

# The Limits of Fair Use in Military Scholarship: When, How, and From Whom to Request Permission to Use Copyrighted Works

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## I. Introduction

Scholarly legal writing is a key component of law practice throughout the military.<sup>1</sup> Specialty journals, such as *The Army Lawyer*, and the *Military, Naval, and Air Force Law Reviews* (combined military publications), jointly embody the philosophy that scholarly legal writing not only serves to develop the skills of judge advocates, but permits the transmission of vital knowledge on legal issues and developments unique to military practice.<sup>2</sup> A substantial amount of scholarly work will emerge in combined military publications solely as a result of mandatory writing requirements in military educational programs.<sup>3</sup> In 2008, for example, student-published work accounted for twenty-eight percent of *The Army Lawyer* and fifty-eight percent of *Military Law Review*.<sup>4</sup> Aside from students, faculty members, military practitioners, and military judges account for the majority of remaining publications, with non-military law professors and practitioners accounting for a much smaller number of contributors.<sup>5</sup>

Among the diverse authors in combined military publications, technology has enabled access to a variety of source material, creating legal considerations.<sup>6</sup> Most articles cite to webpages, and many cite to transcripts of cases, guidelines and standards of professional organizations, interviews, television broadcasts, and even movies.<sup>7</sup> Many articles begin with quotations from popular films or plays for the purpose of grabbing the reader's attention.<sup>8</sup> In addition to copyrighted works, the titles of articles and attention-grabbing excerpts sometimes include material protected as trademarks. Rarely are these uses ever accompanied by indications that the author first received permission to use such material.<sup>9</sup>

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<sup>1</sup> In recognition of this, the Air Force Judge Advocate General's Corps celebrates authorship of scholarly publications by attorneys in its ranks. Its magazine, *The Reporter* contains a recurring section titled "JAG Corps Scholarly Articles and Writings," which begins with a customary notation that "[m]embers of the JAG Corps continue to make significant contributions to academic legal discourse and dialogue, a sample of which is listed below." Note, *The Year in Review 2008*, REPORTER, 2008, at 33, 33-36 (citing individual works, including published articles and book reviews, and "additional papers written in satisfaction of educational requirements").

<sup>2</sup> E.g., Major General Scott C. Black, *Foreword* to 197 MIL. L. REV. (2008) (describing how contributions to the *Military Law Review* serve to continue "legal discourse" on important developments in the military). As one example, *The Army Lawyer*, which is a publication of the Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, routinely publishes a series of articles on new developments in military criminal law. February 2009 marked the Fourteenth Annual Military Justice Symposium, with unique military law perspectives on "the Fourth, Fifth, and Sixth Amendments, as well as substantive criminal law, panel selection, voir dire, challenges, discovery, sentencing, and advocacy." Lieutenant Colonel Daniel G. Brookhart, *Foreword*, ARMY LAW., Feb. 2009, at 1, 1.

<sup>3</sup> In the Army Judge Advocate General's Corps, for example, any member wishing to obtain the Masters in Law in Military Law at the conclusion of the Judge Advocate Officer Graduate Course must complete at least one writing program elective ("primer, research paper, or thesis") with a sufficient grade. U.S. DEP'T OF ARMY, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, CIRCULAR NO. 351-6, JUDGE ADVOCATE GRADUATE COURSE para. 14(a) (1 Aug. 2008). The Judge Advocate General's Legal Center and School is the only military school authorized to grant the Master of Laws. Note, *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, ARMY LAW., Jan. 1988, at 3. See also 10 U.S.C. § 4315 (2006). Because of this advantage, members of sister services often attend the Army LL.M. program.

<sup>4</sup> For the purpose of this article, student-published work includes masters' theses, book reviews, and other materials published during the time when students were associated with legal educational programs, as referenced in their biographical data.

<sup>5</sup> In 2008, for example, three non-military authors published articles in the *Military Law Review*. See Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196 MIL. L. REV. 91 (2008); Mitchell McNalytor, Book Review, *A.J. Lieblin's World War II Writings*, 196 MIL. L. REV. 170 (2008); Hon. Donna E. Shalala, *The Twenty-Seventh Charles L. Decker Lecture on Administrative and Civil Law*, 197 MIL. L. REV. 145 (2008).

<sup>6</sup> E.g., Ralph S. Brown & Robert C. Denicola, *Preface* to RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP, at v (10th ed. 2009) ("Copyright law is undergoing major transformations as new technologies spawn new challenges.").

<sup>7</sup> E.g., Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 65 n.440 (2001) (citing to a transcript of the television broadcast for the program *Larry King Live*).

<sup>8</sup> William Shakespeare's works are favorites among professors at The Judge Advocate General's School. E.g., Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, at 1, 1 n.1 (citing several lines of *King Henry*); Major Jon S. Jackson, *Counsel Should Provide More Fury, Less Nothing: 2004 Developments in Professional Responsibility*, ARMY LAW., May 2005, at 35, 35 n.1 (citing several lines of *MacBeth*).

<sup>9</sup> See *infra* note 19 and accompanying discussion.

Military legal practitioners who produce published works are likely to encounter the same legal issues as university professors concerning the use of intellectual property for educational purposes. Chief among these concerns is the notion of “educational fair use,” which *potentially* permits unauthorized use of copyrighted works for the purpose of expanding knowledge on an issue through criticism or review.<sup>10</sup> In general, copyright experts warn all authors to err on the side of caution and seek permission to use copyrighted material,<sup>11</sup> particularly because the concept of fair use is one of, if not, *the* most complex areas of copyright law.<sup>12</sup> The concern relates to the fact that there are no automatic standards to determine when one’s use is fair.<sup>13</sup> Where infringement does occur, copyright owners can be enjoined from publishing a work or distributing already published work.<sup>14</sup> Judge advocates publishing scholarly work, in fact, have special intellectual property obligations based on the nature of their status in the military.<sup>15</sup> Furthermore, academic standards often add to the existing requirements of Army regulations.<sup>16</sup>

In 1988, long before society merged onto the information superhighway, Captain James Hohensee emphasized the need for military lawyers to learn the nuances of fair use.<sup>17</sup> While he identified numerous reasons for study of these unique rules, misinterpretation and oversimplification were his biggest concerns: “Judge advocates must be alert to the temptation to oversimplify the complex nature of the fair-use doctrine. We look for simple standards such as those holding excessive copying cannot be fair use. If we advise that all educational or military uses are fair use because they are nonprofit we tread dangerous ground.”<sup>18</sup> It appears this call to action has fallen upon deaf ears. In fact, a recent search in the LEXIS-NEXIS® “military law reviews combined” database revealed only eighteen citations acknowledging publishers for permission to reprint material.<sup>19</sup> Among this group of articles, authors mainly requested permission only when reproducing entire articles from other legal publications.<sup>20</sup> In a handful of instances, authors requested permission to reprint existing compilations of data, such as charts reflecting statutory trends across the nation.<sup>21</sup> Only one author acknowledged a publisher for permission to reprint images.<sup>22</sup> In hundreds of other articles, frequent citations to blocks of text, figures, charts, photographs, websites, song lyrics, jokes, and other content are accompanied by mere citations.<sup>23</sup>

While, certainly, not all unauthorized citations infringe upon an author’s intellectual property rights,<sup>24</sup> some may,<sup>25</sup> and this is a reason for concern. Infringement may be unnoticed simply because readers of military publications remain

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<sup>10</sup> See *infra* Part III (describing the doctrine of fair use and its limitations).

<sup>11</sup> See *infra* Parts III & IV.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Even if a defendant succeeds in an infringement case, litigation costs, alone, could exceed \$20,000. RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF 227 (3d ed. 2007) (providing an example in which lawyers’ fees for mounting a defense to infringement “exceeded \$20,000” and eliminated all profits rightfully earned by the user of the work). For this reason, many defendants settle regardless of the merits of a plaintiff’s claim. *E.g.*, Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391, 395 (2006) (observing situations in which, “facing the potential of a significant award, a defendant would likely offer to settle with the copyright owner”).

<sup>15</sup> See *infra* Part II.

<sup>16</sup> U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, 58TH GRADUATE COURSE PROFESSIONAL WRITING PROGRAM MANUAL 34 (2009) [hereinafter PWP MANUAL] (“Students must comply with applicable copyright laws. . . . Students must obtain any necessary copyright permission and cite it in the appropriate footnotes.”).

<sup>17</sup> See generally Captain James M. Hohensee, *The Fair Use Doctrine in Copyright: A Growing Concern for Judge Advocates*, 119 MIL. L. REV. 155 (1988).

<sup>18</sup> *Id.* at 200.

<sup>19</sup> The search, last conducted on 10 January 2010, consisted of “repub! or reprint! w/s permission.”

<sup>20</sup> *Id.*

<sup>21</sup> *E.g.*, Note, *Legal Assistance Items*, ARMY LAW. May 1992, at 37, 44–45.

<sup>22</sup> Major Douglas A. Dribben, *DNA Statistical Evidence and the “Ceiling Principle”: Science or Science Fiction?*, 146 MIL. L. REV. 94, apps. A & B (1994) (reprinting illustrations related to DNA).

<sup>23</sup> See *supra* note 19 and accompanying text.

<sup>24</sup> STIM, *supra* note 14, at 5 (recognizing that even “[i]f a creative work is protected under intellectual property laws, [one’s] unauthorized use may still be legal”).

<sup>25</sup> See *infra* Part III.A.2 (discussing use of “microworks” and small portions of text that still qualifies as copyright infringement).

predominantly within military circles.<sup>26</sup> However, as civilian courts and commentators increasingly turn to military scholarship in efforts to interpret contemporary national security and international law issues—and combined military publications are available through electronic databases such as LEXIS® and Westlaw® or online<sup>27</sup>—the resulting popularity of military legal works could very well provide original authors with belated knowledge of the ways in which their work has been (mis)used.<sup>28</sup> At the very least, the scarcity of permission references in combined military publications alerts us that many authors have abandoned the required cautious perspective on intellectual property.<sup>29</sup>

This article addresses the practical considerations facing military authors, with a focus on the process of requesting permission to republish copyrighted works. Part II explores the ethical dimension of intellectual property for military members. It highlights the special obligations imposed on military law practitioners that other civilian authors simply do not face. Part III explores notions of fair use in the creation of scholarly works. It dispels four common myths about the fair use doctrine. Part IV identifies the practical requirements for requesting permission to use copyrighted works. Aside from identifying the steps of the permission process, it provides examples of licensing agreements and a description of consolidated permission services, such as the Copyright Clearance Center. For more complex issues of copyright law, Part V includes references to comprehensive resources.

## II. The Cautious Perspective and the Ethical Dimension of Military Legal Scholarship

Producing legal scholarship as a judge advocate requires the writer to approach written works with a perspective of caution, acknowledging ethical duties that arise from the status of both government employee as well as law practitioner. Part of this requirement involves an examination of the content of one's writing. For example, the author must consider whether the substance of a given manuscript contains client confidences or assertions that could later be used against the author or her client.<sup>30</sup> It is not uncommon in military publications that an author relates a "war story" from her past to emphasize an argument or scholarly position. Military publications are filled with prompts like "In the author's experience . . ."<sup>31</sup> In Captain Hohensee's piece on intellectual property, even he relates prior advice he provided to commanders in the course of performing his duties as an administrative law attorney, acknowledging the weaknesses of his approaches. After explaining how simple questions in copyright law "can strike fear into the hearts of administrative law attorneys," he goes on:

I know from personal experience. While working as an administrative law action officer in 1985 I was assigned a problem from the post youth activities. When the post theater cancelled Saturday afternoon children's matinees, the youth activities wanted to rent videotapes and show them for a small fee. Would this violate the copyrights on the films? To answer this question I turned to the Administrative Law Handbook and was surprised to find no guidance on copyright matters. . . . I concluded that the plan would violate the copyrights. That opinion was right, but it failed in two respects. It failed because I was reduced to hiding behind the language in the regulation to say no. I didn't understand the law that the regulation embodied. The second failure stemmed from the first. Because I didn't understand the law well enough, I was unable to devise an alternative course of action that might have achieved the mission.<sup>32</sup>

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<sup>26</sup> For example, the *Military Law Review's* average circulation in 2008 was 5450, with roughly half of these periodicals provided to subscribers outside the military. Postal Service Form 3526, Statement of Ownership, Management, and Circulation, at 2 (1 Oct. 2008), available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/MilitaryLawReview.nsf> (for Volume 198) (last visited Jan. 10, 2010).

<sup>27</sup> In the first ten months of Fiscal Year 2008 alone, the Government Printing Office indicated that the *Military Law Review's* website was accessed 1,121,175 times, solely through the Library of Congress' Military Legal Resources Website for the *Military Law Review*. Black, *supra* note 2, at *Foreword*.

<sup>28</sup> STIM, *supra* note 14, at 4 ("[T]he more successful the project becomes, the more likely that a copyright owner will learn of the use."). In this sense, "if you want your project to become successful, unauthorized use becomes an obstacle." *Id.*

<sup>29</sup> See *supra* note 19 and accompanying text. This may, in fact, represent a national trend among civilian legal scholars. *E.g.*, Jessica Litman, *Open Access Publishing and the Future of Legal Scholarship: The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 783 (2006) ("[C]opyright is sufficiently irrelevant that legal scholars, the institutions that employ them, and the journals that publish their research tolerate considerable uncertainty about who owns the copyright to the works in question, without engaging in serious efforts to resolve it."). Even if this is a norm in the world of civilian legal scholarship, different standards apply to military members and practicing attorneys engaging in legal writing.

<sup>30</sup> See *infra* note 35 and accompanying discussion.

<sup>31</sup> *E.g.*, Colonel Thomas G. Becker, *Games Lawyers Play: Pre-Preferral Delay, Due Process, and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1, 21 n.90 & 23 n.103 (1998) (using personal experience to support discussions of charges driven by personal animosity and "unhealthy" competition in the referral process).

<sup>32</sup> Hohensee, *supra* note 17, at 155–56.

While such commentary surely emphasizes the need for judge advocates to learn more about copyright law,<sup>33</sup> similar comments about the representation of clients in criminal cases or family law matters could easily raise questions of confidentiality.<sup>34</sup> Moreover, as legal scholars warn adjunct professors who practice law and produce legal scholarship, there is potential that “[s]tatements made by a lawyer in publications can be used against the lawyer in a malpractice action”<sup>35</sup> or “against a client [at trial] or in briefs and motions.”<sup>36</sup> A conscientious military scholar therefore must first read her manuscript from an ethical perspective and take the necessary precautions to avoid violating confidentiality duties. This may be as simple as removing oneself from the reference and, instead, using a hypothetical attorney faced with a dilemma: “I often write not that a reasonable lawyer must or ought to do something but that a lawyer should consider whether to do that act. Such censorship is not ethically required, but it certainly reduces the potential for controversies arising from a lawyer’s scholarly publications.”<sup>37</sup>

In the context of source use and attribution, the military scholar will scrutinize her scholarly work for the use of copyrighted material. She will look for textual quotes containing more than a simple phrase or concept.<sup>38</sup> She will question whether her use goes to the “heart” of a copyrighted publication, even if its size is limited.<sup>39</sup> In her description of others’ theories or approaches to describing an issue, she will note whether her work follows the same pattern and outline as the original author, even if the cited material contains no verbatim copying.<sup>40</sup> She will pay special attention to use of charts or diagrams, photographs, tables, lists, copies of test questions or guidelines, or excerpts from blogs or websites.<sup>41</sup> She will be conscious of the status of the author of a publication and ready to seek permission not only from the publisher, but also from the author.<sup>42</sup> She will develop lists of potential conflicts and seek permission in all cases where resolution of an issue is not readily apparent, especially because various procedures have simplified the permissions process.<sup>43</sup> The military scholar must take these actions because it is her duty as a military officer and an attorney.

Members of the Army must abide by the provisions of Army Regulation 27-60, *Intellectual Property*, which mandates respect for private intellectual property rights in the performance of military duties.<sup>44</sup> Under the “general rule” on copyrights, “copyrighted works will not be reproduced, distributed, or performed without the permission of the copyright owner unless such use is within an exception under United States Copyright Law . . . or such use is required to meet an immediate mission-essential need for which noninfringing alternatives are either unavailable or unsatisfactory.”<sup>45</sup> Where a member of the Army seeks to use copyrighted material without permission, the use of the copyrighted material must first be approved by the

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<sup>33</sup> The excerpt, in fact, reminds readers of common dilemmas facing judge advocates in the interpretation of copyright statutes, especially in modern times.

<sup>34</sup> Rule 1.6, which addresses client confidentiality, prohibits the release of any information relating to the representation of a client without the client’s consent, which, in the case of a judge advocate, might include both the Government as a former client as well as individuals with whom the attorney formed an attorney-client relationship. Compare U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.6 (1 May 1992) [hereinafter AR 27-26] (“A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.”), with *id.* R. 1.13 (discussing the military attorney’s representation of the Government as a client). There is no recognized exception to this rule for academic writing. David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 391 (2001).

<sup>35</sup> Hricik, *supra* note 34, at 400. Hricik further explains, “for example, if a lawyer writes that a prudent lawyer must always investigate the medical history of a personal injury plaintiff, and then fails to do so in representing a defendant in such a case, that statement may likely be admissible against the lawyer.” *Id.*

<sup>36</sup> *Id.* at 401.

<sup>37</sup> *Id.* at 401 n.86.

<sup>38</sup> See *infra* Part III.A.2.

<sup>39</sup> *Id.*

<sup>40</sup> See *infra* Part III.

<sup>41</sup> See *infra* Parts III.A.2 & III.A.4.

<sup>42</sup> See *infra* Part IV.

<sup>43</sup> *Id.*

<sup>44</sup> U.S. DEP’T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY para. 4-1 (1 June 1993) [hereinafter AR 27-60] (“It is DA policy to recognize the rights of copyright owners consistent with the Army’s unique mission and worldwide commitments.”). See also U.S. DEP’T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 2-5 (27 Mar. 2006) [hereinafter AR 25-30] (acknowledging the responsibility to ensure that any work published through the Army “conform[s] to the copyright laws”); *id.* (requiring adherence to U.S. DEP’T OF ARMY PAM. 25-40, ARMY PUBLISHING: ACTION OFFICERS GUIDE, at sec. v (7 Nov. 2006) [hereinafter DA PAM. 25-40 (addressing the “Use of Copyrighted Material”)]).

<sup>45</sup> AR 25-30, *supra* note 44, para. 2-5d(1) (“When copyrighted matter is to be included in a publication, the proponent will obtain prior written permission from the copyright owner or the owner’s duly authorized agent.”). See also *Spilman v. Mosby-Yearbook, Inc.*, 115 F. Supp.2d 148, 156 (D. Mass. 2000) (“The federal government has no privilege to use copyright materials without the owner’s consent.”).

Intellectual Property Counsel of the Army.<sup>46</sup> In mandating permission requests, AR 27-60 notes instances in which “copyright owners frequently grant the military departments free permission to use copyrighted material.”<sup>47</sup>

Aside from violating the Army regulation on intellectual property, another reason to err on the side of caution in requesting permission is the power of copyright infringement—or even suspected copyright infringement—to harm the reputation of the author, The Judge Advocate General’s Corps, and the U.S. Army. Although copyright infringement is distinct from plagiarism, both concepts arise from the concern for an author’s right to maintain control over her intellectual work product.<sup>48</sup> Some courts refer to copyright infringement as a form of plagiarism.<sup>49</sup> It is certainly cause for concern that a judge advocate engaged in scholarly activity can so easily be viewed as a “plagiarist,” “thief,”<sup>50</sup> “victimizer,”<sup>51</sup> “pirate,”<sup>52</sup> no less a “criminal,”<sup>53</sup> simply by the failure to obtain permission for a source attribution.<sup>54</sup> Even when spectators eschew these harsh characterizations, copyright infringement is often considered as the display of “questionable ethics.”<sup>55</sup> For these very reasons, The Judge Advocate General’s Committee on Professional Responsibility explained, in Legal Opinion 93-1, that copyright law imposes a “special standard of care” on military attorneys to avoid piracy,<sup>56</sup> and the violation of copyright law harms not only the officer, but causes “obvious embarrassment . . . to the Army,” the Corps, and the installation.<sup>57</sup> Aside from criminal penalties, the nature of the infringement may constitute misrepresentation under Rules 8.4(b) and (c), which prohibit “criminal act[s] that reflect[] adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other

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<sup>46</sup> AR 27-60, *supra* note 44, para. 4-1.

<sup>47</sup> *Id.* para. 4-2a.

<sup>48</sup> Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 200 (2003) (observing “a significant overlap between plagiarism and copyright infringement”).

<sup>49</sup> *Id.*

<sup>50</sup> *Compare* PIRACY: IT’S A CRIME (Motion Picture Ass’n of Am. 2004)

(You wouldn’t steal a car . . . .

You wouldn’t steal a handbag . . . .

You wouldn’t steal a television . . . .

You wouldn’t steal a movie . . . .

Downloading pirated films is stealing . . . .

Stealing is against the law . . . .

Piracy. It’s a crime . . . .),

*with* Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connection Between Land and Copyright*, 83 WASH. U. L.Q. 417, 418 (2005) (observing that “general acceptance of the ‘intellectual property’ label has spawned analogies to the protections afforded other forms of property—particularly real property,” including, and especially, the label “thief”). *See also* DA PAM. 25-40, *supra* note 44, para. 2-37a (“Use of the copyright without authority from the owner or as provided by the copyright law is a wrongful taking of the property.”).

<sup>51</sup> *E.g.*, *Davis v. Gap, Inc.*, 246 F.3d 152, 164 (2d. Cir. 2001) (referring to “victims of infringement”). Original authors who experienced plagiarism of their works often expressed the sentiments of victims, simply based on the misuse of their works. *E.g.*, Jonathan Pitts, *A Twice Told Tale*, BALT. SUN, Mar. 10, 2002, at 7E (“I agonized over every word in my book. . . . What took me 20 years took him 15 minutes. If that.”) (comments of author and historian Joe Balkoski).

<sup>52</sup> Note, *Judicial Plagiarism: It May be Fair Use But is it Ethical?*, 18 CARDOZO L. REV. 1253, 1281 (1997) [hereinafter Plagiarism Note] (“The term ‘piracy’ . . . better describes copyright infringement.”).

<sup>53</sup> *See, e.g.*, Joseph W. Cromier et al., *Intellectual Property Crime*, 46 AM. CRIM. L. REV. 761, 782–94 (2009) (reviewing criminal statutes applicable to copyright infringement). Although government employees acting in the scope of their duties are generally immune from criminal sanctions for criminal copyright infringement, military attorneys are subject to professional discipline for such conduct. *Compare* DA PAM. 25-40, *supra* note 44, para. 2-5c(4) (“Government employees will not be personally or criminally liable for copyright infringements in the course of their official duties.”), *with* The Judge Advocate General’s Comm. on Prof. Res., Opinion 93-1, *reprinted in* Office of The Judge Advocate General, Standards of Conduct Office, *Professional Responsibility Note*, ARMY LAW., June 1993, at 54, 54–57 [hereinafter Opinion 93-1] (finding a legal assistance attorney responsible for violating an ethical rule based, in part, on copyright infringement).

<sup>54</sup> The imagery of infringement is similar to the imagery and labels of plagiarism, with plagiarists often “referred to as ‘thieves,’ or ‘criminals,’ and plagiarism as a ‘crime,’ ‘stealing,’ ‘robbery,’ ‘piracy,’ or ‘larceny.’” Green, *supra* note 48, at 169.

<sup>55</sup> STIM, *supra* note 14, at 4.

<sup>56</sup> Opinion 93-1, *supra* note 53, at 56 (“The public rightfully expects attorneys to respect the rights of others; therefore, attorneys have a special standard of care.”).

<sup>57</sup> *Id.*

respects” and “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>58</sup> While it has been common for judge advocates to broadly interpret the defenses to copyright infringement as support for their lack of knowledge or interest,<sup>59</sup> the stakes are too high to risk an indifferent approach in the name of “educational fair use.”<sup>60</sup>

### III. Copyright Law Applicable to Military Scholars

Literary copyright infringement occurs when an author uses copyrighted written material without obtaining the copyright owner’s permission.<sup>61</sup> The “use” of material is not limited to verbatim copying of text; while verbatim copying is the clearest example of use, infringement can occur through paraphrasing<sup>62</sup> or even by duplicating the structure of a work, so that the original author’s “pattern” of analysis is copied.<sup>63</sup> Copyright protection extends to an original author’s unique form of creative literary expression, as opposed to the facts or ideas conveyed through that expression.<sup>64</sup> Consequently, historians who use previously-published dates and other facts in their independent scholarship do not infringe on the rights of the author who initially published those dates or facts.<sup>65</sup> Even though the original writer may have spent years uncovering facts, they are considered to be in the public domain.<sup>66</sup> As opposed to facts or ideas, the infringing use of expression relates to:

- “the manner of expression,
- the [original] author’s analysis or interpretation,
- the way he structures his material and marshals facts,
- his choice of words, and
- the emphasis he gives to particular developments.”<sup>67</sup>

Aside from lack of protection for facts and ideas, the doctrine of fair use permits “others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.”<sup>68</sup> A critic, such as a book reviewer, must naturally be allowed to copy enough of the original text to enable fair criticism, just as a scholar must be able to explain a theory in enough detail to accurately convey the basis for incorporation of the work into her own independent one.<sup>69</sup> To this end, the Copyright Act permits use of a work “for purposes such as

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<sup>58</sup> AR 27-26, *supra* note 34, R. 8.4(b) & (c); *see also* Opinion 93-1, *supra* note 53, at 57 (finding a violation of Rule 8.4(c) based on misrepresentation by the legal assistance attorney who infringed on the local reporter’s copyrighted article).

<sup>59</sup> Hohensee, *supra* note 17, at 200.

<sup>60</sup> *Id.* *See also infra* Part III.A.3 (dispelling popular myths related to educational fair use).

<sup>61</sup> At the most basic level, “infringement of written works usually involves the unauthorized exercise of a copyright owner’s exclusive rights to reproduce the work and prepare derivative works based on it.” STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK*, at 12/2 (8th ed. 2004).

<sup>62</sup> *E.g.*, *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (observing that “protected expression [can be] ‘used’ whether it has been quoted verbatim or only paraphrased”).

<sup>63</sup> *E.g.*, *Werlin v. Reader’s Digest Ass’n, Inc.*, 528 F. Supp. 451, 463 (S.D.N.Y. 1981) (“In deciding whether there is any significant nonliteral similarity between [two articles], the Court must be attentive to the ‘pattern’ of [the original] story, to determine whether the [subsequent] article ‘tracked’ in a material way [the original author’s] treatment of the events.”) (citations omitted); *Salinger*, 811 F.2d at 98 (observing that a user of copyrighted material can “track[] the original so closely as to constitute infringement”).

<sup>64</sup> *E.g.*, *Shipkovitz v. United States*, 1 Cl. Ct. 400, 403 (1983), *aff’d*, 732 F.2d 168 (Fed. Cir. 1984) (“[I]t is well known that copyright registration only affords protection against the manner in which a writing is written, and does not protect the ideas contained therein.”). This rule is longstanding. *Baker v. Sedlen*, 101 U.S. 99, 102–03 (1879) (“The copyright of a work on mathematical science cannot give the author an exclusive right to the methods of operation which he propounds, of the diagrams which he employs to explain them, so as to prevent an engineer from using them whatever occasion requires.”).

<sup>65</sup> Hohensee, *supra* note 17, at 199–200 (“Authors will write about the Vietnam conflict for example. The historical and biographical nature of such works will make them similar to previous works. The similarity is not infringement because of the fact/expression dichotomy.”).

<sup>66</sup> *Craft v. Kobler*, 667 F. Supp. 120, 123 (S.D.N.Y. 1987):

The law does not . . . enforce efforts to hoard, suppress, sell or license historical fact, or to govern who may and who may not disseminate it. Thus, the copyright law does not protect [historical or bibliographical] research. Notwithstanding that enormous effort and great expense may have been required to discover factual information, it may, nonetheless, be freely taken from the original writer’s copyrighted work and republished at will without need of permission or payment.

<sup>67</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (citation omitted).

<sup>68</sup> *Rosemont Enters, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citation omitted).

<sup>69</sup> *E.g.*, *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519, 1525 (D. Colo. 1995) (finding fair use in the posting of Church of Scientology materials because the copying “was made for the non-profit purpose to advance understanding of issues concerning the Church which are the subject of ongoing public controversy” and recognizing that fair use sometimes permits copying of entire documents).

criticism, comment, news reporting, teaching . . . scholarship, or research.”<sup>70</sup> In allowing for such use, the Copyright Act balances between the rights of an original author and the competing rights of the public.<sup>71</sup> As a result of this, minimal use of a text is generally permissible to further the public good.<sup>72</sup> However, not all use is permissible. The proper application of this law requires the copier of the work to exercise reasonableness in the use of textual passages.<sup>73</sup> One commentator gives the following advice to reviewers of books,

If you are commenting on the author’s political views in general, you might not need to actually quote any of the text, or you might quote only a few lines to make the point of the vehemence of his views. On the other hand, if you are commenting on a poet’s use of repetition, you might need to quote several lines of a poem to make your point.<sup>74</sup>

The labels with which the courts and commentators have referred to “fair use” reveal the difficulty of the concept as applied.<sup>75</sup> While the fair use criteria are codified in the U.S. Code, they cannot be mechanically applied to the facts of a case.<sup>76</sup> The statute identifies four non-exhaustive categories of inquiry, including:

- (1) [t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) [t]he nature of the copyrighted work;
- (3) [t]he amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) [t]he effect of the use upon the potential market for or value of the copyrighted work.<sup>77</sup>

In evaluating these factors, courts must consider each case on its own merits.<sup>78</sup> With respect to fair use, legal opinions have dispelled the myths commonly adopted by some judge advocates.<sup>79</sup>

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<sup>70</sup> 17 U.S.C. § 107 (2006).

<sup>71</sup> *Rosemont Enters.*, 366 F.2d at 307 (observing that the fair use doctrine “subordinates the copyright holder’s interest in the maximum financial return to the greater public interest in the development of art, science and industry”).

<sup>72</sup> *Id.* (observing that “[t]he fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, ‘To Promote the Progress of Science and the Useful Arts.’” (citing U.S. CONST. art. I, § 8, cl. 8)).

<sup>73</sup> *E.g.*, Hohensee, *supra* note 17, at 200 (stressing that military authors may copy under the fair use doctrine “within reasonable limits necessary for scholarship”).

<sup>74</sup> GRETCHEN McCORD HOFFMANN, COPYRIGHT IN CYBERSPACE: QUESTIONS AND ANSWERS FOR LIBRARIANS 30 (2001).

<sup>75</sup> *E.g.*, *Marcus v. Rowley*, 695 F.2d 1171, 1174 (9th Cir. 1983) (noting that the doctrine “evolved in such a manner as to elude precise definition” and that leading scholars call it “obscure”); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003), *cert. denied*, 543 U.S. 816 (2004) (“The fair use defense defies codification.”). *See also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 13.03[A] (2006) (describing how “determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations”).

<sup>76</sup> *E.g.*, *Substance, Inc.*, 354 F.3d at 629 (“[T]he four factors that Congress established . . . are not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically.”).

<sup>77</sup> 17 U.S.C. § 107 (2006). *See also* DA PAM. 25-40, *supra* note 44, para. 2-37b(1) (requiring consideration of the same factors to determine whether use of a copyrighted work in military publications is permitted without permission).

<sup>78</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the [fair use] statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

<sup>79</sup> Hohensee, *supra* note 17, at 200 (addressing the temptation of judge advocates to “oversimplify the complex nature of the fair use doctrine”).

## A. Common Myths Among Judge Advocates<sup>80</sup>

### 1. Myth One: Source Attribution is Sufficient

Perhaps due to the “overlap” between copyright law and plagiarism norms,<sup>81</sup> “[s]ome people mistakenly believe it’s permissible to use a work (or portion of it) if an acknowledgement is provided.”<sup>82</sup> This assumption is wrong.<sup>83</sup> As attorney Lloyd J. Jassin explains, “[g]iving credit means you can look at yourself in the mirror and say you are not a plagiarist. However, merely giving credit is not a defense to copyright infringement. . . .”<sup>84</sup> While footnotes in legal writing function as a type of insurance against plagiarism because “a footnote ensures that the author receives credit,”<sup>85</sup> an author can infringe on copyrighted material even if she fully acknowledges the owner in a citation.<sup>86</sup> This is just one way in which “the two concepts are obviously distinct [and in which] there [can be] cases of plagiarism that do not constitute copyright infringement and vice versa.”<sup>87</sup> Ultimately, while attribution may factor into a fair use analysis,<sup>88</sup> “acknowledgement of a source does not excuse infringement when the other factors listed in Section 107 are present.”<sup>89</sup>

### 2. Myth Two: Small Portions of Text Are Free for the Taking

A popular concept in copyright law is “the less you take, the more likely that your copying will be excused as fair use.”<sup>90</sup> The Copyright Office has incorporated such a rule in its regulations that generally deny copyright protection to “[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.”<sup>91</sup> The concept also appears in the dicta of court opinions

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<sup>80</sup> Attorney Lloyd J. Jassin lists the following ten common myths related to copyright permission, with short explanations regarding the dangers connected to each one.

1. The work I want to use doesn’t have a copyright notice so I don’t need permission.
2. If I give credit I don’t need permission.
3. Since I’m only using a small portion of the original work, I don’t need permission.
4. I don’t need permission because I’m going to adapt the original work.
5. Since the work is in the public domain, I don’t have to clear permissions.
6. The material I want to reproduce was posted anonymously to an online discussion or newsgroup. That means the work is in the public domain.
7. I can always obtain permission later.
8. The material I want to quote is from an out-of-print book. This means the work is in the public domain.
9. Since I’m planning to use my work for nonprofit educational purposes, I don’t need permission.
10. I don’t need permission because the work I want to use was published before 1923 and is over 75 years old.

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Lloyd J. Jassin, *Ten Common Copyright Permission Myths*, available at [http://copylaw.com/new\\_articles/copy\\_myths.html](http://copylaw.com/new_articles/copy_myths.html) (last visited Jan. 11, 2010). Attorney Richard Stim also developed “Top 10 Tips for Website Creators” exploring additional myths and addressing Internet-related licensing issues. Richard Stim, *Top 10 Tips for Website Creators*, INTERNET LAW., Apr. 2000.

<sup>81</sup> Green, *supra* note 48, at 200 (observing that “there is a significant overlap between plagiarism and copyright infringement”).

<sup>82</sup> STIM, *supra*, note 14, at 220.

<sup>83</sup> *Id.*

<sup>84</sup> Jassin, *supra* note 80. This quote is reprinted with permission of Lloyd J. Jassin.

<sup>85</sup> Plagiarism Note, *supra* note 52, at 1265.

<sup>86</sup> Green, *supra* note 48, at 201 (“[A] person who reproduced all or part of a copyrighted work without permission would be committing copyright infringement even if he attributes.”).

<sup>87</sup> *Id.* at 200.

<sup>88</sup> STIM, *supra* note 14, at 220.

<sup>89</sup> *Marcus v. Rowley*, 695 F.2d 1171, 1176 n.8 (9th Cir. 1983).

<sup>90</sup> STIM, *supra* note 14, at 218. See also Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 577 (2006) (“Under the fair use doctrine, the smaller the amount copied, the fairer the copying.”).

<sup>91</sup> 37 C.F.R. § 202.1(a) (2009) (listing “Material Not Subject to Copyright”).

addressing *de minimis* or trivial use of copyrighted works, which are supposedly too short to capture enough creativity and originality to warrant protection.<sup>92</sup> However, “even assuming that the shorter the phrase is, the less likely it is to be original, that does not deny the existence of thousands or millions of short phrases that are original enough to cross the modicum of creativity threshold.”<sup>93</sup> At the most general level, scholars recommend a few rules of thumb:

As a general rule, never quote more than a few successive paragraphs from a book or article, quote one or two lines from a poem, or take more than one graphic such as a chart, diagram, or illustration. Also, be aware that although there is no legally established word limit for fair use, many publishers act as if there were one and require their authors to obtain permission to quote more than a specified number of words (ranging from 100 to 1,000 words).<sup>94</sup>

There are several exceptions even to these general guidelines.

Scholars now recognize an increasing trend to protect “microworks,” which are very “small pieces of creative expression.”<sup>95</sup> This trend accords protection to jokes, for example.<sup>96</sup> Even the shortest of phrases can gain protection if the copied text embodies the very “‘heart’ of the work,” which would meet the third substantiality factor, regardless of the amount of text copied.<sup>97</sup> On this view, use of a microwork, such as a sentence or a phrase of few words could be “‘qualitatively great’ even if quantitatively small.”<sup>98</sup> Hence, while quotations of text over 100 words indicate the need for close scrutiny, so should key paragraphs, sentences, or even phrases. As intellectual property scholars observe, “it is not always okay to take one paragraph or less than 200 words. Copying 12 words from a 14-word haiku poem wouldn’t be fair use. Nor would copying 200 words from a work of 300 words likely qualify as fair use.”<sup>99</sup> In these unique cases, “[t]he ‘ordinary’ phrase may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection.”<sup>100</sup>

The case of *Cook v. Robbins* provides important insight on the use of phrases.<sup>101</sup> In *Cook*, Wade B. Cook, an author, published *Wall Street Money Machine*,<sup>102</sup> which topped a number of best-seller lists.<sup>103</sup> Drawing on his experience as a taxi driver in New York, Mr. Cook developed short catch phrases to describe investment techniques.<sup>104</sup> The “meter drop” phrase relates to the practical principle that a taxi driver “could make more money taking numerous short trips than by waiting for higher fares,”<sup>105</sup> while the “rolling stock” represents a “stock that tends to consistently roll up to a specific price point in an obvious pattern of repeated waves.”<sup>106</sup> Motivational speaker Anthony Robbins read *Wall Street Money Machine*, attended

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<sup>92</sup> Hughes, *supra* note 90, at 577 (“The *de minimis* rule expressly allows the copying of small and insignificant portions of the plaintiff’s work.”). See, e.g., *Bell v. Blaze Magazine*, 58 U.S.P.Q.2d (BNA) 1464, 1466 (S.D.N.Y. 2001) (“Words and short phrases, such as titles or slogans, are insufficient to warrant copyright protection, as they do not exhibit the minimal creativity required for such protection.”).

<sup>93</sup> Hughes, *supra* note 90, at 607.

<sup>94</sup> FISHMAN, *supra* note 61, at 11/10.

<sup>95</sup> Hughes, *supra* note 90, at 576.

<sup>96</sup> E.g., Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1798 (2008) (“Formally, jokes and comedic routines can enjoy copyright protection. Jokes are literary works, which constitute a protected category under copyright law.”).

<sup>97</sup> STIM, *supra* note 14, at 218. See also *Werlin v. Reader’s Digest Ass’n*, 58 F. Supp. 451, 464 (S.D.N.Y. 1981) (“[C]ourts have found copyright infringement where . . . only one or two lines in plaintiff’s work were literally duplicated.”). This concept is quite dated. E.g., *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (“The infringement of a copyright does not depend so much on the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that which its chief value consists.”).

<sup>98</sup> Hughes, *supra* note 90, at 587 (citation omitted).

<sup>99</sup> FISHMAN, *supra* note 61, at 11/9.

<sup>100</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

<sup>101</sup> *Cook v. Robbins*, 232 F.3d 736 (2000), *withdrawn and dismissed*, 2001 U.S. App. LEXIS 784 (9th Cir. Jan. 22, 2001), *available at* <http://docs.law.gwu.edu/facweb/claw/Cook%27Robb1.pdf> [hereinafter *Cook PDF*] (reproducing entire text of opinion).

<sup>102</sup> WADE B. COOK, *WALL STREET MONEY MACHINE* (1995).

<sup>103</sup> *Cook PDF*, *supra* note 101, at 14700.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

one of Cook’s seminars, and suggested that they join forces instructing seminars on financial investment.<sup>107</sup> While the alliance was short-lived, Robbins used the phrases “meter drop” and “rolling stock” in his printed seminar materials for a presentation called Financial Power, terms he had never used prior to reading Cook’s book.<sup>108</sup> Cook sued Robbins for infringement based on nine uses of the phrase “meter drop” and two uses of the phrase “rolling stock” in the course materials.<sup>109</sup> The trial court found genuine issues of material fact on four of the phrases, permitting a jury to rule on the infringement claim, while granting summary judgment on seven of the claims because they merely “explain the basic rules of stock market movement.”<sup>110</sup> The trial judge based his ruling on the fact that “[a] reasonable jury could find that the four passages are qualitatively important.”<sup>111</sup> A comparison of the four uses, as reprinted in the Ninth Circuit’s opinion, appears below:

**Cook’s Wall Street Money Machine**

**RRI’s Financial Power Workbook<sup>112</sup>**

Money is made on the Meter Drop.

The ring toss/meter drop.  
The most money is made on the \_\_\_\_\_.

No one I know has come up with a name for the type of investing I call “Rolling Stocks.” It works on stocks that roll up and down in repeated waves. . . . Some roll fast and some slow.

A rolling stock is a stock that tends to consistently roll up to a specific price point in an obvious pattern (repeated waves). Some of these companies roll fast (4-6 weeks) and some roll slow (8-10 weeks).

Rule #1: You have to know your exit before ever going in.

Rule #1: You have to know your \_\_\_\_\_ before going in.

Rule #2: Don’t get greedy.

Rule #2: Don’t get \_\_\_\_\_!<sup>113</sup>

Based on Robbins’s use of the work above, a civil jury awarded Cook \$655,900.<sup>114</sup> Robbins appealed to the Ninth Circuit on the basis that his use of the phrases was permitted, first, due to the lack of copyright coverage for such short terms,<sup>115</sup> and second, under the fair use doctrine.<sup>116</sup> Robbins explained not only that the terms merely described an idea “that already existed,”<sup>117</sup> but also that he used such a “miniscule portion” of Cook’s work, it could not possibly qualify as substantial copying.<sup>118</sup> The appellate court affirmed the jury’s verdict. On the matter creativity, the court ruled that these terms met the very low threshold required for originality and were subject to copyright protection because “Cook’s complete expressions in conveying the meaning of ‘meter drop’ and ‘rolling stock’ are creative, even if minimally so.”<sup>119</sup> On the issue of substantiality, even though Robbins used a few words out of a total of 52,000 words in the entire 300-plus pages of his manual,<sup>120</sup> the use was still substantial: Cook’s testimony revealed the context of the phrases as “the very essence” of his

<sup>107</sup> *Id.* at 14701.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 14701–02.

<sup>110</sup> *Id.* at 14702.

<sup>111</sup> *Id.*

<sup>112</sup> The Financial Power workbook contained blank spaces to encourage seminar participants’ active participation in the course. *Id.* at 14702 n.3.

<sup>113</sup> *Id.* at 14702–03.

<sup>114</sup> *Id.* at 14703.

<sup>115</sup> *Id.* at 14710.

<sup>116</sup> *Id.* at 14712.

<sup>117</sup> *Id.* at 14711.

<sup>118</sup> *Id.* at 14713.

<sup>119</sup> *Id.* at 14711.

<sup>120</sup> *Id.* at 14701.

teachings and an “important part of [his] book . . . and [his] life.”<sup>121</sup> The *Cook* case, though at one time designated for publication, was not reported due to subsequent withdrawal of the action by Cook pursuant to a settlement.<sup>122</sup> However, *Cook* provides a clear indication that fair use does not provide blanket authorization to use even the smallest parts of works.<sup>123</sup>

### 3. Myth Three: A Non-Profit Education Purpose Permits All Use

Even though the basis for the fair use doctrine is the dissemination of knowledge for the betterment of society, this hardly exempts educators or scholars from unrestricted use of copyrighted material in their written works.<sup>124</sup> The case of *Marcus v. Rowley* dispelled this myth when it found copyright infringement by a home economics teacher who distributed a handbook on cake decorating to her students free of charge.<sup>125</sup> Despite the fact that her use of eleven pages of material from a different handbook was for non-profit and educational purposes, her use constituted infringement because it demonstrated no fair use under the other criteria.<sup>126</sup> The court explained that “a finding of nonprofit educational purpose does not automatically compel a finding of fair use.”<sup>127</sup> Because the subsequent user’s purpose in disseminating the work was for the same purpose as the owner, the shared objective favored a presumption of no fair use.<sup>128</sup>

Courts have similarly applied the presumption of no fair use in cases involving scholarly research. Here, admittedly, there may be little monetary value obtained directly from the publication of a work in a scholarly journal.<sup>129</sup> Even so, the first statutory factor can still weigh against fair use because “the crux of the profit/nonprofit distinction is . . . whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.”<sup>130</sup> The context of scholarly publication requires attention to “sweat off [the] brow,” rather than “dollars and cents.”<sup>131</sup> Accordingly, in the “publish or perish” academic environment, which reserves tenure for publishing professors, courts view “promotion and

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<sup>121</sup> *Id.* at 14713.

<sup>122</sup> Hughes, *supra* note 90, at 591 (describing the controversy that ensued over the Ninth Circuit’s ruling).

<sup>123</sup> In the reported case of *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789 (8th Cir. 2003), for example, the plaintiff was an artist who produced a print titled “Angels of Mercy” containing the text “Most people don’t know that there are angels whose only job is to make sure you don’t get too comfortable & fall asleep & miss your life.” *Id.* at 791. A company designed a commercial for Volkswagen displaying a car with a voiceover indicating, “I think I just had a wake-up call, and it was disguised as a car, and it was screaming at me not to get too comfortable and fall asleep and miss my life.” *Id.* at 792. The jury’s finding of copyright infringement was upheld by the Eighth Circuit. *Id.* See also *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 634–35 (8th Cir. 1989) (holding that short test questions on a psychological test, such as “No one seems to understand me,” “satisfy the minimal standard for works of authorship”).

<sup>124</sup> *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“[T]he 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.”); HOFFMAN, *supra* note 74, at 29 (“Nonprofit institutions, libraries, and educational institutions get no break per se. . . . It is important to understand that there are no guarantees under the fair use doctrine.”). This article does not address the use of copyrighted works, such as clips from or entire movies, in face-to-face classroom instruction, which is permitted under the “Face-to-Face Teaching Exemption” of the Copyright Act. The exemption permits such use without the requirement to obtain permission as long as the copy was not unlawfully made with the displayer’s knowledge of unlawfulness. 17 U.S.C. § 110(1) (2006). *E.g.*, LORI SILVER, COLLEGE AND UNIVERSITY LAW MANUAL § 3.3.1 (Mass. Continuing Legal Educ. Inc. 2009), available at WESTLAW CULM MA-CLE 3 (“This exemption allows faculty to show movies or television shows, display slides, perform plays, listen to music, or read from a book without fear of infringement.”); Press Release, Am. Lib. Ass’n., Performance of or Showing Films in the Classroom 2 (Sept. 10, 2009), available at <http://www.ala.org/ala/issuesadvocacy/copyright/fairuse/digitalclassroomdelivery/webdigitalpsafinal.pdf> (observing “a recent hearing before the Copyright Office” in which “representatives of the motion picture industry acknowledged that an instructor’s creation of a film clip compilation is a fair use and that section 110(1) permits the instructor to show this compilation in the classroom”).

<sup>125</sup> 695 F.2d 1171 (9th Cir. 1983).

<sup>126</sup> *Id.* at 1175–76.

<sup>127</sup> *Id.* at 1175.

<sup>128</sup> *Id.* (“[A] finding that the alleged infringer copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indication of no fair use.”).

<sup>129</sup> The court in *Weissmann v. Freeman* observed that “[p]articularly in an academic setting, profit is ill-measured in dollars.” 868 F.2d 1313, 1324 (2d Cir.), cert. denied, 493 U.S. 883 (1989).

<sup>130</sup> *Harper & Row, Publishers. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

<sup>131</sup> *Weissmann*, 868 F.2d at 1324.

advancement”<sup>132</sup> and “recognition . . . among peers in the profession” as the tangible benefits associated with publishing.<sup>133</sup> To find otherwise would eliminate the incentive to continue publishing scholarly works.<sup>134</sup>

In Ethics Opinion 93-1, The Judge Advocate General’s Professional Responsibility Committee applied the same statutory factors for fair use, finding a basis for copyright infringement by a lawyer in a legal assistance office.<sup>135</sup> The attorney attempted to invoke the fair use doctrine to defend his unauthorized use of several passages from a local newspaper in an article he published in the installation’s newspaper.<sup>136</sup> He further claimed that the Army’s Legal Assistance Program encouraged a negligent standard of care by offering material to be reprinted and plagiarized in military publications.<sup>137</sup> While acknowledging the unrestricted use of materials prepared by the Legal Assistance Program, the Committee based its conclusion on the substantial similarity factor, noting that “the extent of copying went beyond that which an attorney could assume would be ‘fair use’ under 17 U.S.C. § 107’s ‘amount and substantiality factor.’”<sup>138</sup> This finding of copyright infringement was independent of a separate finding of plagiarism for failure to attribute the source, emphasizing the limitations of fair use on judge advocates. The Committee also found that, even if the attorney expected the publisher to request permission for the copied material, the attorney did not meet his personal duty of care because he failed to “highlight” to the publisher of the installation newspaper that there were “potential” copyright problems.<sup>139</sup>

#### 4. Myth Four: Material on the Internet is Available for Unrestricted Use

The accessibility of information on the Internet can oftentimes lead to an inference that the person posting such information intends for the world to use it.<sup>140</sup> This is a “popular fallacy” because Internet postings are among “original works” that qualify for copyright protection.<sup>141</sup> On the Web, especially, “you cannot tell by looking at a work whether or not it is copyrighted.”<sup>142</sup> Because of the possibility of confusion, Web search engines have developed the technology to identify content that is available for use or alteration. An advanced Google® search permits a viewer to “scroll down to ‘usage rights’ and select an option from a pull-down menu: ‘free to use or share’; ‘free to use or share, even commercially’; ‘free to use, share, or modify’; or ‘free to use, share, or modify, even commercially.’”<sup>143</sup> Likewise, the website Flickr® will identify public domain photographs available for use or modification.<sup>144</sup> Even though weblogs (blogs) are generally available for copying based on their nature as the source for multiple contributions,<sup>145</sup> some blogs have adopted limiting standards of use. Creative Commons terms of use, now used by thousands of bloggers, permit a blogger to “specify a license that allows readers to copy and distribute his or her writing, as long as the blogger is given credit for the writing and the use is not for commercial gain.”<sup>146</sup> Courts have enforced such licenses, even though “the copyright holder . . . dedicate[d] certain work to

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<sup>132</sup> *Id.* at 1326.

<sup>133</sup> *Id.* at 1324.

<sup>134</sup> *Id.* at 1325–26 (observing that protection of academic works “provides . . . an incentive to continue research,” and lack of protection conversely provides a “distinct disincentive” for the same).

<sup>135</sup> Opinion 93-1, *supra* note 53.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 56.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> STIM, *supra* note 14, at 166 (observing the perpetuation of incorrect beliefs about Web content “[b]ecause the Web is freely accessible and because of the ease of copying material from one site to another”).

<sup>141</sup> *Id.* at 166–67.

<sup>142</sup> HOFFMAN, *supra* note 74, at 18.

<sup>143</sup> Clancy Ratliff, “Some Rights Reserved”: *Weblogs with Creative Commons Licenses*, in MARTHA WOODSMANSEET & PETER JASZI, THE LAW OF TEXTS: COPYRIGHT IN THE ACADEMY 50, 65 (1995) [hereinafter LAW OF TEXTS].

<sup>144</sup> “A search for ‘cupcake’ on Flickr with the ‘Find content I can modify, adapt, or build upon’ box checked yields 6,542 images, any of which a Web designer or graphic artist could use in a collage or site template.” *Id.*

<sup>145</sup> Tyanna Herrington, *Blogging Down: Copyright Law and Blogs in the Classroom*, in LAW OF TEXTS, *supra* note 143, at 154, 163 (“Under usual circumstances, bloggers intend to publish their work on the Web with the specific purpose of making materials accessible and they assume the risk that users may copy and redistribute their work.”).

<sup>146</sup> Ratliff, *supra* note 143, at 50 (defining the “Creative Commons license for content [as one that] enables an author to retain some protections by copyright law but give up others”).

free public use.”<sup>147</sup> Consequently, much like printed works, unless a military author knows the terms of use for an Internet site, it is prudent to assume that material posted on the Web is not only copyrighted, but creates the same requirement to seek permission.<sup>148</sup> Especially on the Internet, “one can never be 100 percent certain, no matter what the circumstances, that any given situation will be excused as fair use.”<sup>149</sup>

## B. Other Important Considerations

Aside from myths about copyright law, judge advocates may encounter certain complex copyright rules, especially regarding the use of titles, government works, and the work-for-hire doctrine as it applies to the ownership of a copyrighted work. The sections below briefly address these areas.

### 1. Titles of Published Works

Commonly, judge advocates follow the popular guidance of writing programs and legal writing experts to use catchy titles for their publications.<sup>150</sup> Because a unique way of recasting information known to the reader garners interest, these authors cite the titles of movies, songs, books, plays, or commercially produced products.<sup>151</sup> Under fundamental principles of copyright, such use does not infringe on the owner of the copyrighted material.<sup>152</sup> Consequently, a military publication with the title, “‘It’s Raining Men’<sup>153</sup>—‘A Few Good Men’<sup>154</sup>: Gender Disparity in the JAG Corps’s Applications During the Recession,” would not facially raise questions of copyright infringement.<sup>155</sup>

Additional considerations may arise, however, if the title of a work is trademarked.<sup>156</sup> While individual book titles do not obtain copyright protection, titles for a recognizable series of books are eligible for trademark protection.<sup>157</sup> In addition, the use of a trademarked title or character could potentially resurrect interests in copyright protection.<sup>158</sup> Such was the case in

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<sup>147</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1375 (Fed. Cir. 2008). See also *id.* at 1381 (“Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material.”).

<sup>148</sup> *STIM*, *supra* note 14, at 166 (recommending that users should assume Internet works are protected and use a standard approach for requesting permission from the owner); *HOFFMANN*, *supra* note 74, at 95 (“As always: Proceed with caution.”).

<sup>149</sup> *HOFFMANN*, *supra* note 74, at 39.

<sup>150</sup> *E.g.*, Major Gregory B. Coe, “*Something Old, Something New, Something Borrowed, Something Blue*”: *Recent Developments in Pretrial and Trial Procedure*, *ARMY LAW.*, Apr. 1998, at 44. Such conventions are common for legal writers in and outside of the Armed Forces. *E.g.*, Richard B. Cappalli, *The 1990 Rose Awards: The Good, The Bad, The Ugly—Titles for Law Review Articles*, 41 *J. LEGAL. EDUC.* 485, 485–87 (1991) (providing “long-overdue recognition for the valiant labors of legal writers to coin the perfect title for their masterpieces . . .”); Ronald J. Rychlak, *The Lighter Side of The Green Movement: The Three Stooges as Early Environmentalists*, 48 *OLKA. L. REV.* 35, 36 n.6 (1995) (observing that, in law reviews, “where humor is found, it is most likely to be in the title”) (citing as an example, Erik S. Jaffee, Note, “*She’s Got Bette Davis’ Eyes*”: *Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 *COLUM. L. REV.* 528 (1990)).

<sup>151</sup> *E.g.*, Major Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, *ARMY LAW.*, Apr. 1997, at 92, 92 & 92 n.1 (citing “a witty expose of life in the Hollywood fast lane starring Meryl Streep and Shirley MacLaine”). *Cf.* Eloisa C. Rodriguez-Dod, “*Lucy in the Sky with Diamonds*”: *Airline Liability for Checked-in Jewelry*, 69 *J. AIR L. & COM.* 743 (2004) (citing a popular song performed by the Beatles).

<sup>152</sup> *E.g.*, Emily Kathryn Taylor, Note, *Infringicus Maximus! An Exploration of Motion Picture Title Protection in an International Film Industry Through the Legal Battles of Harry Potter*, 16 *J. INTELL. PROP. L.* 323, 327 (2009) (“[A]merican courts consistently hold that a title alone, excluding plot, characterizations, or dialogue will not be afforded protection under copyright law.”); *Charter Oaks Fire Ins. Co. v. Hedeem & Cos.*, 280 F.3d 730, 736 (7th Cir. 2002) (recognizing the “non-copyrightable” status of “the title of a book, film, or other literary or artistic work”); *Becker v. Loew’s, Inc.*, 133 F.2d 889, 891 (7th Cir. 1943) (“[I]t is well settled that the copyright of a book or play does not give the copyright owner the exclusive right to the use of the title.”).

<sup>153</sup> *THE WEATHER GIRLS, IT’S RAINING MEN* (Columbia Records 1982).

<sup>154</sup> *A FEW GOOD MEN* (Columbia TriStar/Castle Rock 1992).

<sup>155</sup> See sources cited *supra* note 152.

<sup>156</sup> See generally James E. Harper, Note, *Single Literary Titles and Federal Trademark Protection: The Anomaly Between the USPTO and Case Law Precedents*, 45 *IDEA* 77 (2004) (surveying cases in which book titles received trademark protection).

<sup>157</sup> *E.g.*, *In re Cooper*, 254 F.2d 611, 615 (C.C.P.A.), *cert. denied*, 358 U.S. 840 (1958) (“The name for a series [of] books, at least while it is still being published, has a trademark function in indicating that each book of the series comes from the same source as the others.”); *In re Scholastic Inc.*, 23 U.S.P.Q.2d (BNA) 1774 (T.T.A.B. 1992) (“[N]otwithstanding the fact that it appears as a portion of the titles of specific books in a series, the designation THE MAGIC SCHOOL BUS, as used on books would be recognized as a trademark identifying a series of children’s books emanating from applicant.”).

<sup>158</sup> Because trademark law protects “any word, name, symbol, device, or combination thereof that is used to identify and distinguish a good or service . . . an individual or brief phrase can be protected by trademark law” where copyright law might otherwise fail. *HOFFMANN*, *supra* note 74, at 98.

*Universal City Studios, Inc. v. Kamar Indus., Inc.*,<sup>159</sup> where unlicensed use of the phrases “I love You E.T.” and “E.T. Phone Home” led to a finding of copyright infringement.<sup>160</sup> There, the court relied upon E.T.’s “distinctive and well-developed character,” which had been trademarked and whose license was tightly controlled, to conclude that “the average lay observer would readily recognize the name E.T. as having been taken from the copyrighted character.”<sup>161</sup> Scholars have noted the *Kamar* case as “the prime example of litigation in which weak copyright claims are coupled with more standard trademark claims” to revitalize copyright protections.<sup>162</sup> The military author who titles her article, “Chicken Soup for the Judge Advocate’s Soul,” could possibly run the risk that readers would believe the article is endorsed by the authors of the popular trademarked book series.<sup>163</sup>

Any judge advocate contemplating the use of titles of books, movies, and characters in her scholarly work would be well-served running a query of trademarked terms. The website for the Trademark Electronic Search System (TESS) is <http://tess2.uspto.gov/>. A check of the titles in the hypothetical law review article “‘It’s Raining Men’—‘A Few Good Men’: Gender Disparity in the JAG Corps’s Applications During the Recession,” revealed no identifiable trademark interests for the phrase “It’s Raining Men.” Contrarily, the term “A Few Good Men” resulted in two live trademarks; owned by a women’s cosmetic company in Arizona<sup>164</sup> and a business operating in Western Cape, South Africa.<sup>165</sup> Two additional entries reveal that a music group once owned a trademark for “A Few Good Men,” which has now expired.<sup>166</sup>

As a final note, a military scholar would encounter an entirely different issue if she named her article, “The JAG Corps: A Cluster of Summer Trees, A Bit of the Sea, a Pale Every Moon.” Here, the text following the colon is an entire haiku verse by Kakuzo Okakura,<sup>167</sup> which legal scholars would certainly accord independent copyright protection as a microwork.<sup>168</sup> Ultimately then, with these few exceptions in mind, military scholars enjoy great latitude in the creation of scholarly titles for their manuscripts.

## 2. Government Works in the Public Domain

The Copyright Act explicitly exempts U.S. Government works from copyright protection.<sup>169</sup> With the exception of work licensed to the Government by copyright holders,<sup>170</sup> government works can be copied freely.<sup>171</sup> Judicial opinions and the text of statutes fall under this “public domain” category,<sup>172</sup> as do works admitted as evidence or submitted in court as part of the record of trial, including “tapes played in open court and admitted into evidence—no less than the court reporter’s transcript, the parties’ briefs, and the judge’s orders and opinions.”<sup>173</sup>

<sup>159</sup> 217 U.S.P.Q. (B.N.A.) 1162 (S.D. Tex. 1982).

<sup>160</sup> *Id.* at 1162.

<sup>161</sup> *Id.*

<sup>162</sup> Hughes, *supra* note 90, at 582.

<sup>163</sup> The phrase “Chicken Soup for the Soul” is a protected mark, as are several variations of the phrase. See Serial No. 77821658.

<sup>164</sup> Philosophy, Inc., Serial No. 78535264,

<sup>165</sup> Reibeek Kelder Beperk Corp., Serial No. 75850772.

<sup>166</sup> See Silent Partner Prods., Inc., Serial No. 74379845 and 4 Life Entertainment, LLC, Serial No. 78632201.

<sup>167</sup> KAKUZO OKAKURA, *THE BOOK OF TEA* 82 (1989).

<sup>168</sup> Hughes, *supra* note 90, at 633 & 633 n.319.

<sup>169</sup> 17 U.S.C. § 105 (2006) (“Copyright protection under this title is not available for any work of the United States Government. . . .”); see also DA PAM. 25-40, *supra* note 44, para. 2-37e(1) (“Works of the U.S. Government do not receive copyright protection.”).

<sup>170</sup> 17 U.S.C. § 105 (“[T]he United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”); JAMES S. HELLER, *THE LIBRARIAN’S COPYRIGHT COMPANION* 11 (2004) (“A copyrighted work does not lose its status just because it is included in a work of the U.S. Government.”).

<sup>171</sup> *E.g.*, Schnapper v. Foley, 667 F.2d 102, 110 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (observing a circuit court’s interpretation that “no copyright could be had in a work (1) commissioned by the Government and (2) published as an official document”) (citation omitted). DA PAM. 25-40, *supra* note 44, para. 2-37e(1) (“[U]nclassified works of the Government are in the public domain; unless their distribution is restricted, they can be freely reproduced, distributed, or displayed by the public.”).

<sup>172</sup> *E.g.*, Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980) (observing settled law that “judicial opinions and statutes are in the public domain and are not subject to copyright” primarily because “[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through democratic process”).

<sup>173</sup> *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

Drafts of motions, legal memoranda, or other private litigation documents (as opposed to matters in the record of trial) may be protected by copyright.<sup>174</sup> Another limitation on public domain works involves state governments. The Copyright Act's provisions regarding federal publications do not reach scholarly journals in state-operated law reviews or private universities.<sup>175</sup> Without reviewing state open records rules, which may clarify the status of state publications,<sup>176</sup> military scholars should assume that articles appearing in civilian law reviews belong to the author, requiring permission, unless individual arrangements defy the general rules. In a final major limitation on public domain work, as explained below, it is incorrect to assume that the work produced by federal employees automatically becomes property of the Government.

### 3. Scholarly and Government Publications and the Work-for-Hire Doctrine

Many entities may own a literary work. In the case of a collective publication, like a magazine or a scholarly law review, ownership of a single article in a larger group of articles vests in the author, while the publisher retains merely the right to reproduce, revise, and distribute the work.<sup>177</sup> When a work is jointly authored, each author shares an equal ownership interest, and all must be contacted for permission.<sup>178</sup> Despite these general rules, authors are free to cede their entire ownership interests to a publisher or an employer. Many law reviews, for example, often attempt to obtain the copyright to the work as a primary strategy, and then contract for fewer rights if authors reject their initial approach.<sup>179</sup>

When employees of the Government or professors at universities undertake a written project, the nature of their employment and its relationship to the work often requires additional analysis. In general, the work-for-hire doctrine provides employers with the fruits of their employees' labor, including writings produced during the employment relationship.<sup>180</sup> In interpreting the Copyright Act's provisions for evaluating a work, courts often apply the analysis provided in the *Restatement of Agency*, which considers whether "(1) It is of the kind of work he is employed to perform; (2) [i]t occurs substantially within authorized work hours; [and] (3) [i]t is actuated, at least in part, by a purpose to serve the employer."<sup>181</sup> Because a high school teacher is expected to develop written educational materials, like tests and manuals—even while at home—these works belong to the school district.<sup>182</sup> The same rationale normally applies to government employees.<sup>183</sup>

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<sup>174</sup> Isaacs, *supra* note 14, at 393 & 402 (observing a growing number of attorneys threatening to sue each other for copyright infringement of litigation documents and that such "documents plainly fall within the type of goods covered by the Copyright Act because they [may demonstrate originality and] meet the definition of 'literary works' and they are 'fixed in a tangible medium'").

<sup>175</sup> Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc., 495 F. Supp. 34, 35 (N.D. Ill. 1980), *aff'd*, 692 F.2d 478 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) (observing that "the law with respect to work of the United States government . . . [has] no such provision relating to state governments").

<sup>176</sup> *E.g.*, John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1021 (acknowledging that there may be cases where information possessed, created, or retained by a state may "effectively [be] in the public domain by virtue of state open records laws," despite the absence of an analogous federal works exception); *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 876 (Fla. App. 2004) (observing that "[t]he Florida public records law [in] requir[ing] State and local agencies to make their records available to the public for the cost of reproduction . . . overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exception").

<sup>177</sup> 17 U.S.C. § 201(c) (2006):

In the absence of an express transfer of the copyright or of 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 collective work, any revision of that collective work, and any later collective work in the same series.

<sup>178</sup> *Id.* § 201(a) ("The authors of a joint work are co-owners of copyright in the work.").

<sup>179</sup> Litman, *supra* note 29, at 790 ("If authors object to the request, the journal instead requests a nonexclusive license to print, reprint, publish, distribute, and authorize the electronic reproduction of the piece in Lexis, Westlaw, and other services.").

<sup>180</sup> See 17 U.S.C. § 101 (defining a "work-for-hire" as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned . . ."); *id.* § 201(b) ("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.").

<sup>181</sup> *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 184 (2d Cir. 2004) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

<sup>182</sup> *Id.* at 185.

<sup>183</sup> *E.g.*, AR 27-60, *supra* note 44, para. 4-3e ("The author of a work of the United States Government has no rights in the work which can be conveyed."); DA PAM. 25-40, *supra* note 44, para. 2-39b ("Works prepared by Government employees as part of their official duties cannot be protected by copyright.").

Professorial scholarship recognizes an “academic exception” to the work-for-hire doctrine, which permits professors to retain ownership rights in their scholarly works.<sup>184</sup> In an oft-cited passage, the *Weinstein* Court observed that “a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof.”<sup>185</sup> Furthermore, “[t]his has been the academic tradition since copyright law began.”<sup>186</sup> While universities commonly allow professors to retain intellectual property rights in employment contracts, there may still be instances where an institution has contracted for the exclusive right to a scholarly work.<sup>187</sup>

Combined military publications provide yet another layer of complexity in the analysis of intellectual property rights. When a military author affixes her official rank and title to a publication, it is hard to deny the fact that she is employed by the U.S. Government. Moreover, the journals themselves are produced by military departments. The *Military Law Review* and *Army Lawyer* are published as Department of the Army Pamphlets through the U.S. Government Printing Office.<sup>188</sup> The *Naval Law Review* and *Air Force Law Review* share the same status.<sup>189</sup> Army authors are guided by the provisions of AR 27-60, which states:

A work of the United States Government is defined as a work prepared by an officer or employee of the United States Government as part of that person’s official duties. Those duties may be express or implied. A Government work results even though the work was prepared using the author-employee’s own time, material, or facilities.<sup>190</sup>

As two examples, the regulation cites “a work the preparation of which is necessary for the proper performance and accomplishment of the employee’s duties” and one “requested, directed, instructed or otherwise ordered by an appropriate official.”<sup>191</sup> Despite these broad considerations, the use of government facilities or subject matter of a work does not transform it into a government work per se.<sup>192</sup> Government employees may even sue the Government for copyright infringement of their works.<sup>193</sup> Where the Government permits an employee to retain the copyright to a work, such arrangements are normally reduced to writing.<sup>194</sup>

Independent of the regulation, scholarly publications completed in satisfaction of a Master of Laws requirement are property of the Government, hence public domain, based on a provision granting first publication rights to the military.<sup>195</sup> Because publication of a work in a governmental journal does not extinguish existing copyright protections of nongovernmental authors<sup>196</sup> and combined military journals or other collective publications vest copyright ownership in the author,<sup>197</sup> military scholars wishing to use the works of nonmilitary or nongovernmental authors in military or other governmental publications should still request permission for such use.

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<sup>184</sup> *Shaul*, 363 F.3d at 186 (observing an “academic tradition” granting [collegiate] authors ownership of their own scholarly work”).

<sup>185</sup> *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (recognizing that a contract may “provide otherwise”).

<sup>188</sup> *The Military Law Review* is a serial periodical officially published by the Department of the Army as U.S. DEP’T OF ARMY, PAM. 27-100. The *Army Lawyer* similarly bears the official identifier U.S. DEP’T OF ARMY, PAM. 27-50.

<sup>189</sup> See *Naval Justice School Publications*, available at [http://www.jag.navy.mil/njs\\_publications.htm](http://www.jag.navy.mil/njs_publications.htm) (last visited Jan. 11, 2010) (“The *Naval Law Review* is published from appropriated funds by authority of the Judge Advocate General, in accordance with Navy Publications and Printing Regulations P-35.”). The *Air Force Law Review* is officially published by the Department of the Air Force as U.S. DEP’T OF AIR FORCE, PAM. 15-106.

<sup>190</sup> AR 27-60, *supra* note 44, para. 4-3b.

<sup>191</sup> *Id.* para. 4-3b(1) & (2).

<sup>192</sup> *Id.* para. 4-3c. In fact, DA PAM. 25-40, *supra* note 44, para. 2-39b, recognizes that the determination of “[w]hether a manuscript is an official work is not always clear,” requiring a detailed contextual analysis.

<sup>193</sup> 28 U.S.C. § 1498(b) (2006) (providing “[t]hat a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government”).

<sup>194</sup> *E.g.*, 17 U.S.C. § 201(b) (permitting employee ownership, despite work in the scope of employment, only when “the parties have expressly agreed otherwise in a written instrument signed by them”); U.S. DEP’T OF DEF., FEDERAL ACQUISITION REG. SUPP. subpt. 252.227-7013 (May 19, 2006) (specifying contractual provisions for “[i]dentification and delivery of data to be furnished with restrictions on use, release, or disclosure”).

<sup>195</sup> PWP MANUAL, *supra* note 16, at 30 (“Primers, research papers, and theses submitted in partial satisfaction of Graduate Course writing program requirements are the property of the Judge Advocate General’s Legal Center and School, U.S. Army (TJAGLCS). Accordingly, TJAGLCS reserves first publication rights.”).

<sup>196</sup> *HELLER*, *supra* note 170, at 11.

<sup>197</sup> 17 U.S.C. § 201(c).

#### 4. The Special Status of Unpublished Works

Unpublished works may come in the form of interviews or “letters, diaries, and manuscripts.”<sup>198</sup> Increasingly, the World Wide Web has been a source for drafts of scholarly works. Sites, such as the Social Science Research Network (SSRN), are indispensable to law professors as they permit authors to track how many times their works have been downloaded by visitors.<sup>199</sup> However, placing scholarship on the Internet prior to its publication risks an unauthorized use or even first publication by a viewer passing it off as his own. Not only may an unpublished work obtain the benefits of copyright protection,<sup>200</sup> it will often receive greater copyright protection than previously published works.<sup>201</sup> As the Supreme Court noted in *Harper & Row v. Nation Enterprises*, “[p]ublication of an author’s expression before he has authorized its dissemination seriously infringes the author’s right to decide when and whether it will be made public, a factor not present in fair use of published works.”<sup>202</sup> Consequently, where it is unclear whether a work has been published, military scholars should take extra precautions to request permission from the author to use material.

### IV. The Mechanics of Requesting Permission

#### A. General Approach

Because there are so many nuances in copyright law, intellectual property experts recommended reviewing all uses of copyrighted works through the lens of the fair use factors.<sup>203</sup> They further recommend assuming that a work is copyright protected and requesting permission whenever possible.<sup>204</sup> Even accepting that educational use of work furthers societal goals and that legal scholarship, with its abundant footnotes, is more derivative than other scholarly works,<sup>205</sup> military scholars must be alert to copyright infringement. As one legal writer explained,

[T]hroughout this comment, I have copied from various law review articles and other works subject to copyright. Although I have identified all my sources, I have not sought permission from any of the authors or journals. Almost any author of a research paper, from a fourth grade book report to a dissertation follows the same practice. While this practice is socially accepted, it constitutes prima facie violation of our copyright laws.<sup>206</sup>

Proceeding with the utmost caution is prudent because of the ease with which a work can qualify for protection: “There is no requirement to publish a work in order to copyright it. There is no requirement to display any type of notice, such as © or ‘Copyrighted by ABC Press.’ An author is not required to list his work, or to deposit a copy of his work with the U.S. Copyright Office or anyone else in order to receive copyright protection.”<sup>207</sup> Furthermore, no motive, knowledge, or intent element is required for infringement.<sup>208</sup> Substantial risks can be eliminated with a simple permission request. The cost

<sup>198</sup> STIM, *supra* note 14, at 26.

<sup>199</sup> Ronnen Perry, *De Jure [sic] Park*, 39 CONN L. REV. CONNTEMPLATIONS 54, 59 (2007) (observing “several companies, most notably SSRN and Bepress, have started providing free access to legal manuscripts, published and unpublished” and citing the “promotional value of such access”).

<sup>200</sup> *E.g.*, STIM, *supra* note 14, at 27 (explaining that, depending on whether the work was created before or after 1 January 1978, an unpublished work is protected for “the life of the author plus 70 years,” “120 years from their creation,” or “95 years from first publication”).

<sup>201</sup> *E.g.*, Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L. J. 1, 66–67 (1999) (explaining that, even with legislative amendments to eliminate a presumed per se rule against fair use of unpublished works, leading court opinions have “eradicate[d] much of fair use for unpublished manuscripts”).

<sup>202</sup> 471 U.S. 539, 551 (1985). *See also* Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 ALB. L. J. SCI. & TECH. 451, 474 (2004) (“[P]reemption of a thesis or dissertation . . . prior to student publication effectively strips the student of the intellectual currency embodied in his or her work that may be crucial to future career advancement.”).

<sup>203</sup> *E.g.*, HELLER, *supra* note 170, at 35 (“Every use should be viewed under the Section 107 microscope; when you try to determine whether a use is permitted under other exemptions, also consider whether it is a fair use.”).

<sup>204</sup> *E.g.*, STIM, *supra* note 14, at 4 (“In most cases . . . permission is required, so it’s important to never assume that it’s okay to use a work without permission.”).

<sup>205</sup> *E.g.*, Lawrence Lessig, *Preface* to LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY*, at xv (2004) (“The work of a lawyer is always derivative . . .”).

<sup>206</sup> Jonathan Dowell, Comment, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CAL. L. REV. 843, 848 (1998).

<sup>207</sup> HOFFMAN, *supra* note 74, at 18.

<sup>208</sup> *Id.* at 21.

benefit analysis is compelling: On the one hand, “the legal fees for dealing with an unauthorized use lawsuit can easily cost ten to 50 times the average permission expense—or more!”<sup>209</sup> While the Government has its own attorneys to defend an infringement suit, the law permits actions against the Government in the Court of Federal Claims,<sup>210</sup> and potential recovery of up to \$30,000 for copyright infringement.<sup>211</sup> On the other hand, “by simply obtaining permission, you gain lawsuit-free access to the work you need.”<sup>212</sup>

## B. Practical Guidance

### 1. Basic Steps

Many websites provide assistance in identifying the owner of a copyright for out-of-print works, authors who have relocated, or publishers who may have obtained the copyright from an author.<sup>213</sup> Contacting the original publisher of the work is often a good starting point.<sup>214</sup> Although permission requests imply the possibility of denial<sup>215</sup> and could require a great amount of energy on the part of the licensee,<sup>216</sup> the process for requesting permission generally requires the completion of a few simple steps. Attorney Richard Stimm summarizes the entire process in four steps, which amount to identifying the desired material and intended use, requesting permission, negotiating the terms of the permission, and summarizing the agreement in writing.<sup>217</sup> A written agreement is preferable and mandatory for works published in Army periodicals.<sup>218</sup> The *Action Officers Guide* for Army publishing identifies a skeletal outline for the contents of a permission request.<sup>219</sup> While recognizing that “there is normally no need for the formalities required for more substantial rights,” the pamphlet suggests that permission requests conform to the following guidance on content: “(1) Request only the rights that are actually needed; (2) [f]ully identify the material for which permission is requested; [and] (3) [s]tate the proposed use and conditions of the permission so that the owner or agent need only sign the request to grant permission.”<sup>220</sup> The pamphlet discourages requests for multiple signatures from corporate officers, a “corporate seal [or] certificate,” or any “warranty as to title.”<sup>221</sup> Appendix A contains a template that complies with the *Guide*’s basic recommendations.

Out of all actions a requestor takes to request permission, the most challenging is usually articulating desired uses of the material in the most comprehensive manner, as not to exceed the terms of any license that is granted; to this end, the experts

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<sup>209</sup> STIM, *supra* note 14, at 4.

<sup>210</sup> 28 U.S.C. § 1498(b) (2006). *See also* AR 25-30, *supra* note 44, para. 2-5e(3) (“The copyright owner may sue the U.S. Government when a Government employee acting in an official capacity commits an infringement. However, the copyright owner’s exclusive remedy is by action against the Government for money damages in the U.S. Court of Federal Claims. No injunctive relief is available.”).

<sup>211</sup> *Wechsberg v. United States*, 54 Fed. Cl. 158, 165 & 165 n.15 (Fed. Cl. 2002) (interpreting the statute to permit recovery up to \$30,000 in statutory damages, and leaving open the question of whether the \$150,000 cap for “willful” infringement would also apply in suits against the Government).

<sup>212</sup> STIM, *supra* note 14, at 1.

<sup>213</sup> For example, the University of Texas’s permissions website contains comprehensive advice and links to online resources. *See* Getting Permission, available at [http://www.utsystem.edu/ogc/intellectual property/permisn.htm](http://www.utsystem.edu/ogc/intellectual%20property/permisn.htm) (last visited Jan. 11, 2009). In addition, Attorney Lloyd J. Jassin offers a helpful page devoted to locating copyright holders. *See* Lloyd J. Jassin, Locating Copyright Holders, available at [http://www.copylaw.com/new\\_articles/permission.html](http://www.copylaw.com/new_articles/permission.html) (last visited Jan. 11, 2009). *See also infra* Part V (citing various resources).

<sup>214</sup> STIM, *supra* note 14, at 16 (describing how, in the advent of statutory revisions, for articles published “in the last 20–25 years, your starting point for permission will be the original publisher of the article”).

<sup>215</sup> *E.g.*, Steve Westbrook, *A Refrain of Costly Fires: Visual Rhetoric, Writing Pedagogy, and Copyright Law*, in *LAW OF TEXTS*, *supra* note 143, at 93, 94 (“At the very least, the [permissions] process requires acquiescence with no guarantee of success; copyright holders may simply refuse to grant permission and thus effectively veto the production or circulation of a new work . . .”).

<sup>216</sup> *Id.* (“The process can take months, require exorbitant fees, consist of intense negotiations, and cause many headaches, often leading permission seekers to feel . . . like a cross between a Sisyphian bureaucrat and a charred circus flea.”).

<sup>217</sup> STIM, *supra* note 14, at 34.

<sup>218</sup> AR 25-30, *supra* note 44, para. 2-5d(1) (mandating that the creator of a work “will obtain prior *written* permission from the copyright owner or the owner’s duly authorized agent” when permission is required) (emphasis added).

<sup>219</sup> DA PAM. 25-40, *supra* note 44, para. 2-40.

<sup>220</sup> *Id.* para. 2-40a(1)–(3).

<sup>221</sup> *Id.* para. 2-40a(6)(a)–(d).

recommend specificity.<sup>222</sup> Depending on the intended use of the work, an owner's information needs may change. For republication of a literary work, copyright owners commonly want to know information about the work intended to be used, the user, and the intended source for republication. Requirements often exceed the information suggested in the Army's *Guide*.

As an example, when a user desires to republish materials from the *Harvard Law Review*, The Copyright Clearance Center, a consolidated licensing service that represents the *Review*, requires basic "[i]nformation about the new work [one] is creating."<sup>223</sup> This includes the type of medium where the material will be reprinted, such as a PowerPoint® presentation, DVD, brochure, or journal.<sup>224</sup> This also includes the "circulation/ distribution" of the user's work, i.e., the "print run" of a magazine, the "total number of books . . . to be printed," or the number of "downloads" anticipated for an electronic version of a publication.<sup>225</sup> The Center also requires information about the status of the user, i.e., non-profit 501(c)(3) or for-profit.<sup>226</sup> Under the separate category of "[i]nformation about content to be republished," the user must indicate the type of content to be used from a selection of the following choices:

- Full article/chapter (text only)
- An excerpt
- A quotation
- Selected pages
- A chart
- A graph
- A figure/diagram/table
- A photograph
- A cartoon
- An illustration.<sup>227</sup>

The Center then asks whether the user was the author of the requested work and for its original publication date.<sup>228</sup> Other copyright owners seek the International Standard Serial Number (ISSN) for the military periodical, the website where the publication will be displayed, the average circulation of the publication or "number of visitors to the site per month," and whether rights desired by the user include alteration in addition to reproduction.<sup>229</sup> For copyright owners seeking the Tax Identification Number of the Government Printing Office, the number is 536002509.

Owners who do not have permissions departments or standard forms may take advantage of permission agreement templates. After indicating the copyright holder's data, identifying the user/author, and including basic information for the work, Sage Publications suggests that its authors use the language in Figure 1, below:

I hereby request your permission to include the above-referenced material in the scholarly article prepared by me/us tentatively entitled \_\_\_\_\_ to be published by Sage Publications in the journal \_\_\_\_\_, Vol. \_\_\_\_, No. \_\_\_\_, Publication Date \_\_\_\_\_, and the nonexclusive right throughout the world to reproduce, distribute, transmit, and display the material but only as included in the article and all subsequent versions and editions thereof and foreign language translations and other derivative works, in whole or in part, alone or in compilation, in all formats and media now known or later developed, published or prepared by Sage Publications, its assignees and its licensees.

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<sup>222</sup> HOFFMANN, *supra* note 74, at 94 ("Just remember to get permission for exactly what you want to do, not just permission to generally 'use' or copy the work.").

<sup>223</sup> See <http://www.copyright.com> (type *Harvard Law Review* in "Get Permission/Find Title") (last visited Jan. 11, 2010)

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at "What's this" pull-down menu for "total circulation/distribution."

<sup>226</sup> *Id.* at "Republishing publisher is" prompt.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> STIM, *supra* note 14, at 36 ("Text Permission Worksheet").



Thank you for your time and consideration. Please feel free to contact me if you have any questions or concerns.

### **Fig. 2: Military Publications Permission Request**

With these considerations in mind, Attorney Richard Stim designed a comprehensive form to cover most of the issues related to requests for use of text. Nolo Press has kindly granted permission to use the form, which is reprinted at Appendix B.

In response to republication requests, owners can grant varying types of permission. While they are free to grant the license under the proposed terms, they can, and often do, place limitations on what can be done with the text. For example, a response might include the following: “You may not alter the material. You may omit up to 5% of a story by marking the omission with ellipses.”<sup>233</sup> In a more detailed example, in permission recently granted by Matthew Bender Company, Inc., for the *Military Law Review* to reprint portions of a legal treatise, limitations included the following:

- Permission is non-exclusive and non-transferable.
- Permission is granted for one-time use only.
- The material must be duplicated in its entirety with no additions, deletions, comments or other changes.
- Except as provided for in the specified uses set forth in the request form, no part of the material(s) may be copied, photocopied, reproduced or translated or reduced to any electronic medium or machine-readable form, in whole or in part, without written consent from Matthew Bender or its affiliated companies. Any other reproduction in any form without permission of Matthew Bender, or its affiliated companies, is prohibited.
- A copy containing the requested material should be forwarded to [address].
- A credit line must accompany each use of the material stating “Material reproduced from [title of treatise] with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis Group of companies.”
- Matthew Bender, and its affiliated companies, shall have, in its sole discretion, the right to decline or disapprove of the proposed use of the requested material.
- The grant of permission is void if the required information provided in the permission request is materially false or misleading.
- Matthew Bender and its affiliated companies reserve the right to rescind this agreement at any time. In such event, you agree to immediately remove and/or destroy any copies containing the requested material in your possession.<sup>234</sup>

Copyright owners may also charge fees, which are addressed in the next section.

## *2. Fees*

While the usual fee for permission hovers around \$200,<sup>235</sup> an exception to this pricing scheme occurs with “[r]equests for quotations from scholarly books where the use may be more extensive than what is normally considered fair,” which are usually free.<sup>236</sup> Likewise, as recognized by the Army regulation on intellectual property, the military use of scholarly work may help eliminate required permission fees.<sup>237</sup> In many cases, negotiation is expected in the quest to obtain a license from a copyright owner.<sup>238</sup> Ultimately, if the owner requires a fee for the permission, and the author cannot obtain funding from the military to cover it, this may be an additional reason to request a fee waiver after explaining one’s efforts to obtain permission.

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<sup>233</sup> STIM, *supra* note 14, at 32.

<sup>234</sup> E-mail from Permissions Coordinator, Matthew Bender Company, Inc., to author (Jan. 21, 2010) (on file with author).

<sup>235</sup> STIM, *supra* note 14, at 4.

<sup>236</sup> R. S. TALAB, COMMONSENSE COPYRIGHT: A GUIDE FOR EDUCATORS AND LIBRARIANS 141 (2d ed. 1999) (recognizing this as a type of permission “generally granted without a fee”).

<sup>237</sup> AR 27-60, *supra* note 44, para. 4-2a.

<sup>238</sup> STIM, *supra* note 14, at 37–40 (describing methods to negotiate optimal fees for the user).

### 3. Consolidated Permission Services and Permission Departments

Consolidated services, such as iCopyright<sup>239</sup> and the Copyright Clearance Center<sup>240</sup> can be a blessing for authors who need to obtain permission quickly.<sup>241</sup> However, permission fees may diverge widely between the publisher and the consolidated service.<sup>242</sup> In some cases, consolidated services may charge hundreds of dollars for the use of a few pages that organizations will freely grant through their permissions department. To this end, military authors should carefully review webpages for indications of licensing arrangements. Some organizations provide blanket licenses permission through their websites. As one example, the American Psychological Association's (APA) site licenses authors to use,

- “[a] maximum of three figures or tables from a journal article or book chapter[,]
- [s]ingle text extracts of less than 400 words [and][,]
- [s]eries of text extracts that total less than 800 words,”

all without the need for a “formal request.”<sup>243</sup> The APA, however, does require permission to reprint “a measure, scale, or instrument,” and content that exceeds the license above.<sup>244</sup> Other sites provide simple forms with guaranteed response times. The American Bar Association provides a response to submitted forms within ten days,<sup>245</sup> while the American Psychiatric Association usually responds within two to four weeks, unless the user pays an expedited processing fee for a two-day turn-around.<sup>246</sup>

### V. Conclusion

The following references should assist judge advocates in determining the proper course of action regarding copyright permissions.

- Available from Nolo Press, at the list of price \$34.99, the third edition of Attorney Richard Stim's Book, *Getting Permission: How to License & Clear Copyrighted Materials Online and Off* provides numerous resources for permission seekers, including templates, worksheets, and even a CD-Rom with electronic documents.<sup>247</sup>
- Available from John Wiley & Sons, Inc., at the list price of \$18.95, Attorney Lloyd J. Jassin's *Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers* provides comprehensive advice on the permissions process.<sup>248</sup>
- Lloyd J. Jassin also operates a website, CopyLaw.com, featuring free informative articles on copyright law and the permissions process. These articles include the use of public domain materials,<sup>249</sup> trademark

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<sup>239</sup> See generally [www.icopyright.com](http://www.icopyright.com).

<sup>240</sup> See generally [www.copyright.com](http://www.copyright.com).

<sup>241</sup> STIM, *supra* note 14, at 16 (describing the possibility of a short or even instantaneous grant of permission).

<sup>242</sup> *Id.* (describing the possible benefits of “comparison shop[ping]”).

<sup>243</sup> American Psychological Association, APA Copyright and Permissions Information, *available at* <http://www.apa.org/about/contact/copyright/index.aspx> (last visited Jan. 10, 2009).

<sup>244</sup> *Id.*

<sup>245</sup> American Bar Association, Reprint/Reproduction Requests, *available at* [http://www.abanet.org/abastore/index.cfm?fm=static&url=http://www.abanet.org/abastore/front\\_end/static/permissions.html](http://www.abanet.org/abastore/index.cfm?fm=static&url=http://www.abanet.org/abastore/front_end/static/permissions.html) (last visited Jan. 10, 2010) (“Our standard response time is approximately **10 business days** if all information is received in advance.”).

<sup>246</sup> American Psychiatric Association, Permission Request Form, *available at* <http://store.appi.org/RequestForm/RequestForm.aspx> (last visited Jan. 10, 2010).

<sup>247</sup> Nolo Press, *Getting Permission*, *available at* <http://www.nolo.com/products/getting-permission-RIPER.html> (last visited Jan. 11, 2010).

<sup>248</sup> Wiley, *The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers*, *available at* <http://www.wiley.com/WileyCDA/WileyTitle/productCd-0471146544.html> (last visited Jan. 11, 2010).

<sup>249</sup> Lloyd J. Jassin, *New Rules for Using Public Domain Materials*, *available at* [http://www.copylaw.com/new\\_articles/PublicDomain.html](http://www.copylaw.com/new_articles/PublicDomain.html) (last visited Jan. 11, 2010).

considerations in book titles,<sup>250</sup> the work-for-hire doctrine,<sup>251</sup> fair use determinations,<sup>252</sup> electronic publishing rights,<sup>253</sup> and locating copyright holders,<sup>254</sup> to name a few topics.

- Sage Publications offers its own guidelines in a Copyright Quick Reference table with answers to common problems and analysis in support of each interpretation.<sup>255</sup>
- The Copyright Office offers answers to common questions and links to circulars on its permissions website.<sup>256</sup>
- Stanford University’s Copyright and Fair Use website provides an introduction to the permissions process with useful links.<sup>257</sup>
- The University of California educational similarly has a series of links to valuable permission resources.<sup>258</sup>
- Columbia University’s website offers similar links, in addition to a series of sample permission requests.<sup>259</sup>
- The Indiana University Copyright Management Center provides a “Fair Use Checklist” to assist in evaluating the statutory fair use factors for a given work.<sup>260</sup>

With increased public attention on matters of national security and increased reliance on military scholarship, chances are great that military authors will enjoy recognition for their ideas. The expanded audience for this scholarship may very well include copyright owners who, before the publicity, had no idea of the use of their work by a military scholar.<sup>261</sup> Publishing houses and legal research services have legal departments and resources to pursue contentious litigation. Just as the music industry has relied on copyright law to make an example of individual infringers,<sup>262</sup> publishers can easily turn legal scholarship into a venue for demonstrating the power of deterrence. In fact, many academics in higher education fear that scholarship is the next battleground.<sup>263</sup> Considering that the Federal Government is not immune to lawsuits for copyright infringement, the costs are simply too great to ignore when the remedy is so simple. The first rule of the military scholar should, therefore, be to seek permission from copyright holders, and to do it often.

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<sup>250</sup> Lloyd J. Jassin, *Selecting and Protecting the Title of Your Book*, available at [http://www.copylaw.com/new\\_articles/titles.html](http://www.copylaw.com/new_articles/titles.html) (last visited Jan. 11, 2010).

<sup>251</sup> Lloyd J. Jassin, *Working With Freelancers: What Every Publisher Should Know About the “Work for Hire” Doctrine*, available at [http://www.copylaw.com/new\\_articles/wfh.html](http://www.copylaw.com/new_articles/wfh.html) (last visited Jan. 11, 2010).

<sup>252</sup> Lloyd J. Jassin, *Fair Use in a Nutshell: A Roadmap to Copyright’s Most Important Exception*, available at [http://www.copylaw.com/new\\_articles/fairuse.html](http://www.copylaw.com/new_articles/fairuse.html) (last visited Jan. 11, 2010).

<sup>253</sup> Jack McHugh, *Electronic Publishing Rights: An Interview with Lloyd J. Jassin*, available at [http://www.copylaw.com/new\\_articles/electronicrights.html](http://www.copylaw.com/new_articles/electronicrights.html) (last visited Jan. 11, 2010).

<sup>254</sup> Jassin, *supra* note 213.

<sup>255</sup> SAGE PUBLICATIONS, *supra* note 230, at 14–17.

<sup>256</sup> U.S. Copyright Office, *Can I Use Someone Else’s Work? Can Someone Else Use Mine?*, available at <http://www.copyright.gov/help/faq/faq-fairuse.html> (last visited Jan. 11, 2010).

<sup>257</sup> Stanford University Libraries, Copyright and Fair Use, Chapter 1: Introduction to the Permissions Process, available at [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter1/index.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter1/index.html) (last visited Jan. 11, 2010).

<sup>258</sup> University of California, UCCopyright: Copyright Permission Resources, available at <http://www.universityofcalifornia.edu/copyright/permissions/resources.html> (last visited Jan. 11, 2010).

<sup>259</sup> Columbia University Libraries/Information Services, Copyright Advisory Office, Permissions, available at <http://copyright.columbia.edu/copyright/permissions/> (last visited Jan. 11, 2010).

<sup>260</sup> Indiana Univ., Copyright Mgt. Ctr., Checklist for Fair Use (rev. 3.99), available at [http://www.ibiblio.org/pub/electronic-publications/stay-free/ml/readings/fairuse\\_checklist.pdf](http://www.ibiblio.org/pub/electronic-publications/stay-free/ml/readings/fairuse_checklist.pdf) (last visited Jan. 19, 2010).

<sup>261</sup> See *supra* note 29 and accompanying text.

<sup>262</sup> E.g., Ted Bridis, *Recording Industry Sues 261 Song Sharers*, MIAMI HERALD, Sept. 9, 2003, at 1A.

<sup>263</sup> E.g., Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J. L. & PUB. POL’Y 541, 541 (1999) (“[A]cademic journal articles of scholarship and research . . . are highly likely to precipitate the next fair use controversy.”); Sohui Lee, *Fair Use and the Vulnerability of Criticism on the Internet*, in LAW OF TEXTS, *supra* note 143, at 31, 36 (observing a “trend” and “shift” in copyright law “toward expanded rights for creators and publishers at the expense of information users—like teachers and students”).

## Appendix A

### Basic Template for Permission Agreement from the Army Publishing: *Action Officers Guide*<sup>264</sup>

*(Letterhead)*  
*(Name of Company)*  
*(Address)*  
*(Salutation)*

#### RELEASE

This office is preparing manuscript material for a publication to be issued for defense purposes under the title *(insert title when known)*.

Permission is requested to include in this publication the following material: *(insert specific information regarding the pages and lines of the illustration and/or text matter to be released)* from the work entitled *(title)*, written by *(author's name)*, which was published by your company.

Would you please indicate on one copy of this letter, in the space provided below, whether this material may be used in the publication this office is preparing and whether an appropriate credit line is desired? A self-addressed envelope is enclosed for your use.

*(Signature of requestor)*  
*(Title)*

Publisher's permission:

Release to use requested material is hereby granted, royalty free.

The material covered by this release *(may) (may not)* be placed on sale by the U.S. Government Printing Office.

If the government publication is made available to the public for inspection and copying in accordance with the Freedom of Information Act or any other law, the material covered by this release may be similarly made available for inspection and copying in context.

Credit line *(is) (is not)* requested.

*(Name of copyright owner or authorized agent)*  
*By (Company Officer)*  
*(Title)*  
*(Date)*

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<sup>264</sup> DA PAM. 25-40, *supra* note 44, fig.2-5 ("Sample format: request for free permission to use copyrighted material").

**Appendix B**

**Text Permission Agreement<sup>265</sup>**

Reprinted with permission from the publisher, Nolo, Copyright 2010, <http://www.nolo.com>

\_\_\_\_\_ (“Licensor”) is the owner of the rights for certain textual material defined below (the “Selection”).  
\_\_\_\_\_ (“Licensee”) wants to acquire the right to use the Selection as specified in this agreement (the “Agreement”).

**Licensor Information**

Title of Text (the “Selection”): \_\_\_\_\_

Author: \_\_\_\_\_

Source publication (or product from which it came): \_\_\_\_\_

If from a periodical, the ISSN, volume, issue, and date. If from a book, the ISBN: \_\_\_\_\_

If from the Internet, the entire URL: \_\_\_\_\_

Number of pages or actual page numbers to be used: \_\_\_\_\_

**Licensee Publication Information**

This Selection will appear in the following publication(s) (the “Work”): \_\_\_\_\_

(check if applicable and fill in blanks)

book-title: \_\_\_\_\_

periodical-title: \_\_\_\_\_

event handout-title of event: \_\_\_\_\_

website-URL: \_\_\_\_\_

diskette-title: \_\_\_\_\_

Name of publisher or sponsor: \_\_\_\_\_

Author(s): \_\_\_\_\_

Estimated date(s) of publication or posting: \_\_\_\_\_

Estimated number of copies to be printed or produced (if a book, the estimated first print run): \_\_\_\_\_

If for sale, the price: \$ \_\_\_\_\_

If copies are free to attendees of a program, the cost of program: \_\_\_\_\_

If a website, the average number of visitors per month: \_\_\_\_\_

**Grant of Rights**

Licensor grants to Licensee and Licensee’s successors and assigns, the:

(select one)

nonexclusive

\_\_\_\_\_

<sup>265</sup> STIM, *supra* note 14, at 45–48.

exclusive

right to reproduce and distribute the Selection in:

(select all that apply)

- the current edition of the Work.
- all editions of the Work.
- all foreign language versions of the Work.
- all derivative versions of the Work.
- all media now known or later devised.
- promotional materials published and distributed in conjunction with the Work.
- other rights \_\_\_\_\_.

**Territory**

The rights granted under this Agreement shall be for \_\_\_\_\_ (the "Territory").

**Fees**

Licensee shall pay Licensor as follows:

(select one and fill in appropriate blanks)

**Flat Fee.** Licensee shall pay Licensor a flat fee of \$ \_\_\_\_\_ as full payment for all rights granted. Payment shall be made:

upon execution of this Agreement

upon publication

**Royalties and Advance.** Licensee agrees to pay Licensor a royalty of \_\_\_\_\_ % of Net Sales. Net Sales are defined as gross sales (the gross invoice amount billed customers) less quantity discounts and returns actually credited. Licensee agrees to pay Licensor an advance against royalties of \$ \_\_\_\_\_ upon execution of this Agreement. Licensee shall pay Licensor within 30 days after the end of each quarter. Licensee shall furnish an accurate statement of sales during that quarter. Licensor shall have the right to inspect Licensee's books upon reasonable notice.

**Credit & Samples**

(check if applicable and fill in blanks)

**Credit.** All versions of the Work that include the Selection shall contain the following statement:

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**Samples.** Upon publication, Licensee shall furnish \_\_\_\_\_ copies of the Work to Licensor.

**Warranty**

Licensor warrants that it has the right to grant permission for the uses of the Selection as specified above and that the Selection does not infringe the rights of any third parties.

**Miscellaneous**

This Agreement may not be amended except in a written document signed by both parties. If a court finds any provision of this Agreement invalid or unenforceable, the remainder of this Agreement shall be interpreted so as best to effect the intent of the parties. This Agreement shall be governed by and interpreted in accordance with the laws of the State of \_\_\_\_\_ . This Agreement expresses the complete understanding of the parties with respect to the subject matter and supersedes all prior representations and understandings.

Licensors  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Date: \_\_\_\_\_

Licensee  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Date: \_\_\_\_\_  
Tax ID # \_\_\_\_\_