

AMERICAN BAR ASSOCIATION
TIMOTHY STANLEY AND EDWARD J. WALTERS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to require that any works of the U.S. government that are published privately—that is, by parties other than the government—also be deposited with the Government Publishing Office and subsequently distributed on the Internet, to the member libraries of the Federal Depository Library System, to the Library of Congress, and to the National Archives.

FURTHER RESOLVED, That the American Bar Association urges the Office of Government Ethics to develop a legal advisory for employees and officers of the executive branch to determine when a privately published work is a work of the U.S. government.

FURTHER RESOLVED, That the American Bar Association encourages publishers to inquire of authors who are employed by the U.S. government if their work is a work of the U.S. government and, if so, to clearly label such work upon publication and make it freely and broadly available to the public.

This Resolution and Report were prepared by
Carl Malamud of Public Resource and submitted
by Mr. Stanley and Mr. Walters for consideration
by the House of Delegates. Carl Malamud will
present the Resolution to the House.

REPORT

Introduction

The U.S. Constitution gives Congress the power “to promote the progress of science and the useful arts,”¹ a power that Congress quickly exercised with passage of the Copyright Act of 1790.² Our system of copyright is one of limited rights, both in the terms under which copyright is granted but also in excluding from copyright a number of key areas. In *Wheaton v. Peters*, the Supreme Court’s first major copyright case, the Court defined an exclusion for edicts of government, in that case the opinions issued by the federal courts.³

General principles, such as the doctrine of edicts of government, evolve over time. The *Wheaton v. Peters* case arose out of advances in printing technology, which led Richard Peters, the new court reporter, to come out with cheaper editions of Supreme Court reports, making them more accessible to rural lawyers in the new republic.⁴ Similarly, as the growth of the Internet has made it possible to provide people everywhere with ready access to the law, the ABA House of Delegates at the 2016 Annual Meeting passed Resolution 112, which urged greater public availability of public safety standards incorporated by reference into the Code of Federal Regulations and other statutes and rules.⁵

A related exception to copyright is the works of government doctrine, which excludes from copyright works authored by federal employees and officers in the course of their official duties.⁶ Over the last 100 years, a large number of scholarly articles have been authored by federal employees and officers and published in privately run publications.⁷ In many cases, these scholarly articles bear copyright assertions by the publishers, and are not available to the public without paying a fee and agreeing to stringent terms of use as a condition of access.

¹ U.S. Const. art 1, § 8, cl. 8.

² 1 Stat. 124 (1790).

³ *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁴ Craig Joyce, ‘A Curious Chapter in the History of Judicature’: *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 Hous. L. Rev 325 (2005).

⁵ American Bar Association, Resolution 112, Annual Meeting 2016, August 8-9, 2016. See also Lorelei Laird, *After debate, ABA House calls for publication of privately drafted standards used in legislation*, ABA Journal, August 9, 2016.

⁶ 17 U.S.C. § 105. See also United States Copyright Office, *Compendium of U.S. Copyright Office Procedures*, Third Edition, December 22, 2014, § 313.6(C)(1) (U.S. Government Works).

⁷ See, e.g., Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017); Barack Obama, *The irreversible momentum of clean energy*, Science 09 Jan 2017; Barack Obama, *United States Health Care Reform: Progress to Date and Next Steps*, JAMA. 2016; 316(5):525-532.

This resolution and report examines the availability of works of government in the scholarly literature, including the legal background of the doctrine, an empirical study of the extent of the practice, and proposes a series of concrete steps to increase availability. This inquiry is part of a larger concern, the preservation of and access to works created by our governments, including government databases, edicts of governments, and public information generally.

In recent times, government employees and those who use government data have raised alarms over the deliberate destruction of government databases, especially data that runs counter to partisan beliefs.⁸ Even when data is not deliberately removed, concerns have been raised about the government's ability to properly archive and preserve important information over the long term because it was stored and deleted on government⁹ or private servers,¹⁰ or because of the inadequacy of government electronic archiving systems.¹¹

History of the Works of Government Doctrine

The idea that works by federal employees are not eligible for copyright stems in early cases from an application of the work-for-hire doctrine: a work created in the course of employment generally belongs to the employer and not the employee.¹² For example, from 1852-1854, the artist William Heine accompanied Commodore Matthew C. Perry on his expedition to Japan, creating drawings that were subsequently published by the government. Heine registered copyright in those drawings, then sued William H. Appleton when he published the same report. The court ruled that Heine's copyright registration was invalid because Heine was not the author for purposes of copyright and the work had already been given to the public by the Navy.¹³

Before the 20th century, most of the judicial focus on the issue of copyright in government publications was devoted to the question of whether edicts of government could be registered for

⁸ See, e.g., Brady Dennis, *Scientists are frantically copying U.S. climate data, fearing it might vanish under Trump*, Washington Post, December 13, 2016.

⁹ Editorial, *White House E-Mail Gone Missing*, New York Times, March 1, 2008; Editorial, *History Deleted at the White House*, New York Times, July 13, 2008.

¹⁰ Michael S. Schmidt, *State Department Is Asked to Explain Handling of Hillary Clinton's Emails*, New York Times, March 18, 2015.

¹¹ Carl Malamud, *Testimony on Electronics Records Archives*, Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, U.S. House of Representatives, December 16, 2009.

¹² See Restatement of the Law Third, Agency, American Law Institute (2006), § 220 (Who Is A Servant).

¹³ *Heine v. Appleton*, 11 Fed. Cas. 1031 (No. 6,324) (C.C.S.D.N.Y. 1857).

copyright. The courts started with judicial opinions,¹⁴ then considered statutes,¹⁵ and finally the copyrightability of compilations¹⁶ and their components, such as page numbers¹⁷ or headnotes.¹⁸

Congressional attention to the question of copyright in government works dates back to the Printing Law of 1895, which provides for the sale by the Public Printer of “duplicate stereotype or electrotype plates from which any government publication is printed” and included an additional clause that “no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.”¹⁹

The clause was inserted as a convenience for Representative James D. Richardson, the chairman of the Joint Committee on Printing who had, on his own volition, compiled the *Messages and Papers of the Presidents of the United States*, and wished to come out with his own private edition. During a heated floor debate opposing the measure, the proviso that no copyright would vest in any publication was added to satisfy opponents who were worried that private claims of copyright over government publications would be exercised.²⁰

After Representative Richardson secured passage of the Printing Act of 1895, his actions received continued attention. Richardson was forced to defend on the House floor his belief that that he could properly assert copyright with respect to private individuals but not with respect to the government.²¹ After Richardson issued several volumes of the *Presidential Messages*, accompanied by assertions of copyright, a Senate committee was appointed to review the affair. It concluded that:

¹⁴ *Banks v. Manchester*, 128 U.S. 244 (1888) (Copyright in state court opinions).

¹⁵ See *Davidson v. Wheelock*, 27 F. 61 (Cir. Ct., D. Minn., 1866) (no copyright in Minnesota’s Constitution or statutes); *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (no copyright in statutes of Michigan).

¹⁶ *Gould v. Banks*, 53 Conn. 415, 2 A. 886 (1885) (“a copyright of a volume does not necessarily include a copyright of the opinions”).

¹⁷ *Banks Law Pub. Co. v. Lawyers’ Cooperative Pub. Co.*, 169 F. 386 (2d Cir. 1909) (“paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details”).

¹⁸ *Callaghan v. Myers*, 128 U.S. 617 (1888) (Synopsis created by the reporter may be copyrighted). *But see Chase v. Sanborn*, 4 Cliff. 306, 6 O.G. 932, 5 Fed. Cas. 521 (Cir. Ct. D. N.H. 1874) (Headnotes created by the judge are not copyrightable because authored in the course of official duties).

¹⁹ 28 Stat. 601 (1895), § 52.

²⁰ Caruthers Berger, *Copyright in Government Publications*, Study No. 33, (October 1959) in *Copyright Law Revision: Studies*, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 29-30 (Comm. Print 1961), pp. 23-42.

²¹ Maurice B. Stiefel, *Piracy in High Places—Government Publications and Copyright Law*, 8 Copyright L. Symp. 3, 16 (1955).

“If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.”²²

Congress further extended this legislative prohibition against copyright in government publications in the Copyright Act of 1909, stating no “publication of the United States Government, or any reprint, in whole or in part” is eligible for copyright.²³ That provision was maintained into the Copyright Act of 1976, and the term “work” was substituted for “publication” to clarify that all creative work, whether published or unpublished, in whatever form, were covered.²⁴

Since the 1909 Act, there have been only a few interpretations by the courts of the works of government clause. One of the first cases was *Sherrill v. Grieves*, in which Sherrill, an Army officer, prepared a textbook on military topography in his spare time, the text of which was then printed by the Government and used in an army school.²⁵ Sherrill subsequently published the book on his own and was able to successfully defend his copyright. The case underscores the principle that the government may use copyrighted works in government publications, but such use does not invalidate an underlying copyright.

In *Sawyer v. Crowell Publishing Co.*, the plaintiff accompanied the Secretary of the Interior on a mission to Alaska and on the trip gathered data for a map.²⁶ Although Sawyer gathered the data on his own time, he had a subordinate prepare the map on government time and directed the U.S. Geological Survey to engrave the map. Sawyer subsequently filed for copyright and asserted his right and the court ruled that because the map was closely related to the plaintiff’s official duties, and that government resources were used to create the work, his copyright was thus invalid.

Finally, in *Public Affairs Associates, Inc. v. Rickover*, Vice Admiral Hyman G. Rickover asserted copyright over two speeches he had delivered to a university and an education group in his spare

²² S. Rep. No. 1473, 56th Cong., 1st Sess. (1900) quoted in Stiefel, *op. cit.* note 21 at p. 24.

²³ 35 Stat. 1075 (1909).

²⁴ H.R. Rep. 94-1476, at 58 (1976). See also *Sherr v. Universal Match Corporation*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff’d*, 417 F. 2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (Holding that a statue of soldier in battle gear created by soldiers on active duty is not entitled to copyright protection even when subsequently used on a matchbook cover).

²⁵ *Sherrill v. Grieves*, 57 Wash. L.R. 286 (D.C. 1929). Reprinted in Copyright Office Bulletin No. 20 (Reprint 1972).

²⁶ *Sawyer v. Crowell Publishing Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942), *aff’d*, 142 F. 2d 497 (2d Cir. 1943), *cert. denied*, 323 U.S. 735 (1944).

time. He had written the speeches at home, where they were typed by his wife..²⁷ Despite the fact that the speech’s final form was typed by his office secretary and printed by the Navy as a news release, the court ruled Rickover retained copyright over its contents.

Works of Government and the Private Publication of Works

Since the 1930s, “the practice grew of having scientific and technical works produced by and for the Government published in private journals.”²⁸ This practice is important not only for the dissemination of information, but as the Rickover court held, “it is in the public interest for the Government to encourage intellectual development of its officers and employees, and to look with favor upon their making literary and scientific contributions.”²⁹ In fact, this practice was advocated by the Bureau of the Budget in 1943 as a cost-saving measure to save the government the cost of printing these works.³⁰

The first requirement for the works clause is that the author be an employee or officer of the federal government. There has been considerable discussion in the literature about when a task performed by a contractor becomes a work of the government.³¹ Whether copyright (or lack of copyright) vests in the government is a different issue from the question of works of government and is analyzed as a question of whether this was a work for hire.³² The current report focuses only on works of government, not on works for hire.³³

The key issue is whether a work was produced in the course of the employee or officer’s official duties. The House Report accompanying the 1976 Copyright Act clearly stated that even if the subject matter of a writing overlapped those duties, it was not necessarily a work of government:

“Under this definition, a Government official or employee would not be prevented from securing copyright in a work written at that person’s own volition and outside his or her

²⁷ *Public Affairs Associates, Inc. v. Rickover*, 268 F. Supp. 444 (D.D.C. 1967) (declaratory judgment dismissed); see 177 F. Supp. 601 (D.D.C. 1959), *rev’d*, 284 F. 2d 262 (D.C. Cir. 1960), *vacated per curiam*, *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962).

²⁸ Berger, *op. cit.* note 20 at 34.

²⁹ *Public Affairs Associates, Inc. v. Rickover*, 177 F. Supp. 601, 604 (D.D.C. 1959).

³⁰ Bureau of the Budget, *Publications and Informational Matter*, Circular No. A-16 (Aug. 1, 1943).

³¹ Note, *Rights of Federal Government Personnel Under the Copyright Act*, 37 Ind. L.J. 105, 106 (1961-1962).

³² Nimmer on Copyright, § 5.13[B][2] (Works Made on Commission).

³³ Guidance on what constitutes a “work for hire” was provided in a multi-factor balancing test in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). See also Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 Fla. State Univ. L.R. 197 (2014); Captain Brian R. Price, *Copyright in Government Publications: Historical Background, Judicial Interpretation, and Legislative Clarification*, 74 Mil. L. Rev. 19, 38 (1976).

duties, even though the subject matter involves the Government work or professional field of the official or employee.”³⁴

Courts and executive branch agencies have looked with disfavor on any claim of copyright over government works, since copyright in those instances would frustrate the primary purpose of this clause, which was promoting the “free dissemination of valuable government information.”³⁵ This has been particularly true in the case of misrepresentation. For example, the Federal Trade Commission successfully forced two private parties to cease and desist from selling *How to Win Success in the Mail-Order Business* as a new work when it was in fact a Department of Commerce publication, and held that they must “clearly disclos[e] the title under which it was previously sold.”³⁶ Likewise, when William B. Schulte sold a booklet entitled *Establishing and Operating a Real Estate and Insurance Brokerage Business* and falsely claimed that the information was from previously confidential sources and could not be obtained for less than the sale price of \$2, the FTC forced him to cease and desist as well.³⁷

Under the Copyright Act, if a work of government is included in a private publication, then the copyright notice must clearly identify “either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected.”³⁸ The House Report accompanying the Act stated that this clause was the result of a “publishing practice that, while technically justified under the present law, has been the object of considerable criticism” and requires that the notice should be “meaningful rather than misleading.”³⁹

Assertion of copyright over works of government is a widespread practice in private publishing. In 1963, a sitting president published a book called *To Turn the Tide* with the subtitle “A selection from President Kennedy’s public statements from his election through the 1961 adjournment of Congress.” Two pages after the title page the book contained the notice “Copyright © by John F. Kennedy” and the admonition “No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews.”⁴⁰ It is difficult to argue that any speeches given by the President of the

³⁴ H.R. Rep. 94-1476, at 58 (1976).

³⁵ 30 Cong. Rec. 1031 (1897) quoted in Stiefel, *Piracy in High Places*, *op. cit.* note 21 at 23.

³⁶ Federal Trade Commission Stipulation, *Book—Old as New*, 47 F.T.C. 1729, No. 8114 (1951).

³⁷ Federal Trade Commission Stipulation, *Real Estate Booklet—Qualities, Content and Value*, 46 F.T.C. 1205, No. 7930 (1949).

³⁸ 17 U.S.C. § 403.

³⁹ H. Rep. 94-1476 *op. cit.* note 34 at 145.

⁴⁰ Brucker, *Profits from Public Papers: The Government Copyright Racket*, Saturday Review, Aug. 11, 1962, reprinted in Hearings on S. 597, Copyright law revision, 90th Congress, 1st Sess., pt. 2, 651, 652 (1967). See also *Folsom v. Marsh*, 9 Fed. Cas. 342 (C.C.D. Mass. 1841) (Quoting letters of George Washington is considered fair use); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (Memoirs of former President Gerald Ford are protected by copyright).

United States are not given in the course of his or her official duties.⁴¹ As a result, the text of these speeches should not be given copyright protection.

Additional guidance on the external publication of works of government is provided in departmental-issued guidance and regulations. For example, the U.S. Army policy on intellectual property explains that official duties may be “expressed or implied” and involve work “necessary for the proper performance and accomplishment of an employee’s duties” or works “requested, directed, instructed, or otherwise ordered by an appropriate official.”⁴²

Nevertheless, the Army recognizes that “even though the subject matter of [a] work may be directly related to the author-employee’s official duties,”⁴³ it may in fact be a private work, but that if government facilities were used, the government is entitled to a royalty-free license to use the work “and to have others do so for its benefit.”⁴⁴ Finally, important to the subject of this report, the law requires “affirmative or negative identification of the sections which are actually copyrighted, thereby indicating which portions are works of the United States Government.”⁴⁵

Another example of such guidance is the Federal Judicial Center’s *Outside Publications Policy*. The Center asserts that for any work produced on official duty time or using government resources, the Center has the first right to publish, but if the work was prepared on the employee’s own time and “with no or very minimal use of government resources,” it may be published externally.⁴⁶ An important caveat, one which applies to other branches of government, is that if any “honoraria or outside income” is received, the matter should be cleared with appropriate ethics officials.⁴⁷

The Federal Judicial Center is clear that when materials are a work of government “they should be made widely available and at no cost to the public,” but the Center recognizes that such outside publication may reach “interested audiences more directly” as well as call attention to the Center. As with many government agencies, the Center is also subject to the Government Printing and Binding Regulations, which governs works created using appropriated funds and states

⁴¹ Drew Harwell and Amy Brittain, *Secret Service asked for \$60 million extra for Trump-era travel and protection, documents show*, Washington Post, March 22, 2017 (Quoting White House press secretary Sean Spicer: “The president is very clear that he works seven days a week. . . . This is part of being president”).

⁴² U.S. Army, Intellectual Property, *AR 27-60* (1993), § 4-3(b). See also Captain Brian A. Pristera, *What Do You Mean There Are No Copyrights in My Master’s Thesis? Written Works by Government Personnel—A Short Primer*, *2015 Army Law*, 29 (2015).

⁴³ *AR 27-60*, § 4-3(c).

⁴⁴ *id.*, § 4-3(d).

⁴⁵ *id.*, § 4-3(f).

⁴⁶ Federal Judicial Center, *Outside Publications Policy* (January, 2014).

⁴⁷ *18 U.S.C. § 209* (“Salary of Government officials and employees payable only by United States”).

that no work shall “be made available to a private publisher for initial publication without the prior approval of the Joint Committee on Printing.”⁴⁸ When the Center was found in breach of that requirement, it reached an agreement with the Joint Committee to make reprints of any such privately published articles available to the Federal Depository Library System.⁴⁹

One final issue to consider is what the nature of a “work” is when it is published as part of a larger compilation, such as when an article by a federal employee is part of a journal that contains non-governmental works. This was the nature of the 19th-century controversies over edicts of government, where some parties maintained that while court opinions were in the public domain, page numbers were a creative enterprise deserving of protection.⁵⁰

When a journal publishes an article authored by an employee or officer acting in his or her official capacity, in some cases the publisher will simply mark that article with an explicit disclaimer of copyright.⁵¹ However, in many cases no such disclaimer is provided and in some, the issue becomes even murkier. An example is the recent publication by President Obama in the Harvard Law Review. The article contains a disclaimer at that reads:

“Disclaimer: The journal’s copyright notice applies to the distinctive display of this *Harvard Law Review Commentary*, in both print and online forms, and not the President’s work or words.”⁵²

Perhaps the Harvard Law Review is attempting to distinguish the work the President originally submitted from the “final” work as published, but it is clear that the writing of the President, in the final fixed form as published by the Harvard Law Review Association, is also a work of government. The article as published has been “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communi-

⁴⁸ Government Printing and Binding Regulations, Joint Committee on Printing, Serial No. 26, **S. Pub. 101-9** (February 1990), § 38 (“Publications, by Private Publishers”).

⁴⁹ **Letter from John C. Godbold**, Director, Federal Judicial Center to Hon. Frank Annunzio, Chairman, Joint Committee on Printing, October 5, 1988.

⁵⁰ *Banks Law Pub. Co. v. Lawyers’ Cooperative Pub. Co*, *op. cit.* note 17.

⁵¹ See, e.g., Stephen W. Preston, *CIA and the Rule of Law*, **6 J. of Natl. Security Law & Policy** 1, (2012) (“No copyright is claimed in the content of this article, which was prepared by a federal officer in his official capacity.”); Mullins et. al., *Description of Bartonella ancashensis sp. nov., isolated from the blood of two patients with verruga peruana*, *Intl. J. of Systematic and Evolutionary Microbiology*, **65**, **3339-3343** (2015), (Authors are affiliated with the U.S. Naval Medical Research Center, the Walter Reed Army Institute of Research, and the U.S. Naval Medical Research and a Disclaimer indicates that 4 of the 5 authors “are military service members or employees of the US Government and this work was prepared as part of their official duties (17 U.S.C. § 105 provides that ‘Copyright protection under this title is not available for any work of the United States Government’”).

⁵² Obama, *The President’s Role*, *op. cit.* note 7. The print version may be viewed at <http://cdn.harvard-lawreview.org/wp-content/uploads/2017/01/811-866-Online-Rev-vf.pdf> (last visited March 24, 2017). The on-line version may be viewed at <http://harvardlawreview.org/2017/01/the-presidents-role-in-advancing-criminal-justice-reform/> (last visited March 24, 2017).

cated, either directly or indirectly with the aid of a machine or device”⁵³ and was done so “by or under the authority of the author.”⁵⁴ It is a work and it is a work by an officer of the U.S. government, hence it is a work of government and no copyright may vest in its final form.

Audits of Publication Practices

In order to quantify the extent of the practice of employees or officers of the United States publishing their work in private publications, a series of audits have been conducted. We examine first the results from American Bar Association publications, then law reviews, and finally more generally the full scholarly literature.

Most ABA publications are not freely available on the Internet, and must be accessed through commercial services such as electronic databases from companies such as William S. Hein & Co.’s HeinOnline service. Because author affiliation is not part of the searchable metadata, examining the literature for potential works requires examining the title page and reading the author-provided information, which typically includes information such as the author’s education and professional affiliations. In the case of government employees, the footnote often includes a disclaimer that the work does not represent the official views of the government.

The audit of ABA publications is a partial one in that not all publications and issues were examined. Included are articles in which the author self-describes as an employee or officer of the U.S. government. Not included were articles in which the author included a disclaimer indicating the work was done on personal time.⁵⁵

The results are presented in Table 1.⁵⁶

⁵³ 17 U.S.C. § 102(a).

⁵⁴ 17 U.S.C. § 101.

⁵⁵ See, e.g., Allan Jonathan Stein, *FOIA and FACA: Freedom of Information in the Fifth Branch?*, 27 *Admin. L. Rev.* 31 (1975) (“Presently with the office Hearings and Appeals, United States Department of the Interior. This article was originally written for Professor Roy A. Schotland at the Georgetown University Law Center.”); Nathan I. Finklestein and Collister Johnson, Jr., *Public Counsel Revised: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 *Admin. L. Rev.* 167 (1977) (Both authors self-identify as former federal employees and note “This article was written in consultation of the entire staff of the office of Public Counsel of the Rail Services Planning Office, Interstate Commerce Commission. Mr. A. Grey Staples, Jr., Director of the Office of Public Counsel, is particularly responsible for assisting the authors in developing the concepts and ideas discussed herein.”); Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 *Antitrust L.J.* 549 (2008-2009) (“Attorney, U.S. Department of Justice . . . The article was written while the author was visiting the University of Chicago Law School as the ‘06-‘07 Victor Kramer Fellow”).

⁵⁶ ABA members are encouraged to notify the author of any audited articles that they feel are not properly works of government because they were not conducted in the course of an author’s official duties. The full listing may be viewed at <https://law.resource.org/pub/us/works/aba/aba.audit.listing.pdf>

| <i>Publication Name</i> | <i>Period Examined</i> | <i>Works Found</i> |
|---|------------------------|--------------------|
| ABA Journal of Labor and Employment Law | 2011-2016 | 8 |
| Administrative Law Review | 1949-2015 | 255 |
| Air and Space Lawyer | 2014-2015 | 4 |
| Antitrust Law Journal | 2000-2015 | 75 |
| ABA Institutes | 2012-2015 | 27 |
| Criminal Justice | 2012-2016 | 10 |
| Insights on Law and Society | 2010-2015 | 4 |
| International Lawyer | 2015-2016 | 2 |
| Journal of Affordable Housing and Community Development Law | 1993-2016 | 19 |
| Judges' Journal | 2006-2016 | 25 |
| Jurimetrics | 2014-2015 | 3 |
| Procurement Lawyer | 2011-2015 | 7 |
| Public Contract Law Journal | 2010-2016 | 28 |
| Report of the Proceedings of the Annual Meeting Section on Public Utility Law | 1985-1986 | 13 |
| The Environmental Lawyer | 1994-2003 | 34 |
| The Labor Lawyer | 1985-2009 | 25 |
| The Public Lawyer | 2002-2016 | 13 |
| <i>Total</i> | | 552 |

In no case were articles accompanied by a disclaimer that no copyright applied to works of government or by any indication that the article was in fact such a work, although in a large number of articles a disclaimer was inserted that indicated that the views presented in the article did not necessarily reflect the official views of the employing agency.

In many cases, the articles are clearly explanations of an official about the workings of their department.⁵⁷ Another set of audits were conducted by volunteer law students across the country of law reviews based in law schools. Those results are presented in Table 2. Without clear indications if an article is in fact written in the course of official duties, the reader is forced to examine the runes of the footnote describing the author to try and make that determination.

| <i>Journal Name</i> | <i>Period Examined</i> | <i>Works Found</i> |
|--|------------------------|--------------------|
| Berkeley Technology Law Journal | 1986-2016 | 22 |
| Chicago-Kent Journal of Intellectual Property | 2001-2015 | 5 |
| Duke Law Journal | 1959-2007 | 108 |
| Harvard Law Review | 1946-2017 | 169 |
| Journal of Intellectual Property Law | 1993-2015 | 5 |
| Michigan Telecommunications and Technology Law Review | 1995-2014 | 9 |
| Northwestern Journal of Technology and Intellectual Property | 2003-2016 | 3 |
| Stanford Law Review | 1948-2004 | 58 |
| U. of Chicago Law Review | 1934-2017 | 119 |
| Yale Law Journal | 1923-2017 | 274 |
| <i>Total</i> | | 772 |

In one article, the results seem not to be a work when an ensign serving on active duty in the U.S. Naval Reserve published a piece on tax policy.⁵⁸ In another, the author was a Professor at Harvard Law School who served as the official reporter to the Advisory Committee on Civil

⁵⁷ See, e.g., Steven D. Poulin, *The U.S. Coast Guard Office of the Judge Advocate General: What We're All About*, 24 *Pub. Law.* 14 (2016) (The author is a Rear Admiral with the U.S. Coast Guard); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 *Lab. Law.* 1 (2000-2001) (The author is Chairman, National Labor Relations Board); Aaron E. Woodward, *The Perverse Effect of the Multiple Award Schedules' Price Reductions Clause*, 41 *Pub. Cont. L.J.* 527 (2011-2012) (Author is on active duty in the U.S. Air Force and the article was submitted to satisfy requirements for a Master of Laws degree).

⁵⁸ William D. Andrews, "Out of Its Earnings and Profits": *Some Reflections on the Taxation of Dividends*, 69 *Harv. L. Rev.* 1403, (1956).

Rules and his article described that work.⁵⁹ In a third, the author is Counsel to the President of the United States, but states that the article “was drafted before he became associated with the federal government.”⁶⁰ In a fourth article, a sitting justice of the Supreme Court clearly marks the article “© 1989 Antonin Scalia” which certainly serves as an indicator that this is perhaps not a work of government.”⁶¹ In a fifth, a Federal Trade Commissioner describes how the agency is structured and selects cases.⁶² If the extent of the practice was only a few thousand law review articles, this issue would not necessarily deserve attention. However, legal publishing is one of many fields in which government officials publish prolifically. In fields such as medicine, agencies such as the Centers for Disease Control, the Veterans’ Administration hospital system, and the National Institutes of Health all play a dominant role. In economics, organizations such as the Bureau of Labor Statistics, the U.S. Census, the Board of Governors of the Federal Reserve, and the Federal Trade Commission all play an active role. In the field of agriculture, the U.S. Department of Agriculture is one of the premier research institutions. In the field of transportation engineering, organizations such as the Federal Aviation Administration and the Federal Highway Administration make key contributions.

To help determine the extent of works of government, a series of searches have been conducted in major bibliographic database systems such as ProQuest and EBSCO. The process consists of working through the U.S. Government Manual⁶³ and other sources on the structure of government and entering resulting agency names into the search services.

Table 3 shows preliminary results for select agencies listing the number of potential works of government found through bibliographic searches. Note that these lists are based on raw results and post-processing steps such as elimination of duplicates and quality assurance to make sure each entry is in fact authored by a federal employee will reduce the totals. Because databases such as ProQuest have a limited scope, additional results are being retrieved using specialized search services. For example, ProQuest has cataloging information for 1 million articles from the IEEE, but the IEEE has over 4 million articles published, so a supplementary search of computer science is needed to complement the initial results.

⁵⁹ Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 *Harv. L. Rev.* 801 (1964).

⁶⁰ Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697 (1975).

⁶¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chicago Law Review* 1175 (1989).

⁶² Robert Pitofsky, *Agency Structure, Case Selection, and Public Policy: Antitrust Enforcement at the FTC*, 90 *Yale L.R.* 726 (1981).

⁶³ *U.S. Government Manual*, 2016 Edition, *SuDoc AE 2.108/2*, Government Printing Office.

| <i>Agency</i> | <i>Works Found</i> |
|--|--------------------|
| Army Corps of Engineers | 20,027 |
| Board of Governors of the Federal Reserve | 17,483 |
| Centers for Disease Control | 11,904 |
| Central Intelligence Agency | 5,185 |
| Dept. of Agriculture | 40,298 |
| Dept. of Commerce | 38,352 |
| Dept. of Defense Graduate Schools | 5,569 |
| Dept. of Defense Intelligence Agencies | 11,594 |
| Dept. of Education | 4,713 |
| Dept. of Energy (excluding National Labs) | 6,943 |
| Dept. of Health and Human Services (excluding CDC and NIH) | 24,720 |
| Dept. of Homeland Security (excluding Coast Guard and ICE) | 44,070 |
| Dept. of Interior | 13,520 |
| Dept. of Labor | 7,243 |
| Dept. of State | 7,848 |
| Environmental Protection Agency | 23,297 |
| Legislative Branch and Associated Agencies | 53,931 |
| National Aeronautics and Space Administration | 41,745 |
| National Institutes of Health | 45,301 |
| Nuclear Regulatory Commission | 9,156 |
| Smithsonian Institution | 14,651 |
| U.S. Army (Generally) | 14,899 |
| U.S. Courts | 4,792 |
| U.S. Navy | 6,667 |
| Veteran's Administration | 6,981 |
| White House and Executive Office of the President | 3,092 |
| <i>Total</i> | <i>483,981</i> |

Opportunities for Broader Availability

There are several steps that can be taken to promote broader availability of works of government. First and foremost is better adherence to the terms of existing laws for articles that will be published in the future. When an article is submitted to a publication, most require completion of a copyright release form. Some publications that deal with government employees provide an option that indicates there is no copyright to be transferred because the employee works for the federal government. In other cases, conscientious federal employees simply scratch out the release and pen some form of the phrase “I will not sign this statement.”

It would be a straightforward best current practice for publishers to provide a simple indicator on the form that allows a federal employee to make clear when a submission is a work of government. Likewise, it would be equally straightforward for all publishers to clearly indicate, as the law requires, when a published article is a work of government.

One mechanism that would help provide broader availability of works of government in the future would be legislation mandating that a copy of any externally published works of government be submitted to the Government Printing Office, which would make those works available on the Federal Digital System web site it operates and also provide copies to the members of the Federal Depository Library System.

A second area where guidance would be useful would be formal policies from the Office of Government Ethics and the Judicial Conference of the United States to provide guidelines across government for external publication, in particular guidance on when such a publication is a work of government and when it is the personal publication. Such guidelines could spell out any departmental approvals or other ethics safeguards that agencies should put in place.

While government can make such articles more broadly available on government web sites, private publishers can also take steps to make these materials much more broadly available. In the case of articles published in the future, publishers could provide free access to these articles in addition to clearly marking them as works of government. Conclusion: Keeping America Informed

The works of government doctrine developed in the late 19th century as part of a broader focus on making government information more broadly available. In 1861, on the same day that Abraham Lincoln was inaugurated, the Government Printing Office opened its doors with a mission of “keeping America informed.”⁶⁴ On the other side of Capitol Hill, the newly formed Smithson-

⁶⁴ Robert Washington Kerr, *History of the Government Printing Office*, Govt. Printing Office (1881).

ian Institution was working to promote the “increase and diffusion of knowledge.”⁶⁵ This was a period when all three branches grappled with who owns edicts of government and other works of government, a period that culminated in the Printing Act and then the Copyright Act and a clear policy that works of the U.S. Government are owned by the people and have no copyright. That policy emerged from dramatic changes in printing technology, changes that made possible private works such as the National Reporter System of John B. West.⁶⁶

A subsequent dramatic change in technology in the 1930s and 1940s accompanied an explosion of government activity,⁶⁷ and instituted formal procedures such as the creation of Official Journals of Government such as the Federal Register and the establishment of a National Archives and Records Agency to preserve the materials of government. By the end of World War II, agencies such as the Government Printing Office had greatly expanded their activities, consuming 250,000 tons of paper per year at the world’s largest printing plant.⁶⁸

External publication of works of government is a practice that has grown over time. We should continue to adapt our basic principles to meet the realities of our modern Internet era. We can encourage the continued publication in prestigious scholarly journals and still maintain our belief that government information has a special role because it is owned by the people.

An informed citizenry is at the core of our democracy and a federal government that informs and instructs plays a valuable role in our modern, information-rich society. John Adams said if our democracy is to work, we must arm our citizens with knowledge, letting “the public disputations become researches into the grounds and natures and ends of government” and encouraging us to “let every sluice of knowledge be open’d and set a flowing.”⁶⁹ Works of government are just one small sluice, but one that we can readily open and set a flowing. With adoption of this resolution, the ABA can take a concrete and meaningful step to promote greater access to knowledge.

Respectfully submitted,

Timothy Stanley
Edward J. Walters

⁶⁵ 9 Stat. 102 (1846).

⁶⁶ Ross E. Davies, *West’s Words, Ho!: Law Books by the Million, Plus a Few*, 14 Green Bag 2d 303 (2011).

⁶⁷ Erwin Grisworld, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198 (1934).

⁶⁸ Geoffrey T. Hellman, *Mr. Public Printer—I*, The New Yorker, June 12, 1943, p. 24. See also Geoffrey T. Hellman, *Mr. Public Printer—II*, The New Yorker, June 19, 1943, p. 28; Geoffrey T. Hellman, *Mr. Public Printer—III*, The New Yorker, June 26, 1943, p. 24.

⁶⁹ John Adams, *A Dissertation on the Canon and Feudal Law, No. 4.*, Boston Gazette, October 21, 1765.

GENERAL INFORMATION FORM

Submitting Entity: Individual submission by Timothy Stanley and Edward J. Walters (ABA Members)

Submitted By: Timothy Stanley and Edward J. Walters joined by Nathan Cardozo, David Greene, Vincent Polley, Nina Mendelson

1) Summary of Resolution(s).

The resolution proposes legislation that would require works authored by federal employees or officers in the course of their official duties and subsequently published privately in journals or other publications to furnish those works to the Government Printing Office for subsequent distribution. The resolution encourages publishers to properly identify works of the U.S. government and to make them more broadly available to the public. The resolution identifies actions that may be taken by the Judicial Conference, the Office of Government Ethics, and the Federal Trade Commission to promote better labeling and availability of works of the U.S. government.

2) Approval by Submitting Entity.

This is a submission by individual members comprising the *Ad Hoc Committee on Promulgation*.

3) Has this or a similar resolution been submitted to the House or Board previously?

No.

4) What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Copyright release forms used for acceptance of articles.

5) If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6) Status of Legislation. (If applicable)

N/A

7) Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Policy could be implemented by legislative action and agency action and through voluntary steps by publishers.

8) Cost to the Association. (Both direct and indirect costs).

None (excepting a minor change in procedures for receiving submissions from authors).

9) Disclosure of Interest. (If applicable)

N/A

10) Referrals.

The Resolution and report have been referred to all ABA Section Chairs, Section Delegates, and their staff directors.

11) Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Carl Malamud
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 827-7290
carl@media.org

12) Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Carl Malamud
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 217-2934
carl@media.org

EXECUTIVE SUMMARY

Works of the U.S. government are writings and other publications authored by an employee or officer of the federal government in the course of his or her official duties. These works of government are not eligible for copyright based on long-standing public policy and legislative enactments going back to the Printing Act of 1895 and the Copyright Act of 1909.

1. Summary of the Resolution

This report and resolution outlines a number of steps that governmental authorities and private publishers (including the ABA) could take to encourage broader availability of Works of the U.S. Government. This resolution recommends that Congress mandates a deposit of all externally published works of government with the Government Printing Office for subsequent distribution on government web sites and through the Federal Depository Library System. In addition, this resolution recommends that the Office of Government Ethics develop guidelines instructing federal employees and officers on the proper contours of the works of government clause.

This resolution also recommends that publishers more determine on submission which articles are works of government and more clearly mark them upon publication.

2. Summary of the Issue that the Resolution Addresses

In the 20th century, a large number of scholarly and technical articles began to be published in journals run by professional associations or by private publishers. This report documents 552 articles in publications of the ABA which are potentially works of government and thus not eligible for copyright. This report also demonstrates that the problem is not confined to the legal literature, and includes several hundred thousand journal articles authored by federal employees or officers and privately published. The fields of endeavor include law, economics, medicine, engineering, agriculture, and many other disciplines.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The law requires that works of government be clearly identified. However, many such articles are not properly identified and in any case, many of them are not available except by subscribing to commercial services and adhering to stringent terms of use. By more clearly labelling Works of the U.S. Government and by requiring mandatory deposit of such works to the Government Printing Office, this literature will become more broadly available as is the intent of the Works of the U.S. Government clause of the Copyright Act. By urging formal guidance from the Office of Government Ethics, employees and officers of the government will be able to identify when a work is conducted in the course of their official duties.

4. Summary of Minority Views

None as of this writing.