

**NOTE: THIS DRAFT STATEMENT WAS NOT DELIVERED AS
RESOLUTION 101 WAS WITHDRAWN FOR FURTHER CONSIDERATION**

American Bar Association
House of Delegates
August 14-15
Opening Remarks of Carl Malamud (Revised 7/30/17)

Good morning. I'd like to thank the chair for granting me privileges of the floor and the Committee on Rules and Calendar for their patience and their help as I prepared this Resolution. As a non-lawyer, it is gratifying that the ABA has been such an open and welcoming organization.

Resolution 101 concerns works of the United States government, a special category that is exempt from copyright. The works of the U.S. government exception to copyrightability is based on long-standing public policy that dates back to Abraham Lincoln's presidency when the Government Printing Office was created to "keep America informed." This provision was most recently codified in the 1976 Copyright Act.

Resolution 101 specifically concerns scholarly and scientific works—such as journal articles—which are authored by federal employees or officers in the course of their official duties, and then published by a non-governmental publisher.

Sounds simple and perhaps even somewhat trivial, right? Well, I've spent most of my time since January working with a team of librarians and lawyers to systematically survey the scholarly literature. We found close to 1 million articles written by people who describe themselves as federal employees or officers.

It is important to understand that the works of government exception applies only to employees or officers of the federal government. It does not apply to state or local governments. It does not apply to government contractors. It does not apply to federally-funded research.

Not only is the exception only for employees or officers, it is only for works that are created as part of their official duties. If you spend your evenings away from your government job writing a journal article—even if the topic of that article overlaps your official duties—then it is not a work of the U.S. government. It is your work. You own the copyright.

If it is a work of the U.S. government, however, § 105 of the Copyright Act is very specific: the work is in the public domain.

Section 403 of the Copyright Act further states that if this work of government is included in a larger private work, such as an issue of a journal, the portion that is a work of the U.S. government should be clearly labeled that it is not subject to copyright.

A few of those articles we found in our search are by lawyers, some of them by people here in this room. But, the vast majority of the one million scholarly articles we found are in the sciences.

Agencies such as the National Institutes of Health, the Centers for Disease Control, the U.S. Geological Survey, the National Oceanic and Atmospheric Administration, NASA, and the U.S. Department of Agriculture are all scientific powerhouses. They have a huge impact on the creation and dissemination of knowledge.

How can we tell that they're works of government? Were they authored in the course of their official duties? It turns out that is not easy. The reason for that is that private publishers rarely label their journal articles properly, despite the requirements of § of the Copyright Act.

Let us use the legal literature as a specific example. I conducted the audit of ABA publications myself, looking at a dozen different journals over a few decades and manually examining the title page of each article. I asked law students from around the country, many of them from Yale Law School, to do the same thing with the major law reviews.

My audit of ABA publications found 552 articles that are by federal employees or officers. But, are they works?

There were a few articles that were clearly not works of government. For example, somebody noted in their biography that they wrote an article while a student, thanked his professor for their help, and noted he was now employed by the government. This is not a work.

One of the law reviews had an article by Justice Scalia and it was marked copyright in his name, a dispositive indication that the work is not a work of the U.S. government.

As preparation for bringing this Resolution to the floor of this House, I posted information on all 552 articles that I found for public examination, and I received a nice note from Sean Croston, a lawyer who works for the Board of Governors of the Federal Reserve System.

Mr. Croston informed me he had written all 3 articles I had listed on the audit on his own time. Again, clearly not a work of the U.S. Government.

I also found quite a few examples that clearly are works. For example, FTC Commissioner Robert Pitofsky explaining FTC enforcement priorities to the Antitrust bar. Or, a military officer in the JAG Corps assigned as part of her work to complete an advanced degree in procurement law and published her research in an ABA journal.

The military is actually quite clear on this issue, and one of the more interesting articles on the topic I read was from the Army Law Review and has the rather amusing title “What Do You Mean There Are No Copyrights in My Master's Thesis?”

So, what can we do about this? I'm proposing three steps in this Resolution you are considering and would like to take them in reverse order.

The third RESOLVED clause is about publishers, such as the ABA. It says that when a piece is received from a federal government employee, the copyright assignment form should have a place where the author can mark "I am a federal employee or officer and this work was created as part of my official duties." Today, we don't do that. It is a simple step.

The third RESOLVED clause also says we should mark our articles more clearly upon publication: “This is a work of the U.S. Government and is not subject to copyright.” Note that it is only the specific work, a single article, that is marked. The publisher still retains copyright in the larger compilation, which is the full issue of that journal. This is also a simple step.

Both of these steps are prospective, they do not affect the backfile. In addition, the third RESOLVED clause has an aspirational statement, saying we should try and make these articles more broadly available. We don't specify exactly how, because that is a matter each publisher must consider for themselves.

The second RESOLVED clause suggests that the Office of Government Ethics create a legal advisory to give government employees guidance on when a work is a work of the U.S. Government. Today, some agencies give fairly good guidance, but in most cases that guidance is nonexistent or murky.

OGE does exactly this kind of guidance. Some of their other legal advisories concern when a federal employee may have a free lunch at a private conference or what steps a federal employee should take before joining the board of an outside nonprofit organization, such as the ABA or a standards body.

Finally, the first RESOLVED clause says that federal agencies—not private publishers, the agency—deposit articles with the Government Publishing Office. This is an existing mechanism. If you are at the U.S. Department of Agriculture and author a pamphlet on how to grow lima beans, you would send your pamphlet over to GPO which makes it available to the 1,280 federal depository libraries.

The first RESOLVED clause merely builds on that mechanism, and has each agency send over these journal articles. GPO would make them available to the National Archives for preservation and to the Library of Congress for its collection.

These are 3 simple steps we can take. The impact on the ABA is slight. We're talking about 552 articles over several decades. But, the issue is an important one in the broader scholarly literature, particularly in the hard sciences. We can show leadership on this issue. Our opinion today on this legal issue will be very useful guidance to our colleagues in non-legal scholarly and professional societies.

This is a simple resolution. It will be simple to implement. But most importantly, Resolution 101 says we should obey existing and long-standing law.

I thank you for your time and hope you will vote yes on Resolution 101.