STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
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March 17, 2009

Mr. Mills:

You requested an opinion from this Office that addresses the following issue:

> Are videotapes taken at the Tennessee Valley Unitarian Universalist Church during a shooting that occurred on July 27, 2008, which are currently in the possession of either the Knoxville Police Department or the Knox County District Attorney, public records that have to be made available for inspection and/or copying pursuant to the Tennessee Public Records Act (hereinafter "TPRA") even though a copyright interest has been asserted in the videotapes?

While the TPRA is to be broadly interpreted so as to give the fullest possible access to governmental records, Tennessee Courts have long recognized that exceptions to the TPRA can be found in various laws, including the federal law. As such, it is the opinion of this Office that while the tapes fall within the definition of "public record," unless the display and/or reproduction and subsequent selling of the tapes can be characterized as "fair use," the federal copyright law creates an exception to the TPRA and thus the videotapes will not be available for inspection and/or copying.

I. Analysis

"Public record" is defined in Tenn. Code Ann. Section 10-7-503(a)(1) as the following:

> all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Additionally, Tenn. Code Ann. Section 10-7-503(a)(2)(A) says:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

The videotapes at issue fall within the definition of "public record" because they were received in connection with a criminal investigation. However, the question becomes whether or not an exception exists that would preclude the Knox County District Attorney and/or the Knoxville Police Department from allowing inspection and/or copying of the videotapes.

The Tennessee legislature's directive that the TPRA be "broadly construed so as to give the fullest possible access to public records" is found in Tenn. Code Ann. 10-7-505(d). In response to this directive, Tennessee courts have found that "even in the face of serious countervailing considerations," unless a specific exception exists, disclosure of public records is required. *Memphis Publishing Company v. City of Memphis*, 871 S.W. 2d 681, 684 (Tenn. 1994). The courts have recognized that the specific exceptions referenced above are not only found within statute, but are also found within the common law, Tennessee Constitution, administrative rules and regulations, rules of court, and federal law. *Swift v. Campbell*, 159 S.W. 3d 565, (Tenn. Ct. App. 2004).

In 1976, the federal government passed the 1976 Copyright Act (hereinafter referred to as "the Act"). The Act sets out that copyright is secured automatically upon creation of a work, for works created on or after January 1, 1978. 17 U.S.C. 302(a)(2007). The Act also places limitations on the way in which "original works of authorship fixed in any tangible medium" can be used, reproduced, displayed, and distributed. 17 U.S.C. § 102(a) and 17 U.S.C. § 106.

The overarching provision of the Act is found at 17 U.S.C. § 102(a) and reads as follows:

> **(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:
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> **(1)** literary works;
> **(2)** musical works, including any accompanying words;
> **(3)** dramatic works, including any accompanying music;
> **(4)** pantomimes and choreographic works;
> **(5)** pictorial, graphic, and sculptural works;
> **(6)** motion pictures and other audiovisual works;
> **(7)** sound recordings; and

> **(8)** architectural works.

17 U.S.C. § 102(a).

Courts have consistently held that videotapes, like photographs, are copyrightable works as long as the videotapes contain "originality" and the preparation of the videotapes requires "intellectual and creative input" from the author. *Los Angeles News Service v. Tullo*, 973 F. 2d 791, 794 (9th Cir. 1992). As with photographs, the "originality" of a videotape can be captured in a variety of ways, including the type of camera selected, the position of the camera, and the lighting selected. *Id.*

Generally, copyright in an original work of authorship created on or after January 1, 1978, exists immediately upon the creation of the work. 17 U.S.C. § 302(a). However, for an original work of authorship created before January 1, 1978, that was neither officially copyrighted nor in the public domain, copyright in the work existed as of January 1, 1978. 17 U.S.C. § 303(a). The Act does not require a work to be registered with the United Stated Copyright Office in order to be afforded copyright protection. 17 U.S.C. § 408(a). As such, immediately upon the creation of the videotapes at issue, the videographer became the copyright owner of the videotapes.[1]

In accordance with the Act, the owner of a copyright has the exclusive right to do and to authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
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> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
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> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

[1] According to the information provided by the City of Knoxville Law Department, the videographer was invited to the Tennessee Valley Unitarian Universalist Church to video record the services with the understanding the he could independently sell the video recordings to any member of the congregation desiring a copy at a later date.

Absent an exception, the videotapes at issue can be neither distributed, reproduced, nor displayed without the permission of the copyright owner. In the instant case, the owner of the copyright has asserted his copyright interest and through his attorney "specifically denied" consent for the City of Knoxville and/or the Knoxville Police Department to make the videotapes "available to the public for viewing, copying or otherwise."

Fair use is the only exception that impacts a copyright owner's exclusive right in a work. The Act says the following with regard to fair use:

> Notwithstanding the provisions of sections 106 and 106A 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 —
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

While the concept has long been recognized, courts have routinely refused to create a bright-line rule regarding what constitutes fair use of a copyrighted work and instead require a case-by-case analysis to be conducted. *Harper & Row Pulishers, Inc. v. National Enterprises*, 471 U.S. 539, 561(1985). Additionally, while the language in 17 U.S.C. § 107 specifies various purposes for which fair use is authorized, courts have held that those purposes are "illustrative and not limitative." *Id.* and 17 U.S.C. § 101. Courts have also found that while there are four specific factors that are to be considered when determining whether fair use exists, those factors are not exclusive and no one factor is more dispositive than the others. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 578 (U.S. 1994).

A court's holding in a case where copyright infringement has been claimed and the affirmative defense of fair use asserted is driven by the specific facts of the case and the court's application of the facts to the factors set out in 17 U.S.C. § 107. While a number of state courts have addressed fair use relative to claims against governmental entities who have either produced or refused to produce copyrighted material in response to a public records request, Tennessee courts have not. Additionally, because the facts and the application of the facts of each case differ substantially, it is impossible to say that what constitutes fair use in one state constitutes the same in another. *See Lindberg v.*

County of Kitsap, 133 Wash 2d. 729 (Wash. 1997)(Use of copyrighted engineering drawings in preparation of comment and criticism of proposed residential development was fair use.); *Zellner v. Cedarburg School District*, 300 Wis. 2d 290 (Wis. 2007) (Release of memorandum and CD listing Internet sites and containing copyrighted pornographic images that public high school teacher allegedly viewed on his school computer was fair use.); and *State ex rel. Rea v. Ohio Dept. of Education*, 81 Ohio St. 3d 527 (Ohio 1998)(Use of previously administered and copyrighted proficiency examinations and portions of a competency assessment exam for criticism, research, comment, or other educational/non-commercial nonprofit purposes is fair use.)

As such, this Office is unable to say whether a court would find that displaying the videotapes and/or reproduction of the videotapes at issue, in response to a public records request, constitutes a fair use so as to overcome a claim of copyright infringement.

Conclusion

For the above mentioned reasons, it is the opinion of this Office that while the tapes fall within the definition of "public record," unless the display and/or reproduction of the tapes can be characterized as "fair use," the federal copyright law creates an exception to the TPRA and thus the videotapes will not be available for inspection and/or copying. Again, because there is no bright-line rule as to what constitutes fair use, this Office is unable to say for certain whether or not displaying the videotapes and/or reproduction of the videotapes in response to a public records request is a fair use of the copyrighted works.

Please feel free to call either myself or Ann V. Butterworth at (615) 401-7891 if you have any further questions.

Elisha D. Hodge
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