

THE USE OF COPYRIGHTED MATERIALS BY GOVERNMENT EMPLOYEES

The purpose of this paper is to provide general guidance on the application of the copyright laws to Government employees in the performance of their duties.

I. Summary of rules on copying for Government employees:

It is acceptable:

- for you (or for library or support personnel) to make a copy (either paper or electronic) of an article from a journal or newsletter for your own personal use in carrying out your duties

It is not acceptable:

- for you to copy entire issues of journals or newsletters
- for you to make many copies of a given article, which includes distributing one copy of an article electronically to many recipients, or
- for someone else to make copies for others, when the copying is a scheduled, systematic procedure, especially if done before the other employees have even requested a copy

If making the copies is necessary, but would result in copyright infringement, it may be possible to contact the copyright holder and secure his or her permission for the copying, without having to purchase a license. Alternatively, a license may be secured, if necessary.

II. Discussion

A. Scope of Paper

This document deals with permitted copying (reproduction) of both copyrighted and uncopyrighted works by DOE employees done in the course of performing their duties. It addresses both copying by traditional photocopying, and copying by electronic means.

A great variety of materials can be protected by copyright. A copyright notice (such as ©) is no longer required for copyright protection. Therefore, it would be wise to treat any work as if it were copyrighted in cases of doubt or until its status can be determined.

B. Circumstances where no copyright infringement occurs

The concept of fair use holds that certain instances of copying of a copyrighted work are not to be considered an infringement of copyright on the work copied. What constitutes fair use is described below in Section C. However, there are a variety of other circumstances that also could result in a finding of no infringement. Among these are:

- The work to be copied may be in the public domain, such that anyone can copy it. For example, the copyright may have expired.
- Works prepared by Government employees in the furtherance of their official duties are not copyrightable in the United States (17 U.S.C. 105), and are in the public domain. Therefore, copying these works is not infringing any copyright.
- Works made under Government contracts by employees of contractors are copyrightable. The contractor may have to secure the Government's permission to assert a copyright. In such instances, the Government usually receives a license to use these works. The scope of the license may vary. Therefore, before copying these works under other than fair use circumstances, one must first determine whether the contractor has been allowed to assert copyright or not. If the contractor has been allowed to assert copyright, the Government's license rights should be determined before copying the material. Usually, the Government license includes the right of the Government and those operating on its behalf to make copies and to make derivative works. The Government license may or may not include the right to publicly distribute the work.
- It is permissible to use the idea or the facts contained in a copyrighted work, because the copyright law does not protect ideas or facts. It only protects the author's particular expression of the idea or facts. However, as noted below (Section F), the ideas embodied in a computer program may be patentable. If the program has been patented, you may not use the ideas without a license.
- Instead of or in addition to the fair use defense, the copying may be permissible under one of the other exceptions to infringement in the copyright law, such as the exception for libraries and archives, and the exception for classroom use.
- If the work to be copied was not prepared by Government employees or under a Government contract, the Government may nevertheless have secured a license from the copyright holder which would permit the copying.
- If there would be infringement if copying takes place (i.e., the copying is not a fair use), it may be possible to contact the copyright holder and secure his permission for the copying, without having to purchase a license.

C. The concept of fair use

The concept of fair use provides that certain types of copying of a copyrighted work are not infringement. There is no simple formula for determining what constitutes a fair use. Some situations are easier to deal with than others. Nevertheless, we can provide specific guidance with regard to particular situations, as well as general guidance for other situations that may be encountered.

1. Factors

The copyright law requires that four enumerated factors must be considered in deciding whether or not a use is a fair use. They are:

- 1) the purpose and character of the use (Was it for noncommercial purposes? Was it mere copying, or did the user create a subsequent work which adds to the font of human knowledge?);
- 2) the nature of the copyrighted work (Fictional subject matter has broader protection than factual subject matter.);
- 3) The amount and substantiality of the portion taken (Was the entire work copied, or only a part?); and
- 4) the effect of the use upon the potential market for, or value of, the copyrighted work (Does the use seriously affect the market for the original, to the extent that people would be discouraged from creating similar original works in the future?).

Other factors in addition to these four factors may also be considered.

2. Additional considerations

As a general matter, making a single copy, by machine or by electronic means, of an entire article from a journal or newsletter for the personal reference file of a Government employee acting within the scope of his or her duties would come within “fair use”, and is permitted. The making of many copies of the article for multiple recipients would not be considered fair use.

The copying of **entire issues** of publications such as scientific journals and newsletters is not permitted, particularly the making of multiple copies of journals. The preparation of numerous copies of a single article is also not permitted, particularly if the copying is done in an organized, routine manner.

Additionally, listed below are some general guidelines to keep in mind for copying situations other than those described in the section, above:

- The scope of the fair use exception is more extensive with technical/scientific material than for fictional material, and more extensive for not-for-profit institutions, including Government, than with for-profit institutions.
- The scope of the fair use exception is narrower for unpublished works than for published works.
- The making of photocopies should be kept at an individual level, rather than at an institutional level. For example, rather than making copies of an article for a number of people, give them only the citation or the internet address, so that they can locate the article and make their own independent decision regarding copying. Do not send an electronic copy of a copyrighted article to a long list of people. Instead, tell them where they can secure a copy.
- Whenever possible, copy only pertinent portions of a work, rather than the entire work. For example, copying an abstract or summary of a work, rather than the entire work, would usually be considered a fair use.
- Copying that gives rise to a new work that builds on the preexisting work is more likely to be considered a fair use than copying which merely produces another copy of the preexisting work.
- Copying done for the purpose of criticism, comment, news reporting, teaching, scholarship, or research is more likely to be considered a fair use.
- In general, the more of the original that is copied, the more likely the copying would not amount to fair use, although 100% copying is permissible in some cases.
- If the proposed copying would adversely affect the market for the copied work to a significant degree, this would ordinarily weigh in favor of a finding of infringement.

D. Electronic copying

In general, the copyright law, including the fair use defense and the other non-fair use considerations discussed above, applies equally to electronic copying as it does to standard photocopying.

Downloading copyrighted material onto an office personal computer amounts to making a copy, even if a paper copy is never made.

If an electronic copy is sent to another person, another electronic copy is made, even if it is never called up to the receiving machine's computer screen.

A distribution (discussed below) also takes place when a copy is sent to someone else electronically.

E. Copyright law remedies applicable to the Government

Copyright infringement can result in significant penalties to the Government. When a Government employee infringes a copyright in the course of carrying out his or her duties as a Government employee, the copyright holder can bring an action against the Government for damages. The measure of damages would be reasonable and entire compensation, or, if the copyright holder so chooses, statutory damages which range from \$750 to \$30,000 (\$150,000 for wilful infringement) for all infringements involved in the action, as determined by the jury. The copyright holder cannot get an injunction to prevent future infringement.

F. What is not covered in this paper

This paper does not deal with photocopying by Government employees done for non-Government purposes. Such unauthorized copying may amount to infringement, and may be a violation of one's employment agreement and applicable Federal law.

This paper does not deal with materials protected by other forms of intellectual property law, such as patents, trade secrets, and trademarks. Some materials can be protected by more than one form of intellectual property. For example, computer software may be copyrighted, and it can also be patented.

In covering the right to make copies, this paper has not discussed in detail the other rights of the copyright holder (the distribution right, the right to prepare derivative works, the right to perform publicly, and the right to display publicly). For example, when a scientific article is translated into another language, such as from German into English, a derivative work has been prepared, and it would constitute infringement, unless fair use or some other factor applies.

This paper deals only with actions of Government employees, including the employees of Government-owned Government-operated (GOGO) laboratories. Much of the analysis would also generally apply to Government-owned Contractor-operated (GOCO) laboratories which have as a substantial purpose the performance of research and development to the government.