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Section 105 of the Copyright Act of 1976 continued the prohibition in the Copyright Act of 1909 against allowing copyright protection for certain works which the Congress believes to serve the public interest best by being placed in the public domain. However, diverse interpretations of what is a "work of the United States government " have been continually voiced. This article reviews the case law and legislative history of the statutory prohibition of copyright in works authored by government personnel.

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COPYRIGHT IN GOVERNMENT EMPLOYEE AUTHORED WORKS*

*John O. Tresansky***

The Copyright Act of 1976[1] continues the prohibition enunciated in the Copyright Act of 1909 against allowing copyright protection for certain works which the Congress believes to serve the public interest best by being placed in the public domain.[2] Section 105 of the current copyright statute states, in part, that "[c]opyright protection under this title is not available for any work of the United States Government."[3] The pertinent part of its antecedent, section 8, read: "No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof."[4]

Although the language of these statutory prohibitions may appear to be clear, diverse interpretations of the extent of the prohibition have been continually voiced. As one court stated with reference to section 8: "The precise scope of the phrase 'publication of the United States Government,' has long been a source of conflict and concern, as a result of which many

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* The views expressed herein are those of the author and not necessarily those of his agency.

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1. Pub. L. No. 94-553, 90 Stat. 2541 (codified in scattered sections of 17 U.S.C. (Supp. III 1979)).

2. Ch. 320, § 7, 35 Stat. 1077 (1909).

3. 17 U.S.C. § 105 (Supp. III 1979). The entire provision states: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."

4. Ch. 320, § 7, 35 Stat. 1077 (1909). The 1909 Act provided:

> 7. That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided, however*, That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

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definitions and criteria have been suggested for categorizing various works as within or without the prohibition of the section."[5]

The language and legislative history of section 105 resolved many of the uncertainties which arose in connection with section 8 of the prior act.[6] The statutory definition of the expression "work of the United States Government" provided in section 101 of the current statute explicitly limits the expression to a "work prepared by an officer or employee of the United States Government as part of that person's official duties."[7] Difficulties arise, however, in interpreting the scope of the term "official duties" of government personnel in specific situations. A situation in which this difficulty frequently occurs is when a government employee, requested by a publisher to write an article for a commercial periodical on some facet of his assigned duties, writes the article during working hours.

Whether such an article is a "work of the United States Government" is of great importance to the publisher of the commercial periodical. Under section 201(c), the "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[8] Absent an express transfer of the copyright in the individual contribution by its author, the publisher's copyright in the collective work extends only to the right of reproducing and distributing copies of the contribution as part of the collective work and not of the contribution alone.[9] Thus, publishers desiring to acquire the right to reproduce and distribute copies of individual articles apart from the collective work must require each author of an article to execute an assignment of the copyright therein to the publisher.[10] Where the arti-

5. Scherr v. Universal Match Corp., 297 F. Supp. 107, 110 (S.D.N.Y. 1967).

6. *See* Tresansky, *Impact of the Copyright Act of 1976 on the Government*, 27 FED. B. J. 22 (1978).

7. 17 U.S.C. § 101 (Supp. III 1979).

8. 17 U.S.C. § 201(c) (Supp. III 1979).

9. *Id.*

10. Assignment is only one way of transferring copyright ownership. *See* 17 U.S.C. § 101 (Supp. III 1979). The assignment must be contained in an instrument of conveyance, note, or memorandum of transfer, which is signed by the owner of the interests conveyed or an authorized agent. 17 U.S.C. § 204(a) (Supp. III 1979). A transfer of copyright ownership need not be acknowledged or notarized, but such a certificate of acknowledgment can be *prima facie* evidence of the execution of such a transfer. 17 U.S.C. § 204(b) (Supp. III 1979). If the transfer occurs in the United States, the acknowledgment is only *prima facie* evidence if issued by a notary or someone authorized to administer oaths in the United States. 17 U.S.C. § 204(b)(1) (Supp. III 1979). When execution is in a foreign country, however, the certificate must be issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such diplomatic or consular officer, in order to be considered *prima facie* evidence of a transfer. 17 U.S.C. § 204(b)(2) (Supp. III 1979).

cle is a "work of the United States Government," however, an assignment of copyright by the author is inappropriate because under section 105, the article itself is not subject to a United States copyright. In addition, publishers of periodicals consisting preponderately of one or more works of the United States government are required by section 403 to include in the periodical's notice of copyright a statement identifying those portions of the periodical in which copyright is claimed or, alternatively, unclaimed.[11] The purpose of such statement is to serve notice to the public of those portions of the periodical which are in the public domain and, therefore, free for use.

The difference in emphasis between the section 101 definition of a "work of the United States Government" and the legislative history of section 105, as well as that of its predecessor, section 8, renders the applicability of the copyright prohibition of section 105 more difficult. The statutory definition of the phrase emphasizes the scope of the author's employment, while the legislative history of section 105 places the emphasis on the end product. The House Judiciary Committee's discussion of the scope of the prohibition of this section begins with the statement: "The basic premise of section 105 of the bill is the same as that of section 8 of the present law—that works produced for the U.S. Government by its officers and employees should not be subject to copyright."[12] The emphasis here is clearly on the entity for whom the work was written, and not on the circumstances of writing. The House Report further notes in its discussion of section 105 that, under the section 101 definition of a government work, "a Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee."[13]

The congressional emphasis on the entity for whom the work was authored is in accord with the legislative history of the copyright prohibition in government publications. Section 8 of the Copyright Act of 1909 contained the first legal prohibition in the copyright law against copyright in a

11. 17 U.S.C. § 403 (Supp. III 1979). Section 403 states:

> Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

12. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 58 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5671.

13. *Id., reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 5672.

government publication.[14] Preliminary drafts of the bill purported to incorporate in this provision the common law prohibition of copyright in laws and judicial decisions, as well as the prohibition of copyright in government publications in the Printing Law of 1895.[15] Neither the hearings[16] nor the legislative reports[17] on the Copyright Act of 1909 defines a publication of the United States government.[18] The copyright prohibition of the Printing Law of 1895—the first such statutory prohibition—suggests, however, that the prohibition was intended to apply to any matter prepared for the government. The Printing Law authorized the sale by the Public Printer of "duplicate stereotype or electrotype plates from which any Government publication is printed."[19] To preclude private persons from asserting copyright in republication of government documents from the plates, the prohibition was added that "no publication reprinted from such stereotype or electrotype plates shall be copyrighted."[20] The Senate Committee on Printing, in reviewing the applicability of the prohibition to a congressman who attempted to republish a government publication, entitled "Messages and Papers of the Presidents of the United States," from such plates with a copyright notice in his name, stated:

> [T]he prohibition contained in the Printing Act was intended to cover every publication authorized by Congress in all possible forms. . . .
>
> Your committee thinks that copyright should not have been issued in behalf of the Messages, and that the law as it stands is sufficient to deny copyright to any and every work once issued as a government publication. If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money, frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.[21]

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14. Ch. 320, § 7, 35 Stat. 1077 (1909). The title on printing and documents, 44 U.S.C. § 505 (1976), previously contained the prohibition against copyrighting government publications. The 1978 amendment of this section deleted the copyright provision.

15. Ch. 23, § 52, 28 Stat. 608 (1895).

16. *Hearings Before Joint Committee on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 133-35 (1906).

17. S. REP. NO. 1108, 60th Cong., 2d Sess. (1909); H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909), *reprinted in* S. ROTHENBERG, COPYRIGHT LAW—BASIC AND RELATED MATERIALS (1956).

18. Ch. 23, § 52, 28 Stat. 608 (1895).

19. *Id.*

20. *Id.*

21. S. REP. NO. 1473, 56th Cong., 1st Sess. (1900), *reprinted in* Study No. 33, *Copyrights*

If, therefore, the Printing Act of 1895 is considered to be a statute *in pari materia* with the Copyright Act of 1909, the history of the former statute may be properly viewed as indicating that the legislative intent of the prohibition in the latter statute was to preclude a copyright in any work prepared for printing by the United States government.

Section 105 of the Transitional and Supplementary provisions of the Copyright Act of 1976 deleted the codification of the copyright prohibition of the Printing Act.[22] The commentary in the House Report on amendments to other statutes states the intent thereof to be the repeal of the "vestigial provision of the Printing Act dealing with the same subject" as section 105 of the Copyright Act of 1976.[23] It appears reasonable to conclude, therefore, that Congress viewed the copyright prohibition in the copyright and printing statutes as being directed to works prepared for the government.

The 1961[24] and 1965[25] Reports of the Register of Copyrights on studies aimed at the general revision of the copyright law further emphasized the importance of the entity for whom a work is prepared in determining whether the prohibition against copyright protection applies. These studies were undertaken by the Copyright Office under the authorization of Congress. The 1961 Report recommended retention of the prohibition of copyright in "publications of the U.S. Government."[26] Moreover, the Report recommended that this expression be defined as "works produced for the Government by its officers or employees."[27]

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in Government Publications by Caruthers Berger (Oct. 1959), prepared for the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, 30.

22. 44 U.S.C. § 505 (1976).

23. House Report, *supra* note 12, at 5796.

24. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961).

25. HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW (Comm. Print 1965).

26. *See* note 24, *supra*, at 133.

27. *Id.* The Report presented the following rationale for the copyright prohibition:

> The legislative history of the initial prohibition in the Printing Law of 1895 indicates that it was aimed at precluding copyright claims by private persons in their reprints of Government publications. It was apparently assumed, without discussion, that the Government itself would have no occasion to secure copyright in its publications. Most Government publications at that time consisted of official documents of an authoritative nature. When the copyright laws were consolidated in the Act of 1909, the same provision in substance was incorporated in that act. . . .
>
> The Federal Government today issues a great variety and quantity of information material—technical manuals, educational guides, research reports, historical reviews, maps, motion pictures, etc. The basic argument against permitting these

The 1961 Report also acknowledged that much uncertainty existed about the nature of a "publication of the U.S. Government." The Report identified four possible meanings:

> (a) It may refer to the work itself. In this sense a "Government publication" would be any work produced by the Government—that is, produced for the Government by its employees—regardless of who published it.
>
> (b) It may refer to the act of publishing copies of a work. In this sense a "Government publication" would be any work published by the Government, regardless of who produced it. . . .
>
> (c) Any work which has either been produced or published by the Government. . . .
>
> (d) Only a work which has both been produced and published by the Government. . . .[28]

The Report proceeds to make the observation that "[t]he courts have expressed various opinions, but the weight of authority seems to point to the first meaning: a work produced by the Government."[29]

The 1965 Report was a commentary on the copyright revision bill introduced in the 89th Congress.[30] The Report noted that in section 105 the bill included the 1961 Report's recommendation to retain the copyright prohibition in government publications and furthermore extended it to any work of the United States government.[31] The Report also pointed out that the 1961 Report proposed to include "published works produced for the Government by its officers or employees" within the scope of the prohibition. Further, it stated that section 105 defined a "work of the United States Government" as a "work prepared by an officer or employee of the United States Government within the scope of his official duties or employment."[32] The Report observed that under this definition:

> [A] Government official or employee would not be prohibited from obtaining copyright protection for any work he produces in his private capacity outside the scope of his official duties. The use of Government time, material, or facilities would not, of itself, determine whether something is a "work of the United

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publications to be copyrighted is that any material produced and issued by the Government should be freely available to the public and open to the widest possible reproduction and dissemination.

Id. at 130.

28. *Id.* at 130-31.

29. *Id.* at 131.

30. H.R. 4347, 89th Cong., 1st Sess., 111 CONG. REC.1285 (1965). The Senate bill on the same matter was S. 1006, 89th Cong., 1st Sess., 111 CONG. REC. 1226 (1965).

31. *Supra* note 25, at 8-9.

32. *Id.* at 9.

> States Government," but the Government would then have the privilege of using the work in any event (28 U.S.C. § 1498(b)), and the unauthorized use of Government time, material, or facility could, of course, subject an employee to disciplinary action.[33]

From the foregoing it appears that the Register of Copyrights interpreted the statutory copyright prohibition to apply to works authored by government personnel for use by the United States government and not to works authored for use by the private sector or to works ~~with minor~~ governmental contribution to their preparation. merely because of a

Prior to the enactment of legislation by Congress prohibiting copyright in government works, the issue of whether copyrights could exist in judicial decisions had been decided by the Supreme Court. In *Wheaton v. Peters*[34] the issue was whether a reporter of court decisions, appointed under an act of Congress, could assert a copyright in his published reports against another who later published a book containing some of the reported decisions. The Court determined that whatever copyright existed in the reports was statutory and remanded the case for a determination of whether compliance with the statutory provisions requisite to a valid copyright existed.[35] The opinion concluded with the statement: "It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."[36] If the Supreme Court had been of the opinion that no copyright could exist in the reports of the decisions, the remand would have been without purpose. Thus, it may be assumed that the Court viewed material contributed by the reporter, such as headnotes, statements of facts, and arguments of counsel, as lawful subjects of copyright protection. Subsequently, in *Banks v. Manchester*[37] and *Callaghan v. Myers*,[38] the Court extended the prohibition against copyright to opinions of state courts. In *Callaghan*, the Court held that the reporter was nevertheless entitled to a copyright for his contribution to judicial opinions unless copyright was prohibited by statute. The Court reasoned that:

> [T]here is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred

33. *Id.*
34. 33 U.S. 591 (1834).
35. *Id.* at 667-68.
36. *Id.* at 668.
37. 128 U.S. 244 (1888).
38. 128 U.S. 617 (1888).

> from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor.[39]

In all of these cases, the reports were prepared by individuals appointed to their positions pursuant to legislative authority. The fact that reporting of decisions constituted the official duty of the plaintiffs does not appear to have influenced the Court.

The earliest case clearly involving the issue of whether a work prepared by a government employee could be copyrighted is *Heine v. Appleton*.[40] Heine, a professional artist, had been a member of the crew that accompanied Admiral Perry to Japan and the China Seas. Although he was hired as a master's mate, his chief duty was to make sketches and drawings for the government. It was understood from the outset that all such works would be the exclusive property of the government. Upon completion of the expedition, the plaintiff's works were included in the official report on the expedition. Later, Heine obtained a certificate of copyright in his sketches and drawings. The court denied the plaintiff's right to copyright, stating, "The sketches and drawings were made for the government, to be at their disposal; and congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public at large, has thereby given them to the public."[41] While there was an explicit understanding that the plaintiff's works were to be the exclusive property of the government, this understanding arguably may have been directed to the physical embodiment of the works and not to the individual works contained in the report. The court's decision, however, was based primarily on the consideration that the works were made for, and published by, the government.

The first case to involve the applicability of the statutory copyright prohibition in the Copyright Act of 1909 was *Sherrill v. Grieves*[42] where the plaintiff, an army captain, was assigned to teach a subject in an army school. Because a suitable textbook for the course was not available, he wrote one during his off-duty time. At the request of the army, he consented to the incorporation of a considerable part of the material in a pamphlet which the army printed and distributed to students at the school. The pamphlets bore a notice of copyright in the plaintiff's name. Subsequently, the material contained in the pamphlet was included in the book that the plaintiff had been writing and which he also copyrighted. It was the book that plaintiff alleged was infringed by the defendant's book. The defendant contended that the plaintiff's copyrights were invalid because

39. *Id.* at 647.
40. 11 F. Cas. 1031 (S.D.N.Y. 1857) (No. 6324).
41. *Id.* at 1033.
42. 57 WASH. L. REP. 286 (D.C. Sup. Ct. 1929).

the material was a publication of the United States government.[43] In holding for the plaintiff, the court stated, *inter alia*, that the pamphlet "was not a publication of the United States Government in the sense in which that phrase is used in the statute."[44] The court rejected defendant's argument that, although writing the subject material was not part of plaintiff's duties, it was plaintiff's duty to provide the best possible treatment of the subject. Thus, when he used the pamphlet to teach the class, it had to be assumed that his superiors consented to the discharge of his duty in this manner.[45] The court reasoned:

> The plaintiff at the time was employed to give instruction just as a professor in an institution of learning is employed. The court does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him.[46]

The court also stated that printing of the pamphlet by the army did not put it in the "public domain," and that, even should the army's printing of the pamphlet have been proper, it did not follow that the pamphlet became a government document.[47] The circumstances of printing and use of the plaintiff's writing by the government did not persuade the court to conclude that the statute prohibited copyrighting of the plaintiff's pamphlet.

More recently, in *Sawyer v. Crowell Publishing Co.*,[48] the plaintiff, Executive Assistant to the Secretary of the Interior, asserted copyright in a map of Alaska. Upon returning from an official trip to Alaska, the plaintiff directed a subordinate to assist him in preparing the map. The map was prepared on government time using government materials and facilities as well as information on file in the Department. The map was printed and engraved by the Department bearing a copyright notice in plaintiff's name. The map was later republished by the Department as an official publication with additional information and containing the copyright notice from the original map.

The Court of Appeals for the Second Circuit affirmed the holding of the United States District Court for the Southern District of New York that "[t]he map was prepared as a result of and relating to the plaintiff's work in Alaska in the course of his official duties."[49] The district court observed

43. *Id.* at 287.
44. *Id.* at 290.
45. *Id.*
46. *Id.*
47. *Id.* at 290-91.
48. 46 F. Supp. 471 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944).
49. 142 F.2d at 498.

that persuasive evidence existed to indicate that the map had been drawn to stress Alaska's importance and the need for its development. This, the court found, related directly to the subject matter of the plaintiff's work. The court noted the large governmental contribution to the preparation of the map, the initial intention for the map to be part of an official report, and the government's publication of the map as an official document. The plaintiff's consent to the government's publication of the map as an official document as well as his failure to make any commercial use of the map were also considered significant.[50] In denying the plaintiff's right to a copyright, the district court stated:

> It is true that the mere fact that one has created or invented something while in the employ of the government does not transfer to it any title to or interest in it. But it is equally true that when an employee creates something in connection with his duties under his employment, the thing created is the property of the employer and any copyright obtained thereon by the employee is deemed held in trust for the employer. . . . The evidence is persuasive that this map was drawn to stress the importance of Alaska, as well as the need for its development, and this relates directly to the subject matter of the plaintiff's work.[51]

The most recent case to address the issue of whether a work authored by a government employee is barred from copyright on the grounds that the work is a publication of the United States government is *Public Affairs Associates, Inc. v. Rickover*,[52] decided by the United States District Court for the District of Columbia on remand from the United States Supreme Court.[53] In *Public Affairs Associates*, a navy admiral asserted copyrights in speeches on education and on an experimental atomic power station which he prepared and delivered to private organizations at their request. During that time, the admiral had technical responsibilities in nuclear propulsion plants for naval vessels and reactors, including the experimental atomic power station which was the topic of one speech. The court evaluated the question whether the speeches could be copyrighted as requiring a resolution of the issue of whether they fell within the purview of the admiral's official duties.[54] Speechmaking, as the court noted, was not enumerated among the author's official duties nor was he directed to make them.[55]

50. 46 F. Supp. at 473.
51. *Id.* (citations omitted).
52. 268 F. Supp. 444 (D.D.C. 1967).
53. 369 U.S. 111 (1962) (per curiam).
54. 268 F. Supp. at 448, 456.
55. *Id.* at 448.

The court reasoned, however, that this was not dispositive of the copyright question because a high official has authority to act in a variety of ways not enumerated in his formal position description. In this context, the duties of a high government official should not be narrowly construed.[56] The court found that the preparation and delivery of the speeches was done outside of working time[57] and that the speeches were made in response to a direct invitation to the admiral as a private individual.[58] The final drafts, however, were typed and reproduced by government personnel using government material and time, and, in the case of one of the speeches, also served an official purpose.[59] The court determined that the subject matter of both speeches was far removed from the author's official duties.[60] The court concluded that the speeches were not a part of the admiral's official duties and, therefore, were not "publications of the United States government."[61] The copyrights in the speeches were upheld.

The principle of these cases is that a work authored by a government employee for the use of the government cannot be the subject of a United States copyright. A work, therefore, authored by a government employee which can be considered as an assigned or expected duty cannot be protected by copyright. A work voluntarily authored by a government employee and not intended for use by the government, however, can be protected by copyright. Thus, a copyright would exist in an article authored by a government employee at the direct request of a publisher or editor of a private publication, even though the article was written on government time and its content related to the author's official duties. In turn, a copyright would not subsist in an article on a government agency's activities authored by the agency's public affairs officer and published in a commercial periodical or in a work assigned by a superior to a government employee which the employee prepared outside of working hours.

A narrow interpretation of the scope of the copyright prohibition is consistent with the decisions of the United States Supreme Court on ownership of inventions made by government personnel. In one Supreme Court case, *United States v. Dubilier Condenser Corp.*,[62] the government sued for a declaration of government ownership of patents granted to two physicists

56. *Id.* at 448-49.
57. *Id.* at 449, 452.
58. *Id.*
59. *Id.* at 447.
60. *Id.* at 449. The atomic power plant speech was so viewed because its contents were aimed at administrators and not scientists.
61. *Id.* at 456.
62. 289 U.S. 178 (1933).

employed in the radio division of the National Bureau of Standards. The physicists belonged to a group engaged in research and testing of radios for aircraft. The patented inventions related to the use of alternating current to operate a radio receiver and a power amplifier for a dynamic type speaker. The evidence established that these projects were not involved in the projects assigned to the group, but rather were voluntarily assumed by the inventors.[63] In addition, the projects were pursued during working hours using government material and equipment with permission of their superiors.[64] In holding that the inventions were owned by the employees because they were not made as part of their employment, the Court stated:

> One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment. A term of the agreement necessarily is that what he is paid to produce belongs to his paymaster. On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent.[65]

One must acknowledge that the ultimate results differ greatly between a determination that an invention made by a government employee is a part of the employee's official duties and a determination that work authored by a government employee is within the scope of the employee's official duties. In the former, title to the invention belongs to the government. In the latter, the work is in the public domain. The analogy between inventions and written works, however, is appropriate because of the common constitutional genesis of patent and copyright law.[66] Such analogies were considered by the courts in *Sawyer*[67] and in the initial decision in *Public*

63. *Id.* at 184-85.

64. *Id.* at 185.

65. *Id.* at 187 (citations omitted). In Hapgood v. Hewitt, 119 U.S. 226 (1886), the Court held that an employee under contract to devise improvements in plows for his employer, a manufacturer of plows, was not a trustee of a patent for his employer. Similarly, in Standard Parts Co. v. Peck, 264 U.S. 52 (1924), the court reasoned that where one was employed to develop machines, and was compensated for such services, the improvements developed by the employee properly belonged to his employer.

66. U.S. CONST. art. I, § 8, cl. 8 reads: "The Congress shall have 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."

67. 142 F.2d at 499.

Affairs Associates,[68] although the former case ~~adopted~~ rejected the principles of ownership of employee invention stated in *Dubilier Condenser*.[69]

The plain language of the Copyright Act of 1976 does not clarify fully the ambiguities of earlier court decisions. The House Report's commentary on section 105 includes a statement which contributes to the uncertainty about the scope of the copyright prohibition. The Report states: "Although the wording of the definition of 'work of the United States Government' differs somewhat from that of the definition of 'work made for hire,' the concepts are intended to be construed in the same way."[70]

A literal interpretation of this statement would lead to conflicts between the various statutory provisions governing these kinds of works. Initially, while section 105 provides that a copyright cannot exist in a work of the United States government,[71] section 201(b) provides that the author of a work made for hire is the employer, or other person for whom the work is prepared, and section 201(a) provides that the copyright in a work initially vests in the author.[72] Secondly, section 201(b) provides that this "statutory authorship" may be avoided by the parties' express written agreement to the contrary.[73] No such "exemption" is provided for the copyright prohibition in a work of the United States government. Finally, the definitions of "work of the United States Government"[74] and "work made for hire"[75]

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68. 177 F. Supp. 601, 603 (D.D.C. 1959), *rev'd*, 284 F.2d 262 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962), *opinion on remand*, 268 F. Supp. 444 (D.D.C. 1967).

69. *See* note 62 and accompanying text *supra*.

70. *Supra* note 12, at 58, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 5672.

71. *See* note 3 and accompanying text *supra*.

72. 17 U.S.C. § 201(a) & (b) (Supp. III 1979). The two provisions state:

(a) Initial ownership

Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works made for hire

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

73. *See* note 72 *supra*.

74. Section 101 states in pertinent part: "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (Supp. III 1979).

75. Section 101 defines "work made for hire" as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a

set forth in section 101 differ significantly because the former expression is limited to government personnel while the latter expression includes both employees and independent contractors on special order or commission. It would seem evident from the foregoing that the full significance of the analogy is unclear.

In *Scherr v. Universal Match Corp.*,[76] decided under the prior copyright statute, the "work made for hire" concept was applied to a work authored by government personnel. In this case two ex-servicemen asserted a copyright in a statue which they had sculptured while in the army. The district court rejected the defense that the work was not copyrightable because it was a publication of the government on the rationale that "there seems to be unanimous, albeit tacit, agreement that 'publications of the United States Government' refers to printed works."[77] The district court held for the defendant, however, on the ground that whatever copyright existed in the work belonged to, or inured to the benefit of, the government because the statue was a work for hire.[78] In affirming the judgment of the District Court for the Southern District of New York, but explicitly leaving undecided the ruling that the statue was not a government publication, the Court of Appeals for the Second Circuit identified the factors which it considered determinative of whether the "work for hire" doctrine applied:

> The essential factor in determining whether an employee created his work of art within the scope of his employment as part of his employment duties is whether the employer possessed the right to direct and to supervise the manner in which the work was being performed. Other pertinent, but non-essential, considerations, are those indicating at whose insistence, expense, time and facilities the work was created. Additionally, the nature and amount of compensation or the absence of any payment received by the employee for his work may be considered; but when com-

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written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (Supp. III 1979).

76. 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

77. 297 F. Supp. at 110.

78. *Id.* at 112.

pared with the above factors it is of minor relevance.[79]

Under this test, the court concluded that an employer-employee relationship existed between the government and the servicemen, and any ownership of copyright in the statue belonged to the government.[80] The court noted such factors as the army's power to supervise the servicemen on the project, appropriation of government funds, time and facilities to the project as well as the fact that the statue was created pursuant to a formal government-commissioned project.[81] No conflict was considered to exist between the legislative history of the prohibition or the test applied in the determination of a "work made for hire" in this case and the tests applied in the prior cases to determine whether the statutory copyright prohibition applied to a work prepared by government personnel because it was part of their official duties.[82]

Finally, the House Report's commentary on the "works made for hire" provision of section 201 noted that this approach was adopted rather than the "shop right" approach of patent law under which the employee keeps title to his work but the employer generally acquires the right to use the employee's work to the extent needed for purposes of the employer's regular business.[83] As the reasoning for this choice, the Report explained:

> The pesumption [*sic*] that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.[84]

This statement may be viewed as casting a cloud on the "Government shop right" provision.[85] Under this statute, a copyright owner may sue the government for an infringement of a copyright which had been authorized and consented to by the government. This right to sue the government explicitly applies to employees of the government except where an employee is in a position to order, influence, or induce the government's use of the copyrighted work.[86] However, this right to sue the government is expressly denied by the statute to

any copyright owner or any assignee of such owner with respect

79. 417 F.2d at 500-01 (citations omitted).

80. *Id.* at 501.

81. *Id.*

82. *Id.*

83. *See* note 12, *supra* at 121, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 5736-37.

84. *Id., reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 5737.

85. 28 U.S.C. § 1498(b) (Supp. III 1979).

86. *Id.*

> to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used.[87]

The latter portion, "or in the preparation of which Government time, material, or facilities were used," is considered to create a "Government shop right" in works authored by government personnel outside of their official duties but with a contribution by the government.[88] This "Government shop right" exists despite the comment to the contrary in the House Judiciary Committee's discussion of section 201.[89] Supportive of this view is the statement in the 1965 Copyright Register's Report: "The use of Government time, material, or facilities would not, of itself, determine whether something is a 'work of the United States Government,' but the Government would then have the privilege of using the work in any event (28 U.S.C. § 1498(b))."[90] Also supportive of this view is section 105(c) of the Transitional and Supplementary provisions of the Copyright Act of 1976 which merely changed a cross reference in section 1498(b) without altering the operative provision of section 1498(b), the "Government shop right" provision.[91]

In sum, neither the case law nor the legislative history of the statutory prohibition of a copyright in works authored by government personnel warrants a broad interpretation of section 105. To interpret this provision more broadly than is clearly required to carry out its underlying public purpose would unnecessarily vitiate the government officer's and employee's incentive to intellectual creativity provided by Congress in the Copyright Law pursuant to the intent of the framers of the Constitution.

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87. *Id.*
88. *See* notes 83-84 and accompanying text *supra*.
89. *Supra* note 25, at 9.
90. *Id.*
91. *See* note 85 and accompanying text *supra*.