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## **CONGRESSIONAL POLICY CONCERNING THE DISTRIBUTION OF CRS WRITTEN PRODUCTS TO THE PUBLIC**

The following discussion reviews congressional policy concerning distribution of CRS products to the public and addresses issues for consideration by the Congress in determining whether to alter current policy regarding public availability of various CRS products, such as Reports and Issue Briefs.

As set forth below, CRS at present is precluded by law from general public distribution of its materials without prior approval by a congressional oversight committee. The Congress has actively exercised its oversight authority regarding CRS publication practices and has developed and promulgated standards to be applied in evaluating specific proposals. Current guidelines from the Joint Committee on the Library and other congressional bodies, issued in 1980, restrict the vast majority of CRS written products to congressional use and distribution to the public on a selective basis only.

Many years of congressional consideration of this issue reveal serious concerns about the institutional and legal consequences likely to result from the wholesale direct public distribution of CRS products with a potentially large circulation (e.g., CRS Reports and Issue Briefs).

### **I. BACKGROUND ON CURRENT CONGRESSIONAL POLICY CONCERNING THE DISTRIBUTION OF CRS WRITTEN PRODUCTS TO THE PUBLIC**

#### **A. Summary**

Congress has historically reserved to itself control over the dissemination of CRS products to the public on the principle that CRS, as an extension of congressional staff, works exclusively for the Congress.

To maintain congressional control over dissemination, a provision has been included in CRS annual appropriations acts since FY1952 requiring prior oversight committee approval for any CRS publication (as noted

above, "publication" refers to wholesale release of CRS products directly to the public).

- Congress has never authorized the wholesale public dissemination of CRS analytical products such as Reports or Issue Briefs (and has seldom authorized publication of other products), whether by CRS or the Congress, but rather has preferred to rely on congressional release of individual products on a case-by-case basis.
- To further indicate the degree of congressional control over CRS products, Congress, the courts, and administrative tribunals have declared CRS communications to the Congress to be privileged under the Speech or Debate Clause of the Constitution and to be under the custody and control of the Congress. These determinations have assured the maintenance of confidentiality in CRS relationships with congressional clients, a critical element of CRS effectiveness and an expectation of those who seek its assistance.

#### **B. Current Restrictions and Guidelines.**

At present, CRS is precluded by law from general public distribution of its materials without prior approval by one of its two congressional oversight committees. This restriction results from a limitation that has appeared in CRS' annual appropriations acts in each year since FY 1952. This provision reads as follows:

"Provided, that no part of this appropriation may be used to pay any salary or expense in connection with any publication, or preparation of material therefor (except the Digest of Public General Bills), to be issued by the Library of Congress unless such publication has obtained prior approval of either the Committee on House Oversight or the Senate Committee on Rules and Administration."<sup>1</sup>

The most recent policy statement from Congress regarding the publication of CRS written products came in 1980. In a communication, dated March 21, 1980, the Joint Committee on the Library reaffirmed:

"Congressional policy that the circulation of CRS materials prepared specifically for congressional use be limited to the Congress, and that the long-standing policy of confidentiality in the work of CRS for individual congressional clients should be maintained. We believe that, as in the past,

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For the current version of this provision, see Pub. L. 105-55, 111 Stat. 1190 (1997).

CRS and its oversight committees should consider the publication of only those CRS products whose release to the general public would be compatible, both in terms of cost and product content, with the CRS's obligations to the Congress."

The 1980 guidelines were developed subsequent to a 1978 proposal to CRS by the National Conference of State Legislatures (NCSL) under which CRS would have received access to the files of State research materials abstracted by the NCSL, and also would have had the opportunity to order copies of desired items for use in answering congressional inquiries. In return, CRS would have provided the NCSL with periodic listings of CRS Reports (called "multiliths" at that time) and with only one copy of those CRS Reports which the NCSL requested. Under this proposal the NCSL also would have gained access to certain files from the Library of Congress's SCORPIO system, including CRS Issue Briefs.

On September 27, 1978, the Joint Committee on the Library held a hearing to consider the CRS-NCSL exchange proposal. At the hearing, the Committee concluded that any transmission of CRS material contained in SCORPIO to non-congressional users via computer terminal would constitute a "publication" and thus, under the terms of the language contained in CRS's annual appropriations legislation (noted above) would require the prior approval of either the Committee on House Administration or the Senate Committee on Rules and Administration. Moreover, members of the Joint Committee expressed serious reservations about any activity that might divert CRS resources and priorities from its statutory responsibilities to Congress. Finally, members of the Committee expressed the view that it was appropriate for Members of Congress, rather than CRS, to determine whether and to what extent various CRS products should be publicly disseminated. As a result, no action was taken to implement the proposed CRS-NCSL exchange.

The March 21, 1980 guidelines were followed later that month (March 27, 1980) by enactment of a Senate Resolution. (S. Res. 396, 96th Congress). The Senate resolved:

"That it is the determination of the Senate that the communications of the Congressional Research Service to the members and committees of the Congress are under the custody and control of the Congress and may be released only by the Congress, its Houses, committees and members, in accordance with the rules and privileges of each House."<sup>2</sup>

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<sup>2</sup> 126 Cong. Rec. 6892 (March 27, 1980). This Senate Resolution directed the Senate Legal Counsel to represent the Senate and CRS in respect to a Federal Trade Commission administrative law judge's "sweeping subpoena [on behalf of oil companies involved in a FTC proceeding] to the Congressional Research Service for documents which discuss the oil industry and governmental policy in relation to it." *Id.* The Resolution stated that "the communications between the Congressional Research Service and the members and committees

Senate Majority Leader Byrd, in introducing the Resolution, noted CRS' role in advising members and committees on legislative issues and that CRS "thereby provides a service to the Members and committees of Congress which is equivalent to that performed by the staffs of Members and committees."<sup>3</sup>

Over the years, and at the request of CRS, the Joint Committee on the Library has authorized a very limited number of CRS publications for broader distribution through depository libraries, the sales program of the Superintendent of Documents, and to the public through individual purchases. In addition, several CRS products are published as the result of specific statutory authorization: the Digest of General Public Bills and Resolutions (Bill Digest);<sup>4</sup> and three publications for which CRS has been given responsibility by the Librarian of Congress: the Constitution of the United States of America, Analysis and Interpretation (Constitution Annotated);<sup>5</sup> and the national high school and college debate topic manuals.<sup>6</sup>

### C. Current Accessibility of CRS Written Products

With few exceptions, congressional offices are the exclusive source for distributing CRS Reports and Issue Briefs to the public. Member offices use CRS products to develop their own understanding of policy issues and options and to inform their constituents regarding these issues and options. The principles of representative government and of legislative accountability hold that representatives have an obligation to provide their constituents with the information and understanding required in order to exercise democratic citizenship; that is, the democratic idea that the authority of those who govern rests on the consent of those who are governed, calls for democratic consent to be fully informed and enlightened.

It is well known, both in Washington, D.C. and by interested parties throughout the country, that constituents may obtain copies of CRS written products through a Member or Committee of Congress. In addition, congressional offices often respond directly to constituent requests for information on particular subjects by sending copies of CRS Reports and Issue Briefs. For example, during

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of the Congress are an integral part of the legislative process and privileged under the Speech or Debate Clause of the Constitution."

<sup>3</sup> *Id.*

<sup>4</sup> 2 U.S.C. 166(d)(6).

<sup>5</sup> 2 U.S.C. 168.

<sup>6</sup> 44 U.S.C. 1333.

fiscal year 1996, 690,000 copies of CRS Reports and Issue Briefs were sent to congressional offices. Some percentage of these are sent on to constituents -- either because constituents asked for them specifically or as a means of answering constituent requests for information.<sup>7</sup>

Moreover, current technology now enables Members and Committees to make CRS products available to constituents in electronic format through congressional Homepages. Recent enhancements to the CRS Issue Brief system, initially released to Congress on the CRS Homepage and now available also through the new Legislative Information System, make CRS Issue Briefs available in World Wide Web format (HTML). This upgrade makes it easier for Members and Committees to add Issue Briefs to their own Homepages for their constituents to the extent such availability is deemed appropriate by Members and Committees. Selected CRS Reports are also available to the Congress electronically through the CRS Homepage.

## **II. ISSUES ASSOCIATED WITH THE WHOLESALE RELEASE OF CRS PRODUCTS TO THE PUBLIC**

### **A. Institutional Issues**

The direct, wholesale dissemination by Congress of Reports and Issue Briefs would have significant effects on the policies, resources, and institutional culture that CRS utilizes in serving the Congress.

First, CRS' mission is to support the Congress exclusively. Given its limited resources, CRS can undertake services to non-congressional entities (such as the public) only at the expense of direct support of the Congress. While the direct and indirect costs associated with disseminating Reports and Issue Briefs are difficult to estimate with precision, it is clear that significant resources would have to be diverted from congressional services. For example, with wider product distribution, particularly to users of the Internet/World Wide Web, CRS is more likely to get calls, comments, and requests for additions and changes that would place a burden on CRS analysts, distracting them from their work for Congress. In particular, outside parties may judge and question CRS papers on the basis of standards other than the standards CRS has developed to meet congressional needs (e.g., timeliness, non-partisanship, balance, objectivity). It is reasonable to anticipate that the volume of communications between CRS and the public, currently manageable, would rise substantially and affect the Service's ability to meet the needs of congressional requester. Any mechanisms developed by CRS

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CRS has not undertaken to survey congressional offices to determine this precise percentage.

to shield analysts from these demands would of course also involve resource commitments.

Second, CRS analysts now direct their writings, focused on legislative issues, to congressional audiences. The closeness of CRS to the legislative process and the sensitivity of the Service's traditional culture of exclusively supporting Congress' legislative needs shape the nature and content of its written products. If CRS written products were routinely available on a wholesale basis to academic and other professional peers outside the Congress, CRS analysts might become more conscious of the need to address views, methods, disciplines, and expectations of non-congressional professional peers, with the result that CRS written work could shift away, or appear to shift away, from its current emphasis on the congressional audience.

With an awareness that a CRS Report would be disseminated to the public, Members may increase the number of confidential requests that they place with CRS in order to ensure that they are provided an opportunity - should they so desire - to reflect and consider questions that emerge from evolving legislative proposals before they have to respond to public inquiry about the resulting issues. This increase in confidential requests requiring more tailored responses would diminish the ability of CRS analysts to prepare reports that are generally available to Congress and that serve a broader congressional audience. With this increase in tailored analysis would come the necessity of duplicating more analysis because of the demand of those Members who request that their examination of a legislative proposal remain confidential at that point in the legislative process.

A third, related concern is potentially increased pressure from interest groups and lobbying organizations on CRS analysts concerning the content of their reports and the impact this pressure may have on serving the direct needs of the Congress for analysis and information that is non-partisan, objective, and balanced. Enhanced internal mechanisms would have to be developed to ensure that communications with interested parties did not deflect CRS analysts from producing products that are free from advocacy and bias, resulting in a further diversion of resources from direct service to Congress.

Fourth, CRS staff serve by statute as an extension of Member and committee staff. The release by Congress of CRS Reports and Issue Briefs may set a precedent leading to greater pressure to have studies prepared by congressional staff for Members' exclusive use (e.g., committee staff studies distributed to entire committee membership) to be disseminated directly to the general public. It might be difficult for Congress to articulate a convincing rationale for granting public access to the Service's work but denying equivalent access to materials prepared by other shared staff (e.g., committee staff) that are distributed to more than one Member. Thus, a policy of providing Members' constituents with the same

materials that Members themselves draw upon to make legislative decisions could have serious implications for the functions of staff and their relationship with Members.

## B. Legal Issues

This section considers three pertinent legal issues associated with the wholesale dissemination of CRS products to the public. The first two issues involve the speech or debate clause of the Constitution and the third deals with intellectual property questions.

*1. Widespread electronic dissemination to the general public of CRS Reports and Issue Briefs would be more likely than dissemination pursuant to current policy to precipitate litigation in which speech or debate clause immunity would not be a defense.*

Since its 1972 ruling in *United States v. Brewster*, the Supreme Court has limited the immunity afforded under the speech or debate clause<sup>8</sup> to "legislative acts," which were distinguished from a range of activity described as "entirely legitimate" but unprotected by the speech or debate clause because it was considered to be "political in nature."<sup>9</sup> In several cases relevant to the applicability of speech or debate immunity to the public distribution of CRS products, the Court has relied on the dichotomy established in *Brewster* to hold that congressional activities intended to inform the general public are outside the scope of the speech or debate clause. Notably, in *Doe v. McMillan*, the Court found that the clause might not protect the Public Printer and the Superintendent of Documents from liability for distribution of a committee report, which contained material alleged to have invaded individual privacy rights, beyond "the legitimate legislative needs of Congress...."<sup>10</sup>

The dissemination (by Members and/or their aides, by CRS, or by a congressionally designated entity) to the general public of CRS products would not

<sup>8</sup> U.S. Constitution, Art. 1, § 6, clause 1.

<sup>9</sup> 408 U.S. 501, 509, 512 (1972).

<sup>10</sup> *Doe v. McMillan*, 412 U.S. 306, 324 (1973)(emphasis added). The Court remanded for a determination as to whether the extent of distribution by the Public Printer and the Superintendent of Documents had exceeded "the legitimate legislative needs of Congress, and hence the limits of immunity." *Id.* On the remand, the lower courts upheld the claim of immunity as to the Public Printer and Superintendent of Documents (374 F. Supp. 1313 (D.D.C. 1974), *aff'd*, 566 F.2d 713 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978)), but the court of appeals expressly reserved the question of the availability of immunity "in a case where distribution was more extensive...." 566 F.2d at 718. Apparently the only copies distributed outside the federal government in the events that precipitated the suit in *McMillan* were approximately 172 of 796 copies that had been distributed to various federal agencies.

be viewed as a legislative act but would be considered to be an exercise of Congress' representational function, for which speech or debate immunity is not available.<sup>11</sup> Those engaged in public distribution of CRS products, as well as CRS analysts who prepare the products, may be vulnerable to a variety of administrative and judicial proceedings. In such actions, litigants might seek, for purposes of discovery, the files of CRS analysts or litigants might ask for damages or injunctive relief barring further distribution of a particular report or issue brief. Litigants might also claim damages in suits alleging copyright infringement.

It would seem that these kinds of actions would be more likely to occur as a result of widespread electronic dissemination to the general public of CRS products than from the current practice of limited distribution (*e.g.*, dissemination by a congressional office of a single hard copy of a particular CRS product to a constituent or incorporation of a CRS product in a committee report or hearing).

***2. Widespread electronic public dissemination of CRS products would jeopardize the confidentiality of CRS files and hamper a claim of constitutional immunity by CRS.***

Widespread electronic circulation of CRS products to the general public could set CRS on a course accompanied by uncertain legal consequences.<sup>12</sup>

An inevitable consequence of widespread distribution of CRS products to the general public would be an increase in public awareness of the research and analysis prepared by the Service for Congress, which could escalate the efforts of litigants to obtain, for purposes of discovery, CRS analysts' files. These discovery attempts might seek not only information and data used to develop CRS Reports and Issue Briefs but also related material from the Service's files.

Speech or debate immunity may provide a valid defense in such discovery proceedings if the subject of the proceedings is a protected legislative act.<sup>13</sup> However, it is noted that, even in those cases in which CRS succeeded in defending against discovery efforts, the litigation would place a burden on CRS

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<sup>11</sup> See, *e.g.*, *Doe v. McMillan*, *supra*; *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

<sup>12</sup> As one legal journal has observed, in addressing the Internet and other computer-related issues, the courts are on "uncharted water." *Thou Shalt Not Trespass--Even in Cyberspace*, *New Jersey Lawyer*, Sept. 1, 1997, at p. 10.

<sup>13</sup> See, *e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C.Cir. 1995) .

and other congressional resources<sup>14</sup> and could put judges in the position of arbitrating disputes concerning the confidentiality of communications between CRS and Congress.<sup>15</sup> Claims of speech or debate immunity would be subject to review by the courts, potentially including *in camera* inspection of material as to which a claim of privilege is made<sup>16</sup> and segregation of protected from non-protected material.<sup>17</sup> Arguably, this type of judicial sifting of legislative branch materials would impinge upon the interest in confidentiality served by the speech or debate clause.<sup>18</sup>

Further, for two reasons, it is uncertain whether Congress would prevail in litigating such matters. First, it is possible that a court would not precisely differentiate among the information in the superficially similar types of documents in a CRS subject file and would grant litigants access not only to publicly available information but also to confidential communications between the Service and congressional offices. Second, in previous instances in which CRS has been involved in litigation or agency proceedings, the judicial or agency decision has emphasized that CRS performs a legislative function and that its staff functions as an adjunct of Member and committee staff.<sup>19</sup> With wider dissemination of CRS products to the general public, this longstanding perception of the Service and the nature of its communications to the Congress could be altered, eventually putting at risk speech or debate protection for the Service's confidential work. In other words, extensive involvement by CRS in the direct public information function could lead courts and administrative agencies to reconsider their perception of CRS as playing a significant and unique support role in the legislative process, and thus

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<sup>14</sup> Discovery attempts to obtain CRS file materials have often been defended by the offices of House General Counsel or Senate Legal Counsel. See, e.g. S.Res. 291, 101<sup>st</sup> Cong. (resolution directing Senate Legal Counsel to represent a CRS attorney in *Smith v. IRS*, No. 3778-89 (Tax Ct. 1990)).

<sup>15</sup> See *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978); *United States v. Ellberg*, 507 F. Supp. 267 (E.D.Pa. 1980).

<sup>16</sup> See, e.g., *Benford v. American Broadcasting Co.*, 98 F.R.D. 42 (D.Md. 1983), *rev'd on other grounds sub nom. In Re Guthrie*, 733 F.2d 634 (4th Cir. 1984).

<sup>17</sup> See, e.g., *United States v. Helstoski*, 442 U.S. 477, 488 n.7 (1979).

<sup>18</sup> The courts are divided on the question of whether the speech or debate clause was intended to ensure confidentiality for legislators. Compare *Brown & Williamson Tobacco Corp.*, 62 F.3d at 420 with *In re Grand Jury Investigation*, 587 F.2d at 597.

<sup>19</sup> See *Webster v. Sun Oil*, 731 F.2d 1 (D.C.Cir. 1984) and 790 F.2d 157 (D.C.Cir. 1986)(communications to CRS analyst are within scope of common law privilege for communications to a legislative body); *In re Exxon Corporation*, 95 F.T.C. 919 (1980)(FTC subpoena for CRS documents barred by speech or debate immunity and separation of powers doctrine; CRS performs an "essentially legislative function").

some day might hamper a claim of immunity even in an instance in which CRS was fulfilling its legislative function.<sup>20</sup>

*3. There is some risk of assertion of copyright infringement if CRS materials are made available online to members of the general public.*

United States copyright protection is not available for U.S. Government works.<sup>21</sup> Those portions of a public document authored by the U.S. Government are in the "public domain" – freely and widely available to the public without restrictions placed on their dissemination. However, the government's inclusion of copyrighted material in a government publication does not thrust that material into the public domain or impair the rights of the copyright owner.<sup>22</sup>

CRS may incorporate preexisting material in its written responses to congressional requests. Although such material is often from public domain sources, in certain instances the material, appropriately credited, may be from copyrighted sources. To the extent that the material is copyrighted, CRS either: obtains permission for the use;<sup>23</sup> considers its information-gathering function protected by the speech or debate clause; or believes that the use falls under the "fair use" doctrine of the Copyright Act<sup>24</sup> as applied in the context of the legislative process.

The exclusive rights<sup>25</sup> of the copyright owner are qualified or limited by enumerated exceptions.<sup>26</sup> Unless excused by a statutory exception, the unauthorized use of a copyrighted work is considered an infringement. Fair use

<sup>20</sup> See, *Doe v. McMillan*, note 9, *supra*

<sup>21</sup> 17 U.S.C. § 105

<sup>22</sup> The legislative history of the Copyright Act contains the following statement:

The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 60 (1976).

<sup>23</sup> Although CRS obtains permission to reproduce certain copyrighted works, the permissions are generally based on legislative use and the expectation that dissemination is limited to Members of Congress.

<sup>24</sup> Copyright Act of 1976, Act October 19, 1976, Pub. L. No. 94-553 (*codified as amended at 17 U.S.C. §§ 101 et seq.*). See 17 U.S.C. § 107.

<sup>25</sup> 17 U.S.C. §§ 106, 106A

<sup>26</sup> 17 U.S.C. §§ 107-120.

is one of the limitations on the copyright owner's exclusive rights and may be invoked as an affirmative defense to a claim of copyright infringement.

The copyright statute does not expressly include congressional use of copyrighted works as a fair use. However, both the House and Senate Reports on the Copyright Act of 1976 include the "reproduction of a work in legislative or judicial proceedings or reports" among examples of fair use.<sup>27</sup> The legislative history also contains an observation that publication of copyrighted material in Congressional documents would constitute fair use "[w]here the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern..."<sup>28</sup>

Thus, in an infringement action, a court might regard the publication of copyrighted material in a Congressional document for legitimate legislative purposes as a "fair use." If, however, the use is outside of such legislative purposes, it is possible that a traditional fair use analysis might result in liability for copyright infringement. Wider dissemination outside the confines of Congress would further complicate the "fair use" question.<sup>29</sup>

The copyright laws do not contain an exemption from copyright infringement for unauthorized use of copyrighted materials by the U.S. Government. Subsection 1498(b) of Title 28 of the U.S. Code provides that the exclusive remedy of a copyright owner for copyright infringement by the United States is an action against the United States in the U.S. Court of Federal Claims "for the recovery of ... reasonable and entire compensation ... including the minimum statutory damages ...." Speech or debate clause immunity is not waived under § 1498(b); however, activities outside of the legislative sphere would not be shielded from a copyright infringement action.<sup>30</sup>

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<sup>27</sup> See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 61-62 (1975) quoting REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 24 (Comm. Print 1961) (hereafter REGISTER'S REPORT).

<sup>28</sup> See H.R. Rep. No. 1476, Id. at 73

<sup>29</sup> Moreover, if CRS products were generally available to the public, the construction of these products may be affected, with the potential consequent loss when material, such as copyrighted maps or graphs, may be withheld in the writing of the paper with the foreknowledge that the paper could be widely disseminated and thereby subject to different "fair use" guidelines than those applicable to work for legislative use only. Therefore, public availability may perforce shape selected CRS products so that their contents no longer bring to bear the best information and analysis to assist Members in their decisionmaking.

<sup>30</sup> As originally enacted, § 1498 applied only to suits for patent infringement against the United States. In 1960, Congress amended § 1498 to give its consent to suits for copyright infringement against the United States; Section 2 of Pub. L. 86-726 provided:

Nothing in this Act shall be construed to in any way waive any immunity provided for Members of

In summary, where permission has been granted to CRS to use copyrighted material, it has likely been based on legislative purpose and limited to selective distribution of hardcopy by Members of Congress. If access is broadened to wholesale release to members of the general public, such release may be outside the scope of "legitimate legislative purpose." If a CRS product, containing substantial copyrighted material (albeit with appropriate credit) is made available to the general public without permission and outside the confines of traditional fair use, liability is possible. In this regard, distinctions can be made between the selective distribution of hardcopy CRS products by Members and Committees and wholesale, potentially world-wide distribution of CRS products on the Internet. Violation of any of the exclusive rights of the copyright owner may give rise to an action for copyright infringement. Although the extent of copyright owners' rights in the online environment is still evolving, wholesale distribution of CRS products via the Internet - unlike the current practice - would likely implicate copyright owners' performance and public display rights,<sup>31</sup> as a matter of direct infringement, and may implicate rights of reproduction and public distribution<sup>32</sup> either as a matter of direct, vicarious or contributory infringement. On the other hand, under a "fair use" analysis, there is likely less effect upon the potential market of the copyright owner in the case of selective hardcopy distribution than in the case of wholesale distribution on the Internet. Selective distribution of hardcopy CRS products by Members may not constitute "publication" in the copyright sense.<sup>33</sup>

### III. CONCLUSION

To review, Congress has historically regarded CRS as an extension of its own Member and committee staff. CRS' relationship with Congress is confidential and exclusive; in order to preserve this relationship, Congress has determined as a

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Congress under article I of section 6 of the Constitution of the United States.

Section 2 was added to the House bill by Senate amendment in order "to emphasize the fact that no immunities for Members of Congress under article I of section 6 of the Constitution shall be waived by the enactment of this legislation." See S. Rep. No. 1877, 86th Cong., 2d Sess. (1960) as reprinted in 1960 U.S.C.A.A.N. 3444. Presumably, speech or debate clause protection would protect Congressional use of copyrighted material that is used to further legitimate legislative activities that are part of the legislative processes (e.g., copyrighted material inserted into the Congressional Record or congressional document). See Copyright Office Memorandum of May 26, 1958 reprinted in 1960 U.S.C.A.A.N. at 3456. Congress did not waive its speech or debate clause immunity when it amended § 1498. However, insofar as activities outside of the legislative sphere (e.g., political activities or public information activities) are concerned, it would appear that § 1498(b) would not shield Congress from a copyright infringement action.

<sup>31</sup> 17 U.S.C. §§106(4),(5).

<sup>32</sup> 17 U.S.C. §106(1), (3).

<sup>33</sup> 17 U.S.C. §§101,106(3).

matter of policy that CRS products are to be distributed to non-congressional users through congressional offices on a selective basis. Proposals to disseminate CRS products directly to the public would fundamentally change this longstanding congressional policy, with potentially significant institutional and legal consequences for CRS and current congressional operations and practices.