branch of the federal government.

Congress has the undoubted power to legislate respecting copyrights, and to establish both administrative and judicial bodies for the conduct of such rules as Congress may by legislation establish. We are unaware, however, of any constitutional justification for the creation of administrative agencies within the legislative branch, charged with the execution of laws in precisely the manner which the Constitution reserves to the President. That reservation is unmistakable:

> "The executive Power shall be vested in a President of the United States...."
>
> Art. II, section 1

> "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."
> Art. II, section 3

Congress may investigate problems, legislate toward a solution, and exercise oversight to assure that the laws are adequate and faithfully administered. The President, sole possessor of the executive Power of the United States, is charged with that administration.

The distinction between legislative and judicial roles is equally apparent. The judicial Power of the United States is vested in its courts, not in quasi-judicial "Tribunals" within the legislative branch of government. See the Constitution, Art. III, section 1. That judicial Power expressly extends to "all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made" under their authority. Art. III, section 2. The proposed Tribunal's powers to "make determinations" concerning the adjustment of copyright rates and terms for royalties partakes so directly of both the administrative and the judicial that it cannot fall within the legislative power. Indeed, we note that §810 of S. 22 appears to recognize this point by providing that "final decisions" of the Tribunal are to be reviewed by courts under the same standards governing review of the actions of administrative agencies, just as section 701(d) would make all actions taken by the Register of Copyrights subject to the provisions of the Administrative Procedure Act.

These provisions raise serious constitutional questions which may well be litigated if the bill is approved. Such litigation may jeopardize the entire copyright law revision. Compare, Buckley v. Valeo, 424 U.S. 1 (1976). Nevertheless, the many meritorious provisions in this bill, and the urgent need for a revision of the law of copyright, makes this Department hesitant to recommend an Executive veto of the bill. However, if S. 22 is to receive Executive approval the President should be advised to issue a signing statement calling attention to the problems and urging the next Congress to amend the relevant provisions before litigation ensues.

Sincerely,

Michael M. Uhlmann

MICHAEL M. UHLMANN
Assistant Attorney General

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

14 October 1976

Dear Mr. Lynn:

Your transmittal sheet dated October 8, 1976, enclosing a facsimile of an enrolled bill of Congress, S. 22 "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes," and requesting the comments of the Department of Defense, has been received. The Department of the Navy has been assigned the responsibility for the preparation of a report expressing the views of the Department of Defense.

The purpose of S. 22 is to provide the first comprehensive revision of the Nation's copyright machinery since 1909. The enrolled enactment provides that copyright protection is not available for any work of the U.S. Government, but the U.S. Government is not precluded from receiving and holding copyrights transferred to it. The enactment also provides that it is not an infringement of copyright and is a fair use of a copyright work to reproduce it for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Reproduction of copyrighted works by libraries or archives is limited by the enactment, but the existing law relating to computer uses of copyrighted material is retained. The enactment also conforms U.S. laws to international law by extending the term of copyright protection from a maximum term of 56 years to the lifetime of the author plus 50 years and by providing copyright protection for some foreign works.

The approval of this legislation would result in no increase in the budgetary requirements of the Department of Defense.

The Department of the Navy, on behalf of the Department of Defense, has no objection to the approval of S. 22.

Sincerely yours,

J. William Middendorf II
Secretary of the Navy

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

THE SPECIAL REPRESENTATIVE FOR
TRADE NEGOTIATIONS
WASHINGTON

OCT 19 1976

The Honorable James T. Lynn
Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503

Dear Mr. Lynn:

The enrolled bill S. 22, revising the copyright law of the United States, has come to our attention recently. The bill contains a provision that is of serious concern to this Office.

At present, the "manufacturing clause" of the U.S. copyright law (17 U.S.C. 601) provides that books and periodicals in the English language receiving U.S. copyright protection must be printed and bound in the United States if the author is a U.S. citizen or resident. Imports of such works are prohibited, but an exemption can be obtained for a limited number of copies. Section 601(a) of the enrolled bill, revising the copyright law, would amend the manufacturing clause by exempting Canada from the general import prohibition.

This amendment may be inconsistent with United States obligations under the General Agreement on Tariffs and Trade (GATT). Article XI of the GATT generally prohibits quantitative restrictions on imports, including total import prohibitions, and Article XIII of the GATT requires, in effect, that any permitted quantitative restrictions (such as those imposed under certain circumstances for balance-of-payments purposes) be imposed on a non-discriminatory basis.

The existing manufacturing clause has been the subject of complaints by our trading partners, but does not violate our obligations under the GATT because it was enacted prior to the commencement of the GATT in 1948.

The amendment in S. 22, by reenacting the exclusionary manufacturing clause, and by discriminating against U.S. trading partners by exempting Canada from the exclusion, would be extremely difficult to justify under our international obligations.

We acknowledge that section 601 is only one part of a major revision of the United States copyright law. We ask that the view expressed herein be given careful consideration, however, particularly if there are other objections to the enrolled bill that raise the possibility of a Presidential veto.

Sincerely,

Frederick B. Dent

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OCT 15 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for a report on S. 22, an enrolled bill "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes".

In summary, because the bill has been modified to permit the continuation of interlibrary exchange programs without danger of infringing copyrights, we have no objection to the enrolled bill. We defer to the Library of Congress as to the desirability of the bill's enactment.

The enrolled bill would completely revise the copyright law, title 17 of the United States Code. The principal purpose of the revision is to reflect advances in technology which have occurred since the last general revision of the copyright law in 1909.

The revision would affect the programmatic interests of this Department primarily through the limitations on exclusive rights to copyrighted material that would be provided in section 107, regarding "fair use" and section 108, regarding reproduction by libraries and archives. Under the principles of fair use in section 107, the use of copyrighted material for purposes such as criticism, teaching (including use of multiple copies in a classroom), scholarship, or research would not be an infringement of the copyright. This provision should suffice to ensure that the copyright law does not unduly interfere with the reasonable availability of materials and the full exchange of ideas necessary for the educational process. As with any comprehensive revision of a major law, however, experience under the new law may be necessary to determine fully whether any existing problems remain or new ones are created.

The detailed rules in section 108 relating to the reproduction by libraries and archives of copyrighted materials have been modified in a manner that substantially resolves the problems the National Library of Medicine (NLM) had with the earlier Senate-passed version of S. 22. The NLM had been concerned that section 108(g)(2), which would prohibit the "systematic reproduction or distribution" of copies of materials by libraries, would hamper the flow of biomedical information between NLM and the nation's medical libraries under the interlibrary loan program and regional medical library network established by NLM. The proviso that has been added to section 108(g)(2), which excepts from this prohibition interlibrary arrangements which do not have the purpose or effect of substituting for a subscription to or purchase of the copyrighted materials, should provide us with sufficient authority to continue efforts to provide for the expeditious interchange of information among medical libraries. We also note that the Conference report on S. 22 (H.R. Rep. No. 94-1733, pp. 70-74) incorporates guidelines proposed by the National Commission on New Technological Uses of Copyrighted Works which should be useful in interpreting this new provision.

For the above reasons, we have no objections to the enrolled bill; but we defer to the Library of Congress as to the desirability of its enactment.

Sincerely,

Marjorie Lynch

Under Secretary

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 15 Time: 1230pm

FOR ACTION: Dick Parsons
Lynn May
~~Sarah Massengale~~
Max Friedersdorf

cc (for information): Jack Marsh
Ed Schmults
Steve McConahey
Myer
Bobbie Kilberg
Robert Hartmann
Paul Myer

FROM THE STAFF SECRETARY

DUE: Date: October 16 Time: noon

SUBJECT:

S.22-Copyright Law Revision

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
x For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston,ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

10/15/76 - 3:00 pm

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 15 Time: 1230pm

FOR ACTION: Dick Parsons
Lynn May
Sarah Massengale
Max Friedersdorf

cc (for information): Jack Marsh
Ed Schmults
Steve McConahey
Bobbie Kilberg
Robert Hartmann

FROM THE STAFF SECRETARY

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SUBJECT:

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____ Prepare Agenda and Brief ____ Draft Reply

X For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

10/15/76 - Copy sent for researching. nm

10/16/76 - Researched copy returned. sp

1. I concur in Paul Myer's memo of Oct 15 and substitute language, as edited.

2. If provisions are as in Constitution, as this draft makes out, President should not sign it. But everybody seems to think he should, so why not downplay these reservations?

RKG

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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James M. Cannon
For the President

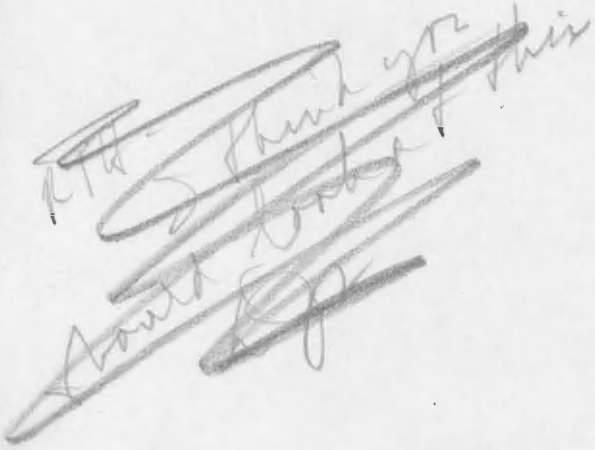
I am pleased to sign S. 22, the general revision of the Copyright Law. It is the first major change in copyright in 67 years and represents the culmination of more than a decade of legislative work by Members of Congress and the literary, musical and artistic creators of our land.

While copyright law itself is ~~an arcane and~~ a complex field, its purpose is practical and essential. Its objective, simply put, is to stimulate creativity by securing for authors, composers, playwrights, publishers, film producers and other creative artists protection for their work and intellectual achievements. However, in conferring these rights on the creators, the bill at the same time protects the public from unwarranted restrictions on access to creative works.

It is not always realized that the framers of our Constitution specifically provided for a copyright law and among the first statutes to be enacted by the Congress in 1790 was a copyright act. This new law now brings our copyright statute into step with copyright laws of most of the free world.

Its principal provisions extend the duration of copyright to the life of the author plus fifty years, improves the access of libraries and teachers to copyrighted works, opens the door for the enjoyment of literary works to the blind and the deaf, provides for the greater use of

copyrighted works by the public broadcasting media, and brings for the first time cable television operations within the scope of the copyright law.



MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 15, 1976

MEMORANDUM FOR JIM CANNON

Attention: Judy Johnston

FROM PAUL MYER

SUBJECT: S. 22 -- Copyright Law Revision/ Comments on Signing Statement

The President should sign enrolled bill S. 22 to revise the law of copyright.

I believe the proposed signing statement is too technical and may overstate earlier Administration objections.

This legislation has attracted considerable interest in the performing and literary arts community, the media industry and technical industrial field. The signing of this bill will attract considerable attention in the trade press and some warmer and more quotable rhetoric would be useful.

Attached is recommended language for modification of the first three paragraphs of the OMB statement.

The proposed language regarding potential constitutional problems should be more carefully reviewed with Justice. It is my understanding that Justice raised this issue and was satisfied with legislative changes made by the House Committee.

Attachment
cc: Art Quern
Doug Smith

I am pleased to sign S. 22, the general revision of the Copyright Law. It is the first major change in copyright in 67 years and represents the culmination of more than a decade of legislative work by Members of Congress and the literary, musical and artistic creators of our land.

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copyrighted works by the public broadcasting media, and brings for the first time cable television operations within the scope of the copyright law.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 15 Time: 1230pm

FOR ACTION: Dick Parsons
Lynn May
Sarah Massengale
Max Friedersdorf

cc (for information): Jack Marsh
Ed Schmults
Steve McConahey
Bobbie Kilberg
Robert Hartmann

FROM THE STAFF SECRETARY

DUE: Date: October 16 Time: noon

SUBJECT:

S.22-Copyright Law Revision

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Sign

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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James M. Cannon
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 7 Time: 1230pm

FOR ACTION: Dick Parsons
Lynn May
Sarah Massengale
Max Friedersdorf

cc (for information): Jack Marsh
Ed Schmults
Steve McConahey
Bobbie Kilberg
Robert Hartmann

FROM THE STAFF SECRETARY

DUE: Date: October 16 Time: noon

SUBJECT:

S.22-Copyright Law Revision

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

X For Your Comments ____ Draft Remarks

REMARKS: Approve (Text of Approval Statement OK) RLP
please return to judy johnston, ground floor west wing

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James M. Cannon
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October Time: 1230pm

FOR ACTION: Dick Parsons
Lynn May
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S.22-Copyright Law Revision

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Concur in the recommendation of OMB -- Ken Lazarus

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If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

OCT 19 1976

Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of S. 22, "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes."

In general, the revisions that would be made to the copyright laws by this enrolled enactment are not of primary concern to the Treasury Department.

However, section 601 of the bill would prohibit the importation of copy-righted English-language books into the United States, except those manufactured in the United States or Canada.

The Treasury Department has opposed this type of provision in the past on trade policy grounds. The preferential treatment which this would accord to Canada could be challenged as inconsistent with United States obligations, under the General Agreement on Tariffs and Trades, to administer such quantitative restrictions on a nondiscriminatory basis.

However, if there are compelling reasons to approve this legislation, the Department would not object to a recommendation that the President sign this enrolled enactment.

Sincerely yours,

General Counsel
Richard R. Albrecht

SIGNING STATEMENT

I am pleased to sign S. 22, a bill which would comprehensively revise the Nation's copyright laws for the first time in 67 years.

Reform of the existing 1909 Act is needed not only to remedy deficiencies in that statute but also to take account of the revolutionary changes in the means of producing and disseminating information and entertainment that have occurred since the beginning of the twentieth century. The present Act takes no account of developments in such fields as commercial and educational radio and television, motion pictures, sound recordings, photocopying, printing, microfilming, and computer storage.

The bill brings the copyright system of the United States into line with the systems prevalent throughout the rest of the world. It provides for a single Federal system of copyright for all published and unpublished works, with a basic term of protection lasting the life of the author plus fifty years. In addition to extending the length of copyright protection, S. 22 modifies the applicability of copyright protection in several major areas. The bill sets standards for fair use and reproduction of copyrighted material; provides a new system of compulsory licensing for cable television and jukeboxes while modifying the existing system of performance royalty payments for records; preempts State laws governing copyright material that come within the scope of the federal law; and repeals, as of 1982, an existing requirement that English-language books and periodicals must be manufactured in the United States.

There are, however, two aspects of this legislation which raise significant constitutional problems.

Section 701(a) of the bill vests "[a]ll administrative functions and duties under this title,..." in the Register of Copyrights as director of the Copyright Office of the Library of Congress.

The Register would continue to be appointed by the Librarian of Congress, within the legislative branch of government, and would preside over the agency charged with primary responsibility for execution and administration of the proposed copyright system. However, the bill would create new duties for the Register -- an arrogation of administrative and executive responsibilities to a legislative officer which appears to be beyond the general grant of legislative powers to the Congress in Article I, section 1 of the Constitution. Furthermore, the provision vesting the appointment power in the Librarian of Congress is inconsistent with the provisions of Article II, section 2 which authorize Congress to vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments."

A similar problem appears in section 801 of the bill which would create a Copyright Royalty Tribunal. The extensive quasi-equitable and judicial powers accorded the Copyright Royalty Tribunal are not ones which can properly be exercised within the Legislative Branch. The "Tribunal" is established as an "independent" body in the Legislative Branch, composed of five commissioners appointed by the President with the advice and consent of the Senate. The Tribunal acts as exchequer, paymaster, and court of chancery in matters respecting disputed royalties and payments. Its role is fundamentally judicial, tinged with the administrative, and incompatible with its purported placement in the Legislative Branch of the federal government.

Congress has the undoubted power to legislate respecting copyrights, and to establish both administrative and judicial bodies for the conduct of such rules as Congress may by legislation establish. I am unaware, however, of any constitutional justification for the creation of administrative agencies within the legislative branch, charged with the execution of laws in precisely the manner which the Constitution reserves to the President. That reservation is unmistakable:

"The executive Power shall be vested in a President of the United States ...."
Art. II, section 1

"[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."
Art. II, section 3

Congress may investigate problems, legislate toward a solution, and exercise oversight to assure that the laws are adequate and faithfully administered. The President, sole possessor of the executive power of the United States, is charged with that administration.

I am requesting that the Attorney General submit a report to the next Congress describing the issues in detail and suggesting appropriate legislative remedies.

I am pleased to sign S. 22, the general revision of the Copyright Law. It is the first major change in copyright in 67 years and represents the culmination of more than a decade of legislative work by Members of Congress and the literary, musical and artistic creators of our land.

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Congress has the power to legislate respecting copyrights, and to establish bodies for the conduct of such rules as Congress may by legislation establish. I am unaware, however, of any clear constitutional justification for the creation of administrative agencies within the legislative branch. Congress may investigate problems, legislate toward a solution, and exercise oversight to ensure that the laws are adequate and faithfully administered. The Executive Branch, however, is charged with the actual administration of our laws.

I am also concerned that due process be assured to every claimant under our copyright laws. The broad grants of authority conferred by this legislation will have to be carefully implemented to guarantee the rights of all parties.

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STATEMENT BY THE PRESIDENT

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