FBI

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

FEDERAL GOVERNMENT

5 JUN 1978

BAB:IJ:MK:lac
145-12-2590

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Harold Weisberg v. U.S. Department of Justice (D. D.C., No. 75-1996).

TIME LIMITS

We have requested an extension to June 19, 1978 for transmitting the record to the court of appeals.

RECOMMENDATIONS

The Federal Bureau of Investigation recommends appeal.

I recommend appeal.

ISSUES INVOLVED

1. Whether photographs in the possession of a federal agency, as to which a third party owns the copyright, are "agency records" under the Freedom of Information Act.

2. If such photographs are agency records, whether they are exempted from mandatory public copying by Exemption 3 and/or 4 of the Information Act.

STATUTES INVOLVED

1. The federal copyright statute in effect prior to January 1, 1978 provided in pertinent part, 17 U.S.C. 2, 10 (1970 ed.):

197-1[illegible]

NOT RECORDED

6 JUN 9 1978

FILE-9

20 JUN 19 1978

§ 2. Rights of author or proprietor of unpublished work.

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

§ 10. Publication of work with notice.

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title [17 U.S.C. 19]; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor * * *.

2. The federal copyright statute in effect as of January 1, 1978, provides in pertinent part, 17 U.S.C. 102, 106, 301, 303, 304:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

* * * * *

(5) pictorial, graphic, and sculptural works[.]

§ 106. Exclusive rights in copyrighted works.

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies * * *[.]

§ 301. Preemption with respect to other laws.

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right in any such work under the common law or statutes of any State.

* * * * *

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978.

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. * * *

§ 304. Duration of copyright: Subsisting copyrights.

(a) Copyrights in Their First Term on January 1, 1978. -- Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured * * *.

3. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

§ 552(a)(4)(B).

On complaint, the district court of the United States * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. * * *

§ 552(b).

(b) This [Act] does not apply to matters that are --

* * * * *

(3) specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]

STATEMENT

1. On November 28, 1975, plaintiff Weisberg commenced this action under the Freedom of Information Act seeking among other things copies of all photographs in the possession of the FBI, from whatever source, taken at the scene of the assassination of Dr. Martin Luther King on April 4 and 5, 1968. During the course of this lawsuit the FBI was advised by its Memphis Office (in a memorandum of April 9, 1976) that that Office had been furnished (in late April, 1968) with 107 photographs of the crime scene taken at the vicinity of the Lorraine Motel by Life Magazine photographer Joseph Louw. Some of these photographs appeared in the April 12, 1968 issue of Life Magazine. The Memphis Office suggested that release of the photographs to Weisberg be initially cleared with the photographer or his employer (Time Inc.) (Att. 4, Weisberg aff.). Thereafter the FBI checked with Time, Inc. (through its Director of Editorial Services, Mr. Richard Seaman) and was advised by the latter that Time, Inc. had no objection to having the photographs viewed, "but would object to having them removed from FBI files or copies being made." Mr. Seaman stated that requests for copies should be directed to Time (Att. 5, Weisberg aff.). On the basis of this letter the FBI permitted Weisberg to view the 107 photographs. FBI Director Kelley advised Weisberg's lawyer that the photographs were the property of Time, Inc., that Time, Inc. had not granted authority to the FBI to release copies of the photographs, that extra copies should be requested directly from Time, and that the copies in the possession of the FBI were protected by Exemptions 3 and 4 of the Information Act (Att. 6, Weisberg aff.).

Weisberg then communicated directly with Time, Inc. requesting copies of the 107 photographs (Att. 8, Weisberg aff.). Time, Inc. responded, offering to provide 8" x 10" prints of each of the 107 photographs at its standard price of $10 per print, without reproduction rights. 1/ This

---

1/ Time provided Weisberg with "contact prints" of all 107 photographs to assist him in selecting which prints he wanted (Att. 18, Weisberg aff.).

letter further noted that book publication rights had been reserved by the photographer, Mr. Louw (Att. 10, Weisberg aff.). Weisberg did not agree to pay the price set by Time, and therefore pursued his attempt to obtain copies of the 107 photographs through his pending Information Act' lawsuit against the FBI. (The FBI's standard charge for reproducing non-exempted government photographs is $.40 per print).

The government moved for partial summary judgment, arguing that its copies of the 107 photographs, as to which Time, Inc. owned the copyright, were not subject to public copying under the Information Act. The government attached to its motion a letter of September 13, 1977 from the associate counsel for Time, Inc. (Harry Johnston, Esq.). This letter stated:

> Time Incorporated is the copyright proprietor, in trust for the photographer, of the 107 photographs taken by Joseph Louw in Memphis, Tennessee, in April of 1968. The photographs pertain to events and circumstances surrounding the death of Martin Luther King, Jr., and were lent to the FBI in connection with its investigation into the King assassination. At no time have any rights to reproduce or copy the photographs been granted to the FBI.
>
> * * * * *
>
> Time, Inc. has offered, in correspondence with Mr. Weisberg, to make as many prints of any of the photographs as he desires at our standard print charge. This is the same rate as any customer for Time, Inc. prints would be charged.
>
> * * * * *
>
> For the reasons reflected in this letter, Time, Inc. opposes any copying of the Louw photographs by the FBI.

In its memorandum in support of summary judgment the government argued not only Exemptions 3 and 4, but also that materials subject to a third party's copyright were not "agency records" under the Information Act. Plaintiff filed his own motion for summary judgment.

2. In an opinion issued on February 9, 1978, the district court denied the government's motion for summary judgment and granted plaintiff's motion. The court rejected the government's argument that the photographs were not "agency records." The court observed that law enforcement materials obtained from the public had always been considered agency records.

The court also rejected the government's argument that Exemption 3 applied. On this matter the court held that 104 of the 107 photographs qualified merely for "common law" copyright protection, and were thus not exempted "by statute" under Exemption 3. As for the remaining 3 photographs, which the court considered to be subject to statutory copyright, the court held that the plaintiff's pledge to use the photographs for "scholarly" purposes qualified as a "fair use"; that such use could be asserted in an Information Act suit; and, hence, that there was no exemption of the photographs under the copyright statute in this particular case.

Finally, respecting Exemption 4, the court considered that the photographs were not "commercial information" under prior Circuit precedents requiring a narrow construction of the exemptions.

DISCUSSION

We believe that information in the possession of the government, as to which a third party holds a copyright, should be deemed not subject to mandatory public copying under the Freedom of Information Act. Whether this result is reached by holding that such information does not constitute an "agency record," or by holding that it is exempt from the Information Act under either Exemptions 3 or 4, is not critical. The important point in this case of first impression is that the Information Act should not be applied so as to diminish copyrights of third parties, simply because the government happens to possess such materials.

1. One way to reach this result is simply to hold that copyrighted materials in the possession of the government are not "agency records" under the Information Act. The Ninth Circuit adopted this approach in dealing with an analogous problem in SDC Development Corp. v. Mathews, 542, F.2d 1116 (C.A. 9, 1976). In that case the National Library of Medicine Act authorized the Library to charge for providing the public with medical literature data. The Library's charge forsale of its entire computer-stored data bank was $50,000, a charge reflecting the Library's substantive expenses in developing the data. Plaintiff sought the same material at a simple reproduction charge of $500, on the basis that the data constituted "agency records" under the Freedom of Information Act. The Ninth Circuit, in an effort to prevent emasculation by the Information Act of the substantive cost-recovery policy incorporated by Congress into the National Library of Medicine Act, held that the Library's stock-in-trade did not constitute agency records.

In this case the district court apparently assumed the government's position to be that "agency records" include only government-generated materials and does not include materials "submitted" to the government. If that was the government's argument it went too far. Obviously, agency records includes government-generated materials and also most items which are "submitted" to government. But "agency records" should not include copyrighted materials which are in the possession of the government. 2/ Copyrighted materials are hardly what Congress intended the government to copy for the public when it enacted the Information Act. There is no sound reason why the interests of copyright owners should be diminished simply because the government is in possession of copyrighted materials. To avoid this result the term "agency records" in the Freedom of Information Act should be deemed not to encompass copyrighted materials in the possession of the government. To obtain copies of such materials the requestor should obtain them from the copyright holder, or its authorized dealers.

2/ A more familiar example would be a copyrighted book in a government library.

2. The same result can be reached by holding that copyrighted materials in the possession of the government are exempted from the Information Act by Exemption 3. This exemption excludes from the coverage of the Act matters that are "specifically exempted from disclosure by statute * * *." The copyright statute gives the copyright holder the exclusive right to copy materials subject to his copyright. 17 U.S.C. 106(1). This provision appears to be a "specific" enough statutory prohibition against non-holders of the copyright (including the government) 3/ from copying such materials for public dissemination. 4/

The district court's holding that 104 of the 107 photographs did not qualify for statutory copyright -- since these photographs (previously unpublished) were allegedly subject to a mere "common law" copyright -- may have been a viable argument prior to January 1, 1978, but it is not a viable argument thereafter. As of January 1, 1978, all common law copyrights, if they meet the substantive criteria of the new copyright law, 17 U.S.C. 102 (which these photographs do), are converted to statutory copyrights. 17 U.S.C. 301(a), 303. The district court was bound in a suit for an injunction to apply the federal law in effect at the time it rendered its opinion (February 9, 1978), and so must an appellate court. Cf. Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). Considering the law now in effect, all 107 photographs are "specifically exempted from disclosure by statute," under Exemption 3, if, as we have pointed out, the copyright statute qualifies as an Exemption 3 statute.

The district court held that Exemption 3 nevertheless did not apply (even as to the three photographs it viewed as being copyrighted by statute) because it viewed plaintiff's prospective scholarly use of the photographs to be "fair use." ("Fair use" is a traditional court-applied limitation on the copyright holder's exclusive rights, and is now codified in the new statute, 17 U.S.C. 107.) The district court considered that the "fair use" doctrine

---

3/ See 28 U.S.C. 1498(b) (government liable in damages for its infringement of copyrights).

4/ Copying or duplication of information is the normal method of disclosure to the public under the Information Act, and is what plaintiff wanted here. See 5 U.S.C. 552(a)(4)(A).

consituted a "discretionary" authorization for the government to disseminate copyrighted materials in appropriate cases, and for this reason it concluded that the government's reliance on the copyright statute in this instance did not meet the requirement of proviso (A) of Exemption 3. Proviso (A) of Exemption 3 limits the exemption to statutes which "require[.] that the matters be withheld from the public in such a manner as to leave no discretion on the issue[.]" The district court's reasoning appears to be wrong. The possessor of a copyrighted work has no discretion under the copyright statute to make copies of it for outsiders, even if the outsider intends to limit his use to fair use. The fair use doctrine permits the possessor of the copyrighted work to make "fair use" of it primarily for himself (or in-house); it does not permit copying for "fair use" of outsiders who would normally purchase from the copyright holder, or its dealers. 5/ Otherwise, the copyright holder's market could be completely undermined. See 17 U.S.C. 107(4). Thus, the photographs at issue here are subject to statutory copyright regardless of the use contemplated by particular members of the public, and are statutorily "exempted" from routine copying (for public dissemination), so far as the government is concerned under Exemption 3, without qualification. 6/

5/ See Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (C.A. 9, 1937). With respect to the practice of photocopy loans by libraries, see generally Williams & Wilkens Co. v. United States, 487 F.2d 1345, 1349, 1354-55 (Ct. Cl.), affirmed by an equally divided Court, 420 U.S. 376 (1975); 17 U.S.C. 108.

6/ Furthermore, leaving aside the interests of copyright owners it is not a proper function of the government to determine applicability of the Information Act based on asserted uses by individual requestors of information. The intended uses and needs of individuals requestors under the Information Act are immaterial to their rights under the Information Act -- all members of the public are treated the same for Information Act purposes. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). It cannot be assumed that all members of the public who request copyrighted materials in the possession of the government will limit their own use to "fair use". The government should not have to litigate this question on a case-by-case basis under the Information Act.

For these reasons, Exemption 3 should be held to exempt from the Information Act any materials in the possession of the government as to which a third party owns the copyright. Such materials should be deemed to be "specifically exempted from disclosure [i.e., from copying for public dissemination] by statute [the copyright statute]." The only copyright issue which should be subject to possible litigation in an Information Act suit would be whether the third party does own the claimed copyright. If the requestor of documents in the Information Act suit wants to litigate that question, he should be required to join the copyright claimant, and litigate the issue directly with it. No issue of "fair use" should be litigated in an Information Act suit. (That issue should be limited to suits exclusively between the copyright holder and the user.)

3. The Exemption 4 "commercial information" exemption should be deemed an alternative avenue for reaching the same result. To the extent that copyrights have commercial value to the holder, the copying of such materials by the government, for any member of the public requesting the same, obviously deprives the copyright holder of potential remuneration. Moreover, copyrighted materials should be deemed to be "privileged" from unconsented copying, within the meaning of Exemption 4.

4. In this case plaintiff never disputed that Time, Inc. held the copyright to all 107 photographs. That underlying fact was accepted by the district court. Plaintiff's suit should have been dismissed simply on the basis that the Information Act does not apply to copyrighted materials in the possession of the government, whether because such materials are not "agency records," or because they are exempted by Exemptions 3 or 4.

The district court's disposition of this case totally fails to recognize the legitimate interests of copyright holders, as protected by Congress. It treats the Information Act as a tool by which any individual member of the public may obtain copies of (upon an advance declaration of his "fair use" of) copyrighted materials in the possession of the government. Neither the Information Act nor the copyright laws contemplate such a result.

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be appealed.

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

By:
Irving Jaffe
Deputy Assistant Attorney General