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The Copyright Act Applies to the Federal Government

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Update on Sam Wright

9.0--Miscellaneous

Q: I am a Lieutenant (O-3) in the Navy Reserve and a member of the Reserve Officers Association (ROA). I serve as a Public Affairs Officer (PAO). The Navy Reserve unit of which I am a member produced a 20-minute video about recent Navy operations. We filmed some of the video ourselves, but most of the content came from national news networks and is probably protected by copyright.

I raised the question of whether we need to seek permission or pay royalties before we use copyrighted material. A more senior officer in the unit insisted that the Copyright Act does not apply to the Federal Government and that a federal agency can lawfully use any copyrighted material without seeking permission or paying royalties. Is that correct?

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers. I am currently fully engaged with a most important matter and not available, for a time, to answer questions. I expect to be available again by the end of the year or early in 2018.

Answer, bottom line up front:

No, that is not correct. The Copyright Act does apply to the Federal Government, and if a federal agency infringes on a copyright it can be required to pay damages to the copyright owner, through an action brought in the United States Court of Federal Claims. Some uses of copyrighted material are deemed to be a "fair use" and not to infringe on the rights of the copyright owner, but it is not correct to say that any use of copyrighted material by a federal agency is per se a fair use.

Explanation:

The United States Constitution empowers Congress to "promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3] Throughout our nation's history, we have had federal laws protecting inventions (through *patents*) and writings (through *copyrights*). The concept of writings has been expanded to include music, photographs, paintings, recordings, and other intellectual creations.

The idea is that if inventions and creations are not protected inventors and authors and other creators will have little incentive to put forth the enormous effort required to advance our understanding of and ability to utilize the forces of nature and human nature. Many readers will remember the 1984 movie *Amadeus.* Leopold Mozart advised his son, Wolfgang Amadeus Mozart, that he should concentrate his efforts on performing and teaching music, rather than composing it, because in that time there was little opportunity to make money composing, since once music was published it could be republished at will without paying royalties to the composer.

Federal law expressly provides for a copyright owner to bring an action and to recover damages whenever a federal agency infringes on rights protected by the Copyright Act:

> Hereafter, *whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement,* including the minimum statutory damages as set forth in section 504(c) of

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[3] United States Constitution, Article I, Section 8, Clause 8. Yes, it is capitalized just that way, in the style of the late 18th Century.

> title 17, United States Code: *Provided,* That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however,* That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further,* That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.
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> Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.[4]

This provision clearly contradicts any statement that the Federal Government is exempt from the Copyright Act or that any use of copyrighted material by a federal agency is per se a “fair use” and not an infringement.

I have found a 1999 memorandum by the Office of Legal Counsel of the United States Department of Justice that summarizes well the law on applying the Copyright Act to federal agencies, as follows:

> As we explain below, while government reproduction of copyrighted material would in many contexts be noninfringing because it would be a “fair use” under section 107 of the Copyright Act of 1976, 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. … To our knowledge, no agency of the executive branch has argued, or advised, that government copying is per se a fair use. …

[4] 28 U.S.C. 1498(b) (emphasis supplied).

> The federal government can be 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 U.S.C. 1498(b) … At the same time, it cannot be disputed that the federal government's copying (and other use) of copyrighted materials is subject to the fair use doctrine codified in 17 U.S.C. 107. It follows that any federal government photocopying that is a fair use is not infringing. However, there is no basis for concluding that the photocopying of copyrighted materials by the federal government automatically or invariably constitutes a fair use.[5]

Suing the United States in the Court of Federal Claims is the exclusive remedy for the copyright owner who claims that his or her copyright was infringed by a federal agency. Individual federal employees and service members cannot be sued for violating copyright and patent laws, but that is not to say that service members and employees should flout those laws. When we enlisted or were hired, we all took an oath to "support and defend the Constitution of the United States."[6] The Constitution empowers Congress to enact statutes, including the Copyright Act of 1976. It is our duty to respect and obey those statutes.

I strongly suggest that your unit should request permission of copyright owners to use copyrighted material. If permission cannot be obtained, copyrighted material should be deleted from the video before it is released or used.

Q: If we add statements or footnotes attributing the copyrighted materials to the copyright owners does that solve the problem?

A: No. Attributing materials to their sources solves the *plagiarism* problem but not the *copyright infringement* problem. The two concepts are not the same and should not be conflated.

For example, let us say that I write "the fault is not in our stars but in ourselves" and try to create the impression that this line is my original work. That constitutes plagiarism. I need to attribute these words to their source.[7] William Shakespeare is long dead, and his works are in the public domain. I do not need permission to use Shakespeare's words, but if I use them in a way that creates the impression that I am claiming credit for originating them I am guilty of plagiarism.

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[5] Memorandum for Andrew J. Pincus, General Counsel of the Department of Commerce, from Randolph D. Moss, Acting Assistant Attorney General for the Office of Legal Counsel, April 30, 1999, pages 1, 2, and 3.

[6] 5 U.S.C. 3331.

[7] William Shakespeare, *Julius Caesar,* Act I, Scene 3, Lines 140-41.