

## Copyright Issues at the Unit Level: Seeing Through the Fog of Law

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*The Congress shall have Power . . . 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 . . .*<sup>1</sup>

### Introduction

Copyright law is as old as the Constitution. Often viewed as a specialized area of the law addressed only at the highest levels of military command and technical authority, in reality copyright concerns arise in many common situations. For example, copyright issues exist when planning a training session or briefing, while planning command events or ceremonies, when using software, or even when designing and selling unit t-shirts and similar items. Despite the frequency of copyright concerns, to many judge advocates it remains an unfamiliar area of law, where solutions often seem elusive. This article proposes that with the appropriate tactics, techniques, and procedures, copyright law questions can be resolved using a clear, step-by-step approach. Armed with the essential principles of copyright law, judge advocates have the means to directly apply these principles to the most common copyright issues arising at the unit level.

First, this article gives an overview of copyright law, to include the definition of key terms, an explanation of how copyright is created, the effect of a copyright interest, and what exclusive rights vest in copyright holders. Next, using current Army policy, the analysis shifts to a detailed discussion of the fair use doctrine and the exceptions to copyright holders' exclusive rights. Finally, this article discusses hypothetical scenarios of copyrighted materials in military briefings, training sessions, official ceremonies, and unit operations as a means to identify and resolve the most common copyright issues judge advocates face in practice.

### Copyright Law: The Constitution, the Code, the Cases, and the Exceptions

#### Copyright Basics

Copyright is grounded in the enumerated powers of Congress under Article I, Sec. 8, of the Constitution, and governed by the statutory provisions of the Copyright Act of 1976, 17 U.S.C. sections 101 through 1332.<sup>2</sup> Copyright law

governs the ownership and use of original works of authorship, such as writings, works of literature, and even computer software, as well as music and works of art.<sup>3</sup> Copyright protects only a creator's particular *expression* of ideas; it does not apply to the ideas themselves.<sup>4</sup> Many creators can copyright their own original works based on the same idea or subject, provided their work is independent of other works.<sup>5</sup> Copyright protection arises immediately upon creation of the work, i.e., fixation in a tangible medium, and exists whether or not the work is marked with a copyright notice ("©") or registered with the Copyright Office.<sup>6</sup> Copyright infringement can result in criminal prosecution as well as civil penalties (damages); however, registration with the Copyright Office is required prior to filing any lawsuit for infringement.<sup>7</sup>

Protection under the Copyright Act applies to all sufficiently original works of authorship except those in the "public domain." In terms of copyright law, the public domain is the body of works that are not protected by copyright and are freely available for use without restriction.<sup>8</sup> Works whose copyright has expired, works placed in the public domain by creators who otherwise could assert copyright protection, and works that under the law do not qualify for copyright (including most U.S. Government

<sup>2</sup> See *id.*; see also Copyright Act, 17 U.S.C. §§ 101–1332 (2006).

<sup>3</sup> See 17 U.S.C. §§ 101–1332. Complete or absolute originality is not required to have protection under the Copyright Act; a work can have non-original elements, but must be sufficiently original to constitute a unique expression of an author.

<sup>4</sup> See, e.g., *id.* § 102(b); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); ROBERT A. GORMAN, FED. JUDICIAL CTR., COPYRIGHT LAW 6 (2d ed. 2006).

<sup>5</sup> See, e.g., 17 U.S.C. § 102(b); see also *Eldred*, 537 U.S. at 219; GORMAN, *supra* note 4, at 6.

<sup>6</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. at 539, 546–47 (1985); see also 17 U.S.C. §§ 401, 408. Accordingly, one should always assume a work has copyright protection whether or not marked, and should always seek permission from the copyright holder or identify an exception under the law that would allow the use intended. See U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY para. 4-1 (1 July 1993) [hereinafter AR 27-60]; see also U.S. DEP'T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 2-5(d) (27 Mar 2006) [hereinafter AR 25-30].

<sup>7</sup> See 17 U.S.C. §§ 411–412, 501–513 (2006); see also 18 U.S.C. § 2319 (2006) (criminal infringement of copyright).

<sup>8</sup> 17 U.S.C.A. 101 note (2006) (citing Pub. L. No. 100-568 § 12, 102 Stat. 2853 (1988)).

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8 (Copyrights and Patents Clause).

works) make up the public domain.<sup>9</sup> A “U.S. Government work” is a work created by an officer or employee of the United States Government as part of that person’s official duties, and is not itself entitled to copyright protection.<sup>10</sup>

Another key principle of copyright is that mere ownership of a work or lawful copy of a work does not give that owner the copyright to that work. The copyright is separate from the physical item, and unless specifically transferred, remains with the creator of the work or any lawful copyright holder to whom the creator transferred the copyright. The purchase of a book, software disc, or other copyrighted work does not, in and of itself, give the purchaser the right to reproduce, distribute, or exercise any other exclusive right reserved to the copyright holder.<sup>11</sup>

### *Copyright vis-à-vis Other Intellectual Property*

Copyright is one of the four primary areas of intellectual property law, along with trademark, trade secret, and patent law.<sup>12</sup> While collectively referred to as intellectual property (as opposed to personal or real property), these areas are very different, and a different body of law governs each.<sup>13</sup> However, the distinction of copyright from other intellectual property is not always clear.<sup>14</sup>

As copyright can apply to visual images as well as the written word, it is often confused with trademark. Trademark is the law that governs images, visual designs, and particular words associated with particular products, services, or entities, usually in the context of a company or brand name, logo, slogan, or catch phrase.<sup>15</sup> Trademark is

fundamentally different from copyright law.<sup>16</sup> The crux of trademark protection is to avoid consumer confusion in the marketplace, i.e., buyers mistaking one vendor’s goods for that of another.<sup>17</sup>

Copyright can also be confused with trade secret. Certain expressions of business information can have a copyright if sufficiently original, and could also meet the requirements for trade secret.<sup>18</sup> However, copyright remains distinct in that it does not protect facts, only expressions.<sup>19</sup> Trade secret protection focuses on the information itself, not any particular expression of that information.

In addition to trade secret, copyright could exist in situations involving patent. In contrast to copyright, patent addresses the protection of inventions, both tangible goods and less tangible processes.<sup>20</sup> Copyright will protect a book about a new invention, and the language in it, from being copied without permission (or under one of the statutory exceptions discussed *infra*), but it will not protect the information about the invention itself.<sup>21</sup> In fact, anyone reading the book could take the information and build the invention without violating copyright.<sup>22</sup> Patent is the law that would protect the invention itself.<sup>23</sup>

### **Exclusive Rights of Copyright Holders**

For protection of copyright, the Copyright Act provides the holder of a copyright with certain exclusive rights, including, *inter alia*, the right to reproduce the work, to distribute the work, and to publicly display or perform the work.<sup>24</sup> As with other property, a copyright holder may

<sup>9</sup> 17 U.S.C. §§ 101, 105–06. Determining the expiration date for a specific copyright can be complex; however, most works created prior to 1923 are considered to be in the public domain. *See id.* § 301–305; *see also* U.S. COPYRIGHT OFFICE, CIR. 15A, DURATION OF COPYRIGHT (2004) [hereinafter COPYRIGHT CIR. 15A], available at <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>10</sup> 17 U.S.C. §§ 101, 105 (2006); *see also* AR 27-60, *supra* note 6, para. 4-3. Note, however, that the U.S. Government can hold copyrights that it acquires by several means, primarily transfer, purchase, or contract, and those copyrights (including licenses), should be addressed along the lines of the discussion *infra*. *See* 17 U.S.C. § 105 (2006).

<sup>11</sup> 17 U.S.C. § 202. Section 109 of the Copyright Act contains what is known as the “first sale doctrine,” by which ownership of a physical copy of a copyright-protected work permits lending, reselling, disposing, etc., of that particular copy. *Id.* § 109. The first sale doctrine does not, however, allow reproducing the work or material, publicly displaying or performing it, or otherwise engaging in any of the exclusive rights reserved to the copyright holder under Section 106, and even the allowed activities may, in a given case, be limited by a license term. *Id.* §§ 106, 109, 202.

<sup>12</sup> *See, e.g.*, GORMAN, *supra* note 4, at 5.

<sup>13</sup> *See* 17 U.S.C. §§ 101–1332 (2006) (copyright); 15 U.S.C. §§ 1051–1141 (2006) (trademark); 35 U.S.C. §§ 1–376 (2006) (patent).

<sup>14</sup> *See, e.g.*, GORMAN, *supra* note 4, at 186–92.

<sup>15</sup> *See* 15 U.S.C. § 1125(a) (2006).

<sup>16</sup> *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 439 n.19 (1984).

<sup>17</sup> *See* 15 U.S.C. § 1125(a) (2006).

<sup>18</sup> *See* GORMAN, *supra* note 4, at 186, 192. To be a trade secret, information must not be generally known or readily ascertainable by the public, the trade secret holder must reasonably protect the information, and the information must have independent economic value from not being generally known to or readily ascertainable by the public. 18 U.S.C. § 1839 (2006).

<sup>19</sup> *See* GORMAN, *supra* note 4, at 186, 192.

<sup>20</sup> 35 U.S.C. § 101 (2006).

<sup>21</sup> 17 U.S.C. § 102(b) (2006)

<sup>22</sup> *See id.*; *see also* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); GORMAN, *supra* note 4, at 6; *see also* Copyright Basics, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/dcom/olia/copyright/basics.htm>.

<sup>23</sup> 35 U.S.C. § 101 (2006); *see also* GORMAN, *supra* note 3, at 6.

<sup>24</sup> 17 U.S.C. § 106 (2006). The duration of these exclusive rights varies under U.S. law, and determining the exact expiration of a given work’s copyright can be complex. *See id.* §§ 301–305; *see also* COPYRIGHT CIR. 15A, *supra* note 9, at 2.

transfer all of these rights or any particular right or rights.<sup>25</sup> The entire copyright may be transferred, by sale, by operation of law, or by bequest.<sup>26</sup> In the same manner, a copyright holder may retain ownership of the copyright itself, but convey a full license that grants rights equivalent to a full copyright, or a limited license granting lesser rights, usually tailored to a specific requirement of the copyright holder or the end user.<sup>27</sup> Absent any transfer or grant of license, in light of the exclusive nature of these rights, any use of a work that conflicts with those exclusive rights (i.e., reproduction, distribution, display, etc.), not authorized by the copyright holder, or not falling within an exception to the exclusive rights of a copyright holder, is illegal and constitutes copyright infringement.<sup>28</sup>

### Exclusions and Exceptions to the Exclusive Rights of Copyright

Several statutory exceptions to (or limitations on, as phrased in the statute) the exclusive rights of the copyright holder provide a legal means to use copyrighted materials without the copyright holder's consent. "[T]he definition of exclusive rights in § 106 of the Act is prefaced by the words 'subject to sections 107 through 122.' Those sections describe a variety of uses of copyrighted material that 'are not infringements of copyright notwithstanding the provisions of § 106.'<sup>29</sup> The statute contains several exceptions, including academic classroom use under the Technology, Education, and Copyright Harmonization (TEACH) Act.<sup>30</sup> Note that the TEACH Act has strict requirements, namely that the use be in a face-to-face setting during classroom instruction at an accredited educational institution.<sup>31</sup> Also included in the limitations on a copyright holder's exclusive rights is the doctrine of "Fair Use."<sup>32</sup>

<sup>25</sup> See 17 U.S.C. §§ 201–205 (2006).

<sup>26</sup> *Id.* § 201(d).

<sup>27</sup> See *id.* §§ 201–205.

<sup>28</sup> See *id.* §§ 501, held invalid as applied to states, Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents, 633 F.3d 1297, 1315 (11th Cir. 2011); see also *Harper & Row Publishers v. Nations Enters.*, 471 U.S. 539, 546–47 (1985). "An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute." *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 447 (1984) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154–55 (1975)).

<sup>29</sup> *Sony*, 464 U.S. at 447.

<sup>30</sup> See 17 U.S.C. § 110.

<sup>31</sup> *Id.* Accordingly, the standard Army training environment will not be covered under the Act, and any use of copyrighted materials must be either with permission of the copyright holder or under an exception for use without permission. AR 27-60, *supra* note 6, para. 4-1.

<sup>32</sup> 17 U.S.C. § 107 (2006); see also *Harper & Row*, 471 U.S. at 549.

### The Doctrine of Fair Use

Fair use is one of the primary exceptions for use of copyrighted materials without permission. Section 107 of the Copyright Act codified the common-law fair use doctrine "traditionally defined as 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'"<sup>33</sup> Although found in the statute as a limitation on the exclusive rights under copyright, fair use in practice is an affirmative defense, to be proven by one accused of copyright infringement.<sup>34</sup> In short, when the copyright holder and the one who uses the copyrighted materials disagree, fair use is a matter for the courts to decide.<sup>35</sup>

In deciding whether a given use is fair use under the law, the distinction between fair use and infringement is often unclear.<sup>36</sup> Neither the statute nor the relevant case law give a specific number of words, lines, or notes that can safely be taken without permission.<sup>37</sup> With no specific guidelines, determining fair use is a mixed question of law and fact, and requires a case-by-case analysis with consideration of the four nonexclusive statutory factors.<sup>38</sup> These four factors are: (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.<sup>39</sup> "These factors are not necessarily the

<sup>33</sup> *Harper & Row*, 471 U.S. at 549 (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

<sup>34</sup> *Id.* at 561; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>35</sup> Note that in light of the often unclear distinction between fair use and infringement, per AR 27-60, all use of copyrighted materials without the permission of the copyright holder within the Army must be approved by OTJAG IP. See AR 27-60, *supra* note 6, para. 4-1.

<sup>36</sup> See, e.g., *Harper & Row*, 471 U.S. at 569 (Supreme Court disagreed with Second Circuit, which disagreed with trial court, as to whether a given use was "fair use"); *Campbell*, 510 U.S. at 572 (Supreme Court disagreed with Sixth Circuit, which disagreed with trial court, about limits of "fair use"); *Salinger v. Random House*, 811 F.2d 90, 99-100 (2d Cir. 1987) (Second Circuit disagreed with trial court on limits of fair use).

<sup>37</sup> See 17 U.S.C. § 107 (2006) (listing "amount . . . of the portion used" as a factor to be considered without more specific guidelines); *Harper & Row*, 471 U.S. at 560 ("[S]ince the doctrine [of fair use] 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." House Report, at 65, U.S. Code Cong. & Admin. News 1976, p. 5678.").

<sup>38</sup> *Harper & Row*, 471 U.S. at 549 (In drafting the exception under Section 107 of the Copyright Act, "Congress 'eschewed a rigid, bright-line approach to fair use . . . A court is to apply an 'equitable rule of reason' analysis, guided by [the] four statutorily prescribed factors[.]'" (citing *Sony Corp. of Am. V. Universal City Studios*, 464 U.S. 417 (1984)).

<sup>39</sup> 17 U.S.C. § 107 (2006).

exclusive determinants of the fair use inquiry and do not mechanistically resolve fair use issues; ‘no generally applicable definition is possible, and each case raising the question must be decided on its own facts.’<sup>40</sup> Notably, even if a work is unpublished, copyright still exists.<sup>41</sup> However, fair use may still prove viable for unpublished works, if a determination is made considering all the above factors.<sup>42</sup>

Discussing the four factors, the Supreme Court noted that as to the purpose of the use, the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>43</sup> In other words, non-profit use is not automatically allowed.<sup>44</sup> As to the second factor, the nature of the copyrighted work, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”<sup>45</sup> With respect to the third factor, the Court examined “the amount and substantiality [i.e., the quantity and quality] of the portion used in relation to the copyrighted work as a whole.”<sup>46</sup> Quoting Judge Learned Hand, the Court noted that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>47</sup> “Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”<sup>48</sup> The final factor, effect on the market, focuses on “the effect of the use upon the potential market for or value of the

copyrighted work.”<sup>49</sup> Per the Court, this factor “is undoubtedly the single most important element of fair use.”<sup>50</sup> “Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”<sup>51</sup> In other words, the law does not forbid all impairment, only material impairment. However, impairment does not have to be actual; potential impairment can suffice.<sup>52</sup> While each case must be judged on its own facts, the courts have used these four factors to find fair use in a number of circumstances.

Circumstances where fair use excused infringement vary widely. In *Wright v. Warner Books*, a biographer quoted from unpublished letters and journal entries of the subject of the book.<sup>53</sup> The case hinged on the third factor, amount and substantiality, or quantitative and qualitative nature of the portion used. The court noted that overall, less than one percent of the subject’s unpublished materials were quoted, and for informational purposes only.<sup>54</sup> In *Bill Graham Archives v. Dorling Kindersley, Ltd.*, reprinting music concert posters in a book for sale commercially was fair use.<sup>55</sup> The court noted the posters were in a much smaller format, and were only used to illustrate a timeline of an artist’s career history.<sup>56</sup> Another instance of fair use, and a rare example that allowed copying of an entire work, was the home videotaping case of *Sony v. Universal Studios*. In the *Sony* case, the Court found that home taping of entire television shows was fair use, in that most viewers were only taping in order to watch the shows later (“time-shifting” in the words of the Court), and not collecting for permanent use.<sup>57</sup> Significantly, the Court found that taping to view later did not deprive the copyright holders of any revenue.<sup>58</sup> The Court has also found other commercial uses to be fair use, notably parody.<sup>59</sup>

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<sup>40</sup> *Harper & Row*, 471 U.S. at 560 (1985) (citing H.R. REP. NO. 94-1476, at 65 (1976)).

<sup>41</sup> *Id.* at 549; *Salinger*, 811 F.2d at 94.

<sup>42</sup> 17 U.S.C. § 107 (2006); see also *Bond v. Blum*, 317 F.3d 385, 394–97 (4th Cir. 2003); *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1525–26 (D. Colo. 1995). While fair use applies to unpublished works, one should note that “the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work . . . the author’s right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.” *Harper & Row*, 471 U.S. at 564.

<sup>43</sup> *Harper & Row*, 471 U.S. at 561.

<sup>44</sup> Further, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

<sup>45</sup> *Harper & Row*, 471 U.S. at 563.

<sup>46</sup> *Id.* at 564.

<sup>47</sup> *Id.* at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)).

<sup>48</sup> *Id.* at 566.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 566–67.

<sup>52</sup> *Id.* at 568. “[O]ne need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” *Id.* (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 (1984) (emphasis in original)).

<sup>53</sup> See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 734–35 (2d Cir. 1991).

<sup>54</sup> *Id.* at 738–39.

<sup>55</sup> 448 F.3d 605, 606-07 (2d Cir. 2006).

<sup>56</sup> *Id.* at 611.

<sup>57</sup> *Sony Corp. of Am.*, 464 U.S. at 421.

<sup>58</sup> *Id.* at 446 n.28, 456.

<sup>59</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

Parody of an original work (using the author's work to make fun of the author's work, at least in part), may qualify as fair use regardless of whether it is published or performed for profit.<sup>60</sup> Parody is evaluated under the four-factor analysis, with emphasis on the first factor (purpose and character of use). Using portions of a classic rock and roll song for humorous effect in a rap song, mocking the original, can be acceptable parody and allowable under fair use.<sup>61</sup> Taking familiar or famous photographs or works of art that are protected by copyright and superimposing different heads or other features for humorous effect can also be acceptable parody under the fair use doctrine.<sup>62</sup> In *Leibovitz v. Paramount Pictures*, a movie company used a photograph of a naked pregnant woman with the head of actor Leslie Nielsen superimposed on the image, in a spoof of a popular *Vanity Fair* magazine cover that had featured actress Demi Moore, pregnant, nude, and in the same pose.<sup>63</sup> The court held that the use was in fact parody under the fair use doctrine, as it targeted the original Moore photograph for humorous effect.<sup>64</sup> However, in *Steinberg v. Columbia Pictures*, the court ruled that a promotional poster for the movie *Moscow on the Hudson* that used the same visual imagery as a famous *New Yorker* magazine cover did not qualify as a parody under fair use. In that case, the magazine cover humorously purported to show the world from the perspective of an average New York resident, i.e., where New York was the center of the known world, and the movie poster did essentially the same.<sup>65</sup> The court pointed out that the movie poster did not parody the magazine cover itself, not even in part. Per the court, the poster only used a slightly modified version of the magazine cover's own parody of New York residents' world view for its own purposes, i.e., promotion of the movie.<sup>66</sup> In short, just copying a parody is not a parody.

While the above demonstrates that findings of fair use are varied, findings of "not fair use" (infringement) are equally diverse. Courts have used the four factor analysis to find a given use as not fair use (i.e., "unfair") in many circumstances. A significant case finding not fair use is the software copying case of *Wall Data v. Los Angeles County Sheriff's Department*. In that case, the Los Angeles County Sheriff's Department installed a certain software program on approximately 6000 computers, but had purchased only 3600 licenses. The Department had configured the network

<sup>60</sup> *Id.* at 584.

<sup>61</sup> *Id.* at 592–94.

<sup>62</sup> See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114–17 (2d Cir. 1998).

<sup>63</sup> *Id.* at 111–12.

<sup>64</sup> *Id.* at 114–17.

<sup>65</sup> *Id.* at 709–10.

<sup>66</sup> *Id.* at 714–15.

so that only the licensed number of computers could access the software at any one time.<sup>67</sup> However, the court found that the verbatim copying of the entire software program was essentially commercial in nature, could have seriously impacted the market for the software, and thus was not fair use.<sup>68</sup> Another not-fair-use case involved downloaded music. In *BMG Music v. Gonzalez*, the copyright holder to 30 songs sued an individual who claimed the downloading was fair use for sampling, to help her decide if she wanted to purchase those songs. The court found that numerous sites allow a "try before you buy" listen, so the sampling defense was without merit and the downloading was not fair use.<sup>69</sup> *Ringgold v. Black Entertainment Television* involved infringement of a work of art entitled "Church Picnic Story Quilt" that appeared in the background of a television broadcast for approximately twenty-seven seconds.<sup>70</sup> The court found the use was not *de minimis* as claimed by the defendant,<sup>71</sup> and overturned a grant of summary judgment by the trial court, sending the case back for trial.<sup>72</sup>

In sum, copyright law is an area of subtle distinctions and careful factual analysis, requiring educated judgment. As the above discussion shows, the exclusive rights under the Copyright Act are substantial and often vigorously enforced. However, in practice, gaining permission from a copyright holder for an Army unit's use of copyrighted materials may not be as daunting as it appears. Further, for those circumstances where permission is not available, the doctrine of fair use may provide a useful tool in resolving common situations a unit Judge Advocate (JA) encounters.

### Use of Copyrighted Materials: Army Policy and Regulation

With the above legal landscape surrounding the use of copyrighted materials, a JA must also follow Army policy when addressing situations regarding copyrighted materials. Current Army policy, as expressed in AR 27-60 and related publications, states:

<sup>67</sup> *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 774–75 (9th Cir. 2006).

<sup>68</sup> *Id.* at 779–82.

<sup>69</sup> *BMG Music v. Gonzalez*, 430 F.3d 888, 890–91 (7th Cir. 2005). The Supreme Court addressed downloading copyrighted music without permission as unfair use in *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>70</sup> See *Ringgold v. Black Entm't Television*, 126 F.3d 70, 72 (2d Cir. 1997).

<sup>71</sup> The doctrine of *de minimis* use is separate from fair use analysis, as the court recognized. *De minimis* use is a use that is trivial, and as such does not trigger relief—for example, private display of a photocopied *New Yorker* cartoon taped to a refrigerator. *Ringgold*, 126 F.3d at 74–75.

<sup>72</sup> *Id.* at 77–81.

It is DA policy to recognize the rights of copyright holders consistent with the Army's unique mission and worldwide commitments. As a general rule, copyrighted works will not be reproduced, distributed, or performed without the permission of the copyright holder unless such use is within an exception under United States Copyright Law, 17 USC, or such use is required to meet an immediate, mission-essential need for which noninfringing alternatives are either unavailable or unsatisfactory. Use of a copyrighted work by the Army without permission of the owner must be approved by the [Intellectual Property Counsel of the Army, Office of Regulatory Law and Intellectual Property, U.S. Army Legal Services Agency, Office of The Judge Advocate General].<sup>73</sup>

Army policy thus gives the highest priority to obtaining permission from all copyright holders, and the only allowable alternative is to request a determination from the Office of Regulatory Law and Intellectual Property as to any non-permissive use. The above policy applies equally to any foreign works protected by copyright.<sup>74</sup> The following discussion will focus on when that permission or determination is needed, using several situations common to unit JA practice. The discussion will also highlight practical guidance on getting that permission or determination.

### **Permission: When Needed, From Whom, and How to Find Them**

At the outset, practice proves that getting permission, at no cost, to use copyrighted materials for many U.S. Army purposes can be surprisingly easy.<sup>75</sup> However, that permission must be granted by the proper copyright holder (i.e., a copyright owner with authority), as discussed in detail below. Critical to getting permission is determining when it is needed, whom it must be obtained from, and how to find the proper copyright holder.

Prior to beginning work on obtaining permissions, licenses, or identifying exceptions to the requirements for such, a breakdown of all materials to be used and a list or table of all the potential copyright interests of each should be

made. This document should be updated regularly, ideally with each copyright interest noted when permission or license is obtained, or justification under an exception is made. The legal authority for any identified exception should be given, as well as any internal approvals and concurrences needed. Depending on the circumstances, one or more legal memoranda may be needed for the file or for any required approval process.

With the copyright interests identified, the very first inquiry when seeking to use copyrighted materials is to determine whether the Government, the Army, or the command already has the permission or a license to use the material sought in the manner it will be used in. This inquiry may be easier said than done, as there may be scant or no records of any permission, and determining where to find those records may be challenging. The technical legal chain, up to and including, if necessary, the Office of Regulatory Law and Intellectual Property, as well as the command Public Affairs Office (PAO), are likely sources to begin the search. If records are found, the critical determination is to identify if the Government holds a full copyright interest, a full license, some form of limited license, or simple written permission which, depending on the terms, may equate to a full or limited license.<sup>76</sup> Once that determination is made, the limits of what is permitted use for the specific work should be noted. Lastly, per Army regulation, leaders should ensure that all use of the work complies with the terms of any license or permission, and does not exceed them.<sup>77</sup> For instance, permission to use parts of a published work in written instructional materials does not necessarily mean permission to distribute electronically or post on an intranet or internet website.<sup>78</sup>

All JAs should make it a personal habit to ask if any information is available about the permitted uses of a given material, and to ensure the proposed use complies with the those terms. Further, JAs should ensure that the requirement to learn the limits on use is included in any unit policies or standard operating procedures that implicate the use of copyrighted materials, such as training, contact with media, and related subjects. The nature and specifics of this search will of course vary depending on the exact materials being used, whether pulled from the internet, taken from an audio recording, excerpted from a video, quoted from a publication, or otherwise used.

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<sup>73</sup> AR 27-60, *supra* note 6, para. 4-1; *see also* AR 25-30, *supra* note 6, para. 2-5(d).

<sup>74</sup> *See* U.S. DEP'T OF ARMY, PAM. 25-40, ARMY PUBLISHING: ACTION OFFICERS GUIDE para. 2-37(g) (7 Nov. 2006) [hereinafter DA PAM. 25-40].

<sup>75</sup> *See* AR 27-60, *supra* note 6, para. 4-2(a); *see also* DA PAM. 25-40, *supra* note 74, para. 2-40.

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<sup>76</sup> *See* AR 27-60, *supra* note 6, para. 4-2(a); *see also* DA PAM. 25-40, *supra* note 74, paras. 2-37, 2-40.

<sup>77</sup> AR 27-60, *supra* note 6, para. 4-2(a).

<sup>78</sup> *See* DA PAM. 25-40, *supra* note 74, para. 2-37a ("Copyright releases received for a printed book do not necessarily translate to an electronic dissemination authorization.").

## General Research and Seeking Permission

Often, there will not be existing permission or license to use the specific material in the way desired, and the copyright holder(s) will have to be contacted for permission or license.<sup>79</sup> There are various ways of searching for licenses and permissions. Usually the first place to search is the copyright registry of the U.S. Copyright Office.<sup>80</sup> The Copyright Office maintains the only legally binding copyright registry, and offers a thorough website with numerous copyright resources, including a copyright records search engine. However, for many works registered prior to 1978, only an in-person search of the registry will be productive.<sup>81</sup> Also note that under the law, registration is not required for copyright to be effective, so many copyright interests may not be recorded within the registry. Thus, one cannot conduct one simple search of that database and be assured that the materials desired can be freely used. If the material sought does not appear in the Copyright Office database, or the copyright holder or other important information is unclear from the record, other available resources should be examined.

While the Copyright Office registry may provide information about the copyright holder, possibly even a point of contact for a given work, there are other services, often referred to as clearinghouses, that offer not only that information, but also direct permission and licensing of specific materials. With the advent of the internet, the practice of complying with permitted uses, and obtaining permissions and licenses, has dramatically simplified and different practices yield good results for different types of work. Some best practices for internet materials, music, printed materials, and movie and video clips follow.

### Internet Materials

When using materials from the internet, it must become habit to click on the “terms of use” or similar link, usually found in a very small font at the bottom of a web page, or in some other obscure location. Exploring the terms of use pages from various sites will yield a quick education in how materials that are “free to use” are anything but free when the issue is copying to distribute to others, to present in public, or often to use for anything but personal viewing on the website. In other words, “free” is not necessarily free. Many common sites such as MapQuest® and Google maps®, allow copying or printing out results for personal

<sup>79</sup> See *id.* para. 4-1.

<sup>80</sup> Search Copyright Information, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/records>.

<sup>81</sup> U.S. COPYRIGHT OFFICE, CIR. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 2, available at <http://www.copyright.gov/circs/circ22.pdf> (last visited Oct. 5, 2011).

use, but place strict limits on any other use.<sup>82</sup> Terms and conditions vary from site to site and may change over time; thus, each site from which materials are used must be checked each time to guard against improper use and possible infringement. One must also use caution because material found on a website may not be lawfully present there; i.e., the website itself could be infringing on the copyright holder’s rights, and any use stemming from that use could also be infringing.<sup>83</sup>

### Music and Recorded Audio

When using music or recorded audio, one must note that there are often two copyright interests at stake: that of the creator, who holds the publishing rights (e.g., sheet music) and that of the company that released the recording, who holds the recording rights (i.e., the rights in the actual recording made by the artist).<sup>84</sup> Permission should be obtained from each if possible, or some other exception to the copyright holders’ exclusive rights must apply. One must also note that the original artist or composer will, in many cases, not be the copyright holder. Noted examples include the late Michael Jackson’s ownership of many of the publishing rights in the Beatles song catalog.<sup>85</sup> For compact

<sup>82</sup> See, e.g., *Terms of Use*, MAPQUEST.COM, <http://www.mapquest.com/http://www.mapquest.com/terms-of-use> (last visited Sept. 28, 2011); *Google Maps/Earth Terms of Service*, MAPS.GOOGLE.COM, [http://maps.google.com/help/terms\\_maps.html](http://maps.google.com/help/terms_maps.html) (last visited Sept. 28, 2011); *Google Permissions*, GOOGLE.COM, <http://www.google.com/permissions.geoguidelines.html> (last visited Sept. 28, 2011).

<sup>83</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, v. Grokster, Ltd.*, 545 U.S. 913, 931-37 (2005) (discussing “derivative infringement,” i.e., activity that equates to infringement that stems from or is facilitated by the infringing activities of others). See also *Viacom Int’l v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010). In this case, Viacom sued Youtube and Google over the posting of “tens of thousands of videos” from works for which Viacom held enforceable copyrights. *Id.* at 518. The trial court awarded summary judgment in favor of defendants Youtube and Google under the “safe harbor” provisions of the Digital Millennium Copyright Act (DCMA), 17 U.S.C. § 512(c)(2010). *Id.* at 527–29. When the statutory requirements are met, the DCMA safe harbor essentially allows an otherwise-innocent or unknowing website operator to escape liability for contributory copyright infringement resulting from third parties posting copyrighted works or portions thereof on their website. To merit this protection, the statute requires, *inter alia*, that the operator “upon obtaining . . . knowledge or awareness [of an infringing post], acts expeditiously to remove, or disable access to, the material . . . [and] does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” *Id.* at 516–18. As of this writing, the Second Circuit has not acted on this case.

<sup>84</sup> See *Freeplay Music, Inc. v. Cox Radio, Inc.*, 404 F. Supp. 2d 548, 551–52 (S.D.N.Y. 2005) (recognizing separate rights in public performance and particular sound recordings) (citing 17 U.S.C. § 102, 106 (2006)). 17 U.S.C. § 106(6) recognizes a separate right in public performance of sound recordings, which is why separate copyright holders must sometimes be consulted when a recording is to be “performed” in public.

<sup>85</sup> Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 239–40 (2010). Interestingly, Paul McCartney, the former Beatle who had to purchase licenses from Michael Jackson to perform songs he himself had

disc or other tangible media releases (as opposed to internet downloads), information contained on the recording sleeve, CD container, etc., may yield a contact for permissions, usually at least for the recording company.

For use of the written, i.e., published music, and public performance licenses of it, perhaps the easiest way to obtain information about copyright holders and points of contact for permissions and licenses is via artists' association websites. Three artist associations cover many past and present music artists. These associations are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors & Composers (SESAC).<sup>86</sup> A license or permission is needed for use of the written music, but if the music is to be performed in public, either by live performers or by playing a recording, then often a separate license or permission is required for the public performance.

### Books, Magazines, and Other Publications

While any search should begin with a check of the Copyright Registry of the U.S. Copyright Office, other organizations can provide valuable assistance in seeking permission for use of copyrighted printed materials such as books and magazines. For contact information for either no-cost or purchased permissions or licenses, one of the readiest sources is the Copyright Clearance Center (CCC).<sup>87</sup> The CCC serves as a permission facilitating service providing a single point of entry for users seeking permissions or licenses to use copyrighted works.<sup>88</sup> The CCC focuses on providing licenses for a fee and "supporting the principles of copyright," for both domestic and foreign works. The database lists various uses and a set price for each use, including whether a given use is free of charge.<sup>89</sup> If the unit's intended use is not listed as free, the copyright holder may be contacted directly for no-cost permission.<sup>90</sup> Other entities like the CCC exist that will work to obtain copyright

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written, owns the copyrights to Buddy Holly's catalog of songs, and collects licensing fees accordingly. *Id.*

<sup>86</sup> See BROADCAST MUSIC, INC., [www.bmi.com](http://www.bmi.com) (last visited Sept. 28, 2011); AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, [www.ascap.com](http://www.ascap.com) (last visited Sept. 28, 2011); SESAC, [www.sesac.com](http://www.sesac.com) (last visited Sept. 28, 2011).

<sup>87</sup> See COPYRIGHT CLEARANCE CTR., <http://www.copyright.com> (last visited Sept. 28, 2011).

<sup>88</sup> See *About Us*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html> (last visited Sept. 28, 2011).

<sup>89</sup> *Products and Solutions*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions.html> (last visited Sept. 28, 2011).

<sup>90</sup> See DA PAM. 25-40, *supra* note 74, para. 2-40.

permissions for a fee.<sup>91</sup> The above guidance can also apply to a third type of materials often sought out: movie and video clips.

### Movie Excerpts and Video Clips

Movie and video clips are generally more complex than either audio or printed materials, in that movies and video usually contain several elements, all with potentially independent copyrights for which permission, license, or an exception to copyright must be found. Movies and videos can have copyright in the movie or video itself, as a visual work, as well as in the soundtrack, within which several songs may have different copyright holders, as might the images of the actors.

This kind of confusion can arise in most any work that contains multiple copyright interests. Fortunately, identifying those different copyright interests in advance makes free permission, license, or justification under an exception such as fair use easier to accomplish. A breakdown of all materials to be used, and a list or table of all the potential copyright interests of each, should be made. This document should be updated regularly, with each copyright interest noted when permission or license is obtained, or justification under an exception is made. In many instances, a vendor offers a clip (or a limited license for it); several networks and movie production companies do so directly.<sup>92</sup> The websites of these entities can be good sources for contact information for seeking free permission or no-cost limited licenses.<sup>93</sup> Many famous actors, or their estates if they are deceased, have websites that offer permissions and licenses as well.<sup>94</sup>

### Non-Permissive and Fair Use Determinations

Sometimes obtaining permission is not practicable at the unit level. In such situations, a statutory exception such as fair use may still allow use of the materials desired. Per Army policy, reliance on fair use is only appropriate if permission cannot be obtained, and any use of copyrighted materials without permission must be approved by Office of

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<sup>91</sup> See, e.g., THE PERMISSIONS GROUP, <http://www.permissionsgroup.com> (last visited Sept. 28, 2011), and ICOPYRIGHT, <http://info.icopyright.com/> (last visited Sept. 28, 2011), both for-profit entities.

<sup>92</sup> See, e.g., SONY PICTURES STOCK FOOTAGE, <https://sonypicturesstockfootage.com> (last visited Sept. 28, 2011); THOUGHTEQUITY, <http://www.thoughtequity.com> (last visited Sept. 28, 2011).

<sup>93</sup> See *Classic Movie Merchandise*, REELCLASSICS.COM, <http://www.reelclassicsl.com/Buy/licensing.htm> (last visited Sept. 28, 2011) (listing various websites for movie studios, independent licensors, and images of stars).

<sup>94</sup> See, e.g., WAYNE ENTERS., <http://www.johnwayne.com> (last visited Sept. 28, 2011); *Licensing*, ELVIS PRESLEY ENTERS., <http://www.elvis.com/licensing> (last visited Sept. 28, 2011).

Regulatory Law and Intellectual Property, U.S. Army Legal Services Agency, Office of The Judge Advocate General.<sup>95</sup> When seeking such approval, all the relevant facts should be recorded in a memorandum, and accompanied by a memorandum of law assessing use of the material and any applicability of fair use or other exceptions, and staffed through the technical chain.<sup>96</sup>

### **Common Scenarios Regarding Copyrights: Putting It All Together**

With all the above rules and authorities, even simple projects may appear daunting. But with careful parsing of the various copyright issues, i.e., eating the elephant one bite at a time, most common situations in Army practice can meet with success. The following discussion will examine several typical scenarios, the copyright issues that may arise, and potential resolutions.

#### **Unit Briefings: Clips, Quotes, and Soundtracks**

In the first scenario, a JA is preparing a briefing as part of the unit's pre-deployment training for an upcoming rotation to Afghanistan. In the presentation, the JA wants to open with the famous "Patton speech" film clip, featuring actor George C. Scott giving his stern monologue in front of a massive American flag. Later in the presentation, to highlight a teaching point, he plans to use a pithy quote from Benjamin Franklin: "Never leave that 'til tomorrow which you can do today," from *Poor Richard's Almanack*.<sup>97</sup> Lastly, he plans to close with a video clip from the movie *The Green Berets* starring John Wayne. This clip will be only a few minutes of the film, and will feature The Duke growling out the most famous line of the movie: "Out here, due process is a bullet."<sup>98</sup> As the film fades into a red Viet Nam sunset and the helicopters take flight, the song "The Ballad of the Green Berets" begins to play.<sup>99</sup> All in all, not an uncommon collection of add-ins to a presentation, and in a training environment, it should be simple enough. However, as each work is analyzed, even simple, brief uses can raise several copyright issues at once.

### *The Patton Speech Clip*

In unpacking these copyright issues, each work and its respective use must be examined independently. Start with the film clip of the Patton speech. If there is no record of any existing permission to use the clip, the first step in using the clip without infringing any copyright interests is to correctly identify the respective interests and interest owners.

Here, from a copyright perspective, the Patton clip is very straightforward; it consists of just one scene, no music, and just one actor. Thus, there is a copyright in the film clip itself, but likely no other interests that would preclude use of the clip. To identify the owner of the film copyright, an easy check of the U.S. Copyright Office registry at [www.copyright.gov](http://www.copyright.gov) shows that 20th Century Fox is the owner of the copyright.<sup>100</sup> A quick internet search obtains the contact information for licensing of 20th Century Fox film clips, including a telephone number to call for permission or license.<sup>101</sup> With the contact information in hand, seeking written permission by means of a properly tailored request per the example in DA PAM 25-40 is the next step.<sup>102</sup> Note that all permissions for an intended use should be in writing.<sup>103</sup>

In light of the intended use of the clip—Army training for an upcoming deployment—the copyright holder may well grant a limited permission or license at no cost, but likely with strict requirements to use the clip only for the briefing and to not distribute or otherwise provide copies to anyone. Not distributing includes not posting the briefing, with the clip included, on the internet or in a location where others could download copies, or e-mailing the briefing to others with the clip included. Further, under a no-distribution requirement, any handouts should not include the copyrighted material in any form (such as a film still photo, etc.). Consider next the second item, the quote from Benjamin Franklin.

### *The Franklin Quote*

This particular Franklin quote is from his work *Poor Richard's Almanack*. Franklin first published the work in book form in 1732, and reissued it each year through 1758;

<sup>95</sup> See AR 27-60, *supra* note 6, para. 4-1.

<sup>96</sup> *Id.* para. 4-1 through 4-2; AR 25-30, *supra* note 6, para. 2-5; DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

<sup>97</sup> See BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1733).

<sup>98</sup> THE GREEN BERETS (Batjac Prods., Inc., & Warner Bros. 1968).

<sup>99</sup> For purposes of this hypothetical, certain elements of the movie are compressed into one scene that are not present in the same manner in the original.

<sup>100</sup> *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011).

<sup>101</sup> See *Latest News*, FOX SEARCHLIGHT PRESS SITE, <http://press.foxsearchlight.com/license> (last visited Sept. 28, 2011) (listing phone number for Fox Clip Licensing Department).

<sup>102</sup> DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

<sup>103</sup> See, AR 27-60, *supra* note 6, paras. 4-1 through 4-2; AR 25-30, *supra* note 6, para. 2-5; DA PAM. 25-40, *supra* note 74, para. 2-40, fig.2-5.

it was published by others up through 1796.<sup>104</sup> While several reprints are available today that may have a copyright in any new introduction or annotations, the original work by Franklin now has no copyright and may be copied and used freely.<sup>105</sup> Franklin published his *Almanack* before 1 January 1923, and under the Copyright Act, any copyright in the work has expired and the work has passed into the public domain.<sup>106</sup> Accordingly, Franklin's quote can be used in the briefing and can be included in any posted or e-mailed version of the briefing, as well as any handouts. Now consider the last item, another movie clip.

### *The John Wayne Movie Clip and Soundtrack Music*

As with the first movie clip, here the first step is to check if any permission or license exists for use of the clip. If no permission for the intended use exists, or if no record can be found, the inquiry should then correctly identify all the respective copyrights and copyright holders. Here, the film clip features the scene with John Wayne and the movie's signature song. As before, the movie company has the obvious copyright in the movie itself. Also, the song composer has a copyright interest in the music, and the recording company has an interest in the recording of the song.<sup>107</sup>

To identify the owners of these three interests, a check of the online Copyright Office registry<sup>108</sup> shows that "Batjac Productions, Inc., & Warner Brothers, a division of Time Warner Entertainment Company, LP (PWH)" are the owners of the movie copyright. A quick internet search obtains the contact information for licensing of Warner Brothers film clips, as well as contact information for Batjac Productions.<sup>109</sup> Apparently, both entities have ownership of the copyright, so unless further research indicates otherwise, both should be contacted for permission or license. As for

<sup>104</sup> See James D. Hart & Phillip W. Leininger, *Poor Richard's Almanack*, in THE OXFORD COMPANION TO AMERICAN LITERATURE (1995).

<sup>105</sup> 17 U.S.C.A. § 101 note (2006) (citing Pub. L. No. 100-568 § 12, 102 Stat. 2853 (1988)).

<sup>106</sup> See COPYRIGHT CIR. 15A, *supra* note 9, at 2.

<sup>107</sup> While not strictly copyright, celebrities often have a protected interest under state publicity laws or similar authorities against any use of their personal images without permission; even non-celebrities may have enforceable interests under state right-to-privacy laws. Here, permission or a release could be sought from the Estate of John Wayne through Wayne Enterprises. See WAYNE ENTERPRISES, <http://www.johnwayne.com> (last visited Sept. 28, 2011).

<sup>108</sup> *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011).

<sup>109</sup> Warner Bros. Licensing Dep't, 4000 Warner Blvd., Burbank, CA 91522, Batjac Prods., Inc., 9595 Wilshire Blvd., Beverly Hills, CA 90212; see also *Clip Licensing*, WARNER BROS. STUDIOS, [http://www2.warnerbros.com/main/company\\_info/med/wb\\_companyinfo.swf](http://www2.warnerbros.com/main/company_info/med/wb_companyinfo.swf) (last visited Sept. 28, 2011).

the music, unfortunately the Copyright Office database only contains records for various recordings of the song, not the actual song. Further, from the movie information on the DVD package, it is clear the movie was made in 1968, and all the recordings shown are newer than 1978.<sup>110</sup> Accordingly, a search of the major music artist association websites should be the next course of action.

Here, a search of the ASCAP database<sup>111</sup> yields results that while SSG Barry Sadler, U.S. Army, along with Robert Moore, composed "The Ballad of the Green Berets," the current publisher and administrator of the song is the Eastaboga Music Company, whose contact information is given. Some basic internet research reveals that the original recording, and the one used in the John Wayne movie, is from SSG Sadler's 1966 album, *Ballads of the Green Berets*, and that the current compact disc release of that recording is by the Collectors' Choice Music Company. Thus, Eastaboga and Collectors' Choice should be contacted for permission to use the clip.

### **Unit Ceremonies: Distribution of Printed Materials and Public Performance of Music**

Like briefings, unit ceremonies often bring copyright issues to the forefront when copyrighted materials are used. For a change of command, a memorial service, etc., participants and planners often want to use music and include quotes in the programs and printed materials. The use of copyrighted works in printed materials should be addressed as shown in the briefing scenario above. Copyrights should be identified, a quick check should be done to see if any existing permissions apply, and then the copyright holders and their contact information should be determined. The Copyright Office registry may prove helpful, as might the Copyright Clearance Center and similar websites.<sup>112</sup> If necessary, permission should then be obtained from the copyright holders to use the material.

For playing copyrighted music at an Army ceremony, i.e., a "public performance" under the law, the research for copyright holders and contact information is as described above.<sup>113</sup> However, in the public performance context, the

<sup>110</sup> The year 1978 is the cutoff date for the searchable database; all records older than that year must be searched in hard copy. U.S. COPYRIGHT OFFICE, CIR. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 2, available at <http://www.copyright.gov/circs/circ22.pdf>.

<sup>111</sup> AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, [www.ascap.com](http://www.ascap.com) (last visited Sept. 28, 2011).

<sup>112</sup> See *Public Catalog*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAE=First> (last visited Sept. 28, 2011); COPYRIGHT CLEARANCE CTR., <http://www.copyright.com> (last visited Sept. 28, 2011). The U.S. Copyright Office's web address ends in ".gov" while ".com" is the commercial Copyright Clearance Center.

<sup>113</sup> Note that the number and status of persons in attendance can influence whether the performance is legally considered public or private; generally, a

permissions needed vary depending on circumstances. If an existing recording of the song or music will be played (the most common situation), then the two permissions described above, from both the composer and the recording company, should be obtained. But if the music will be played live by musicians, then permission from the recording company will generally not be needed, as the actual recording will not be used.<sup>114</sup> Note that if the ceremony will be recorded, such as a DVD for distribution to attendees, later broadcast, internet posting, or otherwise, permission should be requested that explicitly allows for this use. As with any use where permission cannot be obtained for some reason, a fair use determination may be sought; however, it may be more practicable to simply use non-copyrighted music, or music with existing permissions.

### **Unit Operations: Computer Software**

Copyright issues can also arise in a unit's use of computer software. A unit may have a limited number of copies or licenses for software legally owned, and the technicians or end users want to install the program on newly-installed workstations or laptops. The rules in this situation are clear: any use of the copyrighted software must comply with the terms of the license.<sup>115</sup> As with books and other copyrighted materials, ownership of the physical object, here a CD with the software encoded on it, does not mean ownership of the software itself, and does not grant permission to copy freely.<sup>116</sup> In fact, software is often much more restricted by limited license than other copyrighted media such as books and music recordings. The *Wall* case discussed *supra* is particularly instructive. Other situations may involve "shareware" or "freeware" downloaded from the internet or obtained on a promotional disc. As with any

other permissive use, any terms of the license must be strictly complied with; "free" in this context rarely means "free to distribute." The best practice is to always check the "terms and conditions" link on any website offering downloads or material for use.

### **Conclusion**

Infringement remains the primary concern when using copyrighted materials at the unit level. With knowledge of the legal landscape of copyright law outlined in Section II, Army policy and regulation as discussed in Section III, and the practical tactics, techniques, and procedures given in Section IV, almost any situation involving copyrights at the unit level should be resolvable. The above is not an exhaustive discussion of all the potential copyright concerns that could arise at the unit level. But most situations will involve markedly similar issues, and practical resolutions will follow closely along the lines of those discussed here. A conscientious JA should remain vigilant and serve the Army and the unit by guarding against any infringement, intentional or otherwise. Effective employment of the methods discussed here will ensure that the unit, its personnel, and the Army remain within the law of copyright, yet still attain the mission objective.

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performance is "public" when the work is "perform[ed] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" or when a work is transmitted to such a place or places. 17 U.S.C. § 101 (2006) (definition of "To perform or display a work 'publicly'").

<sup>114</sup> Note, however, that the best practice remains to contact all potential copyright holders to ensure that no permission that may be needed is overlooked, as well as to provide flexibility to address unforeseen circumstances. In the context discussed here, such circumstances could arise when, say, the band cannot make it to the venue, and a recording must be used instead. With the permission from the recording company already in hand, last-minute changes would not be at risk of violating copyright.

<sup>115</sup> See *Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't.*, 447 F.3d 769, 781–82 (9th Cir. 2006).

<sup>116</sup> See 17 U.S.C. § 109 (2006).