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Copyright Protection for Writers Employed by the Federal Government

COPYRIGHT PROTECTION FOR WRITERS EMPLOYED BY THE FEDERAL GOVERNMENT*

The United States Government engages in the preparation, processing, and printing of written materials on an enormous scale.[1] Much of the material it prints originates through the hired efforts of government personnel, and the Government undoubtedly is the largest single employer of writers in the country. The Government also publishes from other sources—from the limitless realm of copyrighted and uncopyrighted materials produced by persons not acting within the paid scope of government employment. From whatever source it publishes, the Government has no fear of being sued for infringement of copyright since the shield of sovereign immunity in this area still remains unpierced.[2] In exchange for the privilege of freely publishing whatever it wishes, the Government may be considered to have given a corresponding privilege to the public at large, i.e., the privilege to republish freely "any publication of the United States Government." This privilege exists by virtue of section 8 of the Copyright Law of 1947 which states that "no copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof . . . ."[3]

Manifestly, it would not be a fair policy to permit publication of copyrighted materials by the Government to destroy the copyrights previously existing on such materials, and Congress recognized this by annexing a proviso to section 8 specifically precluding any "abridgment or annulment" of a copyright holder's rights and privileges when his copyrighted material is published or republished by the Government.[4] However, the section says nothing regarding the rights and privileges of the person whose uncopyrighted work is published by

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1. It has been estimated that in a recent average year the total number of copies of all classes of Government publications exceeded thirteen billion. Note, 24 Geo. Wash. L. Rev. 423 (1956).

2. 61 Stat. 652 (1947), 17 U.S.C. § 8 (1958). See Lanman v. United States, 27 Ct. Cl. 260 (1892). See also Note, 24 Geo. Wash. L. Rev. 423, 425 (1956).

3. 61 Stat. 652 (1947), 17 U.S.C. § 8 (1958). This section is a re-enactment of § 7 of the Copyright Act of 1909, with a slight modification not pertinent here. Another prohibition against copyrighting of Government publications is contained in 28 Stat. 608 (1895), 44 U.S.C. § 58 (1958).

4. 61 Stat. 652 (1947), 17 U.S.C. § 8 (1958).

the Government. Another significant gap is that there is no statutory definition of the term "any publication of the United States Government," nor has any comprehensive judicial definition been offered.[5]

The federal employee who engages in original writing, either vocationally or avocationally, runs a double risk of being unable to acquire copyright protection of his material. By virtue of section 8 of the Copyright Law, the material he produces, if handled, duplicated or printed by the Government, may be held to fit the category of the uncopyrightable "government publication." Prediction of whether it will do so is made difficult by the definitional hiatus mentioned in the preceding paragraph. The need for a comprehensive and workable definition of "any publication" of the Government which would render prediction easier for both government and non-government employees has been adequately treated elsewhere,[6] and will not be further explored here. The second, and more substantial, risk of the government employee is that his literary products may be held to belong to the Government—and hence to the public to use as it will—because of the fact that their production in some way arose out of, or was connected with, the employee's paid duties or job functions. Should the government employee stand in any different position than a privately employed person with respect to the literary property rights in his original creations and compositions? If not, how close a connection between the material and the employee's paid duties should be required, as a general rule in both situations, to vest in the employer all property rights to the material? This note will examine these problems and others related thereto in the context of various fact situations which have arisen or may arise in the cases. What is believed to be the most rational and realistic approach toward a fair solution of the problems will be indicated.

The Copyright Law provides that its protection is available to "the author or proprietor of any work made the subject of copyright by this Act. . . ."[7] That author or proprietor includes the employer of an author in the case of "works made for hire" is specifically provided by section 26.[8] It is therefore clear that the employer of a person hired to create specific copyrightable materials has the exclusive right to copyright such materials when they are produced.[9]

There seems to be no doubt that the Government could, if it wished, assert its prerogative as an employer under the act and claim the

5. See Howell, The Copyright Law 42 (2d ed. 1948).

6. Note, 24 Geo. Wash. L. Rev. 423, 440-44 (1956). See Ball, The Law of Copyright and Literary Property § 23 (1944); Nicholson, Manual of Copyright Practice 143 (1945).

7. 35 Stat. 1077 (1909), 17 U.S.C. § 9 (1958).

8. 35 Stat. 1087 (1909), 17 U.S.C. § 26 (1958).

9. Ball, The Law of Copyright and Literary Property § 81, at 182 (1944).

right to copyright all of its "works made for hire." In England, Parliament has secured to the Crown the privilege to copyright these and other classes of government documents.[10] Authorities in this country have expressed the belief that our own Government could act similarly if it so desired.[11] As a matter of practice and policy, however, our Government has not exercised its power to claim a monopoly on its documents or published materials, with one very limited exception in the case of certain publications of the Postmaster General.[12] And, as previously indicated, Congress has by section 8 of the Copyright Law broadly forbidden the copyrighting of "any publication of the United States Government."[13] The policy reason underlying the Government's reluctance to acquire copyrights lies in the feeling that the public-at-large is entitled to make whatever use it desires of materials and publications produced at government expense, inasmuch as the Government is supported by the people.[14] Apparently, Congress felt that this interest of the public outweighs any need to prevent possible abuses which may occur through distortion, misquotation or excessive pricing of government materials when they are privately reproduced.

Since the Government does not obtain copyrights in its written materials, thus placing them in the public domain so far as they may be accessible to the public, the government employee who engages in original writing which is in some way connected with his paid job activities faces the distinct possibility that he may be denied any right to prevent free use and reproduction by the public. This possibility exists, it must be noted, independently of the "Government publication" test of section 8 of the Copyright Law, by the mere fact of the master-servant relationship. For the premise seems undisputed that the master of the public servant is the public, not the Government as a separately existing entity.

The question therefore arises whether the government employee should be considered to possess the same rights and privileges regarding his literary products as does a privately employed person. The test applicable in the instance of a privately employed person is not altogether clear and undisputed in all situations, but in general may be said to depend upon whether the material in question was produced

10. Crown Copyright Act of 1911, 1-2 Geo. V, ch. 46 § 18. See Copinger, Law of Copyright ch. VI (6th ed. 1927) for general discussion of "Crown Copyrights."

11. Drone, Law of Property in Intellectual Productions 162, 164 (1879); Note, 24 Geo. Wash. L. Rev. 423, 433-37 (1956).

12. See 17 U.S.C § 8 (1958).

13. See note 3 supra.

14. See discussion of policy factors both for and against Government obtainment of copyrights in Note, 24 Geo. Wash. L. Rev. 423, 433-40 (1956).

as an essential part of the employee's paid duties,[15] or was called for expressly or impliedly in the contract of employment;[16] if so, the employer is vested with the literary property rights in the material, to the exclusion of the employee.

In considering the positions of both the government employee and the private one, a ready classification may be made according to the capacity in which the material was produced. At one extreme, it may have been produced in the employee's paid capacity, as the very thing that he was hired and paid specifically to do. Here there appears to be no conceivable basis upon which to distinguish the government employee from the private one. There is perhaps a theoretical difference between the positions of the Government and a private employer in that the latter will in most cases obtain copyright protection of the material for which he has paid, whereas the Government will not do so in any case. But certainly this does not change the picture in any way respecting the relative positions and rights of the person employed by the Government and the one employed privately. In no discovered case has it been doubted that if an employee is hired and paid to produce the material in question, he thereby fully surrenders any right to seek extra compensation by claiming property rights in the material. Such was the holding in the early case of *Heine v. Appleton*.[17] The plaintiff was an artist who was employed by Commodore Perry to accompany the famous expedition to Japan. He was hired with the explicit agreement that whatever pictures or drawings he might produce during the journey would belong solely to the Government. He prepared numerous drawings which were printed into a government report of the expedition. Since the drawings were made pursuant to the terms of the employment contract, they were held to be government property in which plaintiff could assert no claim under the copyright law or otherwise.

Obviously, it should be of no consequence whether the employer, either government or private, chooses ever to publish the material

15. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1940); Werckmeister v. Springer Lithographing Co., 63 Fed. 808 (S.D.N.Y. 1894); Brown v. Mollé Co., 20 F. Supp. 135 (S.D.N.Y. 1937); Roberts v. Myers, 20 Fed. Cas. 898 (No. 11,906) (C.C.Mass. 1860); Little v. Gould, 15 Fed. Cas. 604 (No. 8,394) (N.D.N.Y. 1851).

16. Paige v. Banks, 80 U.S. (13 Wall.) 608 (1872); Nat'l Comics Publications v. Fawcett Publications, 191 F.2d 594 (1951); Cohan v. Richmond, 19 F. Supp. 771 (S.D.N.Y. 1937); Lawrence v. Dana, 15 Fed. Cas. 26 (No. 8,136) (C.C.Mass. 1869); Edward Thompson Co. v. Clark, 109 N.Y.S. 700 (Sup. Ct. 1904); Lawrence v. Afialo, [1904] A.C. 17, 1 B.R.C. 314. See Colliery Eng'r Co. v. United Correspondence Schools Co., 94 Fed. 152 (S.D.N.Y. 1899). Cf. W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928) (semble).

17. 11 Fed. Cas. 1031 (No. 6,324) (S.D.N.Y. 1857).

produced by the employee, so long as the latter's compensation does not depend upon it. This, of course, is not to say that an employee could not acquire full property rights by way of donation if the employer chose to make him a gift of the material, over and above his regular compensation. The same would be true regardless of whether the person was a government or a private employee.

The private master-servant test is applicable a fortiori at the opposite extreme where the government employee brings the material into being solely on his own time and at his own expense with no connection whatever between the subject matter of the material and his paid job functions. Here it is indisputable that any individual should enjoy the fruits and benefits of his voluntary, non-salaried efforts regardless of whether he works for the Government or a private employer. To rule otherwise could only result in stifling rather than stimulation of individual initiative toward creativity.[18]

More problematical are cases which lie in the "gray area" between the extremes of material produced wholly within the scope of the employee's paid duties and material produced wholly outside such scope. For example, the material might have been partially or wholly produced during working hours, or its subject matter might bear some relationship to the employee's job activities, or it might have been produced with both of these factors present. Should cases involving government employees require a more stringent test regarding literary property rights than ones involving persons privately employed?

A recent case answering this question negatively is *Public Affairs Associates, Inc. v. Rickover*,[19] decided by the United States District Court for the District of Columbia. The holding was that Vice Admiral Hyman G. Rickover of the United States Navy, who had written and delivered public speeches and distributed copies of them to certain persons and groups,[20] retained exclusive property rights in his speeches so that he could secure copyrights and prevent plaintiff and others from freely reproducing them. Plaintiff was a private publishing firm which sought a declaratory judgment to hold the speeches to be in the public domain. The main argument of plaintiff was based on the premise that if a government employee's literary products are closely enough connected with his official duties, such products are

18. See Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601, 603-04 (1959); Mayberry v. Newell, 200 Iowa 458, 204 N.W. 413 (1925).

19. 177 F. Supp. 601 (1959).

20. This distribution was held to be only a limited publication which did not constitute an abandonment of literary property or a dedication to the public. On this subject, see American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907). See also Ball, The Law of Copyright and Literary Property § 60 (1944); Howell, The Copyright Law 56-61 (2d ed. 1948).

in the public domain by virtue of the employment relationship.[21] It was contended that the speeches were outgrowths of the Admiral's government activities, and were in part prepared on "government time" with the aid of government facilities. Apparently, a government secretary assisted in preparation of the manuscripts, and government duplicating machines were used to prepare the copies.[22] Some of the speeches pertained to subjects related to the Admiral's official job position in the atomic submarine program, while other speeches were wholly unrelated to his official duties, being concerned with problems in education.

In deciding against plaintiff, the court did not distinguish the speeches which pertained to the Admiral's official duties and those which did not. Nor was any importance attached to the facts regarding use of "government time" and facilities in preparation of the manuscripts and copies. If the Navy Department had wished to do so, it could have put a stop to such use "by regulations or other intramural action."[23] The court chose to place controlling force on the fact that preparation and delivery of the speeches were wholly voluntary efforts on Admiral Rickover's part, and "no part of his official duties."[24] It was noted that material produced by a government employee can be classified according to the capacity in which the employee produced it, i.e., either wholly within or wholly without the scope of his paid, obligatory job duties, or somewhere between those poles. Admiral Rickover's speeches were believed to lie in the intermediate category. The fact that the court considered the private master-servant test applicable throughout the whole range between the extremes is clearly shown by the following language:

> [H]is rights are not affected by the fact that he may be a Government officer or employee. In fact it is in the public interest for the Government to encourage intellectual development of its officers and employees, and to look with favor upon their making literary and scientific contributions. It is a matter of common knowledge that this course is followed by private industry.[25]

And similarly, "no one sells or mortgages all the products of his brain to his employer by the mere fact of employment. The officer or employee still remains a free agent."[26]

On the facts, the result obtained in the *Rickover* case seems unquestionably correct, if the court's rationale equating the positions of gov-

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21. 177 F. Supp. at 602.
22. Id. at 604.
23. Ibid.
24. Ibid.
25. Id. at 604-05.
26. Id. at 604.

ernment employees and privately employed persons is accepted as sound. The court pointed out that there was no prior appellate case as precedent which had decided the question presented, but felt that its view was strongly supported by the Supreme Court's ruling in the case of *United States v. Dubilier Condenser Corp.*,[27] a case involving a patent controversy. There two scientists employed by the United States Bureau of Standards had developed an original type of radio instrument while in the regular course of performing their official duties in a government laboratory with use of government tools and equipment. In upholding the scientists' rights to patents on the invention against the claim of the Government, the Supreme Court relied upon the fact that the scientists' employment was general, and the invention of the instrument was not the precise subject of their contract of employment.

The holding of the *Rickover* case is in accord with that in *Sherrill v. Grieves*,[28] decided in 1929 by what was then the trial court of general jurisdiction for the District of Columbia. This was a copyright infringement action growing out of the following facts. Plaintiff had been an army officer engaged as an instructor in an army school at Fort Leavenworth, Kansas. There was no suitable textbook for the course he taught, which was military topography. He prepared material for such a book during his leisure, off-duty hours and not as an incident to his instruction duties. Before he completed the book or obtained a copyright, a part of the material was reproduced in pamphlet form at a government printshop and distributed to students at the school, with the knowledge and permission of plaintiff. Later plaintiff brought the book out in complete form and obtained a copyright. Defendant challenged plaintiff's right to copyright the part of the book reproduced in the Fort Leavenworth pamphlet. The court, in holding that the Government's printing of the pamphlet did not divest plaintiff of any of his rights, said plaintiff was at that time like a professor at any private institution of learning, who is not obliged to reduce his lectures to writing; and if he does so, they do not become the property of the institution employing him.[29] Thus, the plaintiff was held to have been situated like a privately employed person who had not produced the material in question because of any of his duties or job obligations, in the same way that the court in the *Rickover* case identified the Admiral with a private employee.

A case which, although not departing from the private master-servant test, used a different approach from that of the *Rickover* and *Sherrill* cases and which obtained an opposite result was *Sawyer v.*

27. 289 U.S. 178 (1933).
28. 57 Wash. Law Rep. 286 (Sup. Ct. D.C.).
29. Id. at 290.

Crowell Publishing Co.,[30] decided by the United States District Court for the Southern District of New York. The facts are perhaps distinguishable in some minor particulars, but the basic question raised was the same. Plaintiff alleged that defendant had infringed his copyright in a map by reproducing the map without his permission in *Collier's* magazine, which was sold and distributed nationally. Defendant maintained that the map was in the public domain. Plaintiff had gathered data for the map while on a government mission to Alaska in his capacity as executive assistant to the Secretary of Interior. He was not sent for the purpose of gathering data for the map and did so of his own initiative. It did not appear whether he spent any government time in gathering the data. On his return to the United States, he directed a government employee named Wills to assist him in drawing the map and Wills did so on government time. The map was engraved and printed through facilities of the United States Geological Survey, and plaintiff applied for and received a copyright on it in his own name. Later he made a slight change on the original map by drawing red lines to indicate mileage distances between cities. He did not copyright the map as thus changed. With his knowledge and approval, ten thousand copies of the map as changed were printed at government expense by direction of the United States Highway Commission, and the map was also reproduced in a general government publication issued by the Department of Interior. These reproductions contained notices of plaintiff's copyright and credited him as the source.

Defendant's reproduction was of the map with the red lines added. However, the court did not base its holding in favor of defendant on the fact that plaintiff had failed to cover with copyright the map as changed, although it did say that it considered the map as reproduced in the Department of Interior publication to be a government publication and, as such, not subject to copyright,[31] The primary ground on which the decision was rested was that plaintiff brought the map into being while engaged in government service related to the map's subject matter, and had it produced on government time through use of government facilities. That this was the basis of the court's decision is made clear by the opinion's statement that plaintiff was not entitled to a copyright on *either* the map as originally drawn *or* as

30. 46 F. Supp. 471 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944). In the court of appeals decision affirming this case, Swan, J., obviously misinterpreted the finding and holding of the district court, in saying that the basis of decision was that the material in question was produced in the course of the plaintiff's duties. This was not the basis of the decision, as is shown more fully in the text following.

31. 46 F. Supp. at 473.

later changed.[32] The court considered quite significant that plaintiff's official duties were connected with the area centrally and chiefly depicted by the map (Alaska) and emphasized also that both the plaintiff and Wills were in the full time employ of the Government.[33]

There is no suggestion in the opinion of the *Sawyer* case that a government employee stands in any different position than a private employee with respect to literary property rights in his work. The point on which the opinion differs from the holdings in the *Rickover* and *Sherrill* cases is the degree or amount of connection required between the material and an employee's paid job functions to warrant a denial of copyright protection. The courts in *Rickover* and *Sherrill* believed an employee to be entitled to copyright protection in any material not produced by him as *the specific thing* which his duties required him to produce. The court in the *Sawyer* case felt that an employee has no claim to protection in any material he produces which bears a direct relationship in subject matter to his paid job activities. It should be noted that the *Sawyer* case also attached weight to the fact that government time and facilities were utilized in producing the material, whereas the *Rickover* case considered these factors to be of no material consequence whatever.[34] In the *Sherrill* case, only the use of government facilities to print the material after its production was involved, but the court clearly considered this inconsequential.

The weight of case authority in the private master-servant area is clearly in favor of the view adopted by the *Rickover* and *Sherrill* cases. The two cases cited by the court in the *Sawyer* case's opinion do not support the proposition for which they are cited, that "when an employee creates something *in connection with* his duties under his employment, the thing created is the property of the employer . . . ."[35] In the first of these cases, *Brown v. Mollé Co.*,[36] the employee was hired to create and direct a radio show for the Mollé Company. It was necessary for him to obtain a theme song for the program praising the sponsor's product, and he wrote such a song himself which was used on the program. The court held he was not entitled to a copyright on the song, since "where an employee creates something *as part of* his duties under his employment, the thing created is the property of the employer."[37] There is an obvious and important distinction between the phrases "in connection with" and "as part of." The latter

32. Id. at 473-74.
33. Id. at 473.
34. Note 22 supra.
35. 46 F. Supp. at 473. (Emphasis added.)
36. 20 F. Supp. 135 (S.D.N.Y. 1937).
37. Id. at 136. (Emphasis added.)

clearly connotes a condition of integrality, whereas the former expresses only an idea of relationship or bearing. The same words were used in the second of the cited cases, *United States Ozone Co. v. United States Ozone Co. of America*,[38] which held that a book prepared by an employee, though registered in his name, was the property of the employer, because it was prepared *"as part of* his duties under his employment."[39] It thus can be seen that these cases support the principle of the *Rickover* and *Sherrill* cases rather than that of the *Sawyer* case. The same can be said about virtually all of the other cases that have been found on the subject.[40]

Writers in the field of copyright law seem definitely aligned in favor of the view espoused by the *Rickover* and *Sherrill* cases. Ball states:

> An author who performs literary work for another under a contract of employment will not be deemed to have transferred his rights therein to his employer unless that is clearly the legal effect of the contract.[41]

Drone believed that no employer could become the owner of his employee's literary works not produced in the scope of the duties for which the latter is employed and paid.[42]

> The mere fact of employment does not make the employer the absolute owner of the literary property created by the person employed. Where there is no agreement or implied understanding that what is produced shall belong to the employer, it is clear that the latter acquires no title to the copyright.[43]

No expression of a belief to the contrary by any writer has been noted.

Even stronger support for this view appears to exist in the language of the Copyright Law itself. Section 26 states that the word "author" as used in the act "shall include an employer in the case of works made for hire."[44] This would seem to indicate that before an employer can be considered an "author" for purposes of claiming copyright protection under the act, there must have been a clear business understanding at the outset of the employment that the employee's paid duties would include production of the material in question, or that if any such material should be produced it would belong

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38. 62 F.2d 881 (7th Cir. 1932).

39. Id. at 887. (Emphasis added.)

40. See notes 15-18 supra.

41. Ball, The Law of Copyright and Literary Property 569 (1944).

42. Drone, The Law of Property in Intellectual Productions 259 (1879). Although Drone's treatise was published in 1879, it is "still often quoted on fundamentals." Howell, The Copyright Law 10 (2d ed. 1948).

43. Drone, op. cit. supra note 42, at 257.

44. 35 Stat. 1087 (1909), 17 U.S.C. § 26 (1958).

solely to the employer.[45] Under this view, the employer can take a simple step to obtain complete assurance that whatever an employee produces in the way of literary property during the term of employment will be the property of the employer.

Analogous cases in the field of patent law dealing with employees' rights to their inventions, such as that of *United States v. Dubilier Condenser Corp.*[46] cited by the court in the *Rickover* case, weigh heavily in favor of the view that an employee should have exclusive property rights as against his employer in his creations not produced as an essential part of his paid duties, in the absence of a clear agreement to the contrary existing prior to the creations.[47] Use of the employer's time and facilities in making an invention has been considered of little or no significance.[48] Courts in these cases have stressed the desirability from a policy standpoint of stimulating and rewarding individual efforts toward creativity. The court in the *Rickover* case considered this to be a desirable policy also in the field of copyrights,[49] and certainly such policy appears consistent with the fundamental purpose of the Copyright Law, to encourage, promote and protect the literary contributions of persons.[50]

In view of all the above considerations, it appears conclusive that the rationale of the *Rickover* and *Sherrill* cases is the most just and reasonable one for determination of the literary property rights of government employees, and that the position taken by the *Sawyer* case should be disregarded. The policy reason mentioned in the *Rickover* case, i.e., the necessity and importance of encouraging individuals to make literary and scientific contributions, would seem sufficiently strong of itself to warrant this conclusion. An additional reason, perhaps of equal force, is that under the *Sawyer* view there exists no definitely ascertainable criterion by which to determine when

45. See Howell, op. cit. supra note 42, at 51-52.

46. 289 U.S. 178 (1933).

47. Dovel v. Sloss-Sheffield Steel & Iron Co., 139 F.2d 36 (5th Cir. 1943), cert. denied, 322 U.S. 740 (1944); Houghton v. United States, 23 F.2d 386 (4th Cir. 1927), cert. denied, 277 U.S. 592 (1928); Kay-Scheerer Corp. v. American Sterilizer Co., 5 F. Supp. 273 (E.D.N.Y. 1932); Amdyco Corp. v. Urquhart, 39 F.2d 943 (E.D.Pa. 1930), aff'd, 51 F.2d 1072 (3rd Cir. 1931), cert. denied, 284 U.S. 689 (1932); C. V. Mosby Co. v. Jones, 303 Ill. App. 234, 24 N.E.2d 873 (1940); Nat'l Dev. Co. v. Gray, 316 Mass. 240, 55 N.E.2d 783 (1944); Gear Grinding Mach. Co. v. Stuber, 282 Mich. 455, 276 N.W. 514 (1937); Atlas Brick Co. v. North, 2 S.W.2d 980 (Tex. Civ. App. 1928); Barlow & Seelig Mfg. Co. v. Patch, 232 Wis. 220, 286 N.W. 577 (1939).

48. See Solomons v. United States, 137 U.S. 342 (1890) and cases cited in note 47 supra.

49. 177 F. Supp. at 604-05.

50. U.S. Const. art. I, § 8; H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909); Ball, The Law of Copyright and Literary Property § 5 (1944).

a government employee would ever be entitled to obtain copyright protection of his literary products, except in rare instances when such products have absolutely no bearing whatever upon his official duties, and possibly also when not a minute of government time was used in any way in the production of the material. It will be recalled that in the *Sawyer* case the court looked to whether the subject matter of the employee's product was "connected with" his job activities.[51] Does this mean any kind or degree of connection, or only a "close" connection? Avocational writers frequently choose subjects in some way connected with or related to their regular occupations. A prison warden might write an article or deliver a speech on prevention of escapes. Any government employee might keep a diary or journal of his job activities and experiences. A military band director might compose a march. A lighthouse keeper who may be technically "on duty" twenty-four hours a day might prepare charts or maps of coastlines as a mere means of whiling the time away. In all of these hypothetical instances, no one could seriously dispute that the employee should be entitled to full protection and enjoyment of the fruits of his purely voluntary efforts. And yet, there is no doubt that in each case a fairly close connection exists between the job and the material produced.[52] Under the view of the *Sawyer* case, such an employee would have no way of knowing whether he would be able to secure and enjoy copyright protection if any member of the public should happen to challenge his right.

Under the test applied in the *Rickover* and *Sherrill* cases, no such difficulty is presented. The material will be wholly the employee's to own and enjoy unless it can be shown to have been produced as a very thing that the employee was obliged to produce in the course of performing his paid job functions.

It might be argued that the view of the *Rickover* and *Sherrill* cases, if followed, would encourage government employees to shirk their paid duties and use government time and facilities to advance their own interests, to the detriment of the public. In this regard, it is appropriate to return to the inquiry of whether government employees should be treated differently than privately employed persons in the area of literary property rights. They have not been treated differently in the patent law area and no case seems even to have

51. See text at note 35 supra.

52. The opinion in the Rickover case cites a number of actual examples involving noted government officials who have produced literary works dealing with their official duties and job functions. The diaries of Gideon Wells and Harold L. Ickes are mentioned. Also noted is Admiral T. Mahan's classical treatise on "The Influence of Sea Power Upon History" written while he was a professor at the United States Naval Academy. In all of these instances, the books were published under private copyright. 177 F. Supp. at 605-06.

intimated that a different manner of treatment is called for in the copyright field. It would seem that there is even less reason for treating them differently in copyright law in view of the fact that making physical inventions customarily entails working with external objects while creation of literary property largely is accomplished by thought processes. No feasible method has yet been devised to prevent thinking of other things besides one's tasks while working. As indicated previously, the almost unanimous view of the cases involving privately employed persons has been in accord with the view of the *Rickover* and *Sherrill* cases. The court in *Rickover* noted, regarding use of government time and facilities, that the Government or the particular federal agency involved can effectively control the situation by appropriate regulations or intradepartmental action.[53] The court also noted that the Government had declined an invitation to appear in the action as amicus curiae, and thus it was inferable that the Government did not wish to assert any paramount title, or to claim that the literary property involved was in the public domain.[54]

In conclusion, the fact that a person is employed by the Government and is therefore a "public servant" surely does not mean that he is a slave or an indentured servant who has sold in advance all of his intellectual and creative products to the Government or the public, any more than a private employee has sold such products to his employer. It is submitted that no basis exists for distinguishing the positions of government and private employees with respect to literary property rights. Thus, in deciding cases involving the literary property rights of government employees, courts can and should look for guiding precedent to similar cases involving privately employed persons. *The Rickover* and *Sherrill* cases did this, and applied the test which is solidly backed by the weight of authority and by reason and justice as well. This test provides the clearest and most workable criterion available for determining whether an employee should be accorded copyright protection of his literary products, namely, whether the products were produced voluntarily and not as a part of the duties he was obliged to perform in the course of his paid employment.

53. Id. at 604.
54. Ibid.