

Response to NIST’s Green Paper Draft on “Return on Investment Initiative”

February 5, 2019

The Electronic Frontier Foundation, the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries submit these comments in response to NIST’s draft Green Paper on the “Return on Investment Initiative” (December 2018).

We are organizations that defend the public interest in access to information. We write to express our concern about Section E of the draft Green Paper, in which NIST recommends making government-produced software copyrightable. That recommendation appears to be based on misconceptions about the realities of both copyright law and collaborative software development. Moreover, the draft Green Paper ignores the widely accepted and long-standing reasons why federal government works are not subject to copyright—reasons that far outweigh any marginal and speculative boost to technology transfer that changing the default might bring. NIST should remove this recommendation from the Green Paper.

A. U.S. Government Works Have Never Been Copyrightable

Since the very beginning of copyright in the U.S., the law has maintained a basic principle that copyright does not extend to works of the federal government. In its very first copyright-related decision, the Supreme Court held that there could be no copyright in judicial opinions.¹ Expounding on that decision, the Court noted that judges “receive from the public treasury a stated annual salary . . . and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors.”² Congress codified that principle in the Copyright Acts of 1909 and 1978.³

This tradition reflects a practical understanding that allowing copyright in government documents necessarily means conferring the right to limit public access to those documents, such as by requiring users to agree to a license and pay a fee.⁴ The exclusion of federal government works from copyright, by contrast, preserves the public’s legal ability to access to the workings of government. That, in turn, helps ensure that the benefits of taxpayer-funded work are shared broadly.

¹ *Wheaton v. Peters*, 33 U.S. 591, 668 (1834).

² *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

³ 17 U.S.C. § 105.

⁴ *Code Revision Comm’n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1239–40 (11th Cir. 2018) (“[A]ny work of which the People are the constructive authors is intrinsically public domain material and is freely accessible to all so that no valid copyright can ever be held in it.”); *Am. Soc’y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 447 (D.C. Cir. 2018) (recognizing “a serious constitutional concern with permitting private ownership” of the text of government edicts).

This tradition also reflects the purpose of copyright, which is to provide an incentive for the creation of new artistic and scientific works.⁵ The work of federal employees is funded by taxpayers, and does not require the additional incentive of a legal right to limit access to that work.

The exclusion of federal government works from copyright is also consistent with open government laws and policies. In 2018, the President signed into law the Foundations for Evidence-Based Policymaking Act of 2018, which requires federal agencies to make their “data asset[s]” available to the public “in an open format” whenever possible.⁶ Likewise, a policy adopted by the White House Office of Management and Budget in 2016 called for government agencies to release software source code to the public.⁷

B. Copyright Misconceptions in the Green Paper

The draft Green Paper proposes an amendment to copyright law that would extend copyright to software written by federal government employees, breaking with the general prohibition on copyright in federal government works. The draft claims that doing so would spur transfer of valuable software to private firms. This conclusion appears to be based on several misconceptions.

First, the draft claims that the absence of copyright in government-written software causes a “lack of control over potentially sensitive code.”⁸ This is incorrect, because limiting access to “sensitive” materials is not a function of copyright law. When copyright holders bring infringement claims for the purpose of limiting access to newsworthy facts, or government materials, or to suppress criticism, courts permit the use to go forward under the fair use doctrine.⁹ Other legal mechanisms including nondisclosure agreements and trade secret law are better suited to the job of limiting access to “sensitive code.”

Second, the draft Green Paper misleadingly suggests that copyrighting government software can help “ensur[e] software code integrity and version control.”¹⁰ Deterring false statements about the provenance, integrity, authorship, or version of a software program are the domain of trademark and unfair competition law, not copyright. Many companies that permissively license the patents and copyrights in their software for royalty-free use by the general public nonetheless use trademark enforcement to maintain quality, integrity, and accurate

⁵ See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

⁶ Pub. Law No. 115-435 (2018), codified at 44 U.S.C. § 3502 *et seq.*

⁷ Federal Source Code Policy, M-16-21, <https://sourcecode.cio.gov/> (accessed February 2, 2019).

⁸ Draft Green Paper at 40, available at https://www.nist.gov/sites/default/files/documents/2018/12/06/roi_initiative_draft_green_paper_nist_sp_1234.pdf.

⁹ *Am. Soc’y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 453 (D.C. Cir. 2018); *Katz v. Google Inc.*, 802 F.3d 1178, 1182 (11th Cir. 2015); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 92 (2d Cir. 2014); *City of Inglewood v. Teixeira*, No. cv-15-0815-MWF, 2015 WL 5025839, at *12 (Aug 20, 2015).

¹⁰ Draft Green Paper at 41.

labeling.¹¹ The Green Paper alludes to free and open source (FOSS) software licenses that leverage copyright to create a legal requirement to preserve identifying information on a software program,¹² but FOSS licenses are not the only way, much less the best way in this instance, to create such a requirement.

Third, the Green Paper incorrectly states that “[t]here is a need for the legal right for government software works to be protected by copyright in order to grant public users an open source license that helps define the terms of use.”¹³ While the contributions of government employees cannot be copyrighted, a FOSS project that includes privately authored code may still be subject to copyright, which gives legal force to the FOSS license used, provided that the government contributions are not intended to create a work of joint authorship. There is, in short, no barrier to government employees participating in FOSS development. As for software projects that are entirely federal government works, while it is true that a FOSS license cannot be applied, the public domain status of the code accomplishes the core purpose of a FOSS license, which is to ensure that the code is free for re-use by others.

C. Any Benefit to Technology Transfer Is Outweighed by Harms to Transparency

The draft Green Paper makes no attempt to weigh the costs of a Section 105 carve-out against the alleged benefit to technology transfer. It should, because that balance tilts firmly against the proposal.

Turning first to the benefits, they are minimal. As the draft acknowledges, there are myriad other ways to deploy government-written software for commercial use. For example, contractual agreements can take the place of copyright for some uses.¹⁴ And software written by *contractors* at the request of an agency, including prime contractors like the Department of Energy laboratories, is subject to copyright.

Besides these, there are other ways that companies can use and profit from government-authored software. One way is for a private company to revise and build on the software code it receives from an agency. An analogous circumstance is the Android mobile operating system, which is proprietary commercial software derived from the open source Linux operating system.¹⁵ For government-authored code, while the original code remains in the public domain, privately offered revisions, updates, and expansions can nonetheless be copyrighted. Another

¹¹ For example, Mozilla Inc. makes its source code available under an open source license, but also prohibits use of its trademarks on modified code. Mozilla Trademark Guidelines, <https://www.mozilla.org/en-US/foundation/trademarks/policy/> (accessed Feb. 2, 2019). Wikipedia, a freely licensed encyclopedia, likewise limits use of its trademarks. Trademark Policy, https://foundation.wikimedia.org/wiki/Trademark_policy (accessed Feb. 2, 2019).

¹² See, e.g., Apache License 2.0, <https://www.apache.org/licenses/LICENSE-2.0.html> (accessed February 2, 2019).

¹³ Draft Green Paper at 41.

¹⁴ Draft Green Paper at 40.

¹⁵ Ryan Block, “Google is working on a mobile OS, and it’s due out shortly,” Engadget (Aug. 28, 2007), <https://www.engadget.com/2007/08/28/google-is-working-on-a-mobile-os-and-its-due-out-shortly/>.

way is for private companies to offer services related to the software, such as support and hosting.¹⁶ In each of these models, a transfer of the agency's expertise with the software can be as valuable (or more) than a transfer of copyright. Agencies can participate in technology transfer and earn revenues through training and partnering with the private sector, even if the underlying code is in the public domain.

On the other side of the ledger sits the harm to government transparency and public participation that will result from applying copyright to government works. Copyright claims by government bodies are often at odds with the principles of the Freedom of Information Act and other open records laws.¹⁷ And using copyright to limit the distribution of government-authored work runs counter to the recently enacted Foundations for Evidence-Based Policymaking Act of 2018.¹⁸ The line between software and data is often blurry. Applying copyright to government-authored software would create a perverse incentive to package government data in the form of software in order to limit its re-use. The GAO recognized this danger in its 1990 report on the issue, which is cited in the draft Green Paper.¹⁹

We recognize that some industry partners would prefer that agencies give them firm control over the use and distribution of government-authored software, and that they are willing to pay handsomely for this privilege. But copyright in government-authored software is not a requirement for technology transfer, and it would bring its own costs in the form of harm to government transparency. Section 105 of the Copyright Act represents Congress's sound judgment that government does not need the incentives of copyright law in order to do work in the public interest, and that conferring a private right to exclude the public from using that work is itself harmful.

¹⁶ Red Hat Inc. uses a similar business model, providing support for users of open source operating systems. *See* Red Hat Service & Support, <https://www.redhat.com/en/services> (accessed Feb. 2, 2019). IBM also has a significant business division devoted to open source support. Open Source at IBM, <https://developer.ibm.com/open/?lnk=ushpv1&lnk2=learn> (accessed Feb. 2, 2019).

¹⁷ *See, e.g., County of Santa Clara v. Superior Court*, 170 Cal.App.4th 1301, 1326 (2009) (county government's financial interest in restricting access to GIS maps did not overcome the presumption of public accessibility of government records).

¹⁸ Pub. Law No. 115-435 (2018), codified at 44 U.S.C. § 3502 *et seq.*

¹⁹ GAO Report, "Copyright Law Constrains Commercialization of Some Federal Software," (June 1, 1990), <https://www.gao.gov/assets/150/149097.pdf>.

We agree with the conclusion of the draft Green Paper that “uniform policy and procedures”²⁰ relating to federally developed software are beneficial. We recommend, however, that the proposal to amend Section 105 of the Copyright Act be removed.

Respectfully submitted,

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²⁰ Draft Green Paper at 42.