

Office of Government Ethics

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Memorandum to an Agency Official dated December 3, 1982

This is in response to the hypothetical situations posed in your October 26, 1982 memorandum concerning book royalties and other payments to authors, and our further conversations on this topic.

First, we agreed with you that the receipt by a Government official of royalties from a book where all the personal services of the author were rendered prior to his entry into the Government, does not constitute outside earned income for purposes of section 210 of the Ethics in Government Act of 1978, as amended. 5 U.S.C. app. § 210. In such a situation, the interest in the book retained by the author is a property right not within the concept of "earned income" in section 210.

On the other hand, it is the position of this Office that in the context of considering "intellectual property" such as a manuscript, "earned income" includes, for purposes of section 210, income from the sale or other disposition of, transfer of an interest in, or licensing of the use of such property by an official whose personal efforts created the property. Cf. IRS Code § 401(c)(2)(C). After a transaction described in the preceding sentence, the Government official with a royalty interest is deemed to retain a mere property right in the residual income stream -- not within the concept of "earned income." These conclusions are consistent with a fundamental purpose of section 210 (which does not attempt to impose a per se limitation on the amount of outside income an official may have) to preclude significant distractions from the official's service to the Government.

In regard to your hypotheticals, we believe that a contract which provides to a current Government employee either advances against royalties or a payment upon submission of the manuscript in excess of the threshold limitation of section 210 would violate that provision. An arrangement whereby such advances would be staggered or deferred would not avoid the limitation of section 210 which incorporates an "attribution," as opposed to a "cash receipts," formulation for determining the "earned income" which appropriately belongs to a particular year for purposes of

applying its 15% limitation. Applying the statutory rule to specific cases may require an analysis of the trade practices of the industry and the particular publisher to determine the time periods when advances are normally made for that kind of writing and the structure of such payments. This is similar to a determination under 18 U.S.C. § 209(b) in regard to whether or not a severance arrangement is bona fide, except that the section 210 analysis would require a conclusion as to the qualitative and quantitative nature of the "earned income" payment which would be appropriately associated with a particular year. In your hypothetical, we are given the bona fide structure and timing of the official's inducement for his personal efforts and for entering into the publication relationship; accordingly, under the constructive receipt principles that must be associated with an attribution rule, no staggered or deferred alteration can avoid the statutory limitation.

Nevertheless, upon resolving the "contracting" issues discussed above, the Government official in your hypothetical may receive the residual royalties without any section 210 limitation being applicable. Section 210, therefore, seems to favor trade or academic works which are less apt to command front-end rewards which depend on the notoriety or Governmental position of the author. In this connection, we should caution that in a situation where an official derived "earned income" from a transaction referred to in the definition of that term on the previous page, under circumstances in which it was stated that all the personal services of the official were rendered prior to entry into Government service, a careful analysis of the appearance issues would be required. See 5 C.F.R. § 735.201a.