Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 37 | Issue 1 | Article 3

Fall 1961

Rights of Federal Government Personnel Under the Copyright Act

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Intellectual Property Law Commons, and the Labor and Employment Law Commons

Recommended Citation
(1961) "Rights of Federal Government Personnel Under the Copyright Act," *Indiana Law Journal*: Vol. 37: Iss. 1, Article 3.
Available at: http://www.repository.law.indiana.edu/ilj/vol37/iss1/3

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

NOTES

RIGHTS OF FEDERAL GOVERNMENT PERSONNEL UNDER THE COPYRIGHT ACT

The Copyright Act Section 8 provides in part:

> No copyright shall subsist in . . . any work which is in the public domain or . . . in any publication of the United States Government, or any reprint in whole or in part thereof . . .[1]

This apparently simple clause has given rise to a host of complex legal problems, not the least of which is the copyright protection afforded an employee of the federal government for his literary products. The first aspect of the problem to be considered arises in the following context. A federal government employee or official creates a literary work which is related to his official duties in one of three ways:

(1) The production of the literary work is a part of the official duties of the employee or officer and is issued by the government as a public document.[2]

(2) The production of the literary work is not a part of the official duties of the officer or employee, and the subject matter of the work is unrelated to these duties.[3]

(3) The literary work has some bearing on, or arises out of his duties but its creation is not a part thereof.[4] In each of these situations it becomes imperative, because of the prohibition of Section 8, to determine whether the literary product is a "publication of the United States Government," thereby precluding the author-employee from acquiring the exclusive right for a limited time to reproduce and distribute the work that results from securing a statutory copyright.[5] The second part of the problem to be considered arises in the following context. A literary product of the third type noted above has been pro-

---

1. 17 U.S.C. § 8 (1958). 28 Stat. 608 (1895), 44 U.S.C. § 58 (1958), which authorizes the public printer to sell duplicate stereotype or electrotype plates from which government publications are printed also provides that, "No publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted."

2. Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601, 603 (D.D.C. 1959).

3. *Id.* at 603.

4. *Id.* at 604.

5. 17 U.S.C. § 1 (1958). "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work. . . ."

duced by a high-ranking government official, and its subject matter is of current national concern. The author has made a rather wide distribution of copies of the work to the public without securing a statutory copyright. The question is whether the work should be held to be in the "public domain" as a result of the distribution, thus rendering applicable the public domain prohibition of Section 8.

Position of Non-Government Personnel —The Work for Hire Rule

The position of federal government personnel can, perhaps, be brought into clearest perspective by briefly describing the rights of persons other than officers or employees of the United States under the Copyright Act. The Constitution authorizes Congress to enact copyright legislation for the purpose of promoting the creation of literary works, the apparent plan being that an author will be induced to create artistic works if the exclusive right to publish and sell the work is vested in him for a limited time.[6] Although the Constitution refers specifically to authors with no mention of employers the Copyright Act recognizes that a literary product may be created as a result of a master-servant relationship, whereby the author was employed to produce the literary work for his employer. In this situation, designated as a work made for hire, the act provides that the employer is to be considered the author of the work for purposes of initially securing a copyright,[7] and the copyright proprietor for purposes of renewing a subsisting copyright.[8] Thus, it has been held that where a city employed an artist to paint murals on the walls of a school auditorium the employer acquired the right to reproduce copies thereof in the absence of an agreement reserving the copyright in the artist.[9] The apparent reason for the work for hire rule is that the employee did only that which he was hired to do, and the property rights in the finished products should vest in

6. U.S. Const. art. I, § 8, cl. 8 "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the Exclusive Right to their . . . Writings. . . ."

7. 17 U.S.C. § 26 (1958). ". . . the word 'author' shall include an employer in the case of works made for hire."

8. 17 U.S.C. § 24 (1958). It should be noted that when an employee copyrights a work which properly belongs to his employer as a result of the works for hire rule, he is deemed to hold it in trust for his employer. See Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir.), *cert. denied,* 309 U.S. 686 (1939).

9. Yardley v. Houghton Mifflin Co., *supra* note 8. *Accord,* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Tobani v. Carl Fischer, 98 F.2d 57 (2d Cir. 1938); Uproar v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1944), *aff'd* 81 F.2d 373 (1st Cir.), *cert. denied,* 298 U.S. 670 (1936); Grant v. Kellogg Co., 58 F. Supp. 48 (S.D.N.Y. 1944); Brown v. Molle, 20 F. Supp. 135 (S.D.N.Y. 1937); Yale University Press v. Row Peterson & Co., 40 F.2d 290 (S.D.N.Y. 1930).

the employer whose financial expenditure was the proximate cause of the creation of the artistic work.[10] On the other hand, the mere fact of employment does not preclude the author-employee from securing a copyright on his literary work. When the employee is in the general employment of his employer, *i.e.,* he was not specifically employed to exercise his literary creativeness, and the literary work is no part of his prescribed duties, the property rights therein vest in the employee, and he may secure a copyright. Thus, if a person writes a play and allows his employer to produce it at the employer's theater, the fact that the author is employed as an actor and stage manager does not, in the absence of an agreement so providing, give the employer rights in the play.[11]

Difficult problems arise when the employee has vague, ill-defined duties, and the resulting literary work relates generally thereto, but its creation is not specifically called for by the terms of the employment agreement. In this type of situation two competing policies come into sharp conflict. On the one hand, it is desirable to pursue the policy of encouraging an author to produce literary works by allowing him to secure a copyright on his literary work. On the other hand, if the work was produced at the employer's expense as a part of the employee's regular duties, the right to secure a copyright should vest in the employer because of the works for hire rule of Section 26.

The intent of the parties as to who is to have the property rights in the finished work, with the subsequent right to secure a copyright, is decisive.[12] The literary property may be reserved to the author-employee, either expressly or implicitly, by the terms of the employment agreement.[13] When the employment contract is silent as to ownership of the literary product, and it is found that it was produced as a part of the employee's regularly prescribed duties there is a presumption that title was intended to be in the employer,[14] and the burden of showing a reservation of rights in himself is on the employee.[15] This presumption

10. See DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS, 243 (1879).

11. Boucicault v. Fox, 3 Fed. Cas. 977 (No. 1691) (1862); See generally BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY, 479 (1944); DRONE, *op. cit. supra* note 10, at 257.

12. Cohan v. Richmond, 19 F. Supp. 771 (S.D.N.Y. 1937); *accord,* Autry v. Republic Productions, 104 F. Supp. 918 (S.D. Cal. 1952).

13. Press Publishing Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896). See Dielman v. White, 102 Fed. 892 (C.C.D. Mass. 1900).

14. Dielman v. White, *supra* note 13; Storer Broadcasting Co. v. Jack the Bellboy, 107 F. Supp. 988 (E.D. Mich. 1952). See Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d. Cir.), *cert. denied,* 309 U.S. 686 (1939).

15. Dielman v. White, *supra* note 14. This presumption has been criticized on the ground that the Constitution intended to protect the rights of the actual author of the literary work; thus the burden should be on the employer to show these rights have been

has been held to be applicable only when the creation of the work was a part of the regular duties of the employee, and not where it results from a special job assignment for compensation in addition to regular salary.[16]

The courts have considered several factors as relevant in finding that the creation of the literary product was a part of the regular duties of the employee. In the case of *Brown v. Molle*,[17] the plaintiff was hired to "build" and "direct" a radio program. In pursuance thereof, he wrote a theme song, which he subsequently copyrighted. In an infringement action it was held that although the composition of the song was not specifically designated as one of the duties of the plaintiff's employment it was created as a part of his regular duties and thereby became the property of his employer. In reaching this conclusion the court emphasized the fact that the employee had demanded no additional compensation for the use of the song by his employer, thus indicating that it was produced as a part of the employee's regular duties.[18] It has also been considered relevant that the facilities of the employer were used by the employee in creating the finished product.[19] It thus appears that where the creation of the literary work relates to the duties of the employee, but is not specifically encompassed by them, the court will consider the presence of such factors to determine in whom the parties intended the literary property to vest. In this manner the courts determine which of the two conflicting policies should be effectuated in the result of the case. It should be noted, however, that by emphasizing one policy the other is necessarily excluded. In this situation the court must decide how best to effectuate the purpose of the Copyright Act by either vesting exclusive rights in the employee by virtue of his authorship or in the employer by virtue of his contractual rights.

Position of Government Personnel

The term "government publication" is somewhat susceptible to diverse interpretations. It may refer to any materials released under government auspices, or it may refer only to those publications which

contracted away. See Varmer, *Works Made For Hire and on Commission*, General Revision of the Copyright Law, Study No. 11 (1958).

16. See Shapiro Bernstein, Inc. v. Jerry Vogel Music Co., 115 F. Supp. 754 (S.D.N.Y. 1953). Although the reasoning of the court is not clear on this point, the apparent theory is that the author acquires the status of an independent contractor rather than that of a general employee.

17. 20 F. Supp. 135 (S.D.N.Y. 1937).

18. *Id.* at 136; *cf.* Shapiro Bernstein & Co. v. Jerry Vogel Music Co., 115 F. Supp. 754 (S.D.N.Y. 1935).

19. See Storer Broadcasting Co. v. Jack the Bellboy, 107 F. Supp. 988 (E.D. Mich. 1952).

are printed at government expense whether or not they are owned by the government. The term as used in determining whether a literary product created by a government employee is copyrightable by him, however, seems properly to refer only to those published works which were produced as a part of his official duties as a government employee.[20]

In cases where the official duties of the government employee or official are clearly defined the courts have treated the parties exactly as they would in a private employment situation. If it is found that the creation of the literary work was within the scope of the employee's official duties, it is held to be a government publication, and thus not subject to copyright because of the prohibition of Section 8.[21]

In the case of *Heine v. Appleton*[22] the plaintiff sought employment as an artist with Commodore Perry in his expedition to Japan. This employment was unavailable, however, and he signed on as a master's mate and agreed to perform whatever duties were assigned to him. In the employment agreement it was *expressly stipulated* that all sketches and drawings made by him were to belong to the government. Plaintiff prepared sketches which were sent with Perry's official report, and Congress subsequently ordered them published and publicly distributed. Plaintiff secured a copyright on some of these sketches and sought to enjoin further publication by the defendant, who had published some of them after the congressional publication and distribution. In refusing the petition for an injunction, the court held that the sketches were produced for the government as a part of the plaintiff's duties.[23]

It is thus apparent that when the creation of the literary work is a part of the duties of the government employee the finished product is government property and the employee is not entitled to secure a copyright therein. The facts of the *Heine* case support the further conclusion that employment as an author is not necessary to render the literary product government property, if it is expressly agreed that the government is to have the property rights in any resulting literary product.

The converse of the situation represented by the *Heine* case is a situation where the creation of the literary product is not a part of the prescribed duties of the government employee although its subject matter may be generically related thereto. This situation is demonstrated

20. See authorities cited note 49 *infra.*

21. The courts have not specifically relied on the works for hire rule of § 26. They do, however, apply a master-servant relationship test which appears to be an exact duplication of the works for hire rule.

22. 11 Fed. Cas. 1031 (No. 6324) (1857).

23. *Compare* Banks v. Manchester, 128 U.S. 244 (1888); Dielman v. White, 102 Fed. 892 (C.C.D. Mass. 1900).

by the case of *Sherrill v. Grieves*.[24] In that case the plaintiff was a military instructor at Fort Leavenworth. There was no suitable textbook for the subject matter he was teaching, and in his leisure time he prepared materials for such a textbook. At the request of the military authorities, the plaintiff allowed them to use a considerable portion of the materials before he had produced them in book form. These materials were printed at government expense with notice of plaintiff's copyright thereon and distributed to the students for use in connection with their studies. Subsequently, the plaintiff incorporated these same materials in a book and secured a copyright thereon. In a suit for infringement the defendant contended that the materials were not subject to copyright because they constituted a government publication. The court held that it was not a part of the duties of the plaintiff as a professor in a government institution of learning to reduce his lectures to writing, the literary work was not the property of the government, and that the lectures are the property of the instructor and copyrightable by him.

These applications of the "within the scope of duties" test indicate its value as a judicial tool for determining the ownership of literary products created by government personnel, and consequently copyrightable by the employee. The value of the test, however, would appear to be limited to those cases where the official duties of the employee can be determined with reasonable certainty. In situations in which the official duties are vague the utility of the test is negligible and policy factors must play a large part in the court's decision.

As in those cases involving the ownership of literary products of non-government personnel, so in the cases concerned with the ownership of the literary products of government personnel, there are two basic policies. On the one hand, it has been recognized that,

> . . . 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 . . . .[25]

The most effective means for effectuating this policy is to allow government personnel to retain the property in their literary works not pro-

24. 57 Wash. L. Rep. 286 (D.C. Sup. Ct. 1929).

25. Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601, 604 (D.D.C. 1959). The court also took judicial notice of the fact that a similar policy is followed in private business.

duced as a part of their official duties.[26] As stated in the *Sherrill* case, it would be unsound to hold,

> . . . that by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties.[27]

United States v. First Trust Co. of St. Paul [28] is perhaps the clearest application of the policy of encouragement. In that case it was held that the literary property in the personal diary of Captain Clark of the Lewis and Clark Expedition was in his executors rather than in the government, against the contention of the latter that these notes were the written records of a government officer in the discharge of his official duties. The court reached this conclusion even though much of the contents of the diary was a duplication of materials making up the official report of the expedition which materials unquestionably were government property.

The reasons underlying the prohibition of copyrights in government publications embodied in Section 8, appear to be much stronger than those which vest literary property in an employer because of his contractural rights under the works for hire doctrine of Section 26. There are two aspects to the reason which forbids copyrights in government publications. First, there is the feeling that if a literary product was produced at public expense by a government employee it should be freely available to the public, and the author should not be allowed to impede its free circulation by securing a copyright thereon. This position has been enunciated as follows:

> 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 . . . .[29]

An even stronger reason for not permitting copyrights in government publications is the necessity of wide public dissemination of the contents of materials produced by and relating to issues and problems of national

---

26. See generally Drone, *op. cit. supra* note 10, at 259. "But the government can have no rightful claim to the literary property in work produced by an officer independently of his official duties." *Cf.*, 7 Dec. Comp. Gen. 221 (1927).
27. Sherrill v. Grieves, 57 Wash. L. Rep. 286, 291 (D.C. Sup. Ct. 1929).
28. 251 F.2d 686 (8th Cir. 1958), *affirming*, 146 F. Supp. 652 (D. Minn. 1956).
29. S. Rep. No. 1473, 56th Cong., 1st Sess. (1900).

interest. This policy is unquestionably a desirable one in a democracy, much of whose success is dependent on a well informed public. This position has been recently expressed as requiring that:

> . . . such materials as the laws and government documents must be freely available to the public and made known as widely as possible; hence there must be no restriction on the reproduction and dissemination of such documents.[30]

In pursuance of this policy of dissemination it has been held that no copyright may subsist in the text of judicial opinions,[31] although a salaried court reporter may copyright headnotes, index digests, statements of cases, "and in short, such portions of his compilation or authorship as requires the exercise of intellectual thought and skill."[32] Similarly, no copyright may subsist in statutes,[33] nor in any kind of official documents;[34] however, an original compilation from official documents may be copyrighted.[35]

In furtherance of this goal of public enlightenment, the government frequently republishes the copyrighted work of an author, and the Copyright Act specifically saves the author's copyright from impairment as a result of the government publication.[36] Since the policy of dissemination might be fully realized by publishing the copyrighted work of the government employee, the question arises whether the government can publish it without obtaining the author's consent. The congressional report indicates that is was contemplated that the author's consent should be a prerequisite to publication by the government.[37] Should the govern-

30. Berger, *Copyright in Government Publications*, GENERAL REVISION OF THE COPYRIGHT LAW, Study No. 21 (1959).

31. Callaghan v. Myers, 128 U.S. 617 (1888); Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. 591 (1834); Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co., 169 Fed. 386 (2d Cir. 1909).

32. Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co., *supra* note 31.

33. Howell v. Miller, 91 Fed. 129 (6th Cir. 1898).

34. See DuPuy v. Post Telegram Co., 210 Fed. 883 (3rd Cir. 1914); *cf.*, Eggers v. Sun Sales Corp., 263 Fed. 373 (2d Cir. 1920) (*dictum*).

35. Hanson v. Jaccard Jewelry Co., 32 Fed. 202 (E.D. Mo. 1887).

36. 17 U.S.C. § 8 (1958). "The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor."

This aspect of the Act raises some nice problems, *e.g.*, does publication by the government of an uncopyrighted work divest the author of his common law literary property, thus dedicating it to the public? See generally Berger, *supra* note 30; Note, *Piracy In High Places—Government Publications and Copyright Law*, 24 GEO. WASH. L. REV. 423 (1956).

37. H.R. REP. No. 2222, 60th Cong., 2d Sess. 10 (1909). The clause in § 8 was included ". . . for the reason that the Government often desires to make use in its publications of copyrighted materials, *with the consent of the owner of the copyright,*

ment publish the work without the authorization of the copyright owner, however, its soverign immunity from actions "sounding in tort" would protect it from an action for copyright infringement.[38] The immunity of the government, however, does not extend to its agents or employees.[39] There would seem to be many instances in which the copyright owner, whether or not he was a government employee, would be reluctant to consent to government publication of his work. This would seem to be particularly true where the government edition would be in economic competition with those of the copyright owner. Thus it may often be impossible to obtain the consent of the copyright proprietor which appears to be necessary to permit the government to publish the literary work.[40] This factor should be of extreme importance to a court when it is considering, in doubtful cases, whether ownership of a literary work whose subject matter is of pressing national interest should vest in the government or in the employee-author. If it is decided that the latter has the property therein it may be impossible for the government to secure his consent which appears to be necessary to allow it to publish the work for purposes of public enlightenment.

Discretionary Government Employees and Officials

The test of whether the production of the literary work was within the scope of the duties of a government employee, as was noted earlier, is effective and useful in situations where the extent of the official duties are clearly ascertainable. In such cases there is little need for the court to turn to policy considerations in order to determine in whom the literary property should vest. The difficult cases arise when the literary product is that of a high-ranking government official whose duties are discretionary, thus rendering it virtually impossible to determine if the creation of the literary work was within the scope of his official duties. The situation is further complicated when the subject matter of the literary work is generically related to the subject matter encompassed

---

and it has been regarded heretofore as necessary to pass a special act every time this was done, providing that such use by the Government should not be taken to give to anyone the right to use the copyrighted material found in the Government publication." (Emphasis added.)

38. See Lanman v. United States, 27 Ct. Cl. 260 (1892). See generally Note, *Piracy in High Places—Government Publications and Copyright Law, supra* note 36 at 425.

39. This may, however, quite often be an inadequate remedy. See Towle v. Ross, 45 U.S.P.Q. 143 (1940). See generally Howell, The Copyright Law 41 (1942).

40. The doctrine of fair use may mitigate somewhat the rigors of this situation. Judge Yankwich has concisely summarized the rationale of fair use as an attempt to ". . . strike a scrupulous balance between the right of the author to the product of his creative intellect and his imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts. . . ." Yankwich, *What Is Fair Use?*, 22 U. Chi. L. Rev., 203, 214 (1954).

in the author's capacity as a government official. It is in this type of case that the competing policies of encouraging literary contributions, and the wide dissemination of matters of national importance appear to exert great influence on the determination of the courts.

In some instances the circumstances surrounding the creation of the literary work point to one result, even though the official duties of the author are not clearly defined. Thus, in the case of *Sawyer v. Crowell Pub. Co.*[41] the plaintiff, Executive Assistant to the Secretary of the Interior, was in Alaska to make an official survey of facilities located there which were under the control of the Department. While engaged in this task, he collected materials for a map and later had a subordinate employee prepare the map during his working hours with the use of government supplies. The plaintiff indicated to the subordinate that he intended to submit the map with his official report. Plaintiff then copyrighted the map and published it, and subsequently it was published by the government as an official document with plaintiff's notice of copyright thereon. In a copyright infringement action against one who had published the map without plaintiff's consent, it was held that the map was prepared in connection with the plaintiff's official duties and any rights he acquired therein as a result of copyrighting were held in trust for the government. This result appears to be sound, and it is an example of the policy of giving to the public the unrestricted use of those literary works produced at government expense by an employee as a part of his official duties.[42]

In the most recent case arising in this context the official duties of the author were not clearly defined, and the facts of the case were not such as to point clearly to one result. In *Public Affairs Associates, Inc. v. Rickover*[43] the Court of Appeals for the District of Columbia affirmed the District Court's[44] ruling that the literary products involved were the property of the government official who wrote them. It reversed the lower court's holding, however, that the official had not

41. 142 F.2d 497 (2d Cir.), *cert. denied,* 323 U.S. 735 (1944).

42. The *Sawyer* case has been criticized and distinguished from the *Sherrill* case, where it was held that the military instructor had the literary property in his textbook. See Note, *Copyright Protection for Writers Employed by the Federal Government,* 1960 WASH. U.L.Q. 182, 190. The writer points out that in the *Sawyer* case the court held that the literary product was produced in connection with the employee's duties, and then suggests that literary property should vest in the government only when the work was produced as a part of the employee's duties as the court held in the *Sherrill* case. This, however, seems to be only a verbal distinction illogically divorced from the facts of the two cases. The facts in the *Sawyer* case clearly indicate that the production of the map was within the scope of the employee's duties, and it seems immaterial whether the court characterizes its creation as being in connection with or as a part of those duties.

43. 284 F.2d 262 (D.C. Cir. 1960).

44. 177 F. Supp. 601 (D.D.C. 1959).

dedicated this property to the public. The defendant, Vice-Admiral Hyman Rickover, while on active duty with the Navy Department and the Atomic Energy Commission in the years between 1955 and 1959, delivered a number of public speeches dealing with two general areas, education and nuclear energy.[45] The speeches were written by Admiral Rickover after "normal" working hours, the final copy was typed by his secretary, and copies were made on government duplicating machines. They were delivered during "off duty" hours near points where his duties of inspection and supervision carried him. The plaintiff, a private publishing corporation, sought a declaratory judgment that the speeches were government publications thus permitting it to reproduce them; or, in the alternative, that Admiral Rickover had dedicated his literary property therein to the public. The court held that none of the speeches were government publications, reasoning as follows:

> It cannot be properly said, as appellant asserted, that a government official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions.[46]

This decision is a clear cut application of the policy of government encouragement of intellectual development and literary contributions by its personnel. In the course of its opinion the District Court stated:

> It is not in the public interest to hamper the intellectual growth of anyone, or to interfere with the development of ideas, merely because the person who is uttering them happens to be employed by the Government . . . no one sells or mortgages all the products of his brain to his employer by the mere fact of employment.[47]

The fact that government facilities and government personnel were used, to a limited extent, in the production of the speeches was not deemed to have transformed them into government publications. The court stated that if this was considered an undesirable practice it could be rectified

---

45. Neither the District Court nor the Court of Appeals attached any significance to the dates during which the speeches were made. It might, however, be of some significance that they were produced during the era when the arms race was nearing its peak. On Oct. 4, 1957 Russia launched Sputnik I. The result was that the state of our educational programs, particularly in the field of science, and the progress of our missile program became topics of national concern. The fact that the speeches were delivered during this era, plus the fact that their subject matter dealt exclusively with education and atomic energy, might have been construed as indicating that Admiral Rickover felt obliged to impart this knowledge to the public as a part of his official duties.

46. Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 269 (D.C. Cir. 1960).

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

by departmental discipline, but that it would be unduly harsh to hold that these facts were sufficient to vest ownership of the finished product in the government.[48] These are the same factors, however, that the courts have deemed important as an indication that ownership was intended to be in the employer in private employment cases. This fact adds credence to the conclusion that policy factors are more determinative in cases involving government employees than in those concerning non-government employees.[49]

It would seem that by emphasizing the policy that works produced by government employees should be freely available to the public, rather than the policy of encouragement, it could be reasonably argued that the preparation and delivery of the speeches were a part of the official duties of Admiral Rickover, and the literary property should vest in the government.

The Supreme Court has recently recognized in a non-copyright case that public statements on matters of wide public interest and concern, made by high-ranking government officials may well be considered within the scope of their duties; and the fact that the official was not required by law or by direction of his superiors to make these statements should not be considered of controlling significance.[50] In light of this

48. *Ibid.*

49. See text, *supra* at note 19. The Rickover court also stated that the term "government publication" in § 8 should be interpreted to refer only to those publications commissioned or printed at the cost and direction of the United States. It should be noted that in the *Sherrill* case the fact that the original publication was first printed by the government was considered of no significance, but in other cases this fact was an important element in the court's decision. See Sawyer v. Crowell Pub. Co., 142 F.2d 497 (2d 1944), *cert. denied,* 323 U.S. 735 (1944). This apparent anomaly has been explained thus, ". . . a work is not a 'Government publication' for purposes of copyright by mere virtue of its printing and publication by the Government; that a work produced privately (including one produced by a Government employee on his own time outside the scope of his employment) is not a 'Government publication', even though printed and published by the Government; that a work produced for the Government by its employee within the scope of his employment belongs to the Government even though first printed and published privately. In short 'Government publication' refers to a published work produced by the Government, and perhaps to one owned by it, not to the mere act of printing and publishing by the Government." Berger, *supra* note 30; *cf.,* 7 Dec. Comp. Gen. 221 (1927).

50. In Barr v. Matteo, 360 U.S. 564, 575 (1959), the Court in speaking of the privilege of executive officials from suits for defamation for statements made while acting within the scope of their duty said, "It would be an unduly restrictive view of the scope of the duties of a policy making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not required by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underline the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."

statement it could have been reasoned in the *Rickover* case that because of the time when these speeches were made, and because of the close relationship between their subject matter and Admiral Rickover's position, their preparation and delivery were a part of his official duties. In addition, it has become standard practice in high government circles for officials to promote public knowledge of current issues of national concern by means of news releases and public speeches, particularly through the facilities of the mass media.[51]

Of direct bearing on cases like *Rickover* is a recent statement by President Kennedy. The President indicated that in the future he intends to bar officials of his administration from making speeches or writing articles for pay unless they turn this money over to charity. Press Secretary Salinger summarized the reasons for this position, stating that ". . . people should not be allowed to make money on the basis of information or experience they received as Government officials".[52] This pronouncement would seem to add weight to the proposition that it is the intent of the present administration that the preparation and rendition of such speeches are within the scope of the duties of high-ranking officials.[53] The totality of these factors could be urged as a basis for holding that the speeches were a part of Admiral Rickover's official duties, thus rendering them "government publications," and precluding the author from obtaining a copyright thereon. It must be emphasized, however, that the adoption of this approach would by necessity operate to the complete exclusion of the competing policy of encouragement of intellectual development and the creation of literary works by government personnel.

It seems clear that the use of the "created within the scope of duties" rule is of little value in cases involving the literary works of high-ranking officials with highly discretionary duties, absent facts clearly indicating one result. In such cases policy considerations appear to be the determining factor in the decisions of the courts. It is self-evident that there are beneficial aspects in each policy. The *Rickover* case by emphasizing

51. Perhaps the clearest example of this philosophy is that with the advent of President Kennedy's Administration the controversy is no longer concerned with whether there will be Presidential news conferences, as was the case during the Wilson Administration, but, rather, whether these news conferences will be shown on "live" television.

52. *The Wall Street Journal,* Mar 7, 1961, p. 1, col. 3 (Midwest Edition). When *honoraris* was offered to Admiral Rickover he directed that it be paid directly to charities specified by him. Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 266 (D.C. Cir. 1960).

53. In the *Rickover* case the government did not appear as *amicus curiae,* possibly indicating that it, too, believed the speeches were the property of Admiral Rickover. It must be pointed out, however, that this case was decided before the new policy of President Kennedy discussed in the text was announced.

the desirability of allowing an author the fruits of his labor thereby may exclude the beneficial aspects that accrue from a wide circulation of the literary work. A result contrary to that reached in the *Rickover* case would likewise realize the benefits of only one policy to the exclusion of the other. Consequently, the question arises whether the two competing policies need be mutually exclusive, *i.e.,* is there not an alternative method whereby they can be brought into a defensible juxtaposition with a resulting realization of the maximum benefits of each?

In cases involving the literary works of government personnel whose duties are highly discretionary, where the subject-matter of the literary works is of great national interest and concern, it would seem desirable to realize as much of the benefits of each policy as possible. That is, the author of the work should be able to retain his literary property and secure a copyright, and at the same time give its public interest contents the widest possible public dissemination.

PROPOSED SOLUTIONS

"Shop-right" Rule Applied to Copyrights. One plausible solution to the problem presented would be to incorporate a modified version of the patent law "shop-right rule" into the copyright area. The patent law differs significantly from copyright law in that the government is not precluded from securing a patent on its inventions.[54] Under the cases concerning the patent rights of government employees, it is well settled that when the employee is engaged to invent a prescribed thing or to generally exercise his inventive abilities for his government-employer he cannot, after successfully accomplishing the work for which he was employed, assert title thereto against his employer.[55] When the employee is only in the general employment of his employer, however, and:

> . . . during his hours of employment; working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a non-exclusive right to practice the invention.[56]

That is, the patent right of the employee prohibits the unauthorized use of his invention by all persons except his employer. The employer is

54. 35 U.S.C. § 266 (1958). The fact that the government may secure a patent on its inventions but not a copyright on its literary works emphasizes the strength of the policies underlying the letter. There does not seem to be a corresponding necessity for free public access to government inventions as there is to government literary works.

55. See Solomons v. United States, 137 U.S. 342 (1890).

56. United States v. Dubilier Condenser Corp., 289 U.S. 178, 188 (1933).

given an irrevocable license to use the invention by virtue of the fact that his expenditures were a partial cause of its creation.

The incorporation of a version of the "shop-right" rule as a solution for cases of the *Rickover* type would allow the maximum benefits to be realized from encouraging government employees to exercise their literary abilities, and from a wide dissemination of the news value of the work. The "shop-right" rule would permit the author-employee to copyright his work, thus securing for himself the economic value of the exclusive rights afforded by copyright protection. The general public, particularly ambitious publishers,[57] would not be able to publish the work without the author's consent. The government, in pursuance of its policy of public enlightenment, would retain the right to print and publicly distribute the finished product by virtue of its irrevocable license, whether or not the author or employee gave his consent.[58] The notice of the employee's copyright should be affixed to the copies distributed by the government to insure him the protection afforded by the savings clause of Section 8.[59] It should be noted that this solution requires a modification of the traditional theory of government publications. If the "copyright shop-right rule" is made applicable to cases of the *Rickover* type, the public would no longer be able to reproduce the work without the author's consent. However, its value as news would be available to them as a result of the government's right to publish it.

Relaxing the Rules of General Publication. In addition to determining whether the government or its employee should acquire property rights in a literary work, the courts may be confronted with the problem of whether the author has divested himself of his literary property and thereby placed the work in the public domain. If it is found that the work is in the public domain, Section 8 prohibits the securing of a copyright on it.[60]

In the *Rickover* case, in connection with the oral delivery of the speeches, Admiral Rickover distributed copies thereof to individuals who requested them, to persons whom he believed would be interested in the subject-matter, to the sponsors of the speeches to be made available to the audiences, and to the press. The Court of Appeals held that these

---

57. It will be recalled that in the *Rickover* case the plaintiff was a private publisher asserting that he could freely publish Admiral Rickover's speeches because they were government publications. It is arguable that when the controversy is between one who in no way contributed to the creation of the work and the author, the author should be favored. See Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960) (dissenting opinion).

58. See text accompanying note 40 *supra*.

59. See statute cited note 36 *supra*.

60. See text accompanying note 1 *supra*.

acts constituted a general publication of the speeches without securing statutory protection, thus divesting Admiral Rickover of his common law literary property and dedicating the speeches to the public.[61] This holding furthered the desired end of a wide public dissemination of the literary work, however, the result also completely subjugated the policy of encouragement of literary productiveness by government employees.

The *Rickover* case unquestionably is in accord with the general rules pertaining to forfeiture of an author's property rights in his literary products as a result of a general publication.[62] It is well settled that:

> The owner of the common law copyright has a perpetual right of property and the exclusive right of general first publication, and may, prior thereto, enjoy the benefits of a restricted publication without forfeiture of the right of general publication.[63]

To acquire statutory protection a literary work must be published with notice of copyright thereon,[64] and such statutory copyright will operate to divest an author of his common law literary property so that he must thereafter rely on his statutory rights,[65] *i.e.*, a common law copyright and a statutory copyright cannot co-exist in a literary work. As indicated earlier, when an author permits publication of his work without securing statutory protection, his common law property rights are forfeited and the work is dedicated to the public, who may thereafter reproduce it without the author's consent.[66] If the author makes only a "limited publication" of the work, however, he retains his literary property and may thereafter secure a statutory copyright.[67] The most definitive statement of what constitutes a "limited publication" is found in *White v. Kimmell*:[68]

> . . . a limited publication which communicates the contents of a manuscript to a definitely selected group and for a limited

61. Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 271 (D.C. Cir. 1960).

62. See generally Strauss, *Protection of Unpublished Works*, GENERAL REVISION OF THE COPYRIGHT LAW, Study No. 7 (1958); Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956); Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. SOC'Y 642 (1955).

63. Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 18 (2d Cir. 1906). *Cf.*, Holmes v. Hurst, 174 U.S. 84 (1899); Atlantic Monthly Co. v. Post Pub. Co., 27 F.2d 556 (D. Mass. 1928); Bartlett v. Crittenden, 2 Fed. Cas. 967 (No. 1076) (1849). 17 U.S.C. § 2 (1958) preserves the author's common law right of first publication.

64. 17 U.S.C. § 10 (1958).

65. Hirshon v. United Artists Corp., 243 F.2d 640 (D.C. Cir. 1957); Bobbs-Merrill v. Straus, 147 Fed. 15 (2d Cir. 1906); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

66. 17 U.S.C. § 8 (1958).

67. 17 U.S.C. § 12 (1958), in addition allows an author to secure statutory protection for his literary works which are not to be reproduced for sale.

68. 193 F.2d 744 (9th Cir. 1952).

> purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication' which does not result in loss of the author's common law right to his manuscript; but the circulation must be restricted both as to persons and purpose . . . .[69]

The facts of the *Rickover* case, at first glance, certainly appear to constitute a general publication of the speeches, thus divesting the author of his literary property thereby precluding him from securing a copyright. There are two factors in the *Rickover* case, however, which could have been relied on to hold that the publication of the speeches was not one which necessarily constituted a divestiture of the author's literary property. The first factor is that, for all appearances, Admiral Rickover distributed the copies of the speeches for the purpose of public enlightenment and not for commercial self-interests. The second is that since the contents of the speeches were of current national concern and were delivered by a well known government officer, the speeches were of current news value which could be realized only by prompt public presentation.[70] Consequently, it is arguable that the distribution could have been found to give the public only the current news element of the speeches, but the author retained his literary property.[71]

---

69. *Id.* at 746. It has been frequently stated that the publication necessary to divest one of his common law rights and that necessary for investiture of statutory rights are not the same. Generally speaking, the former is more difficult to prove than is the latter. See Hirshon v. United Artists Corp., 243 F.2d 640 (D.C. Cir 1957); American Visuals Corp. v. Holland, 239 F.2d 74 (2d Cir. 1956); Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); DEWOLF, AN OUTLINE OF COPYRIGHT LAW, 32 (1925).

70. The problem of divestiture of literary property could be avoided if the author secured a copyright on his literary product. The procedure for obtaining a copyright is not a cumbersome one, nor would it delay the dissemination of the news aspect of the literary work. See 17 U.S.C. §§§ 10, 13, 14 (1958). Thus the cautious government official would be well-advised to secure a copyright on all his literary works even though their creation might be a part of his duties. Perhaps it is rather utopian, however, to expect these authors to pursue this precautionary procedure. Due to the paucity of litigation there are few well established rules whereby a government author can determine if he is entitled to secure a copyright. More persuasive is the fact that these literary products are often initially produced as a public service with no intention of later reproducing and distributing the work for its literary merit. When the author subsequently decides to profit from his literary work by acquiring the exclusive right to reproduce and sell it for a limited time, it seems inequitable to deny him this right in favor of an ambitious publisher who contributed nothing to the creation of the work, merely because the author had previously distributed it to the public when its subject matter was of grave national importance. This identical problem may face an author who is a national figure but in no way connected with the government. It is certainly arguable that if government authors are to be afforded special treatment, so too should private authors who are similarly situated.

71. Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 272 (1960) (dissenting opinion).

The cases dealing with divestiture of an author's common law literary property as a result of a general publication almost without exception rely, at least superficially, on the dual test set out in the *White* case, *i.e.*, the publication must be limited both as to persons and to purpose in order to be considered a "limited publication." It seems significant, however, that in the great majority of the cases which have held the publication to have been a general rather than a limited one, the apparent motive of the author for distributing the work was some commercial self-interest. This was true even though the number of copies distributed ranged from as few as 100 to as many as 10,000.[72] On the other hand, when the motive of the author for distributing the work was not commercial self-interest, the courts have consistently held that the publication was a limited one, and little significance was attached to the number of persons who had access to the work.[73] Therefore, it might reasonably be implied that the courts attach greater weight to the motive of the author in distributing the work than they do to any expressed or implied limitations he may have placed on who may avail themselves of the work, or on the purpose for which they may use it. In addition, the intention of the proprietor of the literary work when he distributed it is often said to be of controlling significance. Thus it was stated in *Aronson v. Blake*:[74]

> . . . and when his act of dedication is of such a character as to show unmistakably that he does not intend to abandon all right, but simply to give the public the right to have a limited use of his property, or to use it in a particular way, and to reserve to himself whatever is not plainly given, the public acquire the right to use his property to the extent of his dedication, but nothing more, and to use of it in excess of the extent dedicated is in violation of his reserved right.[75]

72. See, *e.g.*, Mifflin v. Dutton, 190 U.S. 265 (1903); Holmes v. Hurst, 174 U.S. 84 (1899); Continental Casualty Co. v. Beardsley, 253 F.2d 702 (2d Cir.), *cert. denied*, 358 U.S. 816 (1958); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952); Egner v. E. C. Schirmer Music Co., 48 F. Supp. 187 (D. Mass. 1948); D'Ole v. Kansas City Star Co., 94 Fed. 840 (W.D. Mo. 1899); Ladd v. Oxnard, 75 Fed. 703 (C.C.D. Mass. 1896); Gottsberger v. Aldine Book Pub. Co., 33 Fed. 381 (C.C.D. Mass. 1887); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898). *Contra*, M'Dearmott Commission Co. v. Board of Trade, 146 Fed. 961 (8th Cir. 1906); Allen v. Walt Disney Prod., 41 F. Supp. 134 (S.D.N.Y. 1941); McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S.D.N.Y. 1919).

73. See, *e.g.*, American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Patterson v. Century Productions, 93 F.2d 489 (2d Cir.), *cert. denied*, 303 U.S. 655 (1937); Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); Bartlett v. Crittenden, 2 Fed. Cas. 967 (No. 1076) (1849).

74. 43 N.J.E. 365, 12 Atl. 177 (1888).

75. *Id.* at 180. See American Tobacco Co, v. Werckmeister, 207 U.S. 284 (1907); M'Dearmott Commission Co. v. Board of Trade, 146 Fed. 961 (8th Cir. 1906);

It is well settled, and of considerable relevance in the type of case under discussion, that the news element of a literary work, *i.e.*, the description or information pertaining to events of current interest contained therein, cannot be the subject of a copyright because it is not the creation of the writer, but is only a report of matters that are *publici juris.* Insofar as an article contains authorship, literary quality, and style, however, it may be the subject of copyright.[76]

In the *Rickover* case the court could have held that these factors rendered the distribution made by Admiral Rickover a "limited publication," thereby allowing him to retain his literary property in the speeches. The court might have reasoned as follows: (1) when it appears that the motive of the author in distributing his literary work was not for commercial self-interest, *e.g.*, to promote public knowledge of matters of current national concern, as opposed to a distribution in order to promote the sale of the literary work; (2) when it appears that the author only intended to give the news value of his work to the public by distributing it solely to the news media and the interested public; (3) and when the subject matter of the literary work and its presentation by a high-ranking government official are events of current national concern; the distribution is a "limited publication." The news value of the literary work would have been dedicated to the public but the author would have retained his literary property in the work after its value as news had terminated.

This approach would permit the public to benefit from a wide dissemination of the current news element of the work, and, at the same time, permit the government official to retain the right to copyright the work, thus providing the desired inducement to stimulate further intellectual endeavors and literary productiveness. Desirable aspects of the competing policies of encouragement and dissemination could thus be realized in a manner similar to the adoption of the "shop-right" rule. The government would not, however, retain an irrevocable license to reproduce the literary work as under the "shop-right" rule, but this seems im-

---

Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904). In this context it is generally held that a public performance of an artistic composition does not constitute a dedication of the work to the public. See Ferris v. Frohman, 223 U.S. 424 (1912); Nutt v. National Institute, Inc., 31 F.2d 236 (2d Cir. 1929); McCarthy & Fischer, Inc., v. White, 259 Fed. 364 (S.D.N.Y. 1919). In the *Rickover* case, however, the court partially based its holding that the speeches had been dedicated to the public on the fact of performance. See Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262, 271 (D.C. Cir. 1960): "Certainly when all of Rickover's acts of distribution are considered together—*performance,* distribution to the press . . . these acts . . . constitute publication of the speeches and dedication to the public." (Emphasis added).

76. See International News Service v. Associated Press, 248 U.S. 215 (1918); Chicago Record-Herald Co. v. Tribune Ass'n, 275 Fed. 797 (7th Cir. 1921).

material in that the desired wide public circulation of the news element of the work would have been accomplished as a result of the author's initial distribution.

Conclusion

The works for hire rule, as it has been applied in the area of "government publications," is a valuable tool for allocating ownership of literary products between the employee and the government in cases where the duties of the employee are readily ascertainable. In cases where the duties of the employee are highly discretionary, however, the rule loses most of its utility, and underlying policies appear to be the determinative factors in the decisions of the courts. Where this is the case it might be better if the courts would adopt an approach whereby the maximum benefits of both policies—encouragement and wide dissemination—could be realized. A copyright version of the patent "shop-right" rule could produce this result. Alternatively, when it is determined primarily on policy considerations that ownership should vest in a high government official, it could be held that his literary property is not divested by distribution to the public, when the subject matter of the work is of current news value, and it does not appear that the distribution was motivated by economic self-interests.