Alaska Department of Fish and Game’s
Copyright Policy (SOP III-401) Background

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During development of the Fishery Research Bulletin, and subsequently the Alaska Fishery Research Bulletin (AFRB), question arose as to whether or not the State of Alaska legally held copyrights to intellectual property that staff developed on state time. Because we did not know how to proceed with AFRB copyrighting, we began to look for answers to this question.

After some basic research on copyright law we asked the Alaska Department of Law, but because copyright law is developed and enforced at a federal level, the Department of Law was not particularly familiar with copyright issues and was unable to give us any clear and immediate answers.

Our search was then extended to Washington, D.C., where we posed the question to staff in the offices of Alaska’s Senator Ted Steven and the U.S. Government Printing Office. Responses from these offices tended to imply that state agencies do own copyrights because no other state legislation prohibited it. However, they recommended we contact the U.S. Copyright Office for additional information, staff there were able to provide us with a great deal of information. We subsequently acquired several helpful books (Gregory et al. 1994; Patry 1995). Those plus information obtained from the Council of Biology Editors, the American Fisheries Society, and the American Chemical Society enabled us to develop, over several years, a draft copyright policy statement to give ADF&G staff guidance on both ADF&G copyright protected material and the use of others’copyright protected material.

During the summer of 1997, the Alaska Department of Fish and Game submitted that policy draft to Steve White and Marie Sansone of the state’s Department of Law for review. Their complete review is in the Appendix.

Although some minor changes in wording and clarification were recommended, the policy was supported as logically sound and legally defendable.

With their approval and that of the ADF&G, specifically Kevin Brooks, Director of the Division of Administration, the policy became official as standard operating policy (SOP) III-401. This report was prepared to provide this brief history and to archive the background support provided by the Department of Law (see Appendix).

**Literature Cited**


APPENDIX
MEMORANDUM

State of Alaska

Department of Law

TO: Bob Wilbur
CPMD Division
Alaska Department of Fish
and Game

DATE: October 3, 1997

FILE NO.: 663-98-0040

TELEPHONE NO.: 465-3600

FROM: Marie Sansone
Assistant Attorney General
Natural Resources Section - Juneau

SUBJECT: Draft copyright policy

The following are my notes and comments on the July 17, 1997, ADF&G Draft Copyright Policy, pursuant to the Commissioner’s request for legal review. The majority are for purposes of having background information readily available, not for inclusion in the policy. I also made some marginal notes on the draft policy. I will be happy to work with you on finalizing the policy.

Authority


The ADF&G’s authority to claim copyright protection for its original works of authorship derives from AS 16.05.050(2), the power to acquire personal property when acquisition is in the interest of furthering an objective or purpose of the department and the state, and AS 16.05.050(8), the power to exercise administrative, budgeting, and fiscal powers. In addition, AS 44.99.400 expressly authorizes all state agencies to “hold the copyright for software created by the agency or developed by a private contractor for an agency, and [to] enforce its rights to protect the copyright.”

1. Federal copyright laws assign the creators of written materials, music, visual arts, architecture, databases, and computer software, etc.,' exclusive rights to determine how and when such material is copied or reproduced.'

1. Federal copyright law. The protection given to copyrights under federal law is entirely statutory. There is no copyright protection under the federal common law. See 17 U.S.C.S. § 301(a) (1994).
The federal Copyright Act is codified as Title 17 of the United States Code. The Copyright Office of the Library of Congress has promulgated regulations to apply the Copyright Act in 37 C.F.R. Pts. 201 – 259.

Preemption of state law. The Copyright Act largely abrogated state copyright law, whether common law or statutory, 17 U.S.C.S. § 301(a). The Copyright Act does not annul or limit any state law rights or remedies with respect to

1. subject matter that does not come within the subject matter of copyright as specified by sections 102 [original works of authorship fixed in any tangible medium of expression] and 103 [compilations and derivative works], including works of authorship not fixed in any tangible medium of expression;

2. any cause of action arising from undertakings commenced before January 1, 1978;

3. activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

4. State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

17 U.S.C.S. § 301(b). Section 301 also preempts, with certain exceptions, state laws relating to sound recordings and works of visual art. See id. § 301(c), (f).

The courts have found various state law claims preempted, including claims for misappropriation, misappropriation involving breach of fiduciary duty, trade secret misappropriation, damage to reputation resulting from unauthorized reproduction and distribution of copyrighted material, failure to attribute authorship of a work, and tortious interference with business relations. See 18 C.J.S. Copyrights and Intellectual Property § 8 at 100 (1990). On the other hand, the courts have allowed various state claims to proceed, such as claims for misappropriation involving breach of fiduciary duty, trade secret misappropriation, accounting for profits by one co-owner of a copyright to another, conversion of tangible property, false advertising, and palming-off. See id.

2. Subject matter of copyright. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. 17 U.S.C.S. § 102(a). A work is
“fixed” in a tangible medium of expression “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Id. § 101. Works of authorship include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Id. § 102(a). Compilations and derivative works may also be the subject of copyright protection. Id. § 103(a).


Applying the Copyright Act to computer programs thus requires that protectable expression be separated from unprotectable ideas, processes, or methods of operation. To determine whether a copyright has been infringed, the courts apply the “abstraction-filtration-comparison” test:

a court should dissect the program according to its varying levels of generality as provided in the abstractions test [the program is broken down into levels of declining abstraction; for example, the main purpose, the program structure, modules, algorithms and data structures, source code, and object code]. Second, poised with this framework, the court should examine each level of abstraction in order to filter out those elements of the program that which are unprotectable. Filtration should eliminate from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material, scenes a faire material, and other unprotectable elements suggested by the particular facts of the program under examination. Third, the court should then compare the remaining protectable elements with
the allegedly infringing program to determine whether the defendants have misappropriated substantial elements of the plaintiff's program.

Gates Rubber Co. v. Bando Chemical Industries, Ltd., 9 F.3d 823, 834 (10th Cir. 1993).

The Copyright Act protects both the original expressive elements of the "literal elements" of a computer program, as well as various "nonliteral elements," such as the program's structure, sequence, and organization. See Arthur R. Miller, "Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?", 106 Harv. L. Rev. 978, 986 & n.37 (1993). The literal elements are the source and object code. The source code is a symbolic language such as FORTRAN, often using English words and mathematical symbols, that humans can read; while the object code is a translation of the source code, through a mechanical process known as compilation or assembly, into a series of zeroes and ones that is readable by a computer. The source and object code are almost always be found protectable expression, unless the doctrines of scenes a faire or merger come into play. Gates, 9 F.3d at 836, 838.

The nonliteral elements are the products generated by the code's interaction with the computer hardware and operating program, including screen displays, the main menu, the submenu command tree structure, parameter lists, and macros. See MTEK Holdings, Inc. v. ArcE Engineering Co., Inc., 89 F.3d 1548, 1555-56 (11th Cir. 1996). The precise scope of copyright protection for nonliteral elements is unclear. See Richard Raysman, et al., Multimedia Law: Forms & Analysis § 5.21 (1996). The courts have held the following individual elements may be subject to copyright protection: (1) internal programming structures, such as data structures or file structures; (2) sequences for communicating between programs; (3) programs that govern other program modules; and (4) various expressive elements of a program's user face. See Miller, 106 Harv. L. Rev. at 995. Cf. Lotus Development Corp. v. Borland International, Inc., 49 F.3d 807, 815 (1st Cir. 1995), aff'd by an equally divided Court, 116 S. Ct. 804, 133 L.Ed.2d 610 (1996) (the menu command hierarchy of

1 Scenes a faire are expressions that are standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting; for example, hardware standards and mechanical specifications, software standards and compatibility requirements, computer manufacturer design standards, target industry practices and demands, and computer industry programming practices. Gates, 90 F.3d at 838.

2 Merger occurs where the expression is inseparable from the ideas, processes, or discoveries underlying the expression. Id.
the Lotus 1-2-3 spreadsheet is an uncopyrightable method of operation).

**Databases:** While facts are not copyrightable, compilations of facts generally are, provided they are made independently by the compiler and entail a minimal degree of creativity. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 348, 113 L.Ed.2d 358, 370, 113 S. Ct. 1282 (1991). Computer databases are copyrightable to the same extent as other databases and directories. 18 Am. Jur. 2d Copyright and Intellectual Property § 50 at 392 (1985).

**What Is Not Protected by Copyright.** There is no copyright protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which is described, explained, illustrated, or embodied in [an original work of authorship]." 17 U.S.C.S. § 102(b). However, the particular manner in which they are expressed or described may be copyrightable. Also, they may be subject to protection by patent or trademark.

Examples of works that are not subject to copyright are words and short phrases, such as names, titles, or slogans; familiar symbols and designs; lettering or coloring; mere listing of contents or ingredients; blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, and order forms; and work consisting entirely of information that is common property containing no original authorship, such as standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents. 37 C.F.R. § 202.1 (1996).

There is no copyright protection in statutes, regulations, or judicial opinions. 18 Am. Jur. 2d § 58 (1985). These are in the public domain because due process requires that the public have free access to governing laws. *Building Officials & Code Administrators v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980).

3. **Exclusive rights.** The owner of a copyright has a "bundle of exclusive rights" to (1) reproduce the copyrighted work; (2) prepare derivative works based on the copyrighted work; (3) distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) perform the work publicly; (5) display the copyrighted work publicly; and (6) in the case of sound recordings, perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C.S. § 106 (1994 & Supp. 1997). These rights are not unlimited in scope. The Copyright Act specified a number of limitations, including "fair use." See 17 U.S.C.S. §§ 107 - 120.
2. Similarly, patents protect original inventions.

Congress has passed laws providing for copyright and patent protection under Article I, section 8, clause 8 of the United States Constitution: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." A patent is a grant of monopoly for a new and useful process, machine, manufacture, or composition of matter, or for a new and useful improvement of a process, machine, manufacture, or composition of matter. 33 U.S.C.S. § 101 (1981). The purpose of the patent law is to (1) foster and reward invention; (2) promote disclosure of inventions to stimulate further innovation and permit the public to practice the innovation once the patent expires; and (3) assure that ideas in the public domain remain there for the free use of the public. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262, 59 L.Ed.2d 296, 302, 99 S. Ct. 1096 (1979).

Similarly, the objective of copyright protection is to encourage the creator of an original work in a tangible medium of expression by giving the creator for a set time the exclusive rights to reproduce the work, to prepare derivative works, to distribute copies, to perform the work, and to display the work. Warner Bros., Inc. v. Dae Rim Trading, Inc., 677 F. Supp. 740, 760 (S.D.N.Y. 1988), appeal denied, 877 F.2d 1120 (2d Cir. 1989).

Unlike patents and copyrights, Congress regulates trademarks under the Commerce Clause. See U.S. Const., art. I, § 8, cl. 3. A trademark includes any word, name, symbol, or device, or combination thereof to identify and distinguish a person’s goods from those manufactured or sold by otherwise and to indicate the source of the goods; while a "service mark" is in effect a trademark that relates to a service rather than a product. 15 U.S.C.S. § 1127 (1991). The objectives of trademark protection differ from the objectives of copyright and patent protection. Trademark protection seeks to protect the maker of goods and the public from confusion as to the origin of goods where the confusion is caused by the use of false and counterfeit trademarks. Dae Rim Trading, 677 F. Supp. at 760.

A given product may be protectable under all three bodies of law. 1 McCarthy on Trademarks and Unfair Competition § 6.5 (1997). Since the scope of protection, elements of infringement, and remedies for infringement may differ under each law, it is important to protect the different aspects of a single product under each applicable law. See id. §§ 6:17-6:24. For example, in Nintendo of America, Inc. v. Dragon Pacific International, 40 F.3d 1007 (9th Cir. 1994), cert. denied, 515 U.S. 1107, 132 L.Ed.2d 2263, 115 S. Ct. 2256 (1995), Nintendo recovered statutory damages under the Copyright Act and an award of profits, trebled for willfulness, under the Lanham Trademark Act, where the infringer sold video game cartridges that included
games copyrighted by Nintendo and marketed under Nintendo’s trademark.

3. Copyrights do not prevent using copyrighted materials in ways that would alter their original form and content such that the restructured item no longer mirrors, in full or in part, the copyrighted item.

   Okay.

4. For example, a book on the birds of Alaska can be used by another author to develop a different but very similar book on the same subject, provided none of the graphic material or verbatim text were used without the original author’s permission.

   Okay.

5. Copyrights, therefore, only protect against duplication.

   This statement could be interpreted too narrowly. The Copyright Act grants the owner of a copyright a "bundle of exclusive rights” consisting of: (1) the right to reproduce the work in copies; (2) the right to prepare derivative works (works based on one or more pre-existing works, such as a translation, motion picture version, or condensation, including works consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship); (3) the right to distribute copies (this right applies to the first public distribution of an authorized copy, whether by sale, gift, loan, rental, or lease); (4) the right of public performance (for example, to show sequentially portions of a motion picture, video, or slide series); and (5) the right of public display (for example, to show a copy of the work, either directly or by means of a film, slide, or other individual image). See 17 U.S.C.S. § 106.

6. An ADF&G employee creating copyrightable materials on state time does not own the copyright; instead, under Section 101 (works made for hire) of the Copyright Act, these materials become the intellectual property of the department or the State of Alaska.

   ADF&G employees. While section 101 of the Copyright Act defines the term “works made for hire,” section 201(b) determines copyright ownership of works made for hire:

   **Works made for hire.** In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a
written instrument signed by them, owns all of the rights comprised in the copyright.

Under the first part of the definition of "work made for hire" in section 101 of the Copyright Act, a "work made for hire" is "a work prepared by an employee within the scope of his or her employment." This provision is construed according to principles of agency law, see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 742-43, 104 L.Ed.2d 811, 826, 109 S. Ct. 2166 (1989); therefore, a work prepared by an independent contractor will not be considered a "work made for hire" under the Copyright Act under the first part of the definition pertaining to employees.

Independent contractors. Some of the ADF&G copyrighted materials may be works created by an independent contractor. This could happen two different ways; however, in both cases, there must be an express written agreement between ADF&G and the contractor. First, under sections 101 and 201(b), there are nine categories of works that when specially ordered or commissioned are considered works made for hire, provided there is a written agreement to that effect. The second part of the definition of "work made for hire" is as follows:

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as an answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

A work created by an independent contractor that does not fall within the nine categories listed in the second part of the definition of "work made for hire" in section 101 is not a "work made for hire", see Reid, 490 U.S. at 738, 104 L.Ed.2d at 823; and, copyright will vest initially in the contractor (author). Therefore, the second way ADF&G might obtain a
copyright to a work prepared by an independent contractor is if the contractor transfers the copyright in writing to ADF&G. All ADF&G contracts should expressly address the question of whether or not the work to be made is a "work made for hire," copyright ownership, transfers, and any limitations on use of copyrighted materials.

7. Reproduction of these works, other than by the department, requires written approval by the department, except as allowed under the fair use provisions of the copyright act (this generally allows an individual to make a single copy of copyrighted material for a research or educational use -- see Fair Use section below).

The "approval" would constitute a "nonexclusive license." See discussion below on transfers and licenses.

8. Copyrights, while historically most important for artistic creations with commercial value, are becoming increasingly important for intellectual property such as research results, computer software, databases, etc.

Okay.

9. Copyrights thwart piracy of intellectual property and facilitate recouping of damages for piracy.

Copyright protection includes remedies such as injunctions, impounding and destruction (or other disposition) of infringing articles, actual damages and any additional profits of the infringer or statutory damages, full costs and reasonable attorney's fees, and criminal penalties, including fines, imprisonment, and forfeiture and destruction of the infringing articles. See 17 U.S.C.S. §§ 501 - 511.

10. In addition, copyrights help to ensure proper credit for copyrighted materials copied or republished by others.

Okay.

11. Hence, copyright issues for states are increasing.

Okay.

12. States have not customarily charged royalties for use of their copyrighted materials, but as states' budgets shrink and intellectual innovation by states increases, the need to more judiciously manage state copyrights has become increasingly important.

This is probably also due to technological innovation, including computer software and databases. For example, electronic
databases compiled by state agencies would have greater value for private commercial applications than hardcopies.

13. If the department's copyrighted material is to be reproduced by someone outside the state, the department may elect to (1) seek a royalty for the use and impose appropriate conditions, (2) approve and condition the request without seeking a royalty, or (3) deny the request (see section below, Transfers and Requests to Reproduce ADF&G Copyrighted Materials).

Okay. See discussion of transfers and royalties below.

Copyright Protection vs. Public Disclosure

14. While materials copyrighted to the department may not be reproduced except as allowed by the department, this should not be confused with disclosure of public records as set forth in AS 09.25.110 -- 09.25.220 and 6 AAC 96.100 -- .900.

Okay.

15. These state laws ensure that public records are available to the public for inspection and that reasonable numbers of copies be provided by the state agency, which is quite different than an individual or company making unauthorized and unlimited copies of state copyrighted material.

Professor John A. Kidwell, in his essay, "Open Records Laws and Copyright," 1989 Wisc. L. Rev. 1021 (1989), also reaches this conclusion:

It is important to realize that the right to access does not necessarily imply the right to exploit, and that the right to copy for purposes of achieving access does not necessarily imply the right to reproduce and distribute multiple copies. On the other hand, since a case can be made for forfeiture of property claims in governmentally authored writings, broad language of particular state statutes could plausibly be held to have just that effect.

1989 Wisc. L. Rev. at 1030-31. The language of the Alaska Public Records Act is not so broad as to defeat ADF&G copyright protection.
Fair Use

16. This section of the copyright law is complex; however, copies of copyrighted materials can be safely made by anyone without seeking the copyright owner's permission as follows:

1. a single copy for personal use (includes job-related use by an individual) in research or education (Note: personal use in a recent court decision means that you promptly read and study the article, not simply copy and file it away in your library for a rainy day; nor can you aggregate papers to form a collective work for personal use);

2. a single copy for each member of a group assembled for research or educational purposes; and

3. similarly, a single-copy reproduction of software for educational use can be made, but must be retrieved and destroyed after the use is completed, unless the software is in the public domain (i.e., not copyrighted).

A state employee should only reproduce/copy copyrighted materials for personal use as described above. Other uses would require approval from the copyright owner (see section below, Staff Use of Copyrighted Material).

Fair use is one of the most unsettled areas of the law. The doctrine is "so flexible as to virtually defy definition." Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

Traditionally, "fair use" was considered "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property 260 (1944), quoted in Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549, 85 L.Ed.2d 588, 600, 105 S. Ct. 2218 (1985). In 1976, the fair use doctrine was codified in 17 U.S.C. § 107, which provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research does not constitute infringement.

To determine whether the use made of a work in any particular case is fair use, the Copyright Act directs that the factors to be considered include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.


The crux of the profit/nonprofit distinction in 17 U.S.C. § 107(1) "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row, 471 U.S. at 562, 85 L.Ed.2d at 608. "Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589, 127 L.Ed.2d 500, 519, 114 S. Ct. 1164 (1994).

To determine market harm, one test, set out in Sony, is that "[T]o negate fair use, one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'" 464 U.S. at 451, 104 S. Ct. at 793.

In American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994), cert. dismissed, 133 L.Ed.2d 486, 116 S.Ct. 592 (1995), the court found that the institutional, systematic, archival copying of scientific journal articles by individual employees of for-profit corporation was not fair use. Texaco employs 400 to 500 research scientists nationwide to improve its commercial performance in the petroleum industry. It maintains a sizable library at its facility in Beacon, New York, and subscribes to many scientific and technical journals for its library. The library circulates current issues to individual researchers who ask to be included on routing slips. One scientist, chosen at random as a representative of the entire group of research scientists, had copied articles and placed them in his files for later use. This practice was found to be unfair use because (1) it represented a systematic institutional policy of multiplying the available number of copies of copyrighted articles by circulating the journal among employed scientists for them to make copies, thereby serving the same purpose for which additional subscriptions are normally sold or for which photocopying licenses may be obtained; (2) strong copyright protection is necessary to provide sufficient incentives for the
creation of scientific work; (3) the articles were copied in their entirety; and (4) there was a substantial harm to the publishers due to lost licensing and lost subscription revenues. The court suggested that there might have been fair use if the scientist had made one copy of a chart, formula, or other material from an article to use in the laboratory or to mark up in connection with his research. The court frowned on the use of copies to build up a "mini-library" for future reference. 60 F.3d at 919.

As the United States Supreme Court dismissed certiorari, American Geophysical Union is binding in only the Second Circuit. While a number of court decisions in other circuits refer to this case, I did not find any decisions that directly followed it. There are also other cases, such as Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 78 L.Ed.2d 574, 104 S. Ct. 774 (1981), that have held that the verbatim copying is not per se unfair, if the unauthorized copying is noncommercial in nature. In Sony, the found that videotaping a television program for later viewing did not constitute infringement. See also Steven D. Smir, "Make a Copy for the File . . .": Copyright Infringement by Attorneys," 46 Baylor L. Rev. 1, 13-33 (1994), suggesting that the proper approach to determine whether the copying of trade journals, newsletters, and periodicals constitutes infringement would be to analyze the effect on the potential market for the particular publication if the copying activity became widespread among similarly situated users.

With respect to copying material for distribution to a group assembled for research or educational purposes, one court has written, "As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt." Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1389 (6th Cir. 1996), cert. denied, 137 L.Ed.2d 495, 117 S. Ct. 1336 (1997) (student coursepacks consisting of segments of books not fair use; publishers would lose licensing/permission fees).

Congress endorsed certain guidelines for classroom copying in the Legislative History for the Copyright Act of 1976. See H.R. No. 94-1476, 94th Cong., 2d Sess., reprinted in 17 U.S.C.S. App. 607-89 (1994). Under these guidelines, a teacher may make one copy per pupil in a course for purposes of classroom use or discussion, provided the copying meets the test for brevity and spontaneity and the cumulative effects test set out in the guidelines and each copy contains a copyright notice. For example, for prose, brevity is defined as a complete article of less than 2,500 words or an excerpt of not more than 1000 words or 10 percent of the work, whichever is less. For illustrations, brevity is defined as one chart, graph, diagram, drawing, cartoon, or picture per book or periodical. 17 U.S.C.S. App. at 688. Spontaneity is defined as
(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Id. at 688. With respect to cumulative effect, the copying may only be for one course. Not more than one short essay or two exceptions may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term. Finally, there may not be more than nine instances of multiple copying for one course during one class term. Id. at 688-89. The guidelines also prohibit certain copying; perhaps, most significant for ADF&G’s purposes, the same instructor may not copy the same item from term to term. See id.

17. A state employee should only reproduce/copy copyrighted materials for personal use as described above.

Okay.

18. Other uses would require approval from the copyright owner (see section below, Staff Use of Copyrighted Material).

Okay.

Transfers and Requests to Reproduce ADF&G Copyrighted Materials

Transfers and Exclusive Licenses vs. Nonexclusive Licenses. In copyright law, it is important to distinguish between a transfer of copyright ownership, including an exclusive license, and a nonexclusive license. Section 101 of the Copyright Act defines the term, “transfer of copyright ownership,” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” Because of ADF&G obligations under the Public Records Act, AS 09.25.100 - 09.25.220, and the Management and Preservation of Public Records Act, AS 40.21.010 - 40.21.150, ADF&G should avoid transferring ownership of a copyright in whole, and instead use nonexclusive licenses to authorize the use and copying of its works. If it is necessary to transfer a copyright in whole, ADF&G should secure a nonexclusive license from the transferee for the duration of the copyright sufficient to enable ADF&G to comply with its obligations under the Public Records Act and the Management and Preservation of Public Records Act. The ADF&G should also consider whether it it would be possible to retain any of the
five exclusive rights under section 106 rather than make a transfer in whole.

A transfer or exclusive license must be in writing. 17 U.S.C.S. § 204(a). As stated in *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990), "It doesn't have to be the Magna Charta; a one-line pro forma statement will do." A nonexclusive license, on the other hand, may be granted orally or even implied from conduct. *Id.* at 558.

**Abandonment and forfeiture.** A copyright may be "abandoned" through some overt act that indicates the owner's desire to surrender its rights under the Copyright Act. See *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1019 (9th Cir. 1985), cert. denied, 474 U.S. 1059, 88 L.Ed.2d 778, 106 S. Ct. 802 (1986); 18 C.J.S. *Copyrights* § 31 (1990). The "forfeiture" of a copyright may occur through the owner's "[a]cquiescence, with full knowledge in the publication of a vast number of copies without copyright notice . . . ." *Transgo*, 768 F.2d at 1019. Section 405(a)(1) of the Copyright Act provides certain exceptions to forfeiture where copyright notice is omitted from a relatively small number of copies or where copyright notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of the copies, that they bear the prescribed notice. 17 U.S.C. § 405(a)(1), (a)(3).

19. **Copyright transfers of scientific manuscripts prepared for external journal or symposium publication by the department staff should be approved by the divisional editor (i.e., the individual within the respective division responsible for approving release of manuscripts for external publication).**

Section 201(c) of the Copyright Act deals with contributions to collective works. It provides:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular public work, any revision of that collective work, and any later collective work in the same series.

As noted above, to facilitate compliance with the Public Records Act and Management and Preservation of Public Records Act, ADP&G should consider whether it is possible to use a nonexclusive license or a partial transfer rather than a transfer in whole to authorize the publisher to publish a manuscript. If it is not
possible, ADF&G should secure in writing from the publisher a nonexclusive license for the duration of the copyright to use and copy the manuscript in accordance with the provisions of the Public Records Act and the Management and Preservation of Public Records Act.

20. All other requests for copying or reproducing the department's copyrighted materials, except as allowed under fair use, or to release or transfer copyrights should only be acted upon by the appropriate division director or commissioner according to the following guidelines:

See discussion of transfers and exclusive licenses versus nonexclusive licenses above.

21. 1. Intellectual property copyrighted to the State of Alaska belongs to the residents of Alaska. The department will therefore protect the overall public interest in allowing or disallowing use of the ADF&G intellectual property and in deciding whether to charge a royalty or require special stipulations.

The second sentence should probably read, “Consistent with the Public Records Act, the department will . . . .”

In addition to “royalties,” ADF&G could also recover “licensing fees.” A royalty is expressed as a percentage of receipts from using the copyright; for example, a percentage of the receipts from each copy of a book sold. See Black’s Law Dictionary 1330 (6th ed. 1990). A licensing fee is a charge, including a flat fee, imposed for the granting of a privilege. See id. at 921.

22. 2. In general, reproduction of the department's copyrighted material will be encouraged if the public clearly receives a benefit from the requested use. Stipulations attended to approved uses of the department’s intellectual property should be included, as needed, to ensure the requested use acknowledges the public’s role in developing this material.

Okay.

23. 3. The department’s intellectual property should not be reproduced by private or other governmental agencies in such a manner that it represents the material as their own. Stipulations attended to approved uses of the department’s intellectual property should be included, as needed, to ensure that the requested use acknowledges the public’s role in developing this material.

Okay.
24. 4. In approving requests, the department may also require
disclaimers be included on reproductions to exonerate
the state from liability for errors or deficiencies in
reproduction.

Okay.

25. 5. Requests for private commercial reproduction of the
department’s intellectual property should be considered on a
case-by-case basis. If the department determines that the public
would clearly derive an associated benefit, the request may be
allowed. In making that determination, the agency may consider
the fees the public would have to pay for this commercial
product.

In considering a request for private commercial
reproduction, one of the first steps should be to determine how
ADF&G makes the copyrighted work available to the public and
whether there are any associated fees, either under the Public
Records Act or AS 16.05.050(16). There may also be fees under
the Management and Preservation of Public Records Act. Next,
ADF&G should take into account how the copyrighted work will
be used in the private commercial reproduction. For example,
reproduction might involve simple copying or reprinting, or it
may be part of a more complex undertaking, such as reproduction
of the work in a compilation or as part of a film. These
considerations will figure into any licensing contract because
ADF&G will need to reserve the rights (1) to make the ADF&G
copyrighted work available to the public under the Public
Records Act and 06 AAC 96 for inspection and copying; (2) to charge any
fees allowed under the Public Records Act and 06 AAC 96; and (3)
to comply with the Management and Preservation of Public Records
Act, which also includes provisions for public access and
copying. The ADF&G should also take into account its authority
under AS 16.05.050(16) to establish and charge fees equal to the
cost of services provided by ADF&G, including the cost of ADF&G
publications.

26. The department may levy appropriate and reasonable royalties
to offset public funding used to develop its intellectual
property and to offset fees the public may be charged to
purchase the commercial product. If the fees are high and
the public or state benefits are comparatively low, requests
may not be in the overall public interest and may be
accordingly denied.

The ADF&G charges under the Public Records Act or
AS 16.05.050(16) represent charges for ADF&G services, and are
limited to the cost of providing the service. Analytically,
these service fees are different from any royalties or licensing
fees that ADF&G may recover for private commercial reproduction
of an ADF&G copyrighted work. These latter fees represent the
consideration paid to ADF&G to grant another person a license of
certain rights under ADF&G’s copyright.
Under article IX, section 6, of the Alaska Constitution, public property may only be transferred for a public purpose. This generally requires that the state receive fair market value for the property it transfers. The failure to recover the fair market value of the intellectual property rights licensed to a private entity would violate this provision of the Constitution, by providing a direct an substantial benefit to a private entity rather than to the public. See 1983 Inf. Op. Att'y Gen. (July 27; 366-036-84); 1982 Inf. Op. Att'y Gen. (Mar. 30; J-66-197-82). See also 1983 Inf. Op. N.Y. Att'y Gen. (Apr. 14; No. 83-23), 1983 WL 167385 (N.Y.A.G.) (To comply with New York State constitutional prohibition on transfer of school district property to a private individual or private undertaking, school district, as copyright owner, must obtain the "highest possible consideration" in granting a license to reproduce a copyrighted painting).

Therefore, in licensing any right under a copyright, the ADF&G should seek to recover the fair market value of the license, which may be greater or less than the cost of providing the service or ADF&G publication. For example, the fair market value of the right to use footage from an ADF&G copyrighted wildlife film in a Hollywood motion picture may greatly exceed the cost to the state of producing the film.

27. 7. Requests for reproducing the department's intellectual property should also be denied when the requested use would:

   a) involve profit-making from sale of reproduced items that the department specifically prepared for free public distribution, except when that item is no longer available and the department has no plans to make additional copies for free distribution.

   There should be no obstacle to profit-making where the licensee is incorporating the copyrighted work into another publication or preparing a derivative work; for example, including an ADF&G pamphlet in a compilation, translating an ADF&G scientific paper, displaying footage from an ADF&G film in a movie, or including an ADF&G photograph in a wildlife calendar.

   b) create public confusion or mislead the public (e.g., reproducing and distributing information that was inaccurate or out of date, . . .)

Okay.
c) reflect badly on the department (e.g., unseemly uses, poor quality of reproduction, . . . )

Okay.

**Internet and Copyright**

This area of the law is in its infancy. There is an inherent tension between the nature of the Internet as a global means of sharing information and the proprietary nature of copyrights. Some commenters have suggested that it may be preferable for authors to use technological means (e.g., encoding) to prevent infringement rather than legal mechanisms.

28. Copying material contained on an ADF&G web page and posting it on another web page of any kind is not considered to be "fair use" and would require approval by the department.

This sentence structure is somewhat awkward; but more importantly, since fair use is a mixed question of law and fact, there may be some circumstances where a portion of the ADF&G material could be posted on another person’s web page; for example, for purposes of scientific research or criticism. Also, the doctrine of "implied license" comes into play. According to one computer law practitioner,

[S]ince the Internet (and the World Wide Web especially) are by definition a network of interconnections facilitating the linking and sharing of data, copyright owners who post material on this media are deemed to have implicitly licensed the copying, performance, display, distribution, and derivative transformation of their works at least in the usual manner in which the Internet works. The debate centers mostly on the limits of the license that is implied.

Jose I. Rojas, "The Internet and Content Control: Liability of Creators, Distributors, and End-Users," *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series* (PLI Order No. G4-J987; Mar. 1997). To limit unauthorized copying, ADF&G should consider adding a provision to its copyright web page that expressly limits ADF&G’s consent to links to ADF&G websites to those links that take the browser to ADF&G’s home page, where copyright and other identifying information can be found. See id.

This sentence could be re-written something to the effect, "Subject to fair use, such as limited copying for purposes of scientific research or criticism, the unauthorized copying and posting of material contained on an ADF&G webpage to another person’s web page constitutes copyright infringement."
A person seeking to copy material from an ADF&G web page to another web page must first obtain permission from ADF&G.

29. This is different than downloading materials for uses allowed under "fair use," such as making a paper copy for subsequent reading.

Okay.

30. Likewise, copying materials posted on the Internet for inclusion on an ADF&G web page would violate copyright law, unless the copyright holder approved such use.

Again, there may be circumstances where fair use would allow such copying. If ADF&G receives notice that it has infringing material on its site, ADF&G should investigate the claim and, if the claim is valid or could reasonably be determined to be valid, take immediate action to remove the material.

**ADF&G Copyright Notice**

31. A copyright is automatic once the material is developed.

Use of the word "developed" makes this sentence susceptible to different interpretations. To be technically correct, it should read that copyright protection begins automatically from the moment a work is created in fixed form, without any formality, process, or application. See 17 U.S.C.S. §§ 201(a), 302(a).

32. The standard copyright notice (e.g., "© 1996 Alaska Department of Fish and Game") is not required to establish copyright.

Section 401(a) of the Copyright Act provides that whenever a work is protected under the Copyright Act, a notice of copyright may be placed on publicly distributed copies. The purpose of the notice is to provide a warning to the public that the work is protected by copyright, to protect innocent persons from copying the copyrighted work, and to inform the public of the date of first publication. DeSilva Construction Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962).

The notice must contain three elements: (1) the symbol ©, the word "Copyright", or the abbreviation, "Copr."; (2) the year of the first publication of the work; and (3) the name of the owner of the copyright in the work. 17 U.S.C.S. § 401(b). The notice must be placed on the copies in a manner and location so as to give reasonable notice of the claim of copyright. Id. § 401(c).
33. Nevertheless, copyright notice should be included on the department's formal publications and any other important materials that the department may want inform users of its copyright.

If ADF&G includes a notice in the form and position specified in 17 U.S.C.S. § 401, then the Copyright Act limits the defendant's ability in a copyright infringement suit to raise the defense of innocent infringement. See 17 U.S.C.S. § 401(d).

34. Occasionally, special materials that need the highest possible level of copyright protection (e.g., ADF&G logo, computer program) should be registered with the federal copyright office.

1. ADF&G logo: The pictorial/design aspects of the logo are protected by copyright. In addition, since the logo serves to identify ADF&G as the source of a product or service, ADF&G should protect its logo under the federal and state trademark laws, 15 U.S.C. §§ 1051 - 1127 (Lanham Act) and AS 45.50.010 - 45.50.205. The Copyright Act will give ADF&G the right to prevent the copying of the logo in any medium, while the trademark laws will give ADF&G the right to prevent the use of a similar mark on other goods and services where the similar mark would probably cause confusion. The elements of infringement are different under the Copyright Act and the Lanham Act, and the Acts provide different remedies. While the copyright has a finite duration, the trademark registration can be renewed beyond the life of the copyright. Depending on the circumstances surrounding the infringement, it may be advantageous to seek remedies under both statutes, or under one or the other. See Nintendo of America, Inc. v. Dragon Pacific International, 40 P.3d 1007 (9th Cir. 1994), cert. denied, 515 U.S. 1107, 132 L.Ed.2d 269, 115 S. Ct. 2256 (1995).

2. Registration. Neither deposit nor registration is a condition of copyright protection, id. §§ 407(a), 408(a). However, under section 410(c), a certificate of registration, if timely obtained, constitutes prima facie evidence of the validity of the copyright. Once the presumption under section 410(c) is established, the defendant in an infringement action has the burden of overcoming it. Gates Rubber Co. v. Bando Chemical Industries, Ltd., 9 P.3d 823, 832-33 (10th Cir. 1993).

In addition, under section 411(a), deposit for copyright registration under section 408 is a prerequisite to maintain an action for copyright infringement. Therefore, in addition to depositing two complete copies of the best edition of the work, ADF&G should also consider registering the copyright claim. Copies deposited for the Library of Congress under section 407 may also be used to satisfy the deposit for registration requirement of section 408, provided they are accompanied by the appropriate application form and a check in the amount of $20.
35. If the materials include a copyright notice, you must, under section 407 of the Copyright Act, send two copies of the material to the Register of Copyrights for filing with the Library of Congress (note: failure to comply can make the department subject to fines). Send two copies to:

Register of Copyrights
Attn: 407 Deposits
Library of Congress
Washington, D.C. 20559

Under section 407(a) of the Copyright Act, the deposit must be made within three months of the date of publication. In general, the copies must be complete copies of the best edition of the work. 17 U.S.C.S. § 407(a). Deposit requirements may vary for different types of work; if staff are uncertain of the deposit requirements for a particular type of work, they should contact the Copyright Office. Failure to comply within three months after receipt of a written demand by the Register of Copyrights can result in fines. Id. § 497(d).

36. When staff are not sure whether the needed copies of someone else's copyrighted material is allowed under fair use, either request copies or copying permission from the copyright owner, or alternatively, contact the Copyright Clearance Center (21 Congress Street, Salem, MA 01970), which can provide prompt authorization to photocopy many copyrighted materials and bill and receive any attendant royalty payments.

Suggested re-phrasing: When staff are not sure whether the fair use provision of the Copyright Act would allow the copying of a needed work, staff should request copies or copying permission from the copyright owner or the owner's designated agent, which may include the Copyright Clearance Center (222 Rosewood Drive, Danvers, MA 01923; telephone (508) 750-8400; Internet address http://www.copyright.com). The Copyright Clearance Center can provide prompt authorization to photocopy many copyrighted works and can bill and receive any attendant royalty payments.

Note the change in address. It may also be a good idea to point out that the lack of a copyright notice does not mean that a particular work can be freely copied. See 17 U.S.C.S. § 401(a).

37. Staff planning to reprint or republish articles or parts of articles (e.g., a figure or table) that were previously published in periodicals, books, etc., will need to secure permission from the copyright owner. Keep in mind that most journals are the copyright owners of the papers they
publish, not the authors; i.e., authors generally transfer their original copyrights to the journal.

Staff should be careful to verify that the author has made an express transfer of the copyright to the publisher. Under section 201(c) of the Copyright Act. "In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U.S.C. § 201(c).

38. However, if all the authors of a paper were federal employees and the paper was developed within the scope of their employment, then no copyright exists, and you may use the material without consent (however, do cite the source of the material).

Notes: Under 17 U.S.C. § 105, copyright protection is not available for any work of the United States Government; however, the Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise. Section 101 defines the term "work of the United States Government" as a work prepared by an officer or employee of the United States Government as part of that person's official duties." Since a federal employee who prepares a work of authorship on his or her own time on a subject relating to his or her employment may claim a proprietary interest in the work and copyright it, provided the work was not part of his or her official duties, Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967), it may be more clear if this sentence were to refer to works developed within the scope of (or as part of) their official duties. Also, this rule would apply not only to papers, but to all other media of expression.

Another caveat to this sentence is that work commissioned by the federal government through grant or contract may be eligible for copyright protection under the Copyright Act. Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948, 71 L.Ed.2d 661, 102 S. Ct. 1448 (1982). Nonetheless, a federal agency may withhold copyright protection from the contractor if would be in the public interest to do so or if the commission is merely an alternative to producing the work in-house. Id., at 109.

Finally, under 15 U.S.C.S. § 290e (1984), the United States Secretary of Commerce may copyright standardized scientific and technical reference data, quantitative information related to a measurable physical or chemical property of a substance or system of substances of known composition and
structure, which is critically evaluated as to its reliability for publication in the Federal Register. See 15 U.S.C.S. § 290a.

39. Also, if you plan to reproduce department-copyrighted material outside your job other than allowed under fair use (see Fair Use section above), you will need to secure the department's approval first.

   Okay.

40. When requesting a copyright owner's permission to copy, republish, or reprint their material, prepare a letter of request that includes the following: (1) explain the nature of the request, and (2) include pertinent source information (e.g., year, volume, number, edition, pages, or portion of a page) that clearly identifies the material. Include an approval line below your signature on the letter, as shown below, and enclose a self-addressed and stamped return envelope.

   Permission Granted:

   ________ ________
   (signature) (date)

   In some cases, it may be necessary to secure permission from the owner's designated agent.

GENERAL COMMENTS

Duration

   It may be helpful to include a statement about copyright duration. Under the federal Constitution, a copyright may last only for a limited time. The Copyright Act contains several provisions specifying the duration of a copyright according to the type of author, whether the work is a "work made for hire," and date on which a work was created. In the case of a work made for hire created after January 1, 1978, the copyright endures for a term of 75 years from the year of its first publication, or a term of 100 years from the year of its creation, whichever expires first. 17 U.S.C.S. § 302(c). A work not made for hire is generally protected for the life of the author plus 50 years. See 17 U.S.C.S. § 302(a).

Infringement by States, State Agencies, and State Officials

   It may be helpful to add a provision relating to infringement by states, state agencies, and state officials. The Copyright Act contains a specific provision in this regard. Section 511 provides:
(a) In General. Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119, for importing copies of phonorecords in violation of section 603, or for any other violation under this title.

(b) Remedies. In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of the infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney’s fees under section 505, and the remedies provided in section 510 [remedies for alteration of programming by cable systems].


Periodic Updates

The ADF&G copyright policy should be periodically reviewed and updated, as certain areas of law are unclear ("fair use") and others are rapidly evolving (software, Internet).

Style

Throughout the document, ADF&G is referred to as the "department," "ADF&G," or "the agency." It is generally preferable to select one term and use it consistently. Same comment: "staff," "employee," "you."

Also, rather than using phrases such as "approve copying," which has a regulatory connotation, it would be preferable to use terms such as "permit," "authorize," "license," or granting "permission," "authorization," or "a license to (use, copy, etc.)," which has more of a proprietary connotation.

MS:prm
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