



Answers to Frequently Asked Questions of USDA Forest Service Employees Regarding *Copyright* and *Fair Use*: Promoting Awareness and Highlighting Grey Areas¹

April 2005

Problem Statement:

When a Forest Service employee wants to share with a colleague an electronic copy of a published resource, when a Forest Service unit receives a Freedom of Information Act (FOIA) request for an Administrative Record that contains published materials, or when a Forest Service unit is compiling an Administrative Record and considering including published materials, questions about *copyright protection* and *fair use* come up. Sharing published materials has never been easier because electronic copies are so readily available, for example when working with files saved as an Adobe PDF (Portable Document Format). Yet copyright protections remain and fair use of copyrighted materials is often less clear than desired. The problem this document addresses is the need for a brief, plain language guide to copyright, fair use, and management related challenges.

What is 'copyright protection'?

Copyright protection is the right of the person who produced an original work of authorship to determine who can make copies of the work or profit from it (see: [US Copyright Office Circular 1](#)). Copyright protection arises automatically and does not require a copyright notice on the work. In the United States, the US Constitution provides for copyright protection. Other sources provide for similar protections in other nations.

Does 'copyright protection' extend to the work of federal employees performing official duties?

No, copyright protection does not extend to the work of federal employees performing official duties because government work is not eligible for copyright protection (see [US Copyright Office Circular 1](#)). Some federal work, however, has protections related to national security or other protections distinct from copyright. This exclusion from copyright protection applies only to federal employees performing official duties. Some work produced by federal contractors may have copyright protection, as may work by employees of non-federal government agencies. Publishers, including journals, cannot legally assert copyright to work produced by federal employees performing official duties.

What about government documents, like Environmental Assessments (EAs), Environmental Impact Statements (EISs), or state agency documents?

Federal government documents, such as environmental compliance documents (EAs or EISs, for example), are not protected by copyright. Electronic versions can and should be made widely available to agency employees and members of the public. Copyright protection varies for documents produced by state or local agencies, including state universities. Contact the source to determine copyright status. Show particular caution towards any document available for sale by a university or state, local, or Tribal agency.

¹ This document has been prepared for informational purposes only and does not constitute legal advice. Several attorneys and librarians contributed professional insights or reference materials, as did planners, researchers, and agency staff members. Nevertheless, this document does not substitute for professional legal counsel.

What is 'fair use'?

Fair Use is the legal principle that covers making copies of a copyrighted work without compensating the author or copyright holder yet also without violating copyright law (see: [17 USC 101](#)). Generally, fair use includes making copies for purposes such as criticism, comment, news reporting, teaching in a formal university, college, or school setting (including multiple copies for classroom use, but not applying to agency training sessions), scholarship, or research. Posting a document on a website or distributing it publicly, for example, probably violates fair use if the copyright holder loses money. Such a loss is called an 'adverse market effect' or 'commercial loss' and it can occur by posting a journal article or sending out a publicly available document even in response to a Freedom of Information Act (FOIA) request. But there are exceptions, some of which are addressed shortly. For a detailed description of this grey area, you might read the [University of Texas's guidance](#) or CENDI's [Frequently Asked Questions about Copyright](#).

What is 'copyright infringement'?

Copyright infringement generally occurs when someone takes a copyrighted work and reproduces, distributes, performs, publicly displays, or makes a derivative work without the permission of the copyright owner (see: [US Copyright Office Frequently Asked Questions](#)). Copyright infringement generally means that a violation of fair use has occurred. An example of copyright violation would include any widespread, public distribution of copies made from a book or journal that causes loss of revenue that the copyright holder might otherwise have received. Single copies for personal use or research generally are not violations, but copying large sections of a book or journal may be an infringement.

What are the consequences of copyright infringement or violation of fair use?

For government employees performing official duties, consequences of copyright violation typically would be limited to the agency paying reasonable compensation to the copyright holder for lost income, but a court would decide compensation based on facts of the specific case. When researching this material, no examples were found of a government agency having been challenged for posting copyrighted documents electronically to publicly accessible internet websites, so any statement about consequences would be speculative.

What if a Freedom of Information Act (FOIA) request asks for copies of copyrighted material that are part of an Administrative Record associated with a project?

Placing copies of copyrighted material into an Administrative Record can present a conflict between FOIA's public disclosure expectations and copyright protections. The 'fair use' doctrine does not extend to a FOIA disclosure that reduces the market for or value of the copyrighted material or causes economic loss to the copyright holder. FOIA has a specific exemption related to loss of commercial value (see [Freedom of Information Act](#)).

How can I respond to a FOIA request for copyrighted material?

You have at least four options. You can respond to the FOIA request by providing the requester with the reference and explaining that the material is copyrighted and publicly available. You can request copyright clearance, which may require paying a fee (the [Copyright Clearance Center](#) can do this, but you may want to ask a Forest Service librarian for assistance). You can contact the author directly and request copyright clearance for a version of their original work prior to publication. Or you can make the copy and deal with costs later if they come up (note that an unknown degree of risk is involved with this option).

What if a Freedom of Information Act (FOIA) request asks for copies of copyrighted material in an Administrative Record associated with a project and the material is hard-to-find?

Typically, the primary concern is the effect on the market or value of the copyrighted material. If a rare, hard-to-find published work is essential to addressing a FOIA request and FOIA disclosure causes no adverse economic impact on the potential market or value of the copyrighted work, making copies may be appropriate 'fair use' just as with making copies for judicial or legislative

proceedings. Nevertheless, securing authorization from the copyright holder is safest. Again, if FOIA disclosure reduces the market for or value of the copyrighted material, 'fair use' does not apply because FOIA provides an exemption for such disclosures based upon threat to commercial value (see [Freedom of Information Act](#)).

Does all this get in the way of sharing resources with colleagues and sharing information with the public?

It can, but there are ways to accomplish both these goals without violating copyright. For example, the USDA National Agricultural Library sponsors [Digitop](#), a digital desktop library for USDA employees. You can send colleagues a link to a file you found on Digitop without sending a copy of the actual document. That saves space on email servers, helps those who run Digitop see how valuable their services are to the agency, and avoids copyright violation. Regarding sharing resources with those outside the Forest Service, it depends on what you are sharing, whether it is copyrighted, who holds the copyright, and with whom you want to share the material. Federal government documents are not copyright protected, so you can share those widely. If you determine that a document produced by a state, local, or tribal government is not copyright protected, you can share those widely. If such a document is available on the Internet, however, you may find it easiest to provide an electronic link to it. Authors hold copyright to their work prior to a publisher formatting it for a book or journal, so you can seek permission from an author directly. You can also seek permission from a publisher and can purchase copyright clearance if necessary. This document includes several examples of copyright clearance request text you might use. There are times, however, when a copyright holder refuses to grant copyright clearance, but that is their right.

What if I just want to share electronic documents with other USDA or USDA Forest Service personnel and I originally located the documents through the USDA Digitop service?

The easiest way to share copyrighted electronic documents internally is to provide your colleague with an electronic hyperlink to the document located on the Digitop service. Many journal articles, for example, located through Digitop services have an URL (Universal Reference Locator) or web address, so you can just provide it instead of an actual electronic copy. Posting an electronic copy locally takes time and server space and probably exceeds the USDA's license scope under terms of the Digitop contract. Instead of posting a document electronically, provide a link to the Digitop location. The solution is transparent to USDA employees.

What if a publisher will not grant limited rights to make copies of an article or chapter that is really important to share?

If the author is a federal employee and produced the document while performing official duties, you can share it with whomever you like because the publisher has no legal right to it. If the author is not a federal employee and the material is copyrighted, you can purchase copies from the copyright holder or contact a Forest Service librarian for assistance. Alternatively, unless the author has relinquished all rights to his or her original work, that person holds the copyright to the work prior to formatting by the publisher. You can seek permission from the author to distribute copies, including electronic copies, of his or her work minus the publisher's formatting. For example, you can ask an author for permission to post an electronic copy of his or her article text, including his or her original graphics or tables, without the publisher having any right to object, but make sure the author knows what right he or she retained and that you receive the author's permission in writing prior to posting the document. With the author's permission, you can even reformat the work to put it into HTML or PDF format for easier electronic distribution, but you have to secure permission. If you choose to do something like this, you may want to ask the author to insert a statement about where and when the text was published and if peer review occurred.

How can I share published resources without violating copyright?

That depends on what you want to share and with whom you want to share it. Here are some general guidelines (if you want to be certain that a guideline applies to your situation, contact a Forest Service librarian):

WHAT DO YOU WANT TO SHARE?	WITH WHOM DO YOU WANT TO SHARE IT?						
	Forest Service	Other USDA agency	Federal agency (non-USDA)	Non-federal government	Public (single individual)	FSWeb (Intranet)	WWW (Internet)
Federal government documents	☺	☺	☺	☺	☺	☺	☺
Document produced by federal employee(s) and printed in journal or book	☺	☺	☺	☺	☺	☺	☺
PDF of document produced by federal employee(s) and printed in journal or book	☺	☺	☺	☺	☺	☺	☺
Copyrighted Electronic Document found through Digitop (i.e., regardless of formatting)	?	?	X	X	X	?	X
LINK to copyrighted electronic document found through Digitop (i.e., provide links, not documents)	☺	☺	?	n/a	n/a	☺	n/a
Annotated Bibliography of copyrighted electronic documents (i.e., citation information and interpretive description)	☺	☺	☺	☺	☺	☺	☺
Non-Copyrighted Electronic Document (consider providing just an electronic link)	☺	☺	☺	☺	☺	☺	☺
Multiple copies of copyrighted Electronic Document found at a non-Digitop source (e.g., University or other library)*	X	X	X	X	X	X	X
Single copies of copyrighted Electronic Document found at a non-Digitop source (e.g., University or other library)*	X	X	X	X	X	X	X
Single fax copy of copyrighted document for research or educational purposes*	X	X	X	X	X	n/a	n/a

* Without copyright permission from copyright holder, you can only obtain single copies for yourself, but the products of federal employees performing government work are not afforded copyright protection and you may share those as widely as you need.

“?” Some circumstances are too dependent on specific contracts or authorship for meaningful guidance.

Remaining Questions

While working on this material, several questions came up that have not been addressed here. Further conversations about these and other questions need to occur. Suggestions for other questions to add to this list are welcome.

- What is the scope of the various licenses held by the National Agricultural Library for reference databases provided through Digitop? Do the licenses provide for internal distribution of copyrighted electronic documents or only for access to the documents through Digitop or similar means? (This would determine whether an internal website might post a link to a PDF copy of a document outside of Digitop or only a link to the Digitop location of the document)
- What rights of distribution, if any, exist for USDA employees, including employees of subordinate agencies like the Forest Service, to circulate PDF copies of documents found through Digitop, especially regarding circulation of documents to other USDA employees?
- Are there any constraints to placing only a reference to a commercially or publicly available document in an Administrative Record, as opposed to placing the actual document (physical or electronic versions)?

For Additional Information:

If you need additional information to address specific circumstance, please contact the USDA Office of General Council, your unit or Regional expert in Freedom of Information Act compliance, or your local Forest Service librarian.

Acknowledgements

The following individuals helped raise questions about challenges faced by Forest Service employees when trying to share published materials, helped explain the situations where they have wanted better guidance, or helped suggest plausible guidance that would be most useful and appropriate. Although they are not responsible for any errors in the previous material, they have been most helpful.

Jim Anderson, Office of Communications Team Leader, USDA-Forest Service Forest Products Lab, Madison, Wisconsin

Carol Ayer, Forest Service librarian, Rocky Mountain Research Station, Ogden, Utah

Julie Blankenburg, Forest Service librarian, Forest Product Lab, Madison, Wisconsin

John Fado, USDA Office of General Council, Patent Law Specialist, Washington, D.C.

Sharon Friedman, Forest Service NEPA and planning expert, Assistant EMC Director for NEPA (Acting Director Inventory and Management Institute), Washington, D.C.

Geneen Granger, NEPA planning specialist, Forest Service Region 3 Regional Office, Albuquerque, New Mexico

Rita Morgan, Forest Service FOIA expert, Washington Office, Washington, D.C.

Velu Sinha, Boom Advisors, Consultant to Forest Service on Electronic Government initiatives, Washington, D.C.

Connie Smith, Forest Service Region 3 Regional Office, NEPA and Appeals, Albuquerque, New Mexico

Janet Stockhausen, Esq., Patent Advisor, USDA-FS, Madison, Wisconsin

Shelly Witt, Forest Service National Continuing Education Program Leader, Logan, UT

Examples

The following are exhibits of requests for copyright clearance.

Copyright Clearance Request

Aside from purchasing copies, one answer to matters of copyright is to request the copyright holder to provide you with limited authorization to make copies. A letter or email from the copyright holder may be enough, but journals may have a more formal process. Forest Service librarians can help obtain copyright clearance if you need, but you can take care of this yourself in many cases. Authors hold copyrights to the intellectual content of their work prior to formatting by a journal, so if a journal publisher is unwilling to grant copyright clearance, you can contact the author directly to seek permission to electronically post or distribute an unformatted version of their work. Unformatted does not mean only 'plain text' or 'html' because the author may choose to provide a PDF version or may grant rights to convert a plain text version into a PDF version.

Example: An informal copyright clearance request to a journal for making physical copies:

I would like permission to make limited copies of the article entitled (name of article) printed in (name of journal) (volume, number, and pages). With your permission, we would make no more than (#) copies for the purposes of (state reason like training, short-course, supporting public participation, etc.). Please respond in writing at your convenience.

Example: An informal copyright clearance request to a journal for making electronic copies:

I would like permission to post an electronic copy of the article entitled (name of article) printed in (name of journal) (volume, number, and pages). With your permission, we would post the document

to an (internal or external?) website because the work is an important resource for our planning project (or other reason) and we would like others to have ready access. Please respond in writing at your convenience.

Example: An informal copyright clearance request to an author:

I would like permission to post an electronic copy of your article entitled (name of article) that was published in (journal or book name). Your work is an important resource for our planning project (or whatever) and I would like others to benefit from reading your findings. I am not seeking to post the formatted version of the article as the journal printed it because they hold the copyrights. Instead, I am seeking to post a plain text version, together with your graphics (if any), of what the journal formatted for publication. I can work with plain text or text you formatted with a word processing software program. I can also work with a PDF version of the plain text document if you prefer. Please respond in writing at your convenience.

Electronic Resources:

US Copyright Office homepage: <http://www.copyright.gov/>

“Frequently Asked Questions about Copyright” (47 pp.) updated in August 2004
<http://cendi.dtic.mil/publications/04-8copyright.pdf> (Note: the website housing this publication is undergoing revision as this FAQ is prepared so the link may not work directly. If you have problems, go to <http://cendi.dtic.mil/> and search under publications for the document by title)

1999 Memo from Dept. of Justice’s Legal Council to Andrew Pincus, General Council to the Dept. of Commerce regarding government reproduction of copyrighted materials
<http://www.loc.gov/flicc/gc/fairuse.html>

Copyright Clearance Center (disclaimer: this site is operated by publishers, so the guidance is somewhat self-serving in places, according to those who have used it): <http://www.copyright.com/>

University of Texas’ take on the future of copyright in the 21st C.:
http://www.utsystem.edu/ogc/intellectualproperty/fair_use.htm

The US Department of Justice’s Freedom of Information Act resource webpage:
<http://www.usdoj.gov/04foia/index.html>