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Permissions - Government-Prepared and Non-federal Authored Works: *Best Practices for U.S. Government Agencies*

Part 1

Prepared by
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CONTRIBUTING MEMBERS: Bill Adams (Army); Vicki Allums (DISA); Jane Barrow (NAVSEA); Andrew Christopher (IMLS); Christopher Cole (NAL); Geoff Cooper (EPA); Charles Duckert (DoT); Laura Jennings (NGA); Rob Kasunic (LoC); Ellen Klan (DTRA); Bonnie Klein (IIA); Hope O'Keeffe (LoC): Darren Pogoda (USPTO); Damon Richardson (USAF); Agnes Rooke (NIAID); Vakare Valaitis(DTIC); Leigh Warren (HHS)

In Memoriam of Leigh M. Warren

The CENDI Copyright and Intellectual Property Working Group acknowledges the hard work and dedication Leigh brought to the composition of this publication. Leigh was a brilliant lawyer and thinker who gave of her time and talents most generously. It is thanks to her participation these past few years, that the working group made its most evident progress.

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Part 1

This document is a practical guide on copyright and permissions issues related to both Government and Non-federal works. It is being published in two parts. Part 1 describes the categories of works that are the subject of this document including works prepared by Government employees and those prepared by non-federal authors on behalf of the Government. It also includes an overview of essential legal precepts regarding use and permissions requirements.
Part 2 will be published later. Part 2 will offer scenarios taken from real workplace situations on use of text, images, music, additive manufacturing (3-D technology), and other audiovisual assets. It will address best practices for publication and dissemination of Government information and will present an example of a copyright management regime for those charged with such duties.

1. INTRODUCTION

This document, with its specific focus on works prepared by the U.S. Government, is a standalone product; however, it is intended to be used in conjunction with two related CENDI Copyright Task Group work products concerning copyright:
CENDI Frequently Asked Questions about Copyright: Issues Affecting the U.S. Government (Copyright FAQ);
and
Frequently Asked Questions about Copyright and Computer Software
Issues Affecting the U.S. Government with Special Emphasis on Open Source Software.

The reader is encouraged to review the frequently asked questions (Copyright FAQs) concerning copyright in general and open source software in particular as an adjunct to this document. Where relevant, this document will hyperlink to an appropriate FAQ in the other works to avoid repetition of a topic and yet allow the reader the option of access to a more thorough explanation. The Government creates a wide range of content. Whether permission is necessary to use the content can be confusing for the public. Equally confusing for Government agencies is whether permission is necessary and how to obtain it to use works (e.g. music, text, images, translations) created by non-federal users.

The purpose of this FAQ is to address the copyright and permission issues related to both Government and Non-federal works - both in the course of creating such works, and in the course of using them. Specifically, the FAQ will provide readers with a detailed description of both Government and non-federal works, when permission is necessary to use the work and the process for obtaining permission. The FAQ will

also discuss issues unique to works prepared by Government employees such as data rights, international copyright protection, publication and dissemination of Government content; and the administration of copyright management.

The Basics – Terminology: The Do's and Don'ts for referring to Works Protected by Copyright

The authors are well aware that familiarity with a subject may lead to bad habits, and we freely admit to being guilty ourselves of occasionally referring to a "copyrighted" work or to saying that someone intends "to copyright" a work. While our day to day American English language is constantly evolving and currently exhibits a tendency to change nouns into adjectives, transitive verbs and adverbs that is reflected in on-line dictionaries; it is our intent to avoid conveying an inaccurate impression of the nature of copyright in this document through such "shorthand" or "slang" usage. In that regard, please note that it is more technically correct to note that a work is "protected by copyright," see Copyright FAQ 2.1.1, et seq. , rather than to say that the work is "copyrighted;" and that an author avails herself/himself of copyright protection for an original work by fixing the work in a tangible medium, see Copyright FAQ 2.1.3, rather than by "copyrighting" the work. We suspect that someone referring to "copyrighting" a work often means the process of registering a copyright claim with the U.S. Copyright Office by filing an application, depositing a copy and paying a fee as specified in Title 17 U.S. Code § 408 ; however, that may not be the case. Such language is imprecise and lacks a specific legal definition. In order for the U.S. to join the Berne Convention in 1989, Congress passed the Berne Convention Implementation Act of 1988 eliminating certain formalities that were previously required in the U.S. to claim copyright protection. Referring to a "copyrighted" work or saying that someone intends "to copyright" a work conveys an impression that the requirement for formalities still exists when it does not. Human nature being what it is, we apologize in advance for any inappropriate or confusing shorthand or slang that has crept into our preparation of this document.

1.1 Glossary of terms

Defense Federal Acquisition Regulation Supplement (DFARS) -- means the supplement to the Federal Acquisition Regulation (FAR) used by the Department of Defense to purchase goods and services.

Dissemination -- the Government initiated distribution of information to the public. As used in this Best Practices Guide (consistent with OMB Circular A-13), the term "dissemination" excludes distribution limited to Government employees or agency contractors or grantees, intra- or inter-agency use or sharing of Government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. § 552) or Privacy Act. OMB Circular A-130 Management of Federal Government Information Resources.

Federal Acquisition Regulation (FAR) -- means the regulation established to codify uniform policies for acquisition of supplies and services by Federal

executive agencies. It is issued and maintained jointly, pursuant to the Office of Federal Procurement Policy Reauthorization Act, under statutory authorities granted to the Secretary of Defense, Administrator of General Services Administration, and the Administrator, National Aeronautics and Space Administration. The official FAR appears in the Code of Federal Regulations at 48 C.F.R. Chapter 1. The FAR applies to procurement contracting only, i.e., contracts to procure goods and services primarily for the benefit of the Federal Government. Other, very different laws and regulations apply to non-procurement award instruments, such as grants, cooperative agreements, "other transactions" agreements, Cooperative Research and Development Agreements, and international agreements. A number of Government agencies use an agency-specific version, or supplement, to the FAR.

Government Information -- Information created, collected, processed, disseminated, or disposed of by or for the Federal Government. OMB Circular A-130 Management of Federal Government Information Resources.

Government-Prepared Works – Works created by U.S. Government employees acting in their official capacity or by contractors, grantees and other individuals, companies or organizations working with the government under a procurement contract, grant, Cooperative Research and Development Agreement (CRADA), other transactions or other legal instruments.

Government Publication -- Informational matter that is published as an individual document at Government expense, or as required by law. 44 U.S.C. §1901 Government Printing Office.

Government Record -- All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them. 44 U.S.C. §3301 National Archives and Records Administration.

Government Work **or** ***Work of the United States Governm****ent* -- 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 U.S. Copyright Act.

Information -- Any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. OMB Circular A-130 Management of Federal Government Information Resources.

Information Dissemination Product **--** Any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, disseminated by an agency to the public. OMB Circular A-130 Management of Federal Government Information Resources.

Non-federal Works -- A work prepared by an individual, corporation or other entity which is protected by copyright under the Copyright Act.

1.2 Abbreviations and Acronyms

CENDI	Federal STI Managers' Group
C.F.R.	Code of Federal Regulations
CRADA	Cooperative Research And Development Agreement
CUI	Controlled Unclassified Information
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
FAR	Federal Acquisition Regulation
FAQ	Frequently Asked Questions
FOIA	Freedom of Information Act
FOA	Funding Opportunity Announcement
FTCA	Federal Tort Claims Act
HHS	Department of Health and Human Services
NIH	National Institutes of Health
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organization
NIST	National Institute for Standards and Technology
NoA	Notice of Award
NSF	National Science Foundation
OMB	Office of Management and Budget
OSTP	Office of Science and Technology Policy
OT	Other Transaction agreement
PII	Personally Identifiable Information
RPPR	Research Performance Progress Report
SDO	Standards Development Organization
SSA	Social Security Administration
STI	Scientific and Technical Information
TIA	Technology Investment Agreement
U.S.C.	United States Code

2 GENERAL INFORMATION REGARDING U.S. GOVERNMENT WORKS

2.1 What are U.S. Government Works?

A "work of the United States Government" is defined in the Copyright Act, as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." A work of the US Government is essentially a work made for hire, (see 17 U.S.C. § 101 except that it is not subject to copyright protection in the United States, pursuant to 17 U.S.C. § 105.

Government-prepared works are generally created by U.S. Government employees acting in their official capacity or by contractors, grantees and other individuals, companies or organizations working with the government under a procurement contract, grant, Cooperative Research and Development Agreement (CRADA), other transactions or other legal instruments. A description of some of the authors who create works on behalf of the U.S. Government is provided in Section 2.2.

Whether permission is necessary to use the works created by these authors depends upon who created the work and the scope of the ownership or licensing rights acquired by the Government. (See CENDI Frequently Asked Questions about Copyright: Issues Affecting the U.S. Government, Section 4.0 Permissions: U.S.-Government-Prepared and Non-U.S. Government Prepared Works)

Please note that works prepared by or for the U.S. Government are only a small subset of U.S. Government information (see OMB Circular A-130(6)(h): "Government information" means "information created, collected, processed, disseminated, or disposed of by or for the Federal Government") or U.S. Government records (see 44 U.S.C. § 3301, "records" includes "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business ...")

Unlike U.S. Government information or U.S. Government records, U.S. Government-prepared works may not include material in the possession of the U.S. Government but prepared, for example, by the general public or by other Governments (non-federal authors). These FAQs do not address issues relating to such material.

2.2 Works created by or for the Government

2.2.1 Works of Government authorship

Government-prepared works are generally created by U.S. Government employees acting in their official capacity. Contractors and other individuals or companies working with the Government under a procurement contract Cooperative Research and Development Agreement (CRADA), other transactions (OTs) or other legal instruments also create works for the U.S.

Government. A detailed description of each category of author is provided below.

Whether permission is necessary to use the works created by these authors depends upon who created the work and the scope of the ownership or licensing rights acquired by the Government. (See Section 4.0 Permissions: U.S.-Government-Prepared and Non-U.S. Government Prepared Works)

2.2.1.1 Government Employees

U.S. Government employees are defined as "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." Employees of the Government include "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under Sections 115, 316, 502, 503, 504, or 505 of Title 32." 28 U.S.C. § 2671. Government employees usually produce works as part of their official duties, generally described in a position description, and assigned to them as a result of their employment. In accordance with 17 U.S.C. § 105, works created by Government employees in their official capacity are not entitled to copyright protection in the U.S.

2.2.1.2 Contractors

§9.403 of the Federal Acquisition Regulation (FAR) defines a "contractor" as an individual or other legal entity that directly or indirectly (e.g., through an affiliate): (1) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract; or (2) who conducts business, or reasonably may be expected to conduct business with the Government.

2.2.1.3 Grantees

A grantee may be a state, a local Government or other recipient to which a Government agency has transferred a thing of value to carry out a public purpose of support authorized by a law of the United States. 31 U.S.C. § 6304

2.2.1.4 Other Non-federal Authors

A Cooperative Research and Development Agreements (CRADAs) is a special type of contract entered into by a federal and anon-federal entity to facilitate sharing of joint research and development. Works created under

CRADAs may be produced by state or local Governments, corporations, public and private foundations, nonprofit organizations (including universities) and other persons (including foreign entities). (See 15 U.S.C. § 3710a) CRADAs are not governed by the FAR, thus the parties mutually agree upon ownership and licensing rights to any intellectual property created under the terms of the agreement.

Foreign entities, such as NATO, may have specific guidelines regarding ownership and licensing of any works created by their staff and protected by copyright. These guidelines must be followed when using this content.

Intergovernmental Personnel Act (IPA) Assignments. Persons working for the Federal Government under the Intergovernmental Personnel Act (IPA). 5 U.S.C. § 3374, et. seq., are considered to be Federal Government employees for purposes of the Federal Tort Claims Act and other statutes, but not for Copyright Act purposes. The IPA assignee and his/her participating non-Federal organization (employer) must agree to assign to the Federal Government the entire right, title, and interest throughout the world in and to all intellectual property developed during the course of duties performed as an IPA assignee in the Federal Government.

Unless the IPA assignee is actually appointed to the Federal agency under 5 U.S.C. §3774(a)(1), any original work of authorship he or she authors in the performance of work as an IPA assignee is *not* considered to be a work of the United States Government under 17 U.S.C. §§ 101 and 105. The work is, therefore, protected by copyright in the United States An IPA agreement should state that the copyright shall be assigned to the United States of America as Represented by the Department or Agency head].

2.2.1.5 Members of the public – User-generated content and crowdsourcing

The use of Web 2.0 technologies by federal agencies allows mass collaboration and the creation of content for use by the Government by members of the public or a targeted group of users (e.g., scientists). The content is often posted to a Government-hosted web site by the individual author for distribution to and use and modification by other users and the federal agency. See also Copyright FAQ 2.4. The hosting organization usually provides criteria on its web site regarding copyright ownership, licensing and usage of any posted content.

2.2.1.6 Standards Development Organizations

(This section will be revised when OMB Circular A-119 is reissued.)

"All federal agencies must use voluntary consensus standards in lieu of Government-unique standards in their procurement and regulatory

activities, except where inconsistent with law or otherwise impractical." OMB Circular A-119. Thus U.S. Government-prepared documents may incorporate or refer to standards developed by Standards Development Organizations (SDOs). "If a voluntary standard is used and published in an agency document, the agency must observe and protect the rights of the copyright holder and any other similar obligations." OMB Circular A-119. The copyright status of a standard developed by a SDO is unclear under current law when incorporated into an agency document that has the force and effect of law (e.g., a regulation). In one case, the United States Court of Appeals for the Fifth Circuit, sitting en banc, held that a model code that was developed by a private code developer for the sole purpose of enactment into law, could be freely copied by others when that code had in fact been adopted as the law of a particular jurisdiction. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 802 (5th Cir. 2002). However, a standard that is merely referenced in an agency regulation may retain its copyright status. See *CCC Info. Servs. Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997). Consult your General Counsel if there is a question about the copyright status of a standard to be adopted in an agency document.

2.3 *What are Joint Works Created by Government Employees and Non-federal Authors*

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. 17 U.S.C. § 101. The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary 17 U.S.C. § 201 (a).

Questions regarding the copyright status of works involving contributions by a government employee and non-federal author (s) can be tricky because it may be impossible to separate the government and non-federal contributions. (This is different from a "compilation defined in 17 USC § 101," which is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship).

Therefore, for ajoint work, it is difficult or impossible to isolate the contribution of Government employees from contributions of non-federal authors. Whether the U.S. Government can be a joint author with a non-federal author is not directly addressed by the law. In such situations, you should consult your legal counsel. Nonetheless, to protect the Government's interests, it would be prudent to specify license terms in a contract or award document from the non-federal co-creator 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 in or contribute to the creation of a copyright protected work arising under a contract or assistance agreement, it is advisable to consult your servicing legal counsel and the outside author concerning the unsettled nature of the law.

3 PERMISSIONS: U.S. GOVERNMENT WORKS

3.1 *When is Permission to Use a U.S. Government Work Required?*

3.1.1 Works Created by Government Employees

Works of the United States Government are works prepared by an officer or employee of the United Stated Government as part of that person's official duties (See 17 U.S.C. § 101, Definitions). An officer's or employee's official duties are the duties assigned to the individual as a result of employment. Generally, official duties would be described in a position description and include other incidental duties. Official duties do not include work done at a Government officer's or employees own volition, even if the subject matter is Government work, so long as the work was not required as part of the individual's official duty. (S. REP. NO. 473, 94th Cong., 2d Sess. 56-57) (1976). Contractors, grantees or other people who work with the Government are not Government employees.

U.S. copyright protection is not available for any work of the United States Government ,17 U.S.C. § 105, which are works created by U.S. Government employees as part of their official duties. 17 U.S.C. § 101. Exceptions are available for certain works of the National Institute for Standards and Technology (NIST) (see 15 U.S.C. § 290 (e)), the U.S. Postal Service (materials, artwork and design and all postage stamps as of January 1, 1978, or are subject to copyright law, (see, Postal Reorganization Act of 1970, and National Aeronautics and Space Administration (NASA) Act of 1958, Pub. L. 85-568, and NASA Space Act Agreements).

Copyright protection may also be available for U.S. Government works outside the United States (see Copyright FAQ 3.1.6) thus foreign copyright laws may apply. In general, foreign copyrights on U.S. Government works are owned by the U.S. Government and the transfer of a foreign copyright owned by the U.S. Government must be executed by an Agency official with authority to transfer Government property.

Although 17 U.S.C. § 105 prohibits copyright in "works of the U.S. Government", it permits the Government to own the copyright in the works of others "transferred to it by assignment, bequest, or otherwise." When a work protected by copyright is transferred to the U.S. Government, the

Government becomes the copyright owner, and the work retains it copyright protection (See Copyright FAQ 4.5 and 4.6) and the U.S. Government may seek to register the copyright with the Register of Copyrights.

A Government employee should inform a publisher that the work was created as part of his official duties and should not sign any document purporting to transfer a U.S. copyright as a prerequisite to publication.

17 U.S.C. § 105 does not prohibit the Government from incorporating a privately created work protected by copyright into a Government work (assuming the Government has a license to incorporate such works or when such incorporation is permitted under a recognized limitation or exception to copyright). Inclusion of a work protected by copyright within a Government work does not change the copyright status of the privately created work.

Although U.S. Government works are not protected by copyright in the U.S. (17 U.S.C. § 105), unlike works in the public domain, they may be subjected to other intellectual property and legal limitations (including statutory restrictions on disclosure of Government information for national security, export control, controlled unclassified information (CUI), personally identifiable information (PII) or for other reasons) governing their use.

3.1.1.1 Privacy and Publicity Rights

Privacy and publicity rights are distinct from copyright and protect the personal interests of the subject(s) featured in a work. These rights are not protected by the Copyright Act, the Privacy Act, or other federal law; rather, they are protected by state laws – state statutory law, state common law, both, or neither, depending on the state. Most (but not all) states have adopted some version of privacy laws recited in the Restatement of Torts, prohibiting invasions of privacy, such as unreasonable intrusion upon the seclusion of another; appropriation of another's name or likeness; unreasonable publicity given to another's private life; and publicity that unreasonably portrays another in a false light. Restatement (Second) of Torts § 652A (1977). The publicity rights recognized in various states' laws may be distinct from or overlap with the privacy torts noted in the Restatement and, generally, prohibit unauthorized use of a person's name or likeness for commercial purposes.

Members of the public that wish to redistribute a U.S. Government work (ineligible for copyright) must separately consider whether privacy and/or publicity rights apply to a subject that appears in the work. For example, if a federal employee photographs a person and posts the photograph on an agency's website , the photograph itself is not protected by copyright, but the person appearing in the photograph may have privacy and/or publicity rights recognized by some states' laws. Before using or redistributing a

photograph appearing on an agency's website, members of the public should seek appropriate permission from the photographed person.

Federal agencies generally alert the public when their repositories or websites contain materials that could be protected by privacy or publicity rights. See, e.g., the Library of Congress's description of privacy and publicity rights (http://memory.loc.gov/ammem/copothr.html) and warning to researchers that use of letters, diary entries, reportage, photographs, and motion pictures found in the Digital Preservation repository may raise issues of privacy or publicity rights, http://www.loc.gov/preservation/about/prd/presdig/copothr.html. However, a federal agency's alert is not intended to be legal advice on states' laws. Members of the public are responsible for determining how their use of a work may be restricted by privacy or publicity rights. Finally, one cannot assume that just because a photograph, image, or voice recording appears on a federal agency's website that it is "in the public domain" or generally "cleared" for use by anyone for any purpose.

3.1.1.2 Statutory Restrictions on Use of Official U.S. Government Seals, Emblems, Insignias, Names

Additional, non-copyright restrictions may apply to works of the U.S. Government that include certain indicators of federal agencies or other Government offices or components. A number of federal statutes specifically addressing this issue, (e.g. 18 U.S.C. § 506 Seals of Departments or Agencies, 50 U.S.C. § 403, (Central Intelligence Agency), 51 U.S.C. § 20141 (National Aeronautics and Space Administration); 42 U.S.C. § 1320b-10 (Social Security Administration and the Department of Health and Human Services), 18 U.S.C. § 713, (Use of likeness of the great seal of the United States, the seals of the President and Vice President, the seal of the United States Senate, the seal of the United States House of Representatives, and the seal of the United States of Congress), and18 U.S.C. § 709 (False Advertising or misuse of names to indicate Federal Agency), prohibit certain unauthorized uses of Government or agency names, acronyms, logos, insignias, seals, etc., e.g., to create a misleading impression of affiliation or endorsement by a federal agency or Government component.

4 PERMISSIONS: WORKS CREATED BY NON-FEDERAL AUTHORS

4.1 When is permission required?

If a work is protected by copyright, permission must generally be obtained from the copyright owner (unless an exception or limitation recognized by law excusing permission is applicable). The ability to transfer permission depends on

the original agreement between the copyright owner and the party to whom the permission was originally granted. Permission obtained from a copyright owner is not transferable to a third party, unless expressly stated.

The Government wishing to include material protected by copyright in a publication must seek permission from any copyright owner unless otherwise authorized by a recognized exception in the Copyright Act. Works prepared by contractors under Government contracts are protected under U.S. Copyright Law. Determining who is the copyright owner or owners in such situations will likely require further investigation.

Rights to works created by contractors are set forth in the contract, for example, the Rights in Data General Clause of FAR 52.227-14. Under FAR 52.227-14, except for works in which the contractor is allowed to assert claim to copyright, the Government has unlimited rights in all data first prepared in the performance of a contract and all data delivered under a contract unless provided otherwise in the contract; in a FAR contract, if a contractor is permitted to assert copyright, the Government will acquire a license to the work (the extent of the license may depend on the type of work created). The scope of the Department of Defense's licensing rights in non-federal works are governed by the DFARS and the Government's license rights generally depend upon the source of the funding (i.e., Government, mixed or private), the nature of the data (commercial or noncommercial) and any negotiated terms of the contract but the non-federal author will maintain copyright protection in the work, e.g., technical data, computer software and computer software documentation.

Permission is not needed for the use of facts, because copyright law does not protect facts. To the extent however, facts or pre-existing material is selected, arranged and presented in an original manner, such original selection and arrangement is eligible for copyright protection. See 17 U.S.C. § 101(definition of the term "compilation" therein). In such situations, it may be necessary to obtain permission to utilize any such compilation copyrights.

4.2 *When is Permission Not Required?*

17 U.S.C. §§ 107 through 122 establish limitations or exceptions on the copyright owner's exclusive rights and describe when permission, by the Government or other users, to use a work protected by copyright is unnecessary. The following describes several of these statutory exceptions permitting use of a work protected by copyright.

4.2.1 Section 107 Fair Use

"Fair use" is a statutory exception that allows the use of a work protected by copyright for certain purposes without permission (See, 17 U.S.C. § 107). Section 107 states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The distinction between "fair use" and infringement can be unclear and it is not easily defined. "There is no right number of words, lines or notes that qualify as a fair use." (See, the U.S. Copyright Office Fact Sheet FL 102.) Fair use determinations are not based on a mechanical application of the four non-exclusive fair use factors. Instead, all factors are to be explored and the results weighed in light of the purposes of copyright. *Campbell v. Acuff Rose Music*, 510 U.S. 569, 578 (1994); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 65 (1976)("[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.")

The fair use exception may apply to the U.S. Government's use of copyright-protected information. It is recommended that an Agency consults with legal counsel regarding whether use of the copyrighted-protected information is a fair use.

While federal agencies may rely on the fair use exception under Section 107, they should also consider the guidance issued by the U.S. Department of Justice, Office of Legal Counsel, dated April 30, 1999, which provides:

"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 U.S.C. § 107, there is no 'per se' rule under which such Government reproduction of copyrighted material invariably qualifies as a fair use;"

4.2.2 Section 108 Libraries and Archives

Section 108 of the United States Copyright Act allows qualifying libraries and archives, including their employees acting within the scope of their employment, to make and distribute copies of materials for specified purposes under specified conditions. Section 108(a) establishes the general eligibility requirements for libraries and archives. Sections 108(b) and (c) set forth the more specific requirements libraries and archives must meet before they may reproduce and distribute copies of works for purposes of preservation or replacement. In addition, during the last 20 years of any term of copyright of a published work, Section 108(h) permits a library or archive to reproduce, distribute, display or perform, in facsimile or digital form, the entire work or portions of the work, for purposes of preservation, scholarship or research, as long as certain conditions are met. Section 108 contains highly specific conditions and criteria that must be met in order to properly utilize the exceptions contained therein. The exceptions in Section 108 were designed to complement rather than to supplant fair use, and Section 108(f)(4) clarifies that nothing in Section 108 "in any way affects the right of fair use as provided by section 107…" Libraries and archives may still avail themselves of fair use to the extent it is applicable. It is recommended that you consult your legal counsel when contemplating utilization of this exception. For further information see, U.S. Copyright Office Circular 21: Reproduction of Copyrighted Works by Educators and Librarians, at http://www.copyright.gov/circs/circ21.pdf.

A specially commissioned "Section 108 Study Group" released a report in 2008 on updating the exceptions and limitations related to the activities of libraries and archives. The Study Group was convened as an independent group by the National Digital Information Infrastructure and Preservation program of the Library of Congress and by the U.S. Copyright Office. The recommendations, conclusions, and other outcomes of the Study Group's Report were its own and did not reflect the opinions of the Library of Congress or the U.S. Copyright Office. Background materials and the Final Report of the Study Group are available at www.section108.gov.

4.2.3 Section 109 First Sale

The first sale doctrine, incorporated in 17 U.S.C. § 109, protects the right of an owner of a material object in which a work protected by copyright is embodied to resell or transfer the object itself; it permits the owner of a particular copy or phonorecord lawfully made under the Copyright Law to sell or otherwise dispose of possession of that copy or phonorecord without the authority of the copyright owner. The first sale doctrine embodied in section 109 (a) acts only as a limitation on the exclusive right of distribution in Section 106 (3). The Supreme Court has held that the first sale doctrine

applies to copies of a work protected by copyright that was lawfully made abroad. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351, 1355-56 (2013). However, it does not permit reproducing the material, publicly displaying or performing it, or otherwise engaging in any of the acts reserved for the copyright holder, because the transfer of the physical copy does not include transfer of the copyright rights to the work.

4.2.4 Section 110 Public Performance

Section 110 of the United States Copyright Act contains a number of limitations on exclusive rights with regard to certain performances and displays of works protected by copyright, including two exceptions that help serve educational needs.

Section 110(1) allows for the performance or display of copyright protected material by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, under specified conditions.

Section 110(2) (the "TEACH Act") permits certain uses of copyright protected works under specified conditions in distance education classes offered by governmental bodies or accredited nonprofit educational institutions.

4.2.5 Public Domain

Public Domain means works that are not protected by copyright. Generally, they may be used by anyone, in any jurisdiction when copyright protection no longer applies, anytime without permission, license or royalty payment.

A work may enter the public domain because the term of copyright protection has expired. A U.S. Government work is not protected by copyright law in the U.S., but it may still be protected in certain foreign countries.

Inclusion of a copyright-protected work in a Government work does not change the copyright status of the privately created work or place it in the public domain.

Government websites may include:
(a) a variety of copyright-protected and public domain materials with different terms and restrictions for use; the user is responsible for determining whether or not a work is in the public domain; some of these works may include embedded information (e.g., quotation, photograph, chart, drawing) that is protected by copyright but used under license or with

permission; the Government's license or permitted use of a copyright-protected work does not place it in the public domain;

(b) a copyright-protected work that is licensed to the Government by the owner of the copyright; because the copyright owner retains its exclusive rights under the copyright, the work is not in the public domain;

(c) links to copyright-protected information or licensed materials that are provided to the public in accordance with specific conditions of use

(d) access to software that is protected by copyright and/or patent; terms of use should be provided on the Government website; such access does not place the software in the public domain.

4.2.6 Orphan Works

"Orphan works" are works that may be protected by copyright, but whose owners cannot be located or identified by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. See http://www.copyright.gov/orphan/ for a report of the Copyright Office's ongoing review of this issue.

The prospective user must first make a preliminary determination as to whether a work is indeed protected by copyright or has passed into the public domain. The Copyright Office is reviewing the problem of orphan works under U.S. copyright law in continuation of its previous work on the subject and to advise Congress on possible next steps for the United States. The Office has requested comments and held public roundtables in 2014.

4.3 *Are there special rules governing works prepared under Government grants and cooperative agreements?*

For works developed and data produced under Federal awards such as grants and cooperative agreements, all federal agencies adhere to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ("Uniform Requirements") (2 C.F.R. Part 200, OMB Final Guidance issued at 78 Fed. Reg. 78590 (Dec. 26, 2013). The Uniform Requirements prohibit awarding agencies from imposing additional or inconsistent requirements relating to intangible property, except as provided by specific exceptions, or unless specifically required by Federal statute, regulation or Executive Order, or 2 C.F.R. §§ 200.100(a), 200.102 (Exceptions). The Uniform Requirements apply to Federal agencies that make Federal awards to non-Federal entities (2 C.F.R. § 200.101(a)), where a non-Federal entity is defined as a state, local government, Indian tribe, institution of higher education, or nonprofit organization that carries out a Federal award as a recipient or sub

recipient (2 C.F.R. § 200.69). Agencies making Federal awards to non-Federal entities must implement the Uniform Requirements in codified regulations unless different provisions are required by Federal statute or are approved by OMB. 2 C.F.R. § 106.

The intangible property provisions of the Uniform Requirements specify that the non-Federal entity (awardee) may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so. 2 C.F.R. § 200.315(b). In addition, the Federal Government has the right to obtain, reproduce, publish, or otherwise use data produced under a Federal award, and to authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes. 2 C.F.R. § 200.315(d).

Agencies may apply the Uniform Regulations to for-profit entities, foreign public entities, or foreign organizations, except were the Federal awarding agency determines that such application would be inconsistent with the international obligations of the United States or the statute or regulations of a foreign government. 2 C.F.R. § 200.101(c).

Certain types of agreements are governed by other authorities, rather than the Uniform Requirements (e.g., cooperative research and development agreements (CRADAs), technology investment agreements (TIAs), and "other transaction" (OT) agreements). Only the Federal awards governed by the Uniform Regulations (as defined in 2 C.F.R. § 200.38, e.g., grants and cooperative agreements) are addressed here.

On February 22, 2013, the Office of Science and Technology Policy (OSTP) issued a memorandum, "Increasing Access to the Results of Federally Funded Scientific Research," directing federal agencies with over 100 million in annual conduct of research and development expenditures to develop a plan to support increased public access to the results of research funded by the Federal Government. This includes any results published in peer-reviewed scholarly publications that are based on research that directly arises from federal funds, as defined in relevant OMB circulars (e.g., A-21 and A-11). See OSTP's memo for a detailed list of elements that each agency plan for both scientific publications and digital scientific data must contain.

Section 527 of the Consolidated Appropriations Act, 2014, directs the Departments of Labor, Health and Human Services, and Education to develop a Federal research public access policy that provides for free online public access to final peer-reviewed manuscripts or published versions of scholarly publications not later than 12 months after the official date of publication.

4.3.1 "Data" under Federal Grants Authorities

The term "data" is not defined in the Uniform Requirements. However, because a "work that is subject to copyright" and "data" are addressed in separate provisions providing nearly identical allocation of rights, the term "data" presumably is intended to encompass recorded factual information produced under an award that is not subject to copyright. *See* 2 C.F.R. § 200.315(b),(d).

Many agencies define "data" and/or "work" in their grants policy statements or guidance. For example, HHS and NIH Grants Policy Statements define "data" as "recorded information, regardless of the form or media on which it may be recorded, and includes writings, films, sound recordings, pictorial reproductions, drawings, designs or other graphic representations, procedural manuals, forms, diagrams, work flow charts, equipment descriptions, data files, data processing or computer programs (software), statistical records, and other research data." Similarly, the Grant General Conditions of the National Science Foundation (NSF) provide examples of copyrightable "subject writings" subject to the Uniform Requirements, including reports, books, journal articles, software, databases, sound recordings, videotapes, and videodiscs. Note that, under these agencies' policies, software is treated like any other data prepared under an award, in contrast to the FAR. Note, how the DFARS defines "data" as the definition might differ from the FAR.

4.3.2 Agencies' Policies on Copyright and Data Rights and Specific Award Conditions

In addition to agencies' grant regulations, agencies may apply other policies with Federal awards, so long as they are consistent with the Uniform Requirements or otherwise authorized. The terms of the particular Federal award specifies the respective rights of the parties. These terms may be found in the Funding Opportunity Announcement (FOA) or the Notice of Award (NoA) to successful applicants. The appropriate terms relating to intangible property (including copyright, data rights, and publication rights) for a particular Federal award should be discussed with the Grants Officer or your General Counsel.

*4.3.3 **Government-Wide Requirements for Reporting Research Progres**s* (This section will be revised at a later date)

The Uniform Requirements do not establish a Government-wide format for reporting progress on Federal awards that support research, which has led to inconsistency in progress reports among agencies. To address this shortcoming, the Research Business Models Subcommittee (of the Committee on Science, National Science and Technology Council, Office of Science and Technology Policy) developed a uniform reporting format called the Research Performance Progress Report (RPPR). The RPPR format is intended to replace other interim

performance reporting formats currently used by agencies. The RPPR is an implementation of 2 C.F.R. Part 215 (OMB Circular A-110), although it does not change existing performance reporting requirements specified in 2 C.F.R. Part 215. The National Science Foundation (NSF) posts the RPPR on its website, along with the implementation plans of various agencies. (http://www.nsf.gov/bfa/dias/policy/rppr/, which links to Final RPPR Format as approved by OMB/OSTP http://www.nsf.gov/bfa/dias/policy/rppr/format_ombostp.pdf). The RPPR contains an optional category suggesting that grantees may report publications and other research "products." [See section on agencies' access to grantees' data below.]

4.4 ***How does the U.S. Government use its nonexclusive rights to materials developed under federal awards?*** (This section will be revised at a later date)

The awarding agency may choose to use the materials for Federal purposes or authorize others to do so under its nonexclusive rights. However, the purpose of a grant or cooperative agreement is not to acquire property or services for the direct benefit or use of the U.S. Government; rather, the principal purpose of a grant is to transfer aid to the grantee to carry out a public purpose of support or stimulation authorized by a law of the United States. 31 U.S.C. § 6304. Under the Federal Grant and Cooperative Agreement Act (31 U.S.C. §§ 6301-6308), the awarding agency must use the appropriate agreement (e.g., contract, grant, or cooperative agreement) that fits the contemplated arrangement. If the awarding agency wishes to acquire specifically required materials (and their corresponding intellectual property rights) for the direct benefit or use of the U.S. Government, then a contract must be used, not a grant. 31 U.S.C. § 6303. For example, software or a brochure to fulfill a specific requirement must be procured through a contract; however, a grant or cooperative agreement can be used to obtain a research report with supporting data or software. The report usually summarizes the results of the research conducted under the terms of the grant or cooperative agreement.