

# What Do You Mean There Are No Copyrights in My Master's Thesis? Written Works by Government Personnel – A Short Primer\*

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## I. Introduction

Copyrights are intended to help protect authors from having their written works published or distributed without their consent.<sup>1</sup> However, no U.S. copyright exists in written works created by a government employee (civilian employees and uniformed personnel) as part of his/her official duties. This includes papers written pursuant to assignment to a military school, as part of a government funded master's program, or during the normal course of duty. Accordingly, the government is free to reproduce, publish, or otherwise disseminate such written work, with or without the government employee-author's consent.<sup>2</sup> Government employees who have authored works as part of their official duties may, with appropriate government

approval, also seek to have their writings published. Government employees, however, must remain mindful of legal restrictions concerning receipt of compensation for their written work and the general ethics guidance outlined below. Government employees may not profit from any written work created as part of their official duties.<sup>3</sup>

This article addresses U.S. copyright law and ethics rules relating to written works by government employees. This article does not address international copyright laws or how any of these laws apply to works of U.S. government contractors.<sup>4</sup> The appendix is a quick reference table designed to help a practitioner quickly answer basic copyright questions regarding a written work of a government employee-author. Many copyright issues are fact specific and all questions should be thoroughly run to ground prior to rendering a legal opinion. Finally, Army Regulation (AR) 27-60, Intellectual Property, is currently under revision. This article references both the current regulation and the current draft revisions to AR 27-60. Substantively, there is little, if any, difference in the portions used herein.

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<sup>1</sup> AR 27-60, Intellectual Property, discusses Intellectual Property and provides an overview of what a "copyright" is. The current Draft AR 27-60, paragraph 4-1, provides the following information on copyrights:

A copyright is a legal collection of rights that exists in a work of creative expression such as writings, drawings, photographs, graphic designs, architectural plans, motion pictures of every kind or technique, music, and sound recordings. The copyright exists at the moment a work is created and fixed in any medium capable of being perceived and reproducing or communicating the work. Historically, such media have been paper, film, magnetic tape, vinyl records, compact discs, fine art and graphic art media, sculptural materials, and any manner of other digital or analog storage media from which the work might be perceived. Software may be protected by copyright, and in some cases, by patents. Although common, a copyright notice or marking such as "©" or "Copyright" is not required for copyright protection to exist. A copyright is not the physical work itself, but the rights accruing to the copyright owner under the U.S. Copyright Act, Title 17, United States Code.

A copyright owner has the exclusive right to: reproduce (make copies of), distribute, perform publicly, display publicly, or make certain modifications (called "derivative works") to the copyrighted work.

U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY (1 June 1993 [hereinafter AR 27-60]); U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY (Draft) (Dec. 19, 2014) [hereinafter AR 27-60 (Draft)], para. 4-1 (2014).

<sup>2</sup> AR 27-60, paras. 4-3(a) and (e).

## II. What Is a "Work of the United States Government"?

A "work of the United States government" is a work prepared by a government employee as part of that person's official duties.<sup>5</sup> Army Regulation 27-60 provides a framework for determining the rights of both a government employee-author and the government concerning works authored by government employees.<sup>6</sup> Whether a U.S. copyright exists in a written work authored by a government employee depends on whether the work is created as part of that individual's official duties.<sup>7</sup> A written work authored as part of a government employee's official duties is *not* protected by U.S. copyright law.<sup>8</sup> Conversely, a written work authored by a government employee outside and independent of her official duties is protected by U.S.

<sup>3</sup> 18 U.S.C. § 209; 5 C.F.R. § 2635.807(a) (2015).

<sup>4</sup> DoD contracts involving written work (or any potentially copyrightable work) should include Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.204-7000, Disclosure of Information, clause 252.227-7020, Rights in Special Works, and /or other appropriate language, as the circumstances of the contract will dictate, addressing the handling of written works and copyrights produced under the contract.

<sup>5</sup> 17 U.S.C. § 101 (Dec. 19, 2014).

<sup>6</sup> See AR 27-60, *supra* note 1 para. 4-3.

<sup>7</sup> 17 U.S.C. §§ 101, 105 (Dec. 19, 2014). See also AR 27-60, para. 4-3(b).

<sup>8</sup> 17 U.S.C. §§ 101, 105 (Dec. 19, 2014).

copyright law.<sup>9</sup> Note, however, that even if a copyright exists in a work authored outside and independent of official duties, if government time or resources were used to create it, the government may automatically retain rights to publish, disseminate, and use the work without penalty for infringement, because government resources were used to create it.<sup>10</sup>

In any case, and with all written works, government employees must remain mindful of Joint Ethics Regulation (JER) guidance, which generally prohibits government employees from profiting or receiving any personal gain for official work.<sup>11</sup> Furthermore, use of official time or resources to complete personal works may constitute misuse of government resources in violation of the JER or other law or regulation.<sup>12</sup>

### III. Application of U.S. Copyright Law to Written Works of Government Personnel

#### a. Works Created as Part of Official Duties

As stated above, there is no U.S. copyright protection in any work created by a government employee as part of her official duties.<sup>13</sup> The fact that no U.S. copyright exists in such works does not mean, necessarily, that the work must be released to the public.<sup>14</sup> Rather, there is simply no legal course of action under U.S. copyright law to protect the work.<sup>15</sup> For example, if a servicemember attends a military or civilian school as part of her official duties (e.g., Command and General Staff College, Army War College, or state university/college as part of an advanced civil schooling program), and part of the curriculum requires writing a thesis, that thesis would be considered a “work of the United States government,” and no U.S. copyright would exist. In this scenario, the servicemember-author could seek publication of the thesis, provided she complies with the ethics rules and applicable Department of the Army (DA) and Department of Defense (DoD) policy regarding the

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<sup>9</sup> 17 U.S.C. § 102 (Dec. 19, 2014).

<sup>10</sup> 28 U.S.C. § 1498(b) (Oct. 28, 1998). *See also* AR 27-60, para. 4-3(d).

<sup>11</sup> U.S. DEP’T OF DEF., 5500.7 R, JOINT ETHICS REGULATION (JER) para. 205 (Nov. 17, 2011) [hereinafter JER]; 18 U.S.C. § 209(a) (Dec.19, 2014).

<sup>12</sup> JER, para. 2-301(b), 3-303; 5 C.F.R. §§ 2635.704 – 705 (Apr. 2, 2015).

<sup>13</sup> 17 U.S.C. § 105 (Dec.19, 2014). Note that even if the work is written or produced using personal time and/or personal resources, it can still be a “Work of the United States Government” if it was completed as part of an official duty.

<sup>14</sup> *See generally*, U.S. DEP’T OF DEF., DIR. 5230.09, CLEARANCE OF DoD INFORMATION FOR PUBLIC RELEASE (22 Aug. 2008) [hereinafter DoDD 5230.09]; U.S. DEP’T OF DEF., DIR. 5230.29 SECURITY AND POLICY REVIEW OF DoD INFORMATION FOR PUBLIC RELEASE (13 Aug. 2014); U.S. DEP’T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM chs. 5, 6 (25 May 2011) [hereinafter AR 360-1].

<sup>15</sup> 17 U.S.C. § 105 (Dec.19, 2014).

release of information.<sup>16</sup> Likewise, since no U.S. copyright exists in a “work of the United States government,” the respective military or civilian school could also publish the same thesis without permission from the author or the government.<sup>17</sup>

#### b. Works Created Using Government Time and/or Resources, But Not as Part of Official Duties

If a government employee uses government time and/or resources to complete personal work (i.e., work not part of official duties), a U.S. copyright in the work may exist and it is possible for the employee to seek registration of the copyright.<sup>18</sup> However, the government would also effectively hold a license to use the work and the employee would not have any legal course of action against the government for infringement.<sup>19</sup> Also note that when government time or resources are used for personal work, the JER and ethics rules may be implicated, as discussed below.

#### c. Works Created on Personal Time with Personal Resources

Finally, a government employee holds a U.S. copyright in any work created on personal time with personal resources, and is not subject to any U.S. copyright restrictions based on her status as a government employee.<sup>20</sup> Simply put, a

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<sup>16</sup> DoDD 5230.09; DoDI 5230.29; AR 360-1, chs. 5, 6.

<sup>17</sup> Certain restrictions may still apply if the work contains non-public information. *See* AR 360-1, ch. 6. *See* 5 C.F.R. § 2635.703(b) for a definition of “non-public information.”

<sup>18</sup> 17 U.S.C. §§ 101, 105 (Dec.19, 2014); 28 U.S.C. § 1498(b) (Dec.19, 2014).

<sup>19</sup> 28 U.S.C. § 1498(b) (Dec.19, 2014). *See also* AR 27-60 (Draft), paras. 4-3(c) and (d), which articulate these principles as follows:

The use of Government time, material, or facilities in creating a work does not necessarily result in that work being a work of the United States Government. Also, unless the work is prepared as part of the employee’s official duties, the subject matter of the work does not automatically establish the work as a work of the United States Government. This is true even though the subject matter of the work may be directly related to the author-employee’s official duties. Thus, the above factors do not preclude the existence of a copyright belonging to the author-employee. However, the use of Government time, material, or facilities for personal projects may result in a violation of AR 600-50. (We know this is obsolete, and in revisions has been changed to “...may result in a violation of the Joint Ethics Regulation...”)

When Government time, material, or facilities are used in the preparation of a work by a Government employee, even if a copyright exists in the work, and is owned by the employee, 28 USC 1498(b) does not confer a right of action by the copyright owner against the Government for infringement. This is interpreted to mean that the Government is entitled to a royalty-free license to duplicate, distribute, and use the copyrighted work, and to have others do so for the Government’s benefit.

<sup>20</sup> 17 U.S.C. § 102 (Dec. 19, 2014).

government employee in this scenario would be entitled to the same copyright protection afforded a non-employee. This is true even if the subject matter of the work overlaps with the nature of the author's government employment.

Importantly, the existence of a U.S. copyright in a work about (or relating to) an employee's official duties does not—in and of itself—authorize a government employee to disclose or publish “non-public information.”<sup>21</sup> Absolutely nothing in U.S. copyright law or in AR 27-60, should be construed to permit disclosure of government information simply because the author holds a U.S. copyright. Prior to release of any such work, appropriate legal and security reviews must be obtained to ensure compliance with DA and DoD Policy regarding the release of information.<sup>22</sup> There may also be additional restrictions on the government employee-author profiting from work relating to a government employee's job.<sup>23</sup>

d. Use of Copyrighted Works Within Works of the United States Government

Using all or part of a copyrighted work, within a work of the United States government, requires permission from the copyright owner.<sup>24</sup> For example, if a government employee, as part of her official duties, writes an article and includes a copyrighted photo, the U.S. government must have properly documented authority to use the photo from the copyright owner. Additionally, the copyright owner will retain the copyright after the government work is published. Subsequent use by the government may require additional permission from the copyright owner.

e. Publication of Government Information

The specific facts and circumstances associated with any particular writing, and the type of publication sought, will dictate who the appropriate authority is to authorize publication, as well as what additional review/authorization, if any, is needed.<sup>25</sup> In accordance with DoD policy, “a security and policy review shall be performed on all official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the [DoD].”<sup>26</sup> “Clearance, through security review and PA [public affairs] channels, is required for all official . . . writings that are presented or published in the civilian domain, to include materials placed on the

Internet or released via similar electronic media.”<sup>27</sup> Writings that pertain to military matters, national security issues, or subjects of significant concern to the DoD, should be “submitted to the appropriate PAO [Public Affairs Office] who will prepare material for release and ensure a security review is conducted.”<sup>28</sup> Additionally, the servicing PAO “either will grant clearance or forward the information to the appropriate headquarters for clearance.”<sup>29</sup> In any event, if either the government or an employee-author wishes to pursue release of government information (i.e., publish written works), the servicing PAO should be contacted first, prior to publication, to facilitate appropriate legal, policy, and security reviews.

IV. Application of Ethics Rules

Separate and apart from the associated copyright issues in the scenarios outlined above, all government employees must remain mindful of the following ethical rules as they relate to written works.<sup>30</sup>

a. Misuse of Position

The Federal Standards of Conduct prohibit government employees from misusing their official positions.<sup>31</sup> Specifically, government employees may not: (1) use public office for private gain; (2) use non-public information to further a private interest; (3) use government property for unauthorized purposes; or (4) use official time, including a subordinate's time, to perform non-official duties.<sup>32</sup>

b. Compensation for Written Work.

Receipt of non-federal compensation for official writing is restricted by criminal and regulatory law, and supplementation of salary is not authorized.<sup>33</sup> Compensation for writing in a personal capacity may also run contrary to ethics regulations, depending on the circumstances.<sup>34</sup> If a government employee's writing falls within any one of several categories, then the employee may

<sup>21</sup> 5 C.F.R. § 2635.703(b) (Apr. 2, 2015).

<sup>22</sup> See *infra* III.d.

<sup>23</sup> See *infra* IV.b.

<sup>24</sup> 17 U.S.C. § 106 (Dec. 19, 2014).

<sup>25</sup> See generally, AR 360-1, ch. 5.

<sup>26</sup> DODI 5230.09 *supra* note 14.

<sup>27</sup> AR 360-1, para. 6-1(b)

<sup>28</sup> AR 360-1, para. 5-3(c)(1)

<sup>29</sup> AR 360-1, para. 5-3(c)(1)

<sup>30</sup> Note that DoDD 5500.07 republishes and specifically makes most provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635) applicable to enlisted personnel. As a practical matter, the ethics rules identified in this information paper should be considered by, and consistently applied to, all DoD personnel, including DA Civilians, military officers, and enlisted personnel.

<sup>31</sup> 5 C.F.R. §§ 2635.702 – 705 (Apr. 2, 2015).

<sup>32</sup> 5 C.F.R. §§ 2635.702 – 705 (Apr. 2, 2015).

<sup>33</sup> 18 U.S.C. § 209; 5 C.F.R. § 2635.807(a) (2015).

<sup>34</sup> See 5 C.F.R. §§ 2635.807(a)(2)(i)(A)-(E) (Apr. 2, 2015).

not receive compensation for her written work.<sup>35</sup> These categories include instances when: (1) the activities undertaken are part of official duties; (2) the government employee writes on topics concerning her duties or agency; (3) compensation is offered because of the employee's official position rather than expertise in the subject matter; (4) compensation is offered from a person who may be substantially affected by the employee's official duties; or (5) the information conveyed draws substantially on ideas or official data that are nonpublic information.<sup>36</sup>

Whether writing in an official or personal capacity, employees may not circumvent restrictions by having compensation paid to another person, including a charitable organization.<sup>37</sup> In such cases, the compensation is still considered to have been "received" by the employee.<sup>38</sup>

Therefore, current U.S. copyright and ethical laws and regulations do not prohibit a government employee from receiving compensation for work she has authored under the following circumstances: (1) when the work was authored on personal time with personal resources, it was not created as part of official duties, and the content of the work does not invoke 5 C.F.R. 2635.807(a)(2)(i); or (2) when the work was authored, at least in part, on government time and/or with some government resources, but it was not created as part of official duties, and the content of the work does not invoke 5 C.F.R. 2635.807(a)(2)(i).

### c. The Appearance of Government Endorsement in Non-Government Writing

Using a government employee's title or position in connection with non-government (or outside) writing can improperly imply government endorsement. Generally, government employees may not use or permit the use of their official titles or positions in a manner suggesting that the government sanctions or endorses their outside writing.<sup>39</sup> There are three exceptions to this general restriction. First,

an active duty Soldier or officer may use or permit the use of her rank to identify her as the author of the work.<sup>40</sup> Second, a reference to the government employee's title or position as one of several biographical details is permitted, if that reference is not given more prominence than other significant biographical details.<sup>41</sup> A reference is given more prominence than other significant biographical details when it is on the cover of a book, the book jacket, the title page, or other promotional materials for the written work.<sup>42</sup> Third, if the writing is being published in a scientific or professional journal, the employee may permit the use of her title and position so long as it is accompanied by a disclaimer that the views expressed in the writing do not reflect the views of the U.S. government.<sup>43</sup>

For example, if Colonel John Smith seeks to publish a non-government article, he may identify himself on the title page of the article as "Colonel John Smith." He may not identify himself as "Colonel John Smith, Commander, 100th Transportation Brigade." If there is a biographical footnote or paragraph listing details such as Colonel Smith's educational background, work experience, etc., then his position may be listed among those biographical details.

## V. Conclusion

As discussed above, there is no U.S. copyright protection for any work created as part of a government employee's official duty. That said, a U.S. copyright exists in written works created independent of official duties. If government time and resources are used to create such an independent work, the government may have an automatic right to use or publish the work.

Importantly, government ethics rules operate independently of U.S. copyright laws. It is possible to own a U.S. copyright for an original work, but be prohibited from profiting from that work based on the author's employment or the information contained therein. Consequently, government employees need to ensure that they are in compliance with the Joint Ethics Regulation and any other ethics policies applicable to them.

Prior to release or publication of a writing, all government employees should consult with their servicing judge advocate and Public Affairs Office concerning written works, release of information, and associated ethics issues.

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<sup>35</sup> Specifically, two of the categories where compensation is prohibited are 5 C.F.R. § 2635.807(a)(2)(i)(E)(I) (an employee may not receive compensation if the subject of the activity deals in significant part with any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period) and 5 C.F.R. § 2635.807(a)(2)(i)(E)(I) (an employee may not receive compensation if the subject of the activity deals in significant part with any ongoing or announced policy, program or operation of the employee's agency.)

<sup>36</sup> 5 C.F.R. § 2635.807(a)(2)(i) (Apr.2, 2015).

<sup>37</sup> 5 C.F.R. § 2635.807(a)(2)(iv) states that an employee "receives" compensation if it is paid: (1) to another person, including a charitable organization, on the basis of designation, recommendation, or other specification by the employee; or (2) with the employee's knowledge and acquiescence to his parent, sibling, spouse, child or dependent relative.

<sup>38</sup> 5 C.F.R. § 2635.807(a)(2)(iv) (Apr.2, 2015).

<sup>39</sup> 5 C.F.R. § 2635.702(b) (Apr.2, 2015); 5 C.F.R. § 2635.807(b) (Apr.2, 2015).

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<sup>40</sup> 5 C.F.R. § 2635.807(b)(3) (Apr.2, 2015).

<sup>41</sup> 5 C.F.R. § 2635.807(b)(1) (Apr.2, 2015).

<sup>42</sup> 5 C.F.R. § 2635.807(b)(1) (Apr.2, 2015).

<sup>43</sup> 5 C.F.R. § 2635.807(b)(2) (Apr.2, 2015).

APPNDIX

QUICK REFERENCE TABLE

Written Works by Government Personnel - Copyright and Ethics Rules

Was the Work Created as Part of Official Duties?	Was Government Time or Resources Used to Create the Work?	Does a U.S. Copyright Exist and Who Holds the Copyright?	Who has Authority to Publish the Work?	May the Employee / Author Receive Compensation for the Work?
<p><b>YES</b></p> <p>(Authoring the work was part of the employee's official duties)</p>	<p><b>YES</b></p> <p>(Employee/Author used government time and/or resources to create the work)</p>	<p><b>NO</b></p> <p>(No U.S. copyright exists)</p>	<p><b>GOVERNMENT**</b></p> <p>May publish after review and clearance through PAO to the appropriate government official (See AR 360-1, chs. 5 and 6).</p>	<p><b>NO</b></p> <p>Employee/Author may <b>not</b> realize any financial gain outside of federal salary.</p>
<p><b>NO</b></p> <p>(Authoring the work was <b>not</b> part of the employee's official duties)</p>	<p><b>NO</b></p> <p>(Employee/Author did <b>not</b> use any government time or resources to create the work. Work was created on personal time with personal resources only.)</p>	<p><b>YES</b></p> <p>(Held exclusively by Employee/Author)</p>	<p><b>EMPLOYEE / AUTHOR</b></p> <p>May publish, unless work "pertains to military matters, national security issues, or subjects of significant concern to the DoD" (<i>i.e.</i>, review and clearance through PAO is required if subject matter meets criteria of DoDI 5230.29) (See AR 360-1, Para 6-8h; DoDD 5230.09; and DoDI 5230.29).</p>	<p><b>YES</b></p> <p>Employee/Author may realize a financial gain from written work, subject to the restrictions in 5 C.F.R. § 2635.807. The most common of those restrictions prohibits compensation for a written work that:</p> <p>1. Deals significantly with the employee's present assignment or with a matter which the employee had been assigned during the previous one-year period (5 C.F.R. § 2635.807 (a)(2)(i)(E)(1))</p> <p><i>or</i></p> <p>2. Deals in significant part with any ongoing or announced policy, program, or operation of the employee's agency. (5 C.F.R. § 2635.807 (a)(2)(i)(E)(2)).</p>
	<p><b>YES</b></p> <p>(Employee/Author used at least some amount of government time or resources to create the work, but not part of the employee's official duties)</p>	<p><b>YES</b></p> <p>(Held by the Employee/ Author; government effectively holds a license and is able to use, reproduce, or publish the work without infringing upon the Employee/ Author's copyright)</p>	<p><b>BOTH THE GOVERNMENT AND EMPLOYEE / AUTHOR</b></p> <p><i>Government</i> may independently publish after review and clearance through PAO to the appropriate government official. <i>Employee/ Author</i> may independently publish, unless work "pertains to military matters, national security issues, or subjects of significant concern to the DoD" (review and clearance through PAO would be required).</p>	

**\*NOTE:** *This table is for illustrative purposes only. All government employees should consult with their servicing Judge Advocate and Public Affairs Office concerning written works, release of information, and associated ethics issues.*

**\*\* NOTE:** U.S. Copyright law does not prevent anyone (government, author, or member of the public) from publishing a work of the United States government. However, Army and DoD regulations require that a review and clearance through PAO to the appropriate government official be completed prior to releasing the information. (See AR 360-1, chs. 5 and 6). Those regulations operate independently from U.S. copyright laws.