LoC/FLICC GC Forum - Copyright Session
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Government Works

1. Government Employees - no copyright if developed as part of official duties (17 USC §§ 101, 105).

A. Prohibition arose in 1909 Copyright Act (17 USC 8) and in the Printing Act of 1895 dealing with the abuse of producing copies of Government reports using printing plates sold by the Government. No definition of Government work. Semiconductor Chip Act has similar restriction.

B. Clarified in the revision of 1976, which codified the case law to apply when a Government employee prepared any work, not just a publication, as part of his/her official duties. Considered like a work made for hire except the consequence is no protection instead of ownership by the Government. Copyright treated differently than inventions that can be owned by the Government.

C. Statutes and court opinions are not protectable although not specified in section 105.

D. Exceptions

- i. statute permits the US to accept an assignment or transfer of copyright
- ii. works produced by contractors
- iii. Standard Reference Data (SRD)- 15 USC § 290e
- iv. USPS
- v. foreign - legislative history of the 1976 Act indicates that the prohibition does not extend to foreign copyright. Several countries, like the UK, permit copyright of its government publications. NTIS claims international copyright in some of its publications sold abroad.

E. Issue arises in:

i. Publication agreements - Government authors are asked to sign an assignment (many publishers understand that Government employees cannot assign copyright because there is

nothing to assign, except perhaps foreign rights, and the standard assignment forms have been appropriately modified); or

ii. When an accused infringer questions the validity of a copyright obtained by a Government employee.

iii. Notice required for publications containing predominantly Government work in 17 USC 403 changed in 1989 after the U.S. joined the Berne Convention which has no copyright formalities. The failure to contain such a notice now only affects the claim of innocent infringement.

F. No regulations like 37 CFR Part 501 for Government employee inventions although some agencies give guidance. According to the legislative history, use of Government time, material or facilities would not, of itself, determine whether something was a "work of the United States."

i. A court held that Admiral Rickover could copyright his speeches on education and nuclear power in spite of his use of a Government secretary to type some of the drafts and of other Government employees to make copies. Making speeches was considered not to be a part of his official duties.

ii. Another court held that the specific task need no to be individually assigned to be part of the official duties and ruled that publishing was part of author's research duties (Herbert).

iii. Some agencies consider the use of Government time, facilities, material or assistance by other Government employees on official duty to make the work an "official writing" which is not subject to copyright protection.

G. Joint works by a Government and private employee. If non-Government part cannot be separated, either the whole is protected or the Government portion may destroy any copyright. No agreement among Government lawyers. No definitive case law.

i. One case considered an ETS foreign service test to which State contributed some questions and found that the copyright was valid because the questions were only a small part (Miller).

ii. Another case held that a VA joint author could not sue the Government under 28 USC 1498(b) but did not hold the work in the public domain (Herbert).

2. Other forms of protection

A. Contractual - some agencies have imposed restrictions on the use of their information but limitations on copying, now prohibited by Paper Reduction Act of 1995 (PL 104-13) and OMB Circular A-130.

B. Trademark - This protects the name of the agency and of the product but not the content.

C. Under the FTTA, Government data and software developed under or in contemplation of a CRADA is exempt for up to 5 years from FOIA. This exemption was sustained in a suit against DOC for access to software.

D. Notwithstanding the lack of copyright, Government may still have a property right in the information. CIA prevented a former employee from publishing some sensitive information (Pfeiffer).

3. Legislative proposals

A. DOC has twice proposed legislation which would allow the Government to copyright software it developed under a CRADA. Neither bill passed and drew a lot of negative comment from the information industry. The rationale - to have Government software commercialized, there needs to be exclusive rights, just as there are for inventions.

B. Software is now patentable, and so can be licensed as a invention under a change to the tech transfer law in 2000.

4. Liability for Copyright Infringement

A. 28 USC § 1498(b)-added in 1960. Prior to this, the US was not liable for copyright infringement.

B. Suit by Government employee precluded if he/she used Government time, materials or facilities. Considered like a license to the US.

C. Defenses - not the owner, no registration, Government free license, fair use, and a 3-year statute of limitations unless suspended by a claim to the accused agency. In 1999, DOJ issued an opinion on Government fair use.

D. Damages - may include minimum statutory damages ($750).

E. History - Although there have been few suits against the USG since 1960 for copyright infringement (USPS seems to be the usual defendant), only one resulted in a determination of liability.