



THE ASSISTANT SECRETARY OF THE NAVY

Research Development and Acquisition

1000 Navy Pentagon

Washington DC 20350-1000

SECNAVINST 5870.4A

ONR 00CC

16 August 2005

SECNAV INSTRUCTION 5870.4A

From: Secretary of the Navy

To: All Ships and Stations

Subj: COPYRIGHT

Ref: (a) DoDD 5535.4 of 31 Aug 84
(b) Federal Acquisition Regulation (FAR) (Subpart 27.4)
(c) DoD FAR Supplement (Subpart 227.4)
(d) SECNAVINST 5720.44A
(e) DoDD of 30 Aug 93 (NOTAL)

Encl: (1) Sample Format for Requesting Permission

1. Purpose. To revise procedures for obtaining permissions from copyright owners for use of copyrighted works in the Department of the Navy (DON) per reference (a), and provide revised policy, procedures and responsibilities for the use of copyrighted sound and video recordings within the DON.

2. Cancellation. SECNAVINST 5870.4, SECNAVINST 5870.5, and SECNAVINST 5870.6. This instruction has been extensively rewritten and should be read in its entirety.

3. Scope. This instruction does not apply to acquisition of rights in data per references (b) and (c).

4. General Information on Copyright

a. Subject Matter of Copyright. Under United States law, copyright protection exists in original works of authorship (published or unpublished) when fixed in any tangible medium of expression. "Original" means that the author made more than a trivial creative contribution to the work. Novelty is not required. Copyright protection is not available for works prepared by employees of the United States government as part of their official duties. Works of authorship which are subject to copyright include literary works (works expressed in words or numbers including computer programs, computer program documentation, e-mail messages, discussion group postings, and

simple websites and web pages); musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works (multimedia presentations, and many websites and web pages); and sound recordings. The requirement that a work be "fixed in any tangible medium of expression" means that the work must be stored in a reasonably permanent medium. Typical storage media include paper, canvas, film, audio tape, video tape, floppy disk, hard disk, CDROM, DVD, etc. The requirement for a work to be fixed in tangible form makes copyright protection unavailable for works of a transitory duration, such as unrecorded speeches and unrecorded dances.

b. Duration of Copyright. Once conferred, copyright protection in works created in 1978 or later normally endures for the life of the author plus 70 years. If the author cannot be identified, the duration of copyright is 95 years from first publication or 120 years from the year of its creation, whichever expires first. For works published and copyrighted before January 1, 1978, the duration of copyright is 95 years from the date the copyright was originally secured. For works created before January 1, 1978, but published on or after January 1, 1978, the duration of the copyright is the same as for works created on or after January 1, 1978, except that the copyright in the work cannot expire before December 31, 2002, and, if the work was published on or after December 31, 2002, the copyright cannot expire before December 31, 2047. All copyrights run to the end of the calendar year in which they expire.

c. Rights of Copyright Owner. The owner of a copyright has the exclusive right to control certain uses of the copyrighted work. Common types of uses covered by copyright protection are reproduction of the copyrighted work in copies or phono-records, preparation of derivative works based on the copyrighted work, public distribution of copies or phono-records of the copyrighted work by sale, gift, rental or loan, and public performance or display of the copyrighted work. Copyright law considers those uses to constitute forms of copying. A copyright protects only the form in which an idea is expressed and does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.

d. Copyright Infringement. In general, copyrighted works may not be copied (see paragraph 4c) without permission of the copyright owner. Copyright infringement does not require

verbatim copying, but does require the existence of a substantial similarity between the allegedly infringing work and the copyrighted work. Such unauthorized copying is copyright infringement, unless the copying is outside the exclusive rights granted to the copyright owner by the law, or unless covered by one of the limitations on the exclusive rights, e.g., fair use, 17 United States Code (U.S.C.) 107; reproduction by library and archives, 17 U.S.C. 108; transfer of particular copy or phono-record, 17 U.S.C. 109; certain performances and displays, 17 U.S.C. 110; secondary transmissions, 17 U.S.C. 111 and ephemeral recordings, 17 U.S.C. 112. An infringer is liable for monetary damages and the United States government has no general exemption from copyright infringement liability. Government employees are not, however, personally liable for copyright infringement occurring in the performance of their official duties. A copyrighted work may be substantially copied even in the absence of verbatim copying, for example, in the case of an adaptation.

e. Copyright Notice. Publicly distributed copies of published, copyrighted works should bear a copyright notice consisting of three elements; the letter "C" in a circle ("P" in a circle if a phono-record of a copyrighted sound recording), or the word "Copyright," or the abbreviation "Copr.," the year of first publication in some instances; and an identification of the owner. It is a criminal offense to remove or alter with fraudulent intent any notice of copyright appearing on a work subject to copyright. Although the presence or absence of a copyright notice does not conclusively establish whether a work is copyrighted, its presence suggests that a prospective user should inquire further before using such work, without permission, in a way that might infringe the copyright owner's rights. The absence of a copyright notice may normally be relied upon as indicative that no copyright exists, unless there is actual knowledge that the work has not been published or that the copyright notice has been omitted without the authority of the copyright owner.

f. Copyright Advice. Legal advice should be obtained when considering questions as to whether a particular work is protected by copyright or whether a particular use would infringe a copyright, as well as all other questions related to copyright.

5. Duplication and Performance of Copyrighted Sound and Video

a. Use of DON-Owned Audiovisual Equipment. DON appropriated or nonappropriated funded audio and video duplicating and playback equipment and facilities may not be used for the reproduction of copyrighted sound or video recordings without permission of the copyright owner, without a written legal determination that the reproduction is outside the exclusive rights granted to the copyright owner by the law, or covered by one of the limitations on the exclusive rights.

b. Guidelines for Determining Whether a Performance is "Public." United States copyright law, 17 U.S.C. 101, provides the following definition for determining whether a performance is "public" for which permission from copyright owners is required:

"To perform or display a work 'publicly' means to perform or display it 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"

(1) Within the DON, displays or performances on-board ship, in bachelor officer or bachelor enlisted quarters, day room, barracks, general mess, in an isolated area or deployed area are not considered "public" provided the performances or displays are made without any purpose of direct or indirect commercial advantage and without charge to the recipients.

(2) Within the DON, displays or performances in open messes and clubs are considered "public" and will not be performed or displayed without the permission of the copyright owner, except for isolated areas or deployed units, as provided in paragraph 5c.

c. Isolated Areas or Deployed Units. Within the DON, the Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) determines which areas are isolated and which units are deployed based on the availability of adequate commercial video programming, whether by off-air or via a cable system. Where adequate commercial programming is available, the CNO and the CMC will not approve requests for a determination as an isolated area or a deployed unit.

6. Procedures For Requesting Permission From The Copyright Owner

a. Request Must Be Made to Use the Copyrighted Work. When a person concludes that permission from the owner of the copyright in a work may be required prior to using a work or a portion of it in furtherance of that person's official duties, the person shall request permission directly from the copyright owner or owner's agent. Copyright owners will often grant the DON permission to make limited use of material subject to copyright without charge. Unless the person making the request is aware that permission will not be granted without a charge, the initial request should ask for permission free of payment of a royalty.

b. Guidelines for Requests of Permission. Requests for permission should permit an easy affirmative response:

(1) The following information should be included in the request, if applicable and available:

(a) Complete identification of the material for which permission to use is requested, including title of the work, name of author, exact copyright notice(s) appearing on the work, and, when appropriate, editor and edition.

(b) Designation of exact portion of the work (e.g., amount, page numbers, chapters, etc.). The Association of American Publishers and the Authors League of America recommends inclusion of a photocopy of the material and the copyright page, if possible. Blanket permission to use excerpts "as later determined" shall not be requested.

(c) Statement of intended use(s) of the copyrighted work, including, when appropriate, number of copies or phono-records to be made, type of reproduction (photocopy, offset, typeset, tape, disc, etc.), intended distribution (including form and recipients), whether material is to be sold and contemplated fees or charges in connection with use or distribution of the material, length of time material will be used; and dates, media, and intended audience of public performances or displays.

(d) Contemplated modifications of the work, if any.

(2) The request shall be for rights no greater than actually needed.

(3) If submitted as a hardcopy, the request shall be submitted in duplicate so the recipient may retain one copy and return the other granting permission.

(4) The request shall indicate that the copyright owner may designate the copyright notice and credit line to be used.

(5) It is advisable to ask the copyright owner to verify in writing that it has the authority to grant the requested permission.

(6) The request may be sent by facsimile, telephone, mail, e-mail, via a web-based transmission (typically an electronic form posted on the website of the copyright owner or copyright owner's agent), or any other method recommended by the copyright owner or agent. Appropriate judgment must be used when requesting permission via a form provided by the copyright owner or agent. Forms provided by the copyright owner or agent are often tailored for non-governmental uses of copyrighted works. Consequently, those forms may not allow for an adequate description of the government's intended use and distribution. Fortunately, those forms often include a "Notes" or "Comments" section in which the details of intended government use and distribution can be more fully explained. If the owner or agent-provided request form cannot be modified to include all critical details of intended government use and distribution, the request should be submitted by a more appropriate method. If the request is sent by mail, a self-addressed return envelope shall be enclosed. The request may be patterned after enclosure (1).

(7) Information about the status and ownership of a copyrighted work, as well as information on how to license a copyrighted work, may be found, for example, at www.loc.gov, www.copyright.com, www.bmi.com, and www.ascap.com. Additionally, several music publishers and copyright agents have their own websites.

(8) If the person requesting permission is aware, from prior experience or otherwise, that a request for permission without charge would be futile, the initial request letter may ask for information concerning the fee required for permission. Such a request should follow the guidelines in 5b(1) and 5b(2).

c. Final Action by Person Who Requested Permission

(1) Purchase of Permission. Upon receipt of the response from the copyright owner or owner's agent, the person who requested permission shall review the response and determine whether the permission offered, if any, is of sufficient scope to cover the intended copying and whether the copying warrants the fee asked, if any. If the permission covers the intended copying and the fee is fair and reasonable, then the person who requested permission may decide to purchase, or have purchased, the permission offered.

(2) Copying Without Permission. In the event that a copyright owner cannot be located, or refuses to reply or to grant permission, or an offered permission insufficient to cover the intended copying, or the fee asked is considered unfair or unreasonable, the person who requested permission should seek legal counsel to confirm whether the material is covered by valid copyright and for advice as to the risk of infringement. After such consultation, the activity having control over the person who requested permission will make its final decision on whether to copy the material, as contemplated, without permission. That activity will be responsible for providing funds to settle any administrative claim for copyright infringement.

7. Administrative Claims. Administrative claims for copyright infringement may be submitted by copyright owners per reference (c). Any communication on behalf of a copyright owner which directly or indirectly alleges a copyright infringement should be forwarded to the Counsel, Office of Naval Research, 875 North Randolph St., Suite 1425, ONR Code 00CC, Arlington, VA 22203-1995.

8. Copyright In Works of Authorship Prepared By DON Personnel

a. Official Duty Determinations. Copyright protection in the United States is not available for a "work of the United States government" (i.e., a work prepared by an officer or employee of the United States government as part of that person's official duties per 17 U.S.C. Sections 101 and 105). Accordingly, before asserting a copyright in a work, a DON employee should consult with his or her supervisor to determine whether the work was prepared as part of the employee's official duties. Employees should be aware of applicable provisions of

references (d) and (e) with regard to writing, official duties and use of information obtained from official duties. The term "employee" includes all full-time and part-time civilian employees and all military personnel (both Regular and Reserve) of the DON.

b. Criteria for Official Duty Determinations. In making a determination of whether a work was prepared as a part of official duties, the employee and supervisor may be guided by these criteria:

(1) A work prepared under the following circumstances is a work prepared as part of official duties:

(a) Preparation of the work was within the employee's position, job or billet description. This includes a work properly self-assigned by the employee who was in a position to do so; or

(b) Preparation of the work was properly assigned by the employee's superiors.

(2) The presence or absence of a government contribution in the preparation of the work does not, by itself, determine whether the work was prepared as part of official duties. (Examples of "government contributions" are use of government time, facilities, equipment, materials, funds, or the services of other government employees on official duty.)

(3) An employee may successfully assert a copyright in a work prepared at that person's own volition and clearly outside his or her official duties, even though the work includes knowledge or information derived from the employee's official duties or relates to the professional field of the employee. Employees should consult the applicable portions of references (d) and (e) as to the required review for any work prepared by them.

c. Transfer of Copyright. No DON employee (nor any supervisor of such employee) should execute any document which expressly or implicitly asserts a United States copyright in a work, or which claims to transfer a United States copyright, if the work was prepared as part of the employee's official duties. The employee should inform anyone who requests a transfer of a United States copyright that the work is a work of the United States government and therefore not protected by United States

copyright, citing 17 U.S.C. Section 105. Works prepared as part of an employee's official duties may, however, be copyrighted in other countries. The employee should obtain legal review of all requests for the transfer of a foreign copyright, including requests for the transfer of all copyrights without reference to a specific country, from cognizant DON legal counsel. In the event that the work was prepared with another person whose contribution to the work was not made as part of official duties as a United States government employee (for example, a contractor employee), another entity may, in some circumstances, own a United States copyright in the work. The government employee should inform the requester of the name and location of the other person, if known. The government employee should also tell the requestor that the other person's interest in the copyright in the work can be addressed only with the other person, a representative of the other person, or an assignee of the other person's copyright.

d. Notice of Copyright. A notice of copyright should not be placed on a work prepared as part of the official duties of a DON employee. Under United States copyright law, it is a criminal offense to place a false notice of copyright on an article with intent to defraud (17 U.S.C. Section 506(c)). If a work is predominantly composed of portions prepared as part of a government employee's official duties, but also includes portions that were not prepared as part of a government employee's official duties, any notice of copyright should identify those portions of the work that were prepared as part of the government employee's official duties and thus not protected under United States copyright law (17 U.S.C. Section 403). This statute only applies to works in which the portions can be segregated. For example, a government employee prepares a fifteen chapter operating manual as part of his or her official duties. The manual is an uncopyrightable work of the United States government. After leaving government service, the former employee prepares a short additional chapter discussing developments that occurred since he or she left government service. The former employee then publishes a second edition of the manual including the additional chapter. Because the revised edition includes a segregable portion not prepared as part of a government employee's official duties, it may be copyrighted. Nevertheless, because the revised edition is predominately a work of the United States government, the copyright notice must identify the fifteen chapters prepared as part of the government employee's official duties that are not protected under United States copyright law.

e. Navy Infringement of Copyrighted Works of Employees. An employee has no right of action against the DON for copyright infringement if he or she was in a position to order, influence or induce the use of the copyrighted work by the DON. An employee does not have a right of action against the DON with respect to any copyrighted work prepared by the employee if government time, material or facilities were used in the preparation of the work (28 U.S.C. Section 1498 (b)).

f. Assistance. Employees are strongly urged to consult with their supervisor and with a cognizant DON attorney for advice in applying paragraphs 8a through 8e of this instruction. This consultation will assist in determining the rights of the DON and will inform the employee of the position the DON will assert. Employees should be aware that the DON attorney's client is the DON, not the employee. Employees who desire an independent assessment of their rights in a work should obtain private counsel.


John J. Young, Jr.
Assistant Secretary of the Navy
(Research, Development & Acquisition)

Distribution:
Electronic only, via Navy Directives Web site
<http://neds.daps.dla.mil>

SAMPLE FORMAT FOR REQUESTING PERMISSION
(LETTERHEAD)

SSIC
Orig Code or Serial
(Date)

(Name of copyright owner or agent)
(Address)

(Salutation)

(Name of activity) requests your permission as copyright owner or agent for the copyright owner to copy the identified material for the following use(s) for the Department of the Navy.

- (Identification of material -- guideline 6b(1)(a))
- (Portion of material to be copied -- guideline 6b(1)(b))
- (Intended use(s) -- guideline 6b(1)(c))
- (Contemplated modifications -- guideline 6b(1)(d))

If the requested permission is granted, please sign below and return this original letter in the enclosed self-addressed envelope. A copy of this letter is included for your records.

(Complimentary close)

(Signature of requester)

(Title)

PERMISSION:

The above requested permission is granted, royalty-free. A notice of copyright and credit line is desired as follows:
(Leave at least 8 lines for credit line)

I hereby certify that I have the authority to grant this permission.

(Name of copyright owner or authorized agent)

DATE: _____ BY: _____

(Title)