

Questions from the 1st LOC/FLICC General Counsels Forum on Copyright Policies and Practices February 24, 1999.

Answers from *Frequently Asked Questions About Copyright: A Template for the Promotion of Awareness Among CENDI Agency Staff*
<http://www.dtic.mil/cendi/publications/00-3copyright.html>

Fair Use Questions from Federal Libraries Where Should We Draw the Line?

1. Background Questions.

Does the fact that we are a US federal government library make a significant difference in the fair use analysis?

The U.S. Government can be held liable for violation of the Copyright Laws. Congress has expressly provided that a work protected by the Copyright Laws can be infringed by the [United States \(28 USC § 1498\(b\)\)](#)¹⁰². (see FAQ 5.1.1)

A fair use of a copyrighted work may include the practice of any of the exclusive rights provided by copyright, for example, reproduction for purposes such as criticism comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. The "fair use" limitation found at 17 USC § 107, is not defined in the statute and does not provide a bright line rule for determining what is or is not a fair use. Rather it identifies four factors that should be evaluated on a case-by-case basis in order to determine if a specific use is "fair". These factors, which should be considered together when determining fair use, are:

1. Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. Nature of the copyrighted work;
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. Effect of the use upon the potential market for or value of the copyrighted work.

The distinction between "fair use" and infringement can be unclear and is not easily defined. There is no right number of words, lines or notes that qualify as a fair use. (SEE FAQ 2.2.2)

The "fair use" exception applies to the U.S. Government. As with any other user, the use of copyrighted information by Government agencies and employees is assessed by the fair use factors to determine if the use is "fair" under 17 USC § 107. (See FAQ 2.2.3)

While the Government may rely on fair use, the use of materials by the Government is not automatically a fair use. The U.S. Department of Justice, Office of Legal Counsel, has stated in a U.S. Department of Justice opinion dated April 30, 1999,¹⁰⁴ that "while government

reproduction of copyrighted material for governmental use would in many contexts be non-infringing because it would be a 'fair use' under 17 USC § 107, there is no 'per se' rule under which such government reproduction of copyrighted material invariably qualifies as a fair use."

Single copy reproduction of portions of a copyrighted work for use solely for official research or related purposes is ordinarily permissible. Additionally, there may be limited exceptions in the case of National Security where the public interest results in a privilege to the Government for use of the copyrighted work without the express consent of the copyright owner. (Key Maps, Inc. v. Pruitt, 470 F. Supp. 33 (S.D. Tex. 1978)) For further discussion, see "Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes"¹⁰⁵ by Major Gary M. Bowen. The Army Lawyer (DA Pam 27-50-332), July 2000. (See FAQ 5.1.1)

Additionally, with respect to fair use, there are no special policies that apply to Government libraries and archives. However, under [17 USC § 108](#)¹⁰⁸, all libraries and archives are provided special rights with respect to interlibrary loan, archiving and preservation. It is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if the...

1. reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
2. collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
3. reproduction or distribution of the work includes a notice of copyright."

Specific guidelines on photocopying and interlibrary loan are also provided in the [CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements](#),¹⁰⁹ and in [Copyright Office Circular 21: Reproductions of Copyrighted Works by Educators and Librarians](#).¹¹⁰ (See FAQ 5.2.1)

- **Is use by Government employees automatically always fair or never fair?**

While the Government may rely on fair use, the use of materials by the Government is not automatically a fair use. The U.S. Department of Justice, Office of Legal Counsel, has stated in a [U.S. Department of Justice opinion](#) dated April 30, 1999,¹⁰⁴ that "while government reproduction of copyrighted material for governmental use would in many contexts be non-infringing because it would be a 'fair use' under 17 USC § 107, there is no 'per se' rule under which such government reproduction of copyrighted material invariably qualifies as a fair use." (See FAQ 5.1.1)

- **How should we assess the risk of proceeding under fair use?**

The "fair use" exception applies to the U.S. Government. As with any other user, the use of copyrighted information by Government agencies and employees is assessed by the fair use factors to determine if the use is "fair" under 17 USC § 107. (See FAQ 2.2.3)

The distinction between "fair use" and infringement can be unclear and is not easily defined. There is no right number of words, lines or notes that qualify as a fair use. (SEE FAQ 2.2.2)

However, single copy reproduction of portions of a copyrighted work for use solely for official research or related purposes is ordinarily permissible. Additionally, there may be limited exceptions in the case of National Security where the public interest results in a privilege to the Government for use of the copyrighted work without the express consent of the copyright owner. (Key Maps, Inc. v. Pruitt, 470 F. Supp. 33 (S.D. Tex. 1978)) For further discussion, see ["Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes"](#)¹⁰⁵ by Major Gary M. Bowen. The Army Lawyer (DA Pam 27-50-332), July 2000. (See FAQ 5.1.1)

- **Is the Government more or less likely to be sued?**

[Title 28 U.S.C. § 1498\(b\)](#)¹¹⁹ specifies that a copyright owner's exclusive remedy shall be an action against the United States in the U.S. Court of Federal Claims. The suit must be initiated within three years of the act of infringement. The U.S. Government is also liable for infringement by a government contractor if the contractor acted with the authorization or consent of the Government. DOD agencies process administrative claims of copyright infringement in accordance with [DFARS Subpart 227.70](#)¹²⁰. (See FAQ 5.4.2)

2. Electronic Publications.

- **Does the fact that a work is electronic really matter in a fair use analysis?**

No. The Internet is another form of publishing or disseminating information; therefore, copyright applies to Web sites, e-mail messages, Web-based music, etc. Simply because the Internet provides easy access to the information does not mean that the information is in the public domain or is available without limitations. Copyrighted works found on the Internet should be treated the same as copyrighted works found in other media. (See FAQ 2.4.1)

4. Government-Authored Works.

How can we ensure that the Government can freely use works authored by Government employees or prepared under Government contract? Agency personnel are authoring works that are published in scholarly journals, abstracted and indexed by commercial firms, included in commercial databases, and so forth.

A paper, report, or other work prepared by an employee of the U.S. Government as part of that person's official duties is a U.S. Government work. Copyright protection is not provided for U.S. Government works under U.S. Copyright Law. (See FAQ 3.1.2).

While a notice regarding copyright is not required, it is helpful to potential users of the material to identify any rights the Government may or may not have in the work. A good example of a notice is:

This is a work of the U.S. Government and is not subject to copyright protection in the United States. Foreign copyrights may apply.

Agency legal offices should be consulted regarding any Agency policies about providing notice. (See FAQ 3.1.7).

A U.S. Government work does not obtain copyright protection simply because it is published in a non-government publication. While a publisher or individual can republish a U.S. Government work, the publisher or individual cannot legally assert copyright unless the publisher or individual has added original, copyright protected material. In such a case, copyright protection extends only to the original material that has been added by the publisher or individual (See FAQ 3.2.1). Thus, assuming the article is written by a government employee as part of his or her official duties and the publisher does not add original, copyright protected content, then the government may reproduce and disseminate an exact copy of the published work either in paper or digital form. (See FAQ 3.2.3)

Because there is no U.S. Copyright in a U.S. Government work, when a U.S. Government work is submitted to be published in a non-government publication, the U.S. Government employee author should inform the publisher of their employment status and should not sign any document purporting to transfer a U.S. copyright as a prerequisite to publication. Additionally, a U.S. Government work may be protected under foreign copyright laws. The law of the foreign country governs ownership of foreign copyrights in U.S. Government works. The owner of the copyright may license or transfer a foreign copyright. The transfer of a foreign copyright owned by the U.S. Government must be executed by an authorized official of the Agency, who is almost never the U.S. Government author. (See FAQ 3.2.5)

Many publishers have [standard forms](#) that provide a specific space for authors to indicate that they are U.S. Government employees or that they are working on the Government's behalf. For examples, see the [IEEE Copyright Form](#)⁶⁹ and the [Kluwer Academic/Plenum Publishing Transfer of Copyright Form](#)⁷⁰. However, many publishing agreements include other terms, such as indemnification or choice of law that the government employee may not have authority to accept. Employees should seek approval from their own organizations before signing such agreements. (See FAQ 3.2.6)

Under the FAR general data rights clause (FAR 52.227-14), unless provided otherwise by an Agency FAR Supplement, a contractor may, without prior approval of the Contracting Officer, assert claim to copyright in scientific and technical articles based on or containing works first produced in the performance of a contract and published in academic, technical or professional journals, symposia proceedings, or the like. Under the FAR, when a contractor asserts copyright in a work first produced in the performance of a contract with a civilian agency or NASA, the contractor must place a copyright notice acknowledging the government sponsorship (including contract number) on the work when it is delivered to the Government, as well as when it is published or deposited for registration with the U.S. Copyright Office. If no copyright notice is placed on the work, the Government obtains unlimited rights in the work. Otherwise, when claim to copyright is made the Contractor grants the Government, and others acting on its behalf, a government purpose license to the work. The Government may use the work within the Government without restriction, and may release or disclose the work outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the work on behalf of the government. If there is any question as to the scope of the Government's license, the Contracting Officer or your General Counsel should be consulted. (See FAQ Chapter 4)

An example of a copyright statement, which includes a government license, for use with works created under contracts with civilian agencies and NASA is:

COPYRIGHT STATUS: This work, authored by _____ employees, was funded in whole or in part by _____ under U.S. Government contract _____, and is, therefore, subject to the following license: The Government is granted for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable worldwide license in this work to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. All other rights are reserved by the copyright owner.

- **Can the publisher copyright the Government-authored work at all?**

A publisher or individual can republish a U.S. Government work, but the publisher or individual cannot legally assert copyright unless the publisher or individual has added original, copyright protected material. In such a case, copyright protection extends only to the original material that has been added by the publisher or individual. ([See 17 USC § 403](#)⁶⁷ regarding copyright notice requirements for works incorporating U.S. Government works.) (See FAQ 3.2.1)

- **Can we reproduce and circulate the published version freely inside the agency?**

Assuming the article is written by a government employee as part of his or her official duties and the publisher does not add original, copyright protected content, then the government may reproduce and disseminate an exact copy of the published work either in paper or digital form. ([Matthew Bender & Co. v. West Publishing Co.](#),⁶⁸ 158 F.3d 674 (2d Cir. 1998), cert. denied, 119 S. Ct. 2039 (1999)). (See FAQ 3.2.3)

- **What if the work were jointly authored with someone outside the Government?**

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole (see [17 USC § 101](#).⁷¹). The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary (see [17 USC § 201](#).⁷²).

If a joint work is interdependent, contributions are generally created independently by separate co-authors with the intention to merge them into a unitary whole, and therefore they comprise separable parts. One should be able to isolate the contributions of a government employee from the contributions of a non-government employee. If, on the other hand, co-authors collaborated on much or all of a joint work, it will be considered inseparable, and it may be impossible to determine where the contributions of one author end and the other author or authors begin. Therefore, for an inseparable joint work, it is difficult or impossible to isolate the contribution of government employees from contributions of non-government employees. In either case, while the Government is a joint owner of the "entire work" (i.e., the unitary whole), the law on how much of the "entire work" is protected by copyright is unsettled and is thus open to differing interpretations. In such situations, you should consult your Office of General Counsel.

Moreover, while the Copyright law says that authors of a joint work are co-owners of the work, the law regarding if and how much the Government may own is unsettled and thus open to interpretation. The notes following section 201 of the Copyright Act (17 U.S.C §201) state that, "Under the bill, as under current law, co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to

the other for any profits.” Nonetheless, to protect the Government’s interests, it would be prudent to obtain a license from the non-government co-owner to use and distribute the work.

Since joint authorship is a collaboration in which the authors have the intent from the beginning to create an integrated work, when it is anticipated that a government employee will participate as a joint author of a work arising under a contract or assistant agreement, it is advisable to consult your General Counsel and the outside author concerning the unsettled nature of the law. (See FAQ 3.2.7)

- **What if the work were also published by the agency or by GPO?**

Not all Government Printing Office or Government agency publications are U.S. Government works. For example, Government Printing Office publications and Agency publications may include works copyrighted by a contractor or grantee; copyrighted material assigned to the U.S. Government; or copyrighted information from other sources. (See FAQ 3.1.5)

- **Are works produced under Government contract (e.g., reports, databases, websites) government works?**

A "work of the United States Government," referred to in this document as a U.S. Government work, is a work prepared by an officer or employee of the United States Government as part of that person's official duties. (See [17 USC § 101, Definitions](#).⁵³)

Contractors, grantees and certain categories of people who work with the government are not considered government employees for purposes of copyright. Also not all government publications and government records are government works (See FAQ [Section 1.0](#), Definitions). (See FAQ 3.1.1)

- **Can the contractor copyright them?**

Unlike works of the U.S. Government, works produced by contractors or grantees under government contract or grant are protected under U.S. Copyright Law. (See *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982).) The ownership of the copyright depends on the terms of the contract. Contract terms and conditions vary between civilian agencies or NASA and the military.

Civilian agencies and NASA are guided by the [Federal Acquisition Regulations](#) (FAR)⁷³. There are a number of FAR provisions that can affect the ownership of the copyright. [FAR Subpart 27.4--Rights in Data and Copyrights](#)⁷⁴ provides copyright guidance for the civilian agencies and NASA. In addition, Agencies may have their own FAR Supplements that should be followed. (See FAQ 4.1)

- **Would the agency have to pay to use them?**

A contractor's assertion of copyright in a work produced under a DFARS contract does not provide any restrictions to the Government's use of the work (see [DFARS 227.7103-9](#)⁸⁷ and [227.7203-9](#)⁸⁸). In a FAR contract, if the contractor is permitted to assert copyright, the government will acquire a license to the copyrighted work. The extent of the license may depend on the type of work created (see [FAR 52.227-1489](#)).

Under the FAR, when a contractor asserts copyright in a work first produced in the performance of a contract with a civilian agency or NASA, the contractor must place a copyright notice acknowledging the government sponsorship (including contract number) on the work when it is delivered to the Government, as well as when it is published or deposited for registration with the U.S. Copyright Office. If no copyright notice is placed on the work, the Government obtains unlimited rights in the work. Otherwise,

when claim to copyright is made the Contractor grants the Government, and others acting on its behalf, a license to the work.

The Government's license is a nonexclusive, irrevocable, worldwide royalty-free license to use, modify, reproduce, release, perform, display or disclose the work by or on behalf of the Government. The Government may use the work within the Government without restriction, and may release or disclose the work outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the work on behalf of the government. Under some FAR data rights clauses, if the work is a computer program, the right to release or disclose the computer program to the public is not included in the Government's license. If there is any question as to the scope of the Government's license, the Contracting Officer or your General Counsel should be consulted. (See FAQ 4.3)