REPORT DOCUMENTATION PAGE

Form Approved OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	July 2000	Journal Article July 2000

4. TITLE AND SUBTITLE

Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes

5. FUNDING NUMBERS

6. AUTHOR(S)

Gary M. Bowman

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

The Army Lawyer
Judge Advocate General's School
U.S. Army
600 Massie Road
Charlottesville, VA 22903-1781

8. PERFORMING ORGANIZATION REPORT NUMBER

ISSN 0364-1287

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

Judge Advocate General's School
U.S. Army
600 Massie Road
Charlottesville, VA 22903-1781

10. SPONSORING/MONITORING AGENCY REPORT NUMBER

DA PAM 27-50-332

11. SUPPLEMENTARY NOTES

Published The Army Lawyer, July 2000, at 20-25. See also http://www.jagcnet.army.mil/TJAGSA.

This is a work of the U.S. Government and is not subject to copyright protection in the U.S. Foreign copyrights may apply. Title 17 USC § 105.

12a. DISTRIBUTION/AVAILABILITY STATEMENT

Approved for Public Release; Distribution Unlimited

12b. DISTRIBUTION CODE

A

13. ABSTRACT (Maximum 200 words)

The purpose of this article is to describe the principles of the fair use doctrine and the legal authorities on which the doctrine is based and to explain why most Army intelligence uses of copyrighted material fall under the fair use doctrine.

20010509 139

14. SUBJECT TERMS

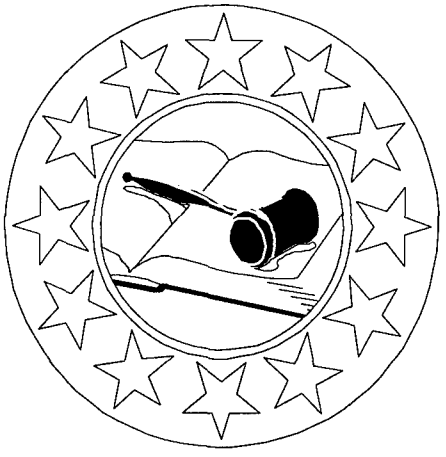
Intellectual property; Copyright; Government publications; Information management; Administrative law

15. NUMBER OF PAGES
6

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT
UNCLASSIFIED	UNCLASSIFIED	UNCLASSIFIED	UL

AQ I01-08-1500



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-332
July 2000

50th Anniversary of the UCMJ Series

The Uniform Code of Military Justice in Transition
The Honorable Jacob Hagopian

Articles

Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis
Lieutenant Colonel Michael J. Davidson

Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes
Major Gary M. Bowman

TJAGSA Practice Note

Estate Planning Note (Preparation of Tangible Personal Property Memorandums Using Drafting Libraries (DL) Wills Software)

Notes from the Field

CLAMO Note

USALSA Report

Guard and Reserve Affairs Items

CLE News

Current Materials of Interest

Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes

Major Gary M. Bowman
United States Army Reserve

Numerous Army intelligence activities reproduce copyrighted materials for distribution to Army personnel. For example, the National Ground Intelligence Center (NGIC) reproduces copyrighted text, photographs, and line drawings in classified intelligence documents for internal defense use. Tactical intelligence organizations provide copies of copyrighted photographs, line drawings, and imagery to war fighters for intelligence purposes. *Army Regulation 25-30, The Army Integrated Publishing & Printing Program (AR 25-30),*[1] provides general information regarding copyright law and states the elements of fair use. There still remains, however, confusion as to the application of the fair use doctrine to Army users of copyrighted material for intelligence purposes.[2]

The purpose of this article is to describe the principles of the fair use doctrine and the legal authorities on which the doctrine is based and to explain why most Army intelligence uses of copyrighted material fall under the fair use doctrine.

The Copyright Act of 1976

Two authorities govern Army use of copyrighted material. The first is the federal Copyright Act of 1976,[3] which prohibits the use of copyrighted material without the prior permission of the copyright holder, unless the use fits within several exceptions. The second is *AR 25-30*, which essentially restates the Copyright Act with additional explanation.

Both the Copyright Act and *AR 25-30* adopt the fair use doctrine, a judicially created doctrine that allows reasonable use of copyrighted materials in limited circumstances.[4] The fair use doctrine clearly states:

> Notwithstanding the provisions of section 106 and 106A [which prohibit copyright infringement], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include–(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[5]

The statute itself does not state that fair use includes the reproduction of copyrighted material, or portions of copyrighted material, for internal government use. However, the Notes of the House of Representatives Committee on the Judiciary, which drafted the Act, specifically state that "reproduction of a work in legislative or judicial proceedings or reports" is fair use.[6] The committee even expressed the intention that publication of an entire copyrighted document in a legislative document constitutes fair use:

> The Committee has considered the question of publication, in Congressional hearings and

1. U.S. DEP'T ARMY, REG. 25-30, THE ARMY INTEGRATED PUBLISHING & PRINTING PROGRAM (28 Feb. 1989) [hereinafter AR 25-30].

2. One Army writer has described the application of the fair use doctrine generally, but he did not address the implications of the fair use doctrine in the intelligence context. *See* Captain James M. Hohensee, *The Fair Use Doctrine in Copyright: A Growing Concern for Judge Advocates*, 119 MIL. L. REV. 155 (1988).

3. 17 U.S.C.S. § 101 (LEXIS 2000).

4. The first judicial application of the fair use doctrine was in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), although the court did not define the term "fair use."

5. 17 U.S.C.S. § 107.

6. H.R. REP. NO. 1476, at 61-62 (1975).

> documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use.[7]

Army Regulation 25-30 specifically recognizes the fair use doctrine and applies it to Army use of copyrighted material.[8]

The Case Law

The federal courts are the ultimate guardian of the meaning of the fair use doctrine. Typically, the defendant in a suit brought by the owner of a copyright who alleges that the defendant infringed upon the copyright raises fair use as a defense.

There are few significant cases in which a government entity was sued for copyright infringement. In *Key Maps, Inc. v. Pruitt*,[9] the copyright holder of a county map, sued a county and its fire marshal, Pruitt, claiming that they had violated Key's copyright by reproducing and distributing a fire zone map, which was drawn on the Key county map, without Key's permission. The county claimed that their use of the map was a fair use of the map under 17 U.S.C. § 107. The U.S. district court ruled in favor of the county. The court stated its ruling as follows:

> The doctrine of "fair use" applies to the conduct of the Defendants because the use of the composite Fire Zone Map was for a legitimate, fair, and reasonable purpose, namely the coordination of fire prevention activities in the unincorporated area of Harris County. Also, Pruitt's use of the maps was not of a commercial nature because the distribution was not in competition with the Plaintiff but solely for internal purposes which related to a discernible public interest.
>
> After balancing the exclusive rights of the copyright holder, Key Maps, with the public's interest in disseminating the maps to the various fire departments for fire prevention purposes, the Court opines that a privilege is created in the Defendants to use the copyrighted maps in a reasonable manner without express consent of the Plaintiff.
>
> The fact that Pruitt had the composite Fire Zone Map reproduced by someone other than Key Maps, as a result of their unreasonable delay, does not diminish or prejudice the potential sale of Plaintiff's maps. Here again, the Court is of the opinion that Pruitt's use of the maps is insubstantial and entitled to the "fair use" defense because the maps were restricted to use by the approximately fifty Fire Departments, Law Enforcement Agencies and Civil Defense Units in Harris County for the purpose of showing the zones of each Fire Department.[10]

The *Key Maps* decision points out that "fair use presupposes good faith and fair dealing."[11] The court was favorably impressed by the fact that the fire marshal had first asked Key Maps to reproduce the fire maps pursuant to a purchase order, but Key Maps delayed copying the maps and the fire marshal canceled the purchase order and hired another vendor.

The *Key Maps* court cited *Williams & Wilkins Co. v. United States*,[12] the other significant case in which a government entity was sued for copyright infringement, as authority for the proposition that the four fair use factors must be evaluated "in concert."[13] Williams & Wilkins was the publisher of medical journals. It sued the libraries of the National Library of Medicine (NLM) and the National Institute of Health (NIH) for infringing the copyright of its medical journals by conducting large-scale photocopying of articles from the journals. The NLM, which serves government agencies, private organizations, and other libraries, photocopied articles, up to fifty pages in length, upon request. The NIH served only the agency's staff, but copied entire journal articles upon request by NIH researchers. Together, the libraries made millions of photo-

7. *Id.*

8. *See* AR 25-30, *supra* note 1, para. 2-44 (b).

9. 470 F. Supp. 33 (S.D. Tex. 1978).

10. *Id.* at 37-38 (citations omitted).

11. *Id.* at 38.

12. 487 F.2d 1345 (Ct. Cl. 1973). The best analysis of *Williams & Wilkins* is in Shannon F. Wagoner, *American Geophysical Union v. Texaco: Is the Second Circuit Playing Fair with the Fair Use Doctrine?*, 18 HASTINGS COMM. & ENT. L.J. 181 (1995).

13. *Key Maps*, 470 F. Supp. at 37.

copies of medical journal pages each year, including many copies of journal articles published by Williams & Wilkins.

A trial court found that the government libraries infringed Williams & Wilkins copyright.[14] A divided United States Court of Claims reversed the trial court in 1973, and it was affirmed by a divided Supreme Court in 1975.[15] The court identified "four main reasons for its decision"[16] that the libraries' reproduction of the copyrighted material constitutes fair use. First, and foremost, the libraries were non-profit organizations "devoted solely to the advancement and dissemination of medical knowledge."[17] Second, the libraries had policies that limited their photocopying.[18] Third, the court recognized that library photocopying had long been a common practice. Fourth, the court found that a finding of infringement would hamper medical science and research.[19]

The Court of Claims decision in *Williams & Wilkins* was severely criticized by the three dissenting judges, who characterized the case as "the *Dred Scott* decision of copyright law."[20] The dissent was based upon the fact that the libraries copied articles, in their entirety, on a vast scale. As Chief Judge Cowen, who wrote the dissenting opinion, pointed out:

> [T]his is not a case involving the copying of copyrighted material by a scholar or his secretary in aid of his research, nor is it a case where a teacher has reproduced such material for distribution to his class. Also, it is not a case where doctors or scientists have quoted portions of plaintiff's copyrighted articles in the course of writing other articles in the same field. We are not concerned here with a situation in which a library makes copes of ancient manuscripts or worn-out magazines in order to preserve information. What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material on a scale so vast that it dwarfs the output of many small publishing companies. In order to fill requests for copies of articles in medical and scientific journals, the NIH made 86,000 Xerox copies [of articles] in 1970, constituting 930,000 pages. In 1968, the NLM distributed 120,000 copies of such journal articles, totaling 1.2 million pages. As the trial judge correctly observed, this extensive operation is not only a copying of the copyrighted articles, it is also a reprinting by modern methods and publication by a very wide distribution to requesters and users.[21]

Despite the dissent, the Court of Claims, which has jurisdiction over copyright infringement claims against federal agencies,[22] held that the mass copying was fair use.

The meaning of *Williams & Wilkins* must be evaluated in light of the decision of the United States Court of Appeals for the Second Circuit in *American Geophysical Union v. Texaco, Inc.*[23] The facts of *Texaco* involve a common practice. Dr. Donald Chickering, a chemical engineering researcher at Texaco, copied eight articles from a scientific journal, *The Journal of Catalysis*, for future reference. The photocopies were solely for Chickering's own use and were not circulated or distributed to anyone else.[24] The trial court found that the photocopying was not fair use and infringed on the publisher's copyright.

The Second Circuit, in a two-to-one decision, affirmed the trial court decision that held that the photocopying was copyright infringement. The court found that the first element of fair use, the purpose and character of the use, was commercial because Texaco is a for-profit company and the copying of the material was a "factor in production."[25] The court found that

14. *Williams & Wilkins Co.*, 487 F.2d at 1347.

15. Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975).

16. Wagoner, *supra* note 12, at 191.

17. *Williams & Wilkins Co.*, 487 F.2d at 1354.

18. Wagoner, *supra* note 12, at 191.

19. *Id.*

20. *Williams & Wilkins Co.*, 487 F.2d at 1387 (Cowden, C.J., dissenting).

21. *Id.* at 1364 (Cowen, C.J., dissenting).

22. 28 U.S.C.S. § 1498(b) (LEXIS 2000).

23. 37 F.3d 881 (2d Cir. 1994). My analysis of *Texaco* is based upon Wagoner, *supra* note 12.

24. Wagoner, *supra* note 12, at 193.

25. *American Geophysical Union*, 37 F.3d at 890.

Texaco's use was not reasonable because Texaco could have contacted the Copyright Clearance Center (CCC) and obtained a copyright license.[26] The second factor, the nature of the copyrighted work, was decided in favor of Texaco because the "accepted rule is that reproduction of factual works is far more likely to constitute fair use than reproduction of creative works."[27] The Second Circuit accepted the trial court's conclusion that the third fair use factor, the amount and substantiality of the copying, did not support a finding of fair use because Chickering copied entire articles. However, at least one commentator has pointed out that copying one article should support a conclusion of fair use because publisher's revenues are derived mostly from the sale of subscriptions rather than the sale of individual articles.[28] Finally, the Second Circuit found that the fourth factor, the effect on the potential market for the original work, did not support a finding of fair use. The court pointed out that the Supreme Court has stated that the effect on the market is "undoubtedly the single most important element of fair use."[29] Texaco argued that Chickering's copying of the articles did not adversely affect the potential market for *The Journal of Catalysis* because the evidence at trial showed that there was no loss of sales of the journal as a result of the copying. However, the court concluded that the publisher lost the revenue that it could have made if Texaco had used the CCC to pay the publisher for a copyright license.[30]

Judge Jacobs of the Second Circuit dissented from the *Texaco* opinion. He wrote that the majority erred in holding that Chickering's actions did not constitute fair use. The main focus of the dissent was on the majority's premise that the CCC was a "market" for the original work. The dissent pointed out that the CCC was not a market unless court decisions made it a market:

> In this case the only harm to a market is to the supposed market in photocopy licenses. The CCC scheme is neither traditional nor reasonable; and its development into a real market is subject to substantial impediments. There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument that Texaco presents: but, under the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed. At present, only a fraction of journal publishers have sought to exact these fees. I would hold that this factor decisively weighs in favor of Texaco, because there is no normal market in photocopy licenses, and no real consensus among publishers that there ought to be one.[31]

Several aspects of the *Texaco* decision caused a sensation. In response, the Second Circuit issued two amended opinions that stated that no single element of the fair use test is more important than the other elements, backing away from the statement in the original opinion that the fourth factor was most important.[32] The court also limited its holdings to "systematic copying."[33]

Application to Army Intelligence Users

Almost all Army uses of copyrighted material for intelligence purposes fall within the fair use doctrine. Five examples demonstrate Army applications of the doctrine. For many years, the Defense Intelligence Agency (DIA) circulated a daily classified intelligence bulletin called the *Early Bird*, which often contains photocopies of articles and photographs from periodicals. The *Early Bird* is now distributed electronically. The DIA has taken the position that the reproduction of the material, for limited distribution within the intelligence community, is fair use. Similarly, when the United States became increasingly involved in the Balkans, several intelligence agencies produced handbooks for commanders and soldiers, which contained copies of copyrighted material relating to Yugoslavian forces. Some of the handbooks were not classified, but were to be used "For Official Use Only." The proponents of the handbooks did not obtain permission to reproduce the copyrighted material from the copyright holders. In 1997, NGIC, the Army activity responsible for analyzing foreign ground-warfare equipment and organizations and disseminating their analyses to war fighters, sought permission from the Chinese to reproduce photographs that originally appeared in certain Chinese military magazines. In 1998, NGIC sought permission to photograph line drawings of Russian military equipment that

26. *Id.* at 898.

27. *Id.* at 893. The general rule is stated in *New Era Publications v. Carol Publishing*, 904 F.2d 152, 157 (2d Cir. 1990).

28. Wagoner, *supra* note 12, at 198.

29. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).

30. *American Geophysical Union*, 37 F.3d at 899.

31. American Geophysical Union v. Texaco, 60 F.3d 913, 937 (2d Cir. 1995) (Jacobs, J., dissenting).

32. *Id.* at 913.

33. *Id.* at 916.

appeared in a Russian-owned military magazine. Lastly, in 1999, NGIC sought permission to reproduce in the classified NGIC journal a news photograph that originally appeared in *The Washington Post*. In each case, NGIC reached the conclusion that the reproduction of this material was fair use, although NGIC obtained prior permission from the copyright holders to reproduce the material.

The fair use doctrine applied to all of these situations. Three common elements of these situations are that: (1) an Army intelligence agency was seeking to use an image; (2) the image was to be used in a classified intelligence document with limited distribution; and (3) the analyst sought to use the image to illustrate his conclusion and not merely reproduce the image without comment.

The use of images such as these are well within the fair use doctrine for a number of reasons, each of which is an independent justification for the Army's reproduction of the material.[34]

First, the purpose and character of the use is beneficial to the public and is not prohibited by the Copyright Act. Most Army intelligence publications and products are classified and are intended for official use by government employees. Army intelligence publications are produced to provide intelligence for national security decision-makers. For this reason, Army intelligence agencies' use of copyrighted material is similar to the fire maps in the *Key Maps* case or the reproduction of material in legislative documents. The Army intelligence agencies' use of copyrighted material in an intelligence document, like the fire marshal's use of the map, is transformative. The fire marshal used the original map as a base but added additional information to the map, transforming its value. Similarly, Army analysts' use of copyrighted material as a source of intelligence merges the copyrighted material with other information, and produces an intelligence product that is different from the original copyrighted material. The material is for a "legitimate, fair, and reasonable purpose," namely national security intelligence. Moreover, intelligence must be fresh to be valuable. If Army intelligence activities were required to obtain copyright permission from the copyright owners of every piece of copyrighted material that an Army analyst wished to use, a copyright owner who did not wish to give permission to the Army could preclude intelligence production. Thus, it only makes sense that the Army may use most copyrighted material without permission.

Army purchase of copyrighted material may also have security implications. For example, intelligence analysts may seek a photograph of a particular individual or weapon, which the United States does not have the means to obtain without copying the photograph from a commercially-produced publication. If the Army has to obtain a license to reproduce the photograph, the Army will implicitly reveal that it does not have an independent source of the intelligence—from human intelligence assets, for example—and compromise the security of its intelligence system.

Second, the extent of copying by Army intelligence agencies is limited. Army intelligence activities do not normally copy entire books or articles. Usually, an analyst merely wishes to use a photograph or copy a portion of an article. The limited reproduction of copyrighted material constitutes fair use, under the express language of the statute.

Third, like the fire marshal's use of the Key's map, the Army's use of copyrighted material is not of a commercial nature because the distribution is not in competition with the copyright owner but is solely for internal purposes which are related to the discernible public interest in military intelligence. The Army does not distribute books, photographs, maps, diagrams, or any of the copyrighted material that it reproduces in its intelligence products to the general public. Army intelligence products are classified, at least "For Official Use Only," which by definition precludes their general distribution; they are distributed in limited quantities; and they are produced for specific military intelligence purposes. In the vast majority of instances, Army reproduction of copyrighted material will not have an adverse impact on the copyright owner's ability to sell his material in the market. For example, the use of a photograph from a foreign language military publication will have no effect on the market for the publication, which consists of foreign language readers. Similarly, the Army use of a news photograph will not adversely affect sales of the newspaper in which the photograph appeared–the newspaper is normally no longer sold after the day of publication. It follows that the reproduction of any other material that is no longer available in the marketplace would clearly be fair use because the reproduction would have no negative effect on the market for the copyrighted material.

There are only a limited number of situations where Army intelligence agencies' use of copyrighted material would be copyright infringement and the test of infringement will often be the second fair use factor—the "amount and substantiality" of the copying. An example would be the copying and distribution of an entire publication. This would not be fair use because it is merely "systematic" copying and the same result could be achieved by merely buying additional copies of the journal and distributing them. On the other hand, if the publication is no longer available for purchase and the only means of disseminating the information is copying, then the copying would constitute fair use. Copying of portions of a publication, even substantial sections of a publication, would constitute fair

34. Memorandum from Randolph D. Moss, Acting Assistant Attorney General, subject: Whether Government Reproduction of Copyrighted Materials Invariably is a "Fair Use" under Section 107 of the Copyright Act of 1976 (30 Apr. 1999) [hereinafter Moss Memorandum] (providing the most recent authoritative guidance from the Justice Department's Office of Legal Counsel (OLC), which is responsible for providing counsel to the executive branch of the government). The OLC concluded that government use of copyrighted material is not per se fair use, but concluded that most government uses of classified material will fall within the fair use exception. *Id. See generally* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1989); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985).

use because the copying is "transformative"–it changes the packaging of the original in a way which makes it more useful for the user.[355]

Fourth, the Army's legal position is strong, in the unlikely event of litigation. No legal authority suggests that the Army would be held liable for copyright infringement for reproduction of material for intelligence purposes. The Court of Claims has jurisdiction over copyright infringement claims against the Army, and the court did not hold NIH or NLM liable in *Williams & Wilkins*. *Williams & Wilkins*, which involved the systematic reproduction of publications, supports the conclusion that the limited copying done by the Army is fair use because it is not nearly as extensive or egregious as the actions of the NIH and NLM, yet their actions were held to be fair use. The *Texaco* decision has stimulated increased attention to copyrights by copyright managers, but the holding in *Texaco* is only applicable to for-profit companies, which the Army is not; it is contradicted by *Williams & Wilkins* in the government context; and the Second Circuit seems to have backed away from its own decision.

The most problematic copyright issues faced by the Army would be the copying of photographs, drawings, and text from private publishing organizations such as Jane's or from photo houses which are in the business of selling photographs. The use of photographs from photo houses is the most difficult issue, because the photographs, like the map in *Key Maps*, are use-neutral. The only thing that the photo houses sell is an image, which could be used for any purpose. When an Army intelligence agency obtains a photograph, the intelligence activity does not transform the photograph into a different product. However, the photograph is treated as a *source of intelligence* and does not distribute the photograph to end-users without an explanation that the photograph is merely one source of intelligence that contributes to the analyst's conclusion. In this sense, the use of the image is national security intelligence, which is of sufficient public benefit that the image probably constitutes fair use.[36] In the case of Jane's, Jane's may sell its information in the same market that Army intelligence activities serve with their products. It may appear that the market for Jane's products would be diminished by substantial Army copying of images and information from Jane's publications. However, Army products almost always transform the general information from sources like Jane's into specific military intelligence for decision-makers. Thus, Army intelligence agencies' use of images an information from Jane's, even without the payment of royalties, probably constitutes fair use.

In fact, the Army's overzealousness in seeking copyright licenses may be counterproductive, as well as unnecessary. The Army's use of copyrighted material will almost never reduce the sales of the original copyrighted material in the market for which it was intended to be sold. However, if the Army continues to pay royalties for many uses of copyrighted material, it may create a market for license fees. If the Army customarily pays royalties in that market, and does not assert fair use for its use in most cases, and then asserts fair use in the future, a court, like the majority in *Texaco*, may hold that it denied the copyright holder the revenues it could have made in the royalty market that the Army produced in the first place.[37]

Moreover, the Army is acting in good faith in the application of its copyright policy, a factor which the *Key Maps* court recognized as an element of fair use. *Army Regulation 25-30* is a clear statement of intention to follow the Copyright Act. The Army does not allow individuals to make copyright decisions, but requires the copyright manager to review each copyright decision. Army intelligence agencies have repeatedly sought counsel regarding copyright issues. As long as the Army continues to follow the policy of *AR 25-30*, it will have demonstrated good faith in an effort to comply with the copyright laws.

Adherence to the law does not dictate the payment of royalties for every use of copyrighted material. Rather, the principles of the fair use doctrine, which will usually be applicable to Army use of copyrighted material for intelligence purposes, should be applied by copyright managers at intelligence activities in making their copyright decisions, prior to the decision to obtain a copyright license or pay royalties to the owner of the copyrighted material.

---

35. *See id.* at 7.

36. On the other hand, the Army will often need to purchase the original image from the photo house so that it can be included in the publication. The Army would be required to pay for the image in that situation, but there is a difference between (1) purchasing an image, and (2) obtaining the right to reproduce and distribute the image.

37. *See* Moss Memorandum, *supra* note 34, at 5.