Department of Administration

INFORMATION POLICY OFFICE

Minnesota Government
Information Access Council Report

Report on Minnesota Government Use of Copyright and Intellectual Property

Pursuant to 1995 Minn. Laws Chap. 259 Art. 1 Sec. 60

Minnesota Government
Information Access Council Report

Report on Minnesota Government Use of Copyright and Intellectual Property

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January 15, 1996

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Introduction

The Government Information Access Council (GIAC) was created by the legislature in 1994 to do the following:

- To improve public access to government information and democratic processes through the use of information technology; and,

- To help government become more efficient, effective, and responsive to the public through the use of information technology.

In addition, the 1995 State Legislature requested the Government Information Access Council to "report recommendations regarding the state and local government intellectual property to the legislature by January 15, 1996." And "to the extent feasible" prepare an inventory of state intellectual property.[1]

The purpose of this report is to present a comprehensive analysis of Minnesota government use of copyright. GIAC will release another report in February that covers a broad range of government information access principles designed for the electronic information age. GIAC anticipates that the principles report will be a useful and timeless guide for the legislature as they consider the increasingly complex nature of information in the context of technology.

The area of intellectual property includes copyright, patents, trademarks and service marks. While this report focuses on copyright, which is most directly related to the issues of access to and use of government information, patent, trademark, and service mark are briefly addressed at the end of this report. The Council proposes that government units may continue to exercise these other forms of intellectual property and that the issue of copyright be addressed more comprehensively by the legislature.

The issues surrounding the claim and exercise of copyright by government units in Minnesota are complex. After months of meetings and extensive research, it is clear

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[1] Laws of Minnesota for 1995, Ch 259, Art. 1, Sec. 60. Due to the enormity and complexity of the task to define intellectual properties as the issue applies to Minnesota government, it was not feasible for the Council to complete an inventory of state intellectual properties.

that there are no simple answers and that a new legislative framework that would juxtapose the Minnesota Government Data Practices Act with the Federal Copyright Act is necessary. In comparison with other states the depth and detail of the GIAC effort and the resulting proposal is unparalleled.

Prior to any discussion of recommendations presented by GIAC, some background on the Minnesota Government Data Practices Act and the Federal Copyright Act is necessary. These are the two essential frameworks that must be considered in the development of Minnesota's policy on government use of copyright.

What is the Minnesota Government Data Practices Act?

The Minnesota Government Data Practices Act (MGDPA), Minnesota State Statutes Chapter 13, is the primary information policy law in the state. Among other things, it protects the public's right to access public government data,[2] sets guidelines for access to public data including copying costs, establishes rights for individual data subjects, and establishes classifications of data as not public.

As it relates to copyright, three important public access features of the MGDPA are:

1. The public has a right to free inspection of public government data;[3]
2. The public has a right to receive a copy of public government data;[4] and,
3. A government unit must provide a person access to public data for inspection or a copy "without regard to the nature of that person's interest in the data."[5]

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[2] It is important to note that the MGDPA uses the term "data" to define the basic element to which public access is guaranteed. The terms "information" and "data" is used interchangeably in GIAC documents. While "data" that is a simple fact may not be copyrighted, "data" that takes the form of a book may be copyrightable. Both the book and the simple fact are considered "government data" under Minnesota law.

[3] Minnesota Statutes 13.03, Subdivision 3

[4] ibid.

[5] Minnesota Rules 1205.0300, Subp 2

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What is Copyright?

A U.S. Copyright Office publication titled, "Copyright Basics" is included in Appendix I. The following section from the publication explains the general copyright provisions:

> "Copyright is a form of protection provided by the laws of the United States (Title 17, U.S. Code) to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is a available to both published and unpublished works. Section 106 of the Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:
>
> - To reproduce the copyrighted work in copies or phono records;
> - To prepare derivative works based on the copyrighted work;
> - To distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> - To perform the copyrighted work publicly ....
> - To display the copyrighted work publicly ....
>
> It is illegal for anyone to violate any of the rights provided by the Act to the owner of the copyright. These rights however, are not unlimited in scope. Sections 107 through 119 of the Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use" which is given a statutory basis in section 107 of the Act."

In addition to having a basic understanding of copyright, it is important to highlight a number of critical points of discussion born out of the work groups or examined in other papers relating to copyright and government information. They are:

1. While the U.S. Federal government is not allowed by federal law to copyright their "works of authorship", state and local governments are **not expressly forbidden** to do so by federal law. Extensive research has determined that only a few states[6] address the issue directly in state law, and that no states have reviewed this issue to the extent of Minnesota. Like Minnesota, a number of states specifically allow copyright of computer software. A number of states and other interested parties are monitoring Minnesota's activities on this issue.

2. Copyright is secured automatically upon creation. While a notice of copyright is recommended, it is no longer required. At one point copyright registration was required in order to exercise one's basic copyright protections. While this is no longer the case, registration is advised and required before any infringement suit may be filed. For works to exist in the "public domain" they must be placed there by the copyright owner.

3. Copyright protects only "original works of authorship." Facts, names, titles, ideas, procedures, methods, systems, processes, principles, discoveries, etc., are not copyrightable. Much of the "public government data" produced by

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[6] The State of Oregon requires that all agency claims of copyright are subject to the approval of the Joint Legislative Committee of Information Management and Technology and the Oregon Department of Administrative Services a government unit may obtain a copyright or patent. However, any revenue generated by the sale or license are to be deposited in the state's general fund. This statute has not been exercised much due to the loss of the revenue incentive. (Oregon Revised Statutes 291.042)

The State of Wisconsin has a broad public records law. However, "records" do not include "materials to which access is limited by copyright, patent or bequest; ..." (Wisconsin Statutes 19.32 (2)) Minnesota is considered to have one of the strongest public access laws in the country because it requires public access to be granted at the basic "data" level, not just a superset of "records." An interpretation of the Wisconsin statute is that government entities may restrict access (and use) of copyrighted government information because they are not defined as "records."

The State of Nevada allows the superintendent of State Printing to "secure copyright under laws of the United States in all publications issued by the State of Nevada, the copyright to be secured in the name of the State of Nevada." (Nevada Revised Statutes 344.070) Current practice by the state agencies that use copyright in Minnesota is to copyright them in the name of the state agency.

government is not copyrightable.

4. "Facts" in a database are not likely to be protected by copyright according to the U.S. Supreme Court's Feist decision. However, an original compilation of facts from a database may be copyrightable. A study on Minnesota's geographic information systems dissemination policy stated, "Prior to the Feist decision, some courts held that facts within a database were protected under an 'industrious collection' or 'sweat of the brow' theory of copyright. In essence the mere effort in compiling facts justified the protection of copyright. Feist rejected the 'sweat of the brow' theory. Copyright can only protect the expression of facts, and not the facts themselves."[7]

Minnesota Government Use of Copyright (Opinions)

The purpose of the State Legislature's request for this report was to seek advice on what policies and issues the legislature should consider in the development of government intellectual property policy. This proposal presents a framework for determination of important policy options based on an analysis of current practice.

Two recent opinions explore in great detail the current status of Minnesota law as it relates to the federal copyright act and government use of copyright. The "Department of Administration Data Practices Opinion Number 94-057" and the Attorney General Opinion dated December 4, 1995 are included in Appendix II. It should be noted that the Attorney General's Opinion takes precedence over advisory opinion from the Department of Administration. These opinions are not in general agreement; on the fundamental issue of use they arrived at opposite conclusions.

The Commissioner of Administration's Opinion concluded:

> "The position of the Department of Natural Resources that it can limit Mr. Boe's use of public data, is not in compliance with the presumption of the Minnesota Government Data Practices Act, that, unless clearly specified by the legislature, the public's right to access to and use of public government data cannot be

[7] Winiecki, Judy A., "The Present Status of GIS Dissemination Policy in Minnesota and Decision of the Future." National Center for Geographic Information and Analysis, University of Maine, Orono (on leave of absence for the Minnesota Department of Natural Resources) (1995)

curtailed by a government entity's claim on intellectual property rights in those data."

However, the Attorney General' Opinion states:

"Our basic conclusion is that, although the Minnesota Government Data Practices Act, Minn Stat ch 13 (1994), generally does not permit state agencies to withhold access to "public" government data, it does not follow that the MGDPA prohibits state agencies from placing reasonable restrictions on the use of their "original works of authorship," consistent with the rights of a copyright owner under the Federal Copyright Act (FCA)."

The Attorney General's Opinion concludes by noting:

"It is, of course, ultimately the legislature's role and responsibility to make or change policy in this area. The management of the state's intellectual property raises a number of crucial policy issues: when to permit, when to encourage, and how to administer the commercial use[8] or resale of government data; what principles should determine whether the taxpayers or the users of government information should bear the greater costs of data generation and compilation; what kind of guidelines should state and local government agencies have to interpret concepts like 'fair use'; and what impact will changing communications technologies have on the public's need and interest in a broader range of

[8] The Attorney General's opinion seems to interpret the "commercial value" section of the MGDPA to mean "commercial use." One interpretation of the "commercial value" argues that government units do not have the authority to determine relative value for their information. The "commercial value" section is a "yes" or "no" option - upon which a "yes" determination allows for additional prorated fees to recover up to the full development cost of the information.

In general, copyright is used to maintain the "commercial value" of information by ensuring that the copyright owner is the sole provider of the information. However, Minnesota Rules (1205.0300, Subd.2.) require that the government unit shall "provide access to public data to any person, without regard to the nature of that person's interest in the data." One would assume that, in spite of a copyright, a government unit can not refuse to provide an individual a copy of government information based on speculation that the person may infringe on government's copyright. Inherent in this is that a government unit would have to sue the person for copyright infringement upon discovery of such infringement.

government information. We certainly encourage the legislature to consider these issues carefully."

Consistent in both conclusions is that basic access rights may not be restricted by the claim or exercise of copyright. The Government Information Access Council recommendation addresses the following fundamental policy questions:

1. Should citizens have the right to *use* public government data for any purpose, or should government units in Minnesota be allowed to limit use through the claim and exercise of copyright for some broader public/government interest?

2. How should the Minnesota Government Data Practices Act be modified to reflect the legislature's position on government's use of copyright?

3. If copyright is permitted, will there be a process and criteria for determining what may be copyrighted and to what extent the government units may exercise copyright protections? Where will the process and decision-making authority be placed? How should public appeals of a government unit's decision to copyright be handled?

4. If copyright is not permitted, what will be the impact on the government units that currently use copyright? What might the fiscal impact be on programs that are supported through the sale of copyrighted materials? What will be the impact on contract negotiations that involve intellectual property?

Process Work Groups Used to Reach Conclusions

Minnesota is a leader in exploring how the reform of government information policy may be used to bring citizens and government closer through information technology and networks. The issues raised by the policy questions above highlight a number of discussions by the citizen, business, and government members of the Government Information Access Council. Members of the Council have expressed that work on this issue in Minnesota has just begun. Deliberations on this recommendation occurred primarily in the GIAC Information Access Principles (IAP) Work Group. An informal group, brought together by GIAC and referred to as the "October Group," deliberated

over two months to consider additional input from government units that currently use copyright and from citizens that have strong feelings on the issue.

An "October Group" proposal was crafted as an attempt to define the middle ground on the issue of government use of copyright. No vote was taken on the "October Group" proposal, nor was it formally endorsed by any of the participants. The proposal did, however, provide the framework for developing the GIAC recommendation.

The major differences between the "October Group" proposal and the approved GIAC recommendation will be explained in **footnotes** in the following pages. The Information Access Principles work group determined that a few major issues could not be resolved in the form of specific recommendations because of the highly political nature of the choices. The GIAC has opted to defer those policy options to the state legislature.

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Recommendation from the Government Information Access Council

Note: All text in ***bold italics*** was approved by the full Government Information Access Council on December 18, 1995. The Council directed staff to develop a report that provides context and analysis to support the recommendations. (A concise copy of the recommendation adopted by the Council is included in Appendix III.)

Use of Minnesota Public Government Information

The GIAC recommendation to the legislature regarding use of public government information is best summarized by the following adopted principle:

> ***Government information shall exist in the public domain to the greatest extent possible.***
>
> ***Stewardship of government information, and the value of that information, is a function of government. Government shall protect the right of citizens to use public government information for any legal purpose and shall promote the use of public government information to meet public purposes. Use of government information should not be constrained by copyright or copyright-like controls except under limited circumstances. A government unit may exercise copyright on certain government information only pursuant to criteria established by the legislature. In no case should government's exercise of copyright be used to deny public access for inspection or to receive copies of public government information.***

Government Information Should Be in the Public Domain[9]

Government produces an abundance of information. Much of this information is not entitled to copyright protection because it does not qualify as "an original work of authorship" under federal copyright law. It was noted above that the federal copyright law grants basic copyright protection automatically without requiring registration of the original work. The following statement was developed to ensure that, in general, government information will be placed in the public domain:

> ***1. To the greatest extent possible public government data, on which a government unit may claim original authorship under United States copyright law, shall exist in the public domain.***

The recommendation details public domain and copyright registration later in this report.

Government Claim of Copyright

It was generally accepted by a majority of those involved in discussions that: under limited circumstances there is a "public interest" in allowing some degree of copyright protection for certain government "original works." There was no consensus on where to draw the line between the public interest and the interest of a person who intends to use the information nor was there agreement on who should determine when something is in the public interest.

During group deliberations, some argued that information created by government at public expense, is "owned" by the taxpayers. Therefore, a citizen should have the right to use the information in any way they wish. Those who originally argued for total prohibition on government's use of copyright indicated that they might be willing to accept copyright on say, 0.5 percent of government's original works. Those who strongly support the use of copyright by government argued that exercise of copyright is

[9] Works in the public domain are free to use without permission. They may not be copyrighted by other parties. The U.S. Copyright Office highly recommends that copyrighted works by others that include sections produced by the federal government should include in their copyright notice a statement that clearly states which sections are in the public domain based on federal government authorship.

done to protect the overall public interest or taxpayer interest, because copyright may allow for generation of revenues to recover costs incurred in development of the information, to support specific government programs, or to assure attribution.

The major issue of concern relating to government use of copyright focused on "literary works," as defined in the Federal Copyright Act. Other categories of original works, listed in items 2B - 2H, are exempt from the proposed criteria or review process. The MGDPA covers all government units, therefore, these recommendations have implications for all state agencies, counties, public educational institutions, and cities, among others.

The following section provides a context for how the Minnesota Government Data Practices Act may be meshed with the Federal Copyright Act. Any additions to MGDPA should use terminology from federal law to ensure that the state statue is consistent and clear in intention and effect.

> ***2. A government unit may exercise copyright in certain 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:***
>
> ***2A. literary works,***

In order to make it clear that copyright authority should be focused on a very limited selection of government data, the following section lists potentially copyrightable government works (under federal copyright law) which, under this recommendation, **may never be copyrighted.** This concurs with the U.S. Copyright Office's refusal to register copyrights on "Edicts of Government."[10] The section below limits to a

[10] The Compendium of Copyright Office Practices (Compendium II) section 206.01 states, "Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments." Currently, a notice of copyright appears on the Minnesota State Statutes. While the copyright notice expressly states that the claim is in the "compilation" and not the text, the Compendium suggests that it is unlikely the State of Minnesota could register a copyright on its statutes. Without registration, the state may not file

considerable degree those literary works on which Minnesota government units may claim and exercise copyright.

2A-1. The following literary works or any compilations[11] thereof shall exist in the public domain, including but not limited to the following:

a. the text of adopted or proposed statutes, rules, regulations, ordinances, codes, other laws and general legislative and rule making information, and any materials that explain or justify the foregoing (excluding training manuals);

b. judicial and quasi-judicial pronouncements, orders, decisions, dockets, calendars and opinions; rule related and government units' pronouncements, orders and opinions;

c. text of reports created by or on behalf of government units;

d. directories or a directory index of government services and institutions or listings of records, assets, products, employees or offices, grants of permission or license; and,

e. government policies and procedures, memorandum, agendas, correspondence, notes, meeting notices, meeting minutes, schedules, speeches, news releases, contracts, audits, investigative reports, and government financial and budget information.

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a suit for damages related to copyright infringement. Although the Compendium II does not have the force of law, the State of Minnesota would have to successfully sue the Federal Copyright Office to have an enforceable copyright. Note: Minnesota Statutes 14.47, Subdivision 1, (5) requires the Revisor of Statutes to "copyright any compilations and or supplements" of the Minnesota Rules.

[11] The "October Group" recommendation did not include the phrase "or any compilations."

The next section describes criteria under which government units may be granted a copyright on literary works.

The issues of criteria, approval process, reporting mechanisms, authority, etc. are intertwined. A system with pre-approval by a government panel or office would likely have broader criteria. A system that gives the government units discretion on the use of copyright would likely have more strict criteria. The criteria and process questions are fundamental policy choices which must be determined by the legislature. The following section provides an initial framework for further legislative work in this area.

2A-2. Government units may be granted copyright for public government information that are copyrightable as literary works if all of the following three criteria are met:

a. There is a compelling need for the copyright; and,

b. The original and creative material will clearly advance the public mission or the purpose of the government unit; and,

c. The copyright will not prevent access to the public government data.

2A-3. Maps may be copyrighted under certain conditions as outlined in 2A-2, 2A-4 or 2A-5.

(The "October Group" discussions produced a more lengthy criteria[12] which were not

[12] Below are the "criteria" from the "October Group" proposal as included in the side-by-side comparison of the IAP Work Group and the "October Group" proposals.

2A-2 Copyright in a "literary work" by a government unit may be exercised if one or more of the following criteria are met:

a. the reproduction of public information, or the proposed inclusion of public information in a derivative work, must be reviewed by the government unit for accuracy, currency (timeliness), comprehensiveness and give notice of the original source of the information;

b. the exercise of copyright is necessary to ensure the broadest public access and dissemination of the government data;

adopted by the Information Access Principles Work Group nor given consideration by the full GIAC Council.)

Under the following two sections, government "literary works" are exempted from the criteria process in 2A-2. Also, the MGDPA currently contains a section that allows for the copyright of computer software programs.

2A-4. Computer software programs are literary works which are copyrightable and which need not meet the criteria set forth above to be copyrighted. Provision to treat computer programs as trade secrets, as provided by current law, shall continue. In no case shall copyright of a software program be used to prevent access to the underlying public government data.

2A-5. Copyright will be granted in the case of public/private partnerships or collaborations where the exercise of copyright is required by negotiated contract or when the exercise of copyright is needed for protection of joint ownership of a copyright.

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c. the literary work is a substantial and creative publication in book or electronic form, and copyright is necessary to assist the government unit in recovering the cost to produce and disseminate the information;

d. the exercise of copyright is required by statute or budget authorization to maximize a financial return to the public by recovering costs or generating revenues;

e. the literary work contains copyrighted materials from non-government sources, and attribution of individual copyrights is not practical; or,

f. the literary work is created as the result of a public/private collaboration, and the exercise of copyright is required by negotiated contract, or the exercise of copyright is needed for protection of joint ownership.

The following categories are taken directly from the federal copyright law and may be copyrighted by government units outside the requirements of "2A. literary works". They are exempt from the criteria process, but must follow all other requirements of government works on which a government unit plans to claim and exercise copyright.

2B. musical works, including any accompanying words;
2C. dramatic works, including any accompanying music;
2D. pantomimes and choreographic works;
2E. pictorial, graphic [Maps, see A.3 above], and sculptural works;
2F. architectural works;
2G. motion pictures and other audiovisual works; and,
2H. sound recordings.

Copyright Registration, Notice and Public Domain

The following sections under this proposal specify that to exercise copyright protection, government units must register their selected original works with the U.S. Copyright Office. The cost to register a copyright is $20. Registration with the U.S. Copyright Office will create a public record of all works copyrighted by Minnesota government units and ensure that the decision to copyright is an explicit and formal choice. Government units would be required to file a copy of their federal copyright registration with the Commissioner of Administration.

Recommendations within this section ensure that all unregistered public government data (that are "original works of authorship"), are expressly placed in the public domain. If this is not done, all copyrightable works - regardless of a notice of copyright or registration - will be assumed to be copyrighted under federal law.

3. Government units may claim and exercise copyright on public government data only if the copyrightable work meets the above criteria and has been registered, prior to any dispute, with the U.S. Copyright Office. A copy of the federal copyright filing must be submitted to the Commissioner of Administration. The commissioner shall make copies of copyright registrations available to the public and shall publish on a regular basis listings of newly registered copyrights. Copies of public government data that have been registered by state agencies and are in a

form or media which can be reproduced, shall be distributed to the state document depository libraries, pursuant to Minn. Stat. 15.18.

4. All public government data which are original works of authorship and eligible for copyright protection under Title 17 of the U.S. Code, but which have not been registered, shall exist in the public domain. No person or entity may claim original copyright on public domain government data.

5. A notice of copyright must appear on all copyrighted public government data when the medium permits such notice. All notice of copyright on public government data by a government unit must state that the claim does not limit public access to public government data, as established in the Minnesota Government Data Practices Act. The notice shall include a statement that defines the public's right to exercise fair use[13] of the copyrighted work as granted under federal copyright law, and other disclaimers that clarify the acceptable use of copyrighted materials.

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[13] A short brief on "fair use" from the U.S. Copyright Office's Internet site states:

"Section 107 [of the U.S. Code] contains a list of the various purposes for which the reproduction of a particular work may be considered "fair," such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

(1) the purpose and character of the use, including whether such use is of 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 of value of the copyrighted work."

Government Exercise of Copyright

Once a copyrightable work has been registered, the government unit may exercise full copyright protections. The Minnesota Department of Trade and Economic Development's "A Guide to Intellectual Property Protection" states:

> "The owner of a copyrighted work has the exclusive right to do and to authorize any of the following:
>
> - Copying of the work;
> - Adaptation of the work ...;
> - Distribution of copies of the work to the public, by sale, rental or otherwise;
> - Public performance of the work; and,
> - Public display of the work."

This section places basic limits on how a government unit may exercise their copyright protections and limits damages that government may seek in court if they sue for infringement of copyright.

> ***5. Pursuant to the criteria and conditions specified in this recommendation and under federal copyright law, government units may exercise the full copyright protections on copyrightable public government data except under the following circumstances:***
>
> > ***5A. if the exercise of a specific copyright protection is contrary to the public mission or purpose of the government unit; and***
> >
> > ***5B. if the exercise of copyright has the affect of limiting the liberty of the press, free speech, or ability of persons to alter, modify or reform government;***[14]

[14] The source for this phrase is the section 1 and 3 of the Constitution of the State of Minnesota which states:

> Section 1. Object of government. Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent,

Further, the government unit shall:

5C. never condition a person's access to public government data on the execution or signing of a copyright agreement or license;

5D. claim only actual damages in any infringement suit or action taken; and

5E. never be permitted to collect attorney's fees in any infringement suit or action taken unless the court determines that an action brought under this subdivision is frivolous and without merit and a basis in fact, in which case the court may award reasonable costs and attorney fees to the responsible authority.

The Legislature Shall Establish A Process

A number of process options were discussed by members of the Information Access Principles Work Group and members of the "October Group". Differences in how to apply discretion in the criteria, review process, appeals process, or pre- or post-approval could not be mediated. Hence, there was no agreement.

6. The legislature shall establish a process that will:

6A. monitor the registration and exercise of copyright authority by government units; and,

6B. encourage the use of Alternative Dispute Resolution (ADR) techniques to resolve disputes concerning that exercise.

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together with the right to alter modify of reform government whenever required by the public good. ...

Section 3. Liberty of the press. The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for an abuse of such right.

The two primary process options discussed in both the Information Access Principle Working and the "October Group" were:

1. Criteria-based; pre-approval by panel or office required prior to registration with U.S. Copyright Office; or,

2. Criteria-based; government unit has the discretion to determine if the original work meets state's copyright criteria for copyright registration with a post-registration public appeal process available.

It should be noted that the issue of applying criteria prior to exploring copyright options was one area of common ground. However, the criteria developed in each proposal revealed important differences. Significant concerns were raised about citizens having to go through the intimidating process of a legal proceeding to appeal a government unit's decision to claim copyright (or to appeal the way the copyright is being exercised). The issue of pre-approval was described by some as burdensome, particularly with the possible requirement that local governments would have to get copyright approval from state government. On the other hand, those who felt copyright should be used sparingly felt that the approval panel/office could easily evaluate the few legitimate requests each year.

Responsible Authority and Copyright

The MGDPA requires that each agency have a "responsible authority" to handle requests related to access and use of government data. The responsible authority may delegate responsibilities to others within a government unit. This section integrates copyright processes into the duties of the responsible authority.

7. The duties of the government unit's data practices responsible authority[15], as defined in Minn. Stat. 13.02, Subd 16, shall include the

[15] "Responsible authority" in a state agency or statewide system means the state official designated by law or by the commissioner as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data. "Responsible authority" in any political subdivision means the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data, unless otherwise provided by state law.

documentation of criteria compliance, copyright registration, and application of procedures and decisions to ensure that this section and the criteria are applied uniformly across the government unit. The responsible authority shall maintain a publicly accessible list describing all registered copyrights filed by that government unit. The responsible authority shall also receive, administer and respond to, in a timely fashion, all inquiries or complaints related to that government unit's claim or exercise of copyright. A government unit may not copyright public government data before the designation of the responsible authority.

Universities and Colleges

It was evident from discussions that public colleges and universities should be allowed to continue their practices in the area of copyright, except as it relates to documents prepared under 2A-1. For example, the text of a report on administrative matters required by the legislature would not be copyrightable. Noting the diversity of public bodies covered by the MGDPA, the issue of exemption will likely cause other public bodies to request similar status from the legislature.

8. The University of Minnesota and Minnesota State Colleges and Universities may claim and exercise full copyright protections available under Title 17 of the U.S. Code on all their public government data except for that data described in 2A-1 a-e, and in compliance with 5. and 7. of this recommendation.

Review of Government Use of Copyright in Two Years

Any legislative initiative regarding this issue should require a two year review which will allow Minnesota to justify or modify its laws regarding government use of copyright.

9. Two years following the enactment of statutory authority for government unit to exercise copyright on certain public government information pursuant to criteria established by the legislature, a panel created by the legislature shall review issues and trends, criteria application, appeals by citizens or others, and assess any positive or negative impact on the public based on government units' exercise of copyright.

Patent, Trademark, Service Mark

The general area of intellectual property also includes patent, trademark, and service mark. The work group determined that these forms of intellectual property are not inconsistent with the goal of improved information access and use.

> ***10. Nothing in this recommendation shall be construed to prevent a state agency, statewide system, or political subdivision from acquiring a patent or registering a trademark or service mark.***

Conclusion

Government in Minnesota is noted for its high level of service, value and citizen participation because it has one of the strongest public access laws in the country. Efforts to improve electronic access and general use of government information will lead us to an era where the "good work" of government will be available to more and more people on an on-demand basis.

These efforts have made Minnesota a recognized leader in improved access to government information and the proactive dissemination of information for use in a democracy. The realities of the information age will make it possible for government units to share information with their citizens more broadly, more efficiently, and more cost-effectively. General trends in the use of information technology and networks will bring sweeping change to our society, our economy and citizen interaction with government.

Government must continue to create valuable and useful information and publications. It should not become a warehouse of raw data. However, to demonstrate its value government must take up the challenge of the information age and be visible by ensuring that it makes its information available for use by the greatest number of citizens.

The Government Information Access Council, which represents a citizen perspective, recommends that under a limited criteria-based process, government units be granted copyright privilege. Original works of authorship, such as creative publications and books, will likely be eligible for copyright. However, the Council's forthcoming full report

regarding citizen access and use of public government information is based on the position that use of public government information will generally be unrestricted and exist in the public domain.

Report on Minnesota Government Use of Copyright and Intellectual Property

January 15, 1996

Appendix I:

Copyright Basics - Circular #1
From the U.S. Copyright Office

Copyright Basics

WHAT COPYRIGHT IS

Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- *To reproduce* the copyrighted work in copies or phonorecords;
- To prepare *derivative works* based upon the copyrighted work;
- *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;
- *To perform the copyrighted work publicly*, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works; and
- *To display the copyrighted work publicly,* 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.

It is illegal for anyone to violate any of the rights provided by the Act to the owner of copyright. These rights, however, are not unlimited in scope. Sections 107 through 119 of the Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the Act. In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions. For further information about the limitations of any of these rights, consult the Copyright Act or write to the Copyright Office.

WHO CAN CLAIM COPYRIGHT

Copyright protection subsists from the time the work is created in fixed form; that is, it is an incident of the process of authorship. The copyright in the work of authorship *immediately* becomes the property of the author who created it. Only the author or those deriving their rights through the author can rightfully claim copyright.

In the case of works made for hire, the employer and not the employee is presumptively considered the author. Section 101 of the copyright statute defines a "work made for hire" as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire....

The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.

Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

Two General Principles

- Mere ownership of a book, manuscript, painting, or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.
- Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.

COPYRIGHT AND NATIONAL ORIGIN OF THE WORK

Copyright protection is available for all unpublished works, regardless of the nationality or domicile of the author.

Published works are eligible for copyright protection in the United States if *any* one of the following conditions is met:

- On the date of first publication, one or more of the authors is a national or domiciliary of the United States or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United

States is also a party, or is a stateless person wherever that person may be domiciled; or

- The work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or the work comes within the scope of a Presidential proclamation; or
- The work is first published on or after March 1, 1989, in a foreign nation that on the date of first publication, is a party to the Berne Convention; or, if the work is *not* first published in a country party to the Berne Convention, it is published (on or after March 1,1989) within 30 days of first publication in a country that is party to the Berne Convention; or the work, first published on or after March 1, 1989, is a pictorial, graphic, or sculptural work that is incorporated in a permanent structure located in the United States; or, if the work, first published on or after March 1, 1989, is a published audiovisual work, all the authors are legal entities with headquarters in the United States.

WHAT WORKS ARE PROTECTED

Copyright protects "original works of authorship" that are fixed in a tangible form of expression. The fixation need not be directly perceptible, so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

(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.

These categories should be viewed quite broadly: for example, computer programs and most "compilations" are registrable as "literary works;" maps and architectural plans are registrable as "pictorial, graphic, and sculptural works."

WHAT IS NOT PROTECTED BY COPYRIGHT

Several categories of material are generally not eligible for statutory copyright protection. These include among others:

- Works that have *not* been fixed in a tangible form of expression. For example: choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded.
- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents.
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration.
- Works consisting *entirely* of information that is common property and containing no original authorship. For example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

HOW TO SECURE A COPYRIGHT

Copyright Secured Automatically Upon Creation

The way in which copyright protection is secured under the present law is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright (see following NOTE). There are, however, certain definite advantages to registration. (See page 8.)

Copyright is secured *automatically* when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. "Copies" are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm. "Phonorecords" are material objects embodying fixations of sounds (excluding, by statutory definition, motion picture soundtracks), such as cassette tapes, CD's, or LP's. Thus, for example, a song (the "work") can be fixed in sheet music ("copies") or in phonograph disks ("phonorecords"), or both.

If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the created work as of that date.

PUBLICATION

Publication is no longer the key to obtaining statutory copyright as it was under the Copyright Act of 1909. How-

ever, publication remains important to copyright owners.

The Copyright Act defines publication as follows:

> "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.

NOTE: Before 1978, statutory copyright was generally secured by the act of publication with notice of copyright, assuming compliance with all other relevant statutory conditions. Works in the public domain on January 1, 1978 (for example, works published without satisfying all conditions for securing statutory copyright under the Copyright Act of 1909) remain in the public domain under the current Act.

Statutory copyright could also be secured before 1978 by the act of registration in the case of certain unpublished works and works eligible for ad interim copyright. The current Act automatically extends to full term (section 304 sets the term) copyright for all works including those subject to ad interim copyright if ad interim registration has been made on or before June 30, 1978.

A further discussion of the definition of "publication" can be found in the legislative history of the Act. The legislative reports define "to the public" as distribution to persons under no explicit or implicit restrictions with respect to disclosure of the contents. The reports state that the definition makes it clear that the sale of phonorecords constitutes publication of the underlying work, for example, the musical, dramatic, or literary work embodied in a phonorecord.The reports also state that it is clear that any form of dissemination in which the material object does not change hands, for example, performances or displays on television, is ***not*** a publication no matter how many people are exposed to the work. However, when copies or phonorecords are offered for sale or lease to a group of wholesalers, broadcasters, or motion picture theaters, publication does take place if the purpose is further distribution, public performance, or public display.

Publication is an important concept in the copyright law for several reasons:

- When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Works published before March 1, 1989, ***must*** bear the notice or risk loss of copyright protection. (See discussion "notice of copyright" below.)
- Works that are published in the United States are subject to mandatory deposit with the Library of Congress. (See discussion on page 10 on "mandatory deposit.")
- Publication of a work can affect the limitations on the exclusive rights of the copyright owner that are set forth in sections 107 through 120 of the law.
- The year of publication may determine the duration of copyright protection for anonymous and pseudonymous works (when the author's identity is not revealed in the records of the Copyright Office) and for works made for hire.
- Deposit requirements for registration of published works differ from those for registration of unpublished works. (See discussion on page 8 of "registration procedures.")

NOTICE OF COPYRIGHT

For works first published on and after March 1, 1989, use of the copyright notice is optional, though highly recommended. Before March 1, 1989, the use of the notice was mandatory on all published works, and any work first published before that date must bear a notice or risk loss of copyright protection.

(The Copyright Office does not take a position on whether works first published with notice before March 1, 1989, and reprinted and distributed on and after March 1, 1989, must bear the copyright notice.)

Use of the notice is recommended because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Furthermore, in the event that a work is infringed, if the work carries a proper notice, the court will not allow a defendant to claim "innocent infringement"—that is, that he or she did not realize that the work is protected. (A successful innocent infringement claim may result in a reduction in damages that the copyright owner would otherwise receive.)

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

Form of Notice for Visually Perceptible Copies

The notice for visually perceptible copies should contain all of the following three elements:

1. *The symbol* © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and
2. *The year of first publication* of the work. In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article; and
3. *The name of the owner of copyright* in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Example: © 1994 John Doe

The "C in a circle" notice is used only on "visually perceptible copies." Certain kinds of works—for example, musical, dramatic, and literary works—may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings such as audio tapes and phonograph disks are "phonorecords" and not "copies," the "C in a circle" notice is not used to indicate protection of the underlying musical, dramatic, or literary work that is recorded.

Form of Notice for Phonorecords of Sound Recordings

The copyright notice for phonorecords of sound recordings* has somewhat different requirements. The notice appearing on phonorecords should contain the following three elements:

1. *The symbol* ℗ (the letter P in a circle); and
2. *The year of first publication* of the sound recording; and
3. *The name of the owner of copyright* in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

Example: ℗ 1994 A.B.C., Inc.

NOTE: Since questions may arise from the use of variant forms of the notice, any form of the notice other than those given here should not be used without first seeking legal advice.

Position of Notice

The notice should be affixed to copies or phonorecords of the work in such a manner and location as to "give reasonable notice of the claim of copyright." The notice on phonorecords may appear on the surface of the phonorecord or on the phonorecord label or container, provided the manner of placement and location give reasonable notice of the claim. The three elements of the notice should ordinarily appear together on the copies or phonorecords. The Copyright Office has issued regulations concerning the form and position of the copyright notice in the *Code of Federal Regulations* (37 CFR Part 201). For more information, request Circular 3.

Publications Incorporating United States Government Works

Works by the U.S. Government are not eligible for copyright protection. For works published on and after March 1, 1989, the previous notice requirement for works consisting primarily of one or more U.S. Government works has been eliminated. However, use of the copyright notice for these works is still strongly recommended. Use of a notice on such a work will defeat a claim of innocent infringement as previously described *provided* the notice also includes a statement that identifies one of the following: those portions of the work in which copyright is claimed or those portions that constitute U.S. Government material. An example is:

© 1994 Jane Brown. Copyright claimed in Chapters 7-10, exclusive of U.S. Government maps.

Works published before March 1, 1989, that consist primarily of one or more works of the U.S. Government *must* bear a notice and the identifying statement.

* Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."

Unpublished Works

To avoid an inadvertent publication without notice, the author or other owner of copyright may wish to place a copyright notice on any copies or phonorecords that leave his or her control. An appropriate notice for an unpublished work is: Unpublished work © 1994 Jane Doe.

Effect of Omission of the Notice or of Error in the Name or Date

The Copyright Act, in sections 405 and 406, provides procedures for correcting errors and omissions of the copyright notice on works published on or after January 1, 1978, and before March 1, 1989.

In general, if a notice was omitted or an error was made on copies distributed between January 1, 1978, and March 1, 1989, the copyright was not automatically lost. Copyright protection may be maintained if registration for the work has been made before or is made within 5 years after the publication without notice, and a reasonable effort is made to add the notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered. For more information request Circular 3.

HOW LONG COPYRIGHT PROTECTION ENDURES

Works Originally Created On or After January 1, 1978

A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation, and is ordinarily given a term enduring for the author's life, plus an additional 50 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 50 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 75 years from publication or 100 years from creation, whichever is shorter.

Works Originally Created Before January 1, 1978, But Not Published or Registered by That Date

Works that were created but not published or registered for copyright before January 1, 1978, have been automatically brought under the statute and are now given Federal copyright protection. The duration of copyright in these works will generally be computed in the same way as for works created on or after January 1, 1978: the life-plus-50 or 75/100-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2027.

Works Originally Created and Published or Registered Before January 1, 1978

Under the law in effect before 1978, copyright was secured either on the date a work was published or on the date of registration if the work was registered in unpublished form. In either case, the copyright endured for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The current copyright law has extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, making these works eligible for a total term of protection of 75 years.

Public Law 102-307, enacted on June 26, 1992, amended the Copyright Act of 1976 to extend automatically the term of copyrights secured between January 1, 1964, and December 31, 1977 to the further term of 47 years and increased the filing fee from $12 to $20. This fee increase applies to all renewal applications filed on or after June 29, 1992.

P.L.102-307 makes renewal registration optional. There is no need to make the renewal filing in order to extend the original 28-year copyright term to the full 75 years. **However, some benefits accrue to making a renewal registration during the 28th year of the original term.**

For more detailed information on the copyright term, write to the Copyright Office and request Circulars 15, 15a, and 15t. For information on how to search the Copyright Office records concerning the copyright status of a work, request Circular 22.

TRANSFER OF COPYRIGHT

Any or all of the exclusive rights, or any subdivision of those rights, of the copyright owner may be transferred, but the transfer of *exclusive* rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed (or such owner's duly authorized agent). Transfer of a right on a nonexclusive basis does not require a written agreement.

A copyright may also be conveyed by operation of law and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance, or transfer of personal property as well as terms of contracts or conduct of business. For information about relevant state laws, consult an attorney.

Transfers of copyright are normally made by contract. The Copyright Office does not have or supply any forms for such transfers. However, the law does provide for the recordation in the Copyright Office of transfers of copyright ownership. Although recordation is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties. For information on recordation of transfers and other documents related to copyright, request Circular 12.

Termination of Transfers

Under the previous law, the copyright in a work reverted to the author, if living, or if the author was not living, to other specified beneficiaries, provided a renewal claim was registered in the 28th year of the original term.* The present law drops the renewal feature except for works already in the first term of statutory protection when the present law took effect. Instead, the present law permits termination of a grant of rights after 35 years under certain conditions by serving written notice on the transferee within specified time limits.

For works already under statutory copyright protection before 1978, the present law provides a similar right of termination covering the newly added years that extended the former maximum term of the copyright from 56 to 75 years. For further information, request Circulars 15a and 15t.

INTERNATIONAL COPYRIGHT PROTECTION

There is no such thing as an "international copyright" that will automatically protect an author's writings throughout the entire world. Protection against unauthorized use in a particular country depends, basically, on the national laws of that country. However, most countries do offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions. For a list of countries which maintain copyright relations with the United States, request Circular 38a.

The United States belongs to both global, multilateral copyright treaties—the Universal Copyright Convention (UCC) and the Berne Convention for the Protection of Literary and Artistic Works. The United States was a founding member of the UCC, which came into force on September 16, 1955. Generally, a work by a national or domiciliary of a country that is a member of the UCC or a work first published in a UCC country may claim protection under the UCC. If the work bears the notice of copyright in the form and position specified by the UCC, this notice will satisfy and substitute for any other formalities a UCC member country would otherwise impose as a condition of copyright. A UCC notice should consist of the symbol © accompanied by the name of the copyright proprietor and the year of first publication of the work.

By joining the Berne Convention on March 1, 1989, the United States gained protection for its authors in all member nations of the Berne Union with which the United States formerly had either no copyright relations or had bilateral treaty arrangements. Members of the Berne Union agree to a certain minimum level of copyright protection and agree to treat nationals of other member countries like their own nationals for purposes of copyright. A work first published in the United States or another Berne Union country (or first published in a non-Berne country, followed by publication within 30 days in a Berne Union country) is eligible for protection in all Berne member countries. There are no special requirements. For information on the legislation implementing the Berne Convention, request Circular 93 from the Copyright Office.

An author who wishes protection for his or her work in a particular country should first find out the extent of protection of foreign works in that country. If possible, this should be done before the work is published anywhere, since protection may often depend on the facts existing at the time of *first* publication.

If the country in which protection is sought is a party to one of the international copyright conventions, the work may generally be protected by complying with the conditions of the convention. Even if the work cannot be brought under an international convention, protection under the specific provisions of the country's national laws may still be possible. Some countries, however, offer little or no copyright protection for foreign works.

*The copyright in works eligible for renewal on or after June 26, 1992, will vest in the name of the renewal claimant on the effective date of any renewal registration made during the 28th year of the original term. Otherwise, the renewal copyright will vest in the party entitled to claim renewal as of December 31st of the 28th year.

COPYRIGHT REGISTRATION

In general, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, except in one specific situation,* registration is not a condition of copyright protection. Even though registration is not generally a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration. Among these advantages are the following:

- Registration establishes a public record of the copyright claim;
- Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin and for foreign works not originating in a Berne Union country. (For more information on when a work is of U.S. origin, request Circular 93.);
- If made before or within 5 years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate; and
- If registration is made within 3 months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Copyright registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies. For additional information, request Publication No. 563 from:
  Commissioner of Customs
  ATTN: IPR Branch,
  Room 2104
  U.S. Customs Service
  1301 Constitution Avenue, N.W.
  Washington, D.C. 20229.

Registration may be made at any time within the life of the copyright. Unlike the law before 1978, when a work has been registered in unpublished form, it is not necessary to make another registration when the work becomes published (although the copyright owner may register the published edition, if desired).

*Under sections 405 and 406 of the Copyright Act, copyright registration may be required to preserve a copyright on a work first published before March 1, 1989, that would otherwise be invalidated because the copyright notice was omitted from the published copies or phonorecords, or the name or year date was omitted, or certain errors were made in the year date.

REGISTRATION PROCEDURES

In General

A. To register a work, send the following three elements *in the same envelope or package* to the Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C. 20559-6000: (see page 11 for what happens if the elements are sent separately).

1. A properly completed application form;
2. A nonrefundable filing fee of $20* for each application;
3. A nonreturnable deposit of the work being registered. The deposit requirements vary in particular situations. The *general* requirements follow. Also note the information under "Special Deposit Requirements" immediately following this section.

- If the work is unpublished, one complete copy or phonorecord.
- If the work was first published in the United States on or after January 1, 1978, two complete copies or phonorecords of the best edition.
- If the work was first published in the United States before January 1, 1978, two complete copies or phonorecords of the work as first published.
- If the work was first published outside the United States, one complete copy or phonorecord of the work as first published.

B. To register a renewal, send:

1. A properly completed RE application form; and
2. A nonrefundable filing fee of $20 for each work.

*For the fee structure for application Form SE/GROUP and Form G/DN, see the instructions on these forms.

NOTE: COMPLETE THE APPLICATION FORM USING BLACK INK PEN OR TYPEWRITER. You may photocopy blank application forms; however, photocopied forms submitted to the Copyright Office must be clear, legible, on a good grade of 8 1/2 inch by 11 inch white paper suitable for automatic feeding through a photocopier. The forms should be printed preferably in black ink, head-to-head (so that when you turn the sheet over, the top of page 2 is directly behind the top of page 1). **Forms not meeting these requirements will be returned.**

Special Deposit Requirements

Special deposit requirements exist for many types of work. In some instances, only one copy is required for published works, in other instances only identifying material is required, and in still other instances, the deposit requirement may be unique. The following are prominent examples of exceptions to the general deposit requirements:

- If the work is a motion picture, the deposit requirement is one complete copy of the unpublished or published motion picture *and* a separate written description of its contents, such as a continuity, press book, or synopsis.
- If the work is a literary, dramatic or musical work *published only on phonorecord,* the deposit requirement is one complete copy of the phonorecord.
- If the work is an unpublished or published computer program, the deposit requirement is one visually perceptible copy in source code of the *first 25 and last 25 pages* of the program. For a program of fewer than 50 pages, the deposit is a copy of the entire program. (For more information on computer program registration, including deposits for revised programs and provisions for trade secrets, request Circular 61.)
- If the work is in a CD-ROM format, the deposit requirement is one complete copy of the material, that is, the CD-ROM, the operating software, and any manual(s) accompanying it. If the identical work is also available in print or hard copy form, send one complete copy of the print version *and* one complete copy of the CD-ROM version.
- For information about group registration of serials, request Circular 62.

In the case of works reproduced in three-dimensional copies, identifying material such as photographs or drawings is ordinarily required. Other examples of special deposit requirements (but by no means an exhaustive list) include many works of the visual arts, such as greeting cards, toys, fabric, oversized material (request Circular 40a); video games and other machine-readable audiovisual works (request Circular 61 and ML-387); automated databases (request Circular 65); and contributions to collective works.

If you are unsure of the deposit requirement for your work, write or call the Copyright Office and describe the work you wish to register.

Unpublished Collections

A work may be registered in unpublished form as a "collection," with one application and one fee, under the following conditions:

- The elements of the collection are assembled in an orderly form;
- The combined elements bear a single title identifying the collection as a whole;
- The copyright claimant in all the elements and in the collection as a whole is the same; and
- All of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

NOTE: LIBRARY OF CONGRESS CATALOG CARD NUMBERS.

A Library of Congress Catalog Card Number is different from a copyright registration number. The Cataloging in Publication (CIP) Division of the Library of Congress is responsible for assigning LC Catalog Card Numbers and is operationally separate from the Copyright Office. A book may be registered in or deposited with the Copyright Office but not necessarily cataloged and added to the Library's collections. For information about obtaining an LC Catalog Card Number, contact the CIP Division, Library of Congress, Washington, D.C. 20540. For information on International Standard Book Numbering (ISBN), write to: ISBN, R.R. Bowker/Martindale-Hubbell, 121 Chanlon Road, New Providence, N.J. 07974. Call (908) 665-6770. For information on International Standard Serial Numbering (ISSN), write to: Library of Congress, National Serials Data Program, Washington, D.C. 20540.

Short Form/SE and Form SE/GROUP: specialized SE forms for use when certain requirements are met

Form G/DN: a specialized form to register a complete month's issues of a daily newspaper when certain conditions are met

Form PA: for published and unpublished works of the performing arts (musical and dramatic works, pantomimes and choreographic works, motion pictures and other audiovisual works)

Form VA: for published and unpublished works of the visual arts (pictorial, graphic, and sculptural works, including architectural works)

Form SR: for published and unpublished sound recordings

For Renewal Registration

Form RE: for claims to renewal copyright in works copyrighted under the law in effect through December 31, 1977 (1909 Copyright Act)

For Corrections and Amplifications

Form CA: for supplementary registration to correct or amplify information given in the Copyright Office record of an earlier registration

For a Group of Contributions to Periodicals

Form GR/CP: an adjunct application to be used for registration of a group of contributions to periodicals in addition to an application Form TX, PA, or VA

Free application forms are supplied by the Copyright Office.

COPYRIGHT OFFICE FORMS HOTLINE

NOTE: Requestors may order application forms and circulars at any time by telephoning (202) 707-9100 (TTY: 707-6737). Orders will be recorded automatically and filled as quickly as possible. Please specify the kind and number of forms you are requesting.

MAILING INSTRUCTIONS

All applications and materials related to copyright registration should be addressed to the Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C. 20559-6000.

The application, nonreturnable deposit (copies, phonorecords, or identifying material), and nonrefundable filing fee should be mailed in the same package.

We suggest that you contact your local post office for information about mailing these materials at lower-cost fourth class postage rates.

WHAT HAPPENS IF THE THREE ELEMENTS ARE NOT RECEIVED TOGETHER

Applications and fees received without appropriate copies, phonorecords, or identifying material will **not** be processed and ordinarily will be returned. Unpublished deposits without applications or fees ordinarily will be returned, also. In most cases, published deposits received without applications and fees can be immediately transferred to the collections of the Library of Congress. This practice is in accordance with section 408 of the law, which provides that the published deposit required for the collections of the Library of Congress may be used for registration only if the deposit is "accompanied by the prescribed application and fee...."

After the deposit is received and transferred to another service unit of the Library for its collections or other disposition, it is no longer available to the Copyright Office. If you wish to register the work, you must deposit additional copies or phonorecords with your application and fee.

FEES

All remittances should be in the form of drafts (that is, checks, money orders, or bank drafts) payable to: **Register of Copyrights.** Do not send cash. Drafts must be redeemable without service or exchange fee through a U. S. institution, must be payable in U.S. dollars, and must be imprinted with American Banking Association routing numbers. International Money Orders and Postal Money Orders that are negotiable only at a post office are not acceptable.

If a check received in payment of the filing fee is returned to the Copyright Office as uncollectible, the Copyright Office will cancel the registration and will notify the remitter.

The fee for processing an original, supplementary, or renewal claim is nonrefundable, whether or not copyright registration is ultimately made.

Do not send cash. The Copyright Office cannot assume any responsibility for the loss of currency sent in payment of copyright fees.

EFFECTIVE DATE OF REGISTRATION

A copyright registration is effective on the date the Copyright Office receives all of the required elements in acceptable form, regardless of how long it then takes to process the application and mail the certificate of registration. The time the Copyright Office requires to process an application varies, depending on the amount of material the Office is receiving and the personnel available. Keep in mind that it may take a number of days for mailed material to reach the Copyright Office and for the certificate of registration to reach the recipient after being mailed by the Copyright Office.

If you are filing an application for copyright registration in the Copyright Office, you ***will not*** receive an acknowledgement that your application has been received, but you can expect:

- A letter or telephone call from a Copyright Office staff member if further information is needed;
- A certificate of registration to indicate the work has been registered; or
- If registration cannot be made, a letter explaining why it has been refused.

Please allow 120 days to receive a letter or certificate of registration. Requests to have certificates available for pickup in the Public Information Office or to have certificates sent by Federal Express or another express mail service cannot be honored.

If you want to know when the Copyright Office receives your material, you should send it by registered or certified mail and request a return receipt from the post office. Allow at least 3 weeks for the return of your receipt.

SEARCH OF COPYRIGHT OFFICE RECORDS

The records of the Copyright Office are open for inspection and searching by the public. Moreover, on request, the Copyright Office will search its records at the statutory rate of $20 for each hour or fraction of an hour. For information on searching the Office records concerning the copyright status or ownership of a work, request Circulars 22 and 23. Records from 1978 forward may be searched via the Internet. For access, see below.

AVAILABLE INFORMATION

This circular attempts to answer some of the questions that are frequently asked about copyright. For a list of other material published by the Copyright Office, request Circular 2, "Publications on Copyright." Any requests for Copyright Office publications or special questions relating to copyright problems not mentioned in this circular should be addressed to the Copyright Office, LM-455, Library of Congress, Washington, D.C. 20559-6000. To speak to a Copyright Information Specialist, call (202) 707-3000 (TTY: 707-6737) between 8:30 a.m.-5:00 p.m., Eastern Time, Monday to Friday, except Federal holidays.

Copyright information, including many of the other circulars mentioned in Circular 1, as well as the latest Copyright Office regulations and announcements, is available via the Internet. Internet site addresses are:

World Wide Web URL: http://lcweb.loc.gov/copyright

Gopher: marvel.loc.gov, port 70

Telnet: marvel.loc.gov and login as marvel

Copyright Office records of registrations and other related documents from 1978 forward are also available over the Internet via the above addresses or telnet directly to LOCIS (Library of Congress Information System) at:

Telnet: locis.loc.gov

The Copyright Public Information Office is also open to the public Monday-Friday, 8:30 a.m. to 5:00 p.m., Eastern Time, except Federal holidays. The office is located in the Library of Congress, Madison Building, Room 401, at 101 Independence Ave., S.E., Washington, D.C., near the Capitol South Metro stop. Information Specialists are available to answer questions, provide circulars, and accept applications for registration. Access for disabled individuals is at the front door on Independence Avenue, S.E.

The Copyright Office is not permitted to give legal advice. If information or guidance is needed on matters such as disputes over the ownership of a copyright, suits against possible infringers, the procedure for getting a work published, or the method of obtaining royalty payments, it may be necessary to consult an attorney.

Copyright Office • Library of Congress • Washington, D.C. 20559-6000

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Report on Minnesota Government Use of Copyright and Intellectual Property

January 15, 1996

Appendix II:

Department of Administration Data Practices Advisory Opinion Number 94-057 December 28, 1994

Attorney General Opinion to Commissioner Sando, Department of Natural Resource, December 5, 1995

Department of Administration

OPINION Number 94-057

This is an opinion of the Commissioner of Administration, hereinafter "Commissioner," issued pursuant to authority vested in him by Laws of Minnesota, 1993, Chapter 192, Section 38. This opinion is based on the facts and information available to the Commissioner as described below. All correspondence and other information relied on by the Commissioner in issuing this opinion is on file in the office of the Public Information Policy Analysis Division (PIPA) of the Department.

Facts and Procedural History:

For purposes of simplification, the information presented by the citizen who requested this opinion and the response from the government entity with which the citizen disagrees are presented in summary form. Copies of the complete submissions are on file at the offices of PIPA and are available for public inspection.

On November 17, 1994, PIPA received a letter from Mr. Stephen Boe, dated November 15, 1994, in which he described his attempts to gain access to certain data maintained by the Department of Natural Resources, hereinafter "Department."

Beginning in June, 1994, and continuing into October, 1994, Mr. Boe attempted to gain access to and copies of data concerning Cass Lake muskellunge. Department personnel told him that he was free to view or copy the requested data, but that the Department copyrighted all the data he requested, and therefore any use, other than personal, was regulated by the terms of the copyright. In addition, the Department told him that all photocopies and notes he made must carry the Department's copyright statement. Mr. Boe objected to having these conditions placed upon his access to the data, and asked the Department to provide him, in writing, with the legal basis upon which it relied to impose such limitations.

On August 22, 1994, Mr. Boe wrote to Mr. Rodney Sando, Commissioner of the Department, to ask for a ruling on the Department's response to his data request. Mr. Sando, in his written reply to Mr. Boe, stated that it was the Department's position that the data in question were copyrighted, and that all copies or notes made by or for Mr. Boe were to carry the Department's copyright stamp. Mr. Boe then requested an opinion of the Commissioner on the issue stated in the "Issue" section below.

In response to this request, PIPA, on behalf of the Commissioner, wrote to Commissioner Sando. The purposes of this letter were to inform Mr. Sando of Mr. Boe's opinion request, to provide a copy of the request to him, to ask Mr. Sando or the Department's attorney to provide information or support for the Department's position,

and to inform him of the date by which the Commissioner was required to issue this opinion.

On December 2, 1994, PIPA received a response letter from Commissioner Sando. In his response, Mr. Sando stated that it is the Department's position that it is in full compliance with Minnesota Statutes Chapter 13, the Minnesota Government Data Practices Act ("Act" or "MGDPA"), regarding Mr. Boe's request. He stated that the Department gave Mr. Boe access to all the data he requested, that Mr. Boe took notes on the data he reviewed, and that Mr. Boe refused the Department's offer to provide him copies of the data, because the copies carried the Department's copyright notice. He also stated that the Department informed Mr. Boe that he may not publish or otherwise use the data for purposes other than personal ones unless he obtains a license from the Department. He said that "[t]he Department grants licenses to the public on a regular basis, normally without charge."

Mr. Sando based his assertion of intellectual property rights for the data under Title 17, United States Code, the Copyright Act of 1976.

Issue:

Is the position of the Department of Natural Resources that it can limit Mr. Boe's use of public data in compliance with the Minnesota Government Data Practices Act?

Discussion:

The legislature has implemented fundamental information policy principles in the MGDPA. It has determined that, unless otherwise classified by statute, federal law, or temporary classification, government data are public, and that generally, no restrictions may be imposed upon the public's use of public government data. (See Minnesota Statutes Section 13.03, subdivision 1, and Minnesota Rules, Section 1205.0300, subpart 2.)

However, in provisions of the Act and in other statutes, the Minnesota legislature has addressed the reality that in some instances government data may have commercial or other value, and that taxpayers in general ought to benefit from the value of government information and data. In a variety of instances the legislature has made both general and specific policy that is intended to give entities the authority to tap the value that may be inherent in government data.

As a matter of general policy, the legislature, in 1984, amended Minnesota Statutes Section 13.03, subdivision 3, to authorize responsible authorities to charge a reasonable fee, in addition to the costs of making, certifying, and compiling copies, when a request

for data under this subdivision "...involves any person's receipt of copies of public government data that has commercial value and is an entire formula, pattern, compilation, program, device, method, technique, process, database, or system developed with a significant expenditure of public funds by the agency,...." The agency must be able to demonstrate clearly the relationship of the fee to the actual development costs of the information. (Laws of Minnesota for 1984, Chapter 436, Section 2.)

In certain instances, the legislature has authorized government agencies to sell data or to seek copyright or patent protection for certain types of government data. In Minnesota Statutes Section 16B.51, the Department of Administration is authorized to sell certain data. Government entities can also seek patent or copyright protection for computer software programs or components of software programs. (See Minnesota Statutes Section 13.03, subdivision 5.) In the instance of projects supported by the Minnesota Environment and Natural Resources Trust Fund (and two other funds), the legislature has said that: "[t]he fund owns and shall take title to the percentage of a royalty, copyright, or patent resulting from a project supported by the fund equal to the percentage of the project's total funding provided by the fund...." (Minnesota Statutes Section 116P.10.)

The history of specific legislative authorizations to sell data or claim intellectual property rights indicates a legislative position that government entities do not have general authorization to make claims of intellectual property rights over public government data. If all government entities could claim intellectual property rights in their public data, then there would be no need for such specific authorizations to do so. In fact, during the 1984 session, Hennepin County proposed general legislative authorization that would have allowed government entities to acquire a copyright or patent for any government data created by their agencies. The legislature rejected such a broad approach, and instead enacted the language in Minnesota Statutes Section 13.03, subdivision 5, that authorizes agencies to seek protection for computer software programs or components of programs.

In 1994, the legislature again considered and rejected an amendment to Minnesota Statutes Section 13.03, subdivision 5, which proposed that state agencies and political subdivisions be authorized to acquire copyright or other protection for intellectual property in any government data developed or acquired by the entity. The proposed legislation defined "intellectual property" to mean "...an idea, datum, artistic or other tangible expression, innovation, invention, process, or product, or any other meaning as defined by state or federal copyright, patent, or trademark laws...." (See A-1 amendment, SF 2076, 3-9-94.)

After rejecting this language, the only action taken by the legislature in 1994 concerning intellectual property was the creation of the following new section in Minnesota Statutes Chapter 16 B:

> Sec. 33 [16B.483] INTELLECTUAL PROPERTY.
> Before executing a contract or license agreement involving intellectual property developed or acquired by the state, a state agency shall seek review and comment from the attorney general on the terms and conditions of the contract or agreement. (Ch. 632, Art. 3, Sec. 33, Laws of Minnesota for 1994.)

Given the previous history of legislative consideration of copyright and other forms of intellectual property claims for government data, this language does not appear to be sufficient evidence of legislative intent to allow any government entity in this state to claim copyright or other forms of intellectual property protection for any public government data.

Commissioner Sando stated that the Department relied upon Title 17, United States Code, as its authority to claim copyright protection for the data in question. It is the case that Title 17 U.S.C. does not exclude state governments and agencies from claiming copyright protection, but it also does not provide for it. (Federal copyright law does not allow federal government agencies to claim copyright protection for federal data.)

There is no indication in legislative history that the legislature intends that any government entity can claim and enforce intellectual property rights in its public government data, and thereby severely limit public use of public data. As noted above, a fundamental principle of the MGDPA is that anyone may use public data, for any purpose. It would contravene this principle to find that such a general authority resides in agencies. These reasons, as well as the devastating impact that intellectual property claims may have on public access to and use of public government data, lead to the conclusion that the Department's position is not appropriate.

The legislature, through the enactment of the MGDPA, and as evidenced by subsequent actions, has for 20 years retained the authority to classify data. It removed such discretion from government entities. If the Department's assertion that it can control the use of public government data were to be upheld, the Department would, in effect, be exercising its own discretion over public access to and use of public data. The information policy principles embedded in the MGDPA, (the presumption of openness of government data, and the absence of limitations upon the use of public government data) would then be circumvented.

The Department, and other government entities, in appropriate circumstances, may charge an add-on fee as is authorized in the Act. This enables entities to recover development costs for data which have commercial value, without imposing upon the public the financial and other costs of intellectual property claims.

Opinion:

Based on the correspondence provided in this matter, my opinion on the issue raised by Mr. Boe is as follows:

The position of the Department of Natural Resources that it can limit Mr. Boe's use of public data, is not in compliance with the presumption of the Minnesota Government Data Practices Act, that, unless clearly specified by the legislature, the public's right of access to and use of public government data cannot be curtailed by a government entity's claim of intellectual property rights in those data.

Signed: Robert A. Schroeder

Robert A. Schroeder
Acting Commissioner

Dated: December 28, 1994

DATA PRACTICES: COPYRIGHT: STATE AGENCY DATA: State agency data constituting original works of authorship are protected by federal copyright law. Certain restrictions may be placed upon use of public data. Tit. 17 U.S.C. Minn. Stat. §§ 13.03, 13.37, 15.95, 16B.483, 16B.51, 16B.53.

852
(Cr. Ref. 315a)

December 4, 1995

Rodney Sando, Commissioner
Department of Natural Resources
DNR Bldg., 6th Floor
500 Lafayette Road
St. Paul, Minnesota 55155

Dear Commissioner Sando:

In your letter to Attorney General Hubert H. Humphrey III, you request an opinion of the attorney general pursuant to Minn. Stat. § 8.06 (1994) which, under 13.072, subd. 1(c) (1994) takes precedence over Department of Administration Data Practices Opinion No. 94-057, issued by the acting commissioner of administration on December 28, 1994. You present substantially the following:

FACTS

In 1994, Stephen Boe requested access to and copies of maps and other data developed by department of natural resources (DNR) staff concerning Cass Lake muskellunge. The DNR told him that he was free to view and copy the requested data, but that his right to use the data was subject to the department's copyright under the Federal Copyright Act (FCA), 17 U.S.C. § 102(a) (1988), and that all photocopies and notes on the data would carry the department's copyright notice. The DNR further advised Mr. Boe that he could not publish or otherwise use the data for purposes other than personal ones unless he obtained a license from the department.

Mr. Boe objected and, pursuant to Minn. Stat. § 13.072, subd. 1(a) (1994), requested an opinion of the commissioner of administration. Acting commissioner of administration Robert A. Schroeder opined that, under the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. ch. 13 (1994), state agencies must provide access to government data classified as "public," and must also permit unrestricted use of that data, even for commercial purposes, absent specific statutory authority to the contrary. On that basis, the acting commissioner ruled that the DNR's position was impermissible.

You then asked us substantially the following:

QUESTION

Under current law, may a state agency lawfully require that a person seeking to distribute or sell copies of government data enter into a license or authorization agreement governing the data's subsequent use, if that data is "public" under the Minnesota Government Data Practices Act?

OPINION

We answer your question in the affirmative, subject to the following restrictions:

1. The data in question must come within the scope of "original works of authorship" of the State protected by the Federal Copyright Act (FCA), Title 17, U.S. Code.

2. The agency may not impose restrictions on use beyond its rights under the FCA. For example, the agency may use a license or authorization agreement to restrict or condition an individual's authority to make additional copies, to prepare derivative works based upon the copyrighted work, or to distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending, 17 U.S.C. § 106 (1988), but may not restrict or condition "fair use" of the data for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 107 (1988).

3. The department may not assert copyright ownership to deny members of the public their right "to inspect and copy public government data at reasonable times and places" under Minn. Stat. § 13.03, subd. 3 (1994). To the extent the data has commercial value, was developed with a significant expenditure of public funds, and meets the other criteria in the second paragraph of Minn. Stat. § 13.03, subd. 3 (1994), the department may not use copyright ownership to recover fees in addition to the costs of making, certifying, and compiling copies in

an amount more than can be justified in relation to the actual development costs of the data, unless otherwise specifically authorized by statute.

Our basic conclusion is that, although the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. ch. 13 (1994), generally does not permit state agencies to withhold access to "public" government data, it does not follow that the MGDPA prohibits state agencies from placing reasonable restrictions on the use of their "original works of authorship," consistent with the rights of a copyright owner under the Federal Copyright Act (FCA).

Federal copyright law

The Federal Copyright Act (FCA) provides that:

> 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.

17 U.S.C. § 102(a) (1988). The purpose of the Act is set forth in the U.S. Constitution, which gives Congress the power "[t]o regulate the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const., art. I, § 8.

The coverage of the copyright law is broad. Not only does it protect creative works like novels, paintings, and pictures, but it also can cover what are sometimes called "fact works"--works that have value because they communicate accurate factual information in useful ways. That includes "pictorial, graphic, and sculptural works" such as "maps, globes, charts, diagrams, models, and technical drawings," as well as "literary works," defined as "works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the

material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." 17 U.S.C. § 101 (1988). Copyright protection also extends to "compilations," 17 U.S.C. § 103 (1988), which section 101 in turn defines as works "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1988). It is, of course, not the underlying facts themselves that are copyrightable, but rather the particular selection or arrangement chosen. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282 (1991); see also Kidwell, Open Records Laws and Copyright, 1989 Wis. L. Rev. 1021, 1025.

Contrary to a common misperception, no application is required to secure copyright protection. Copyright protection is in place immediately and automatically when the work is created. No registration or other action in the Copyright Office of the Library of Congress is required,[1] nor is there any requirement that the work be published before it is copyrighted. At least since the 1978 amendments to the Federal Copyright Act, copyright "subsists" from the time that a work is first embodied in a tangible medium. 17 U.S.C. § 102 (1988).

Copyright vests initially in the author or authors of the work, 17 U.S.C. § 201(a) (1988), except that, in case of "works for hire," the employer or other person for whom the work was prepared is considered to be the author. 17 U.S.C. § 201(b) (1988). Subject to a number of

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[1] The familiar copyright notice, e.g., "Copyright 1995 Jane Doe," is optional, as is copyright registration with the Copyright Office. Under the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, failure to place a copyright notice can never cause loss of copyright. Copyright notices and registrations do help prevent defendants from claiming "innocent infringement" or making other arguments to avoid or reduce the size of infringement damages awards.

exceptions, 17 U.S.C. §§ 107-120 (1988), the owner of a copyright has the exclusive right to do or to authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (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;
>
> (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; and
>
> (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.

17 U.S.C. § 106 (1988).

The State of Minnesota obviously generates significant amounts of "data" under state law that would come within the scope of "original works of authorship" under federal law. A threshold question, then, is whether, under the FCA, a State or its agencies can be a copyright owner with the exclusive rights set forth in section 106.

We conclude that they can. Nothing in the FCA restricts the scope of the Act to private parties. The federal government is excluded, 17 U.S.C. § 105 (1988), but, as at least one court has reasoned, "[t]he statute relating to copyrights is not restricted to private parties and there is no reason to believe that such a restriction should be upheld. In fact, the opposite inference is required when only one specific governmental entity, the United States of America, is excluded from the protection of the Act." National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 495 F. Supp. 34, 35 (N.D. Ill. 1980), aff'd, 692 F.2d 478 (7th Cir. 1982), cert.

denied, 464 U.S. 814, 104 S. Ct. 69 (1983). The Copyright Office at the Library of Congress also recognizes that works of state and local government officials can be copyrighted. See also Copyright Office Practices Compendium II § 206.03, cited in John W. Hazard, Jr., Copyright Law in Business and Practice , para. 4.3[3] at 4-22 (1989):

> *Coyrightable government works.* Works (other than edicts of government)[2] prepared by officers or employees of any government (except the U.S. Government) including State, local, or foreign governments, are subject to registration if they are otherwise copyrightable.

Hazard at 4-22 ("It is generally recognized that the works of state and local governments can be the subject of a copyright.") Likewise, the Copyright Remedy Clarification Act, adopted in 1990, expressly includes "any governmental or nongovernmental entity" within the scope of those with standing to sue in federal court for copyright infringement, clearly suggesting Congress's understanding that state and local governments can be copyright owners. 17 U.S.C. § 511 (1988). See also Kidwell, Open Records Laws and Copyright, 1989 Wis. L. Rev. 1021, 1024 ("[S]tate and local governments may generally hold copyright in works they author, while the federal government may not.") We likewise conclude that, under the federal law, the State of Minnesota, its agencies, and its political subdivisions can enjoy the intellectual property rights of the Federal Copyright Act.

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[2] Most states claim copyright in their statutes, session laws, and other legislative materials. There is case law support, however, for the proposition that the texts of statutes, rules and judicial opinions are in the public domain. See, e.g., Building Officials & Code Administrators v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980); see generally 1 M. Nimmer and D. Nimmer, Copyright, § 5.06[C] (1993); Patterson and Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L. Rev. 719 (1989).

State data practices and records management laws

Government agencies are, of course, creatures of statute and possess only those powers given to them by the legislature. As the Minnesota Supreme Court has made clear:

> The legislature states what the agency is to do and how it is to do it. While express statutory authority may not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature.

Peoples Natural Gas Co. v. Minnesota Public Utilities Commission, 369 N.W.2d 530 (Minn. 1985). Our review of the statutes leads us to the conclusion that the power to exercise and enforce intellectual property rights can be "fairly drawn" and is "fairly evident from the powers expressly given by the legislature."

For example, Minn. Stat. § 15.95, subd. 5(8) (1994) delegates to the government information access council the responsibility to evaluate "how the state and other governmental units can protect their intellectual property rights, while making government data available to the public as required in chapter 13." At bare minimum, that provision acknowledges the existence of those rights, and is inconsistent with the view that the legislature has already relinquished them outright. Likewise, Minn. Stat. § 16B.483 (1994), which provides that "[b]efore executing a contract or license agreement involving intellectual property developed or acquired by the state, a state agency shall seek review and comment from the attorney general on the terms and conditions of the contract or agreement," implies that the legislature understands that the state owns intellectual property and that agencies have the authority to enter into contracts or license agreements involving that property.

Other statutes expressly delegate to state agencies the authority and responsibility to preserve, transfer, sell and otherwise manage government records. Those statutes are all consistent with the idea that state agencies are to act as the responsible owners of certain government data. Minn. Stat. § 138.17, subd. 7 (1994) provides that "[i]t shall be the duty of the head of each state agency and the governing body of each county, municipality, and other subdivision of government to cooperate with the commissioner [of administration] . . . to establish and maintain an active, continuing program for the economical and efficient management of the records of each agency, county, municipality or other subdivision of government." The record retention statute, Minn. Stat. § 15.17, subd. 2 (1994) likewise creates a duty of "preservation and care" of government records in the chief administrative officer of each agency.

Minn. Stat. § 138.17, subd. 1c(3) (1994) gives the historical society, which is the ultimate depository for most state agency data, the authority to deny public access to "proprietary information, including computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by the agency or entrusted to it." Minn. Stat. § 16B.51, subd. 3 (1994) provides that the commissioner of administration may sell, not just "certain data" or computer software, but rather:

> may sell official reports, documents, data, and publications of all kinds, may delegate their sale to state agencies, and may establish facilities for their sale within the department of administration and elsewhere within the state service.

Likewise, Minn. Stat. § 16B.52, subds. 1 and 2 (1994) seems to support state agencies' assertion of ownership of intellectual property, by providing that any "report or publication paid for from public funds must carry the imprimatur of the agency under whose authority it is

issued." Minn. Stat. § 16B.51, subd. 1 (1994) further provides that the commissioner of administration "shall supervise and control the making and distribution of all reports and other publications of all kinds issued by the state when not otherwise prescribed by law."

At minimum, those provisions delegate general management authority over government data and records to agencies, in conjunction with the commissioner of administration, and it is not unreasonable to construe that general authority to include the authority to take steps to preserve federal copyright ownership rights.

Section 201(d) of the Copyright Act does, however, provide that "[t]he ownership of a copyright may be transferred in whole or in part . . . by operation of law," and so, the question is whether the Minnesota Government Data Practices Act (MGDPA) transfers all or some of the State's exclusive rights with respect to "works of original authorship" to members of the public who seek access to the data or into the "public domain."

A fundamental principle of federal copyright law is that "[i]n order for the holder of a copyright to abandon his rights thereunder, he must perform some overt act which manifests an intent to surrender rights in the copyrighted material. Mere inaction or negative behavior will not suffice." Dodd, Mead & Co. v. Lilienthal, 514 F.Supp. 105, 108 (S.D.N.Y. 1981)(citations omitted).[3] If the question, then, is whether the state has expressly waived its right to exercise and

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[3] An analogous rule applies to the states' constitutional immunity from suit in federal court under the eleventh amendment, U.S. Const., amend. XI. States can waive their eleventh amendment immunity by state statute or constitutional provision, or by taking some other affirmative action in the context of a particular federal program, but the U.S. Supreme Court has insisted that, to be effective, the states' waiver of immunity be "unequivocal." See generally Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907 (1984). No court would consider the absence of express state statutory authority to assert eleventh amendment immunity to constitute a state waiver of its federal constitutional right.

enforce its intellectual property rights under the FCA, the answer is clearly no. There are no generally applicable state statutes expressly relinquishing federal intellectual property rights.

The MGDPA does give the public the right to inspect and copy public government data. Minn. Stat. § 13.03, subd. 3 (1994) provides that:

> Upon request to a responsible authority or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places, and, upon request, shall be informed of the data's meaning.

State agencies, therefore, may not rely on the FCA to deny citizens either an opportunity to inspect or to copy public data.[4] In addition, the MGDPA also places restrictions on the amounts that government agencies can charge for certain kinds of public government data:

> When a request under this subdivision involves any person's receipt of copies or public government data that has commercial value and is a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, database, or system developed with a significant expenditure of public funds by the agency, the responsible authority may charge a reasonable fee for the information in addition to the costs of making, certifying, and compiling the copies. Any fee charged must be clearly demonstrated by the agency to relate to the actual development costs of the information. The responsible authority, upon the request of any person, shall provide sufficient documentation to explain and justify the fee being charged.

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[4] The Federal Copyright Act does contain a broad preemption provision, 17 U.S.C. § 301, and at least one attorney general opinion has suggested that state agencies need not comply with state open records laws if that would interfere with rights under the FCA. MW-307 Op. Atty. Gen. Tex. 980 (1981) ("Moreover, the supremacy clause of the United States Constitution would prohibit the custodian from following the Open Records Act where it conflicts with the copyright law.") Our view is that nothing in the Supremacy Clause would prohibit a state from waiving or relinquishing its rights as a copyright holder, if its legislature so decided. It therefore is reasonable to conclude that a state legislature can forfeit any part of that federal "bundle of rights" should it deem such waiver to be in the public interest. The state cannot forfeit those rights on behalf of third parties, however, so state agencies who acquire "original works of authorship" from third parties cannot be compelled by the MGDPA to violate federal prohibitions on copyright infringement. To the extent then that compliance with the MGDPA would compel an actual violation of the FCA, and subject the State to liability, the FCA controls. See, e.g., Chavez v. Arte Publico Press, 59 F.3d 539 (5th Cir. 1995).

Id. Other statutes expressly authorize selling government data at market values, e.g., Minn. Stat. § 16B.405 (1994) (software developed by state agencies); Minn. Stat. § 116J.63 (1994) (reports, publications and related publicity and promotional material of the department of trade and economic development). Nevertheless, we do not believe the FCA provides state agencies with a basis to refuse to comply with the fee restrictions in Minn. Stat. § 13.03, subd. 3 (1994).

The focus of the MGDPA is, of course, on access, and it is mostly silent on subsequent use of government data. Accordingly, Minn. Rule § 1205.0300, subp. 2 (1993) provides that "the responsible authority shall provide access to public data to any person, without regard to the nature of that person's interest in the data," and does not govern subsequent use. It neither authorizes nor prohibits private commercial sales, further reproductions, noncommercial distributions, lending, displays, or the preparation of derivative works without attribution, or any of the other exclusive or nonexclusive rights set forth in the FCA. Requiring agencies to comply with the state access, copying, and fee charging provisions of the state law, while allowing them to use license or authorization agreements to enforce their other rights under the federal copyright law would therefore give effect to both statutes. See generally Minneapolis Star & Tribune Co. v. Housing and Redevelopment Authority, 310 Minn. 313, 324, 251 N.W.2d 620, 626 (1976) (harmonizing state open meeting law with statutory attorney-client privilege by allowing public agencies to close meetings with attorneys to discuss pending or imminent litigation).

The commissioner's opinion, however, concludes that the legislature that adopted the MGDPA decided, by implication, to thereby forfeit the state's federal copyright protections in "original works of authorship" involving public data. According to the commissioner, "[t]he

history of specific legislative authorizations to sell data or claim intellectual property rights indicates a legislative position that government entities do not have general authorization to make claim of intellectual property rights over public government data. If all government entities could claim intellectual property rights in their public data, then there would be no need for such specific authorizations to do so." Opinion 94-057, at 3.

In our view, that negative implication does not necessarily follow from the statutes cited. Minn. Stat. § 116P.10 (1994), which authorizes the environment and natural resources trust fund to share in receipts from copyrights to the extent of its share of the project's funding, does not address works authored by government agencies. To the extent, however, that that trust fund makes grants to state agencies (which it does), it arguably demonstrates a legislative assumption that those agencies may, under existing law, own copyrights in which the fund should share. Likewise, Minn. Stat. § 16B.51 (1994), which authorizes the commissioner to sell "official reports, documents, data, and publications of all kinds" and to delegate that authority to other state agencies, appears less like a "specific authorization" and more like a general authorization to take action consistent with the assertion of copyright ownership.[5] Minn. Stat. § 13.03, subd. 5 (1994) does clarify that "[n]othing in [the MGDPA] or any other statute shall be construed to prevent a state agency, statewide system, or political subdivision from acquiring a copyright or patent for a computer software program or components of a program created by that government

[5] Indeed, Minn. Stat. § 16B.41, subd. 2(f)(4) (1994) expressly directs the information policy office at the department of administration to establish "information sales systems that utilize licensing and royalty agreements to the greatest extent possible, together with procedures for agency denial of requests for licenses or royalty agreements by commercial users or resellers of the information."

agency." Since, under federal law, copyright "subsists" from the time a work is first embodied in a tangible medium, 17 U.S.C. § 102 (1988), state law could not prevent a state agency from "acquiring" a copyright in such data. The operative sentence in that subdivision is the second, where it denies the public access to that data under the trade secret provisions in Minn. Stat. § 13.37 (1994). Without that provision, under our analysis, the government would have to provide access and copying of that software, but could use a license or authorization to attempt to impose restrictions on later use. The legislature presumably concluded that, to protect the state's interest in generating computer software, it needed to impose additional restrictions on even public access for inspection purposes. We do not deduce from that provision a legislative intention to forfeit the state's rights as a copyright owner in all other public government data.[6]

The commissioner's opinion does raise important concerns about the impact intellectual property claims may have on public access and use of public government data," Opinion 94-057, at 4. We share that concern. We also believe, however, that it is important to understand that the agencies' discretion over managing the use of their "original works of authorship" remains subject to significant constraints. First of all, as previously explained, allowing state agencies to assert the state's intellectual property rights would not limit the right of the public to access and copy public data; the only potential limits would be on subsequent use of some of that data.

---

[6] We acknowledge that bills were introduced but not enacted in the 1994 legislative session which would have expressly authorized agencies to "acquire" copyright protection. As the U.S. Supreme Court has often cautioned, however, drawing positive inferences from legislative inaction is risky. See, e.g., Cipollone v. Liggett Group, Inc., 504 U.S. ____, 112 S. Ct. 2608, 2619 (1992), quoting United States v. Price, 361 U.S. 304, 313, 80 S. Ct. 326, 330 (1960). While the failure to enact proposed legislation can flow from a consensus of opposition to the principles embodied therein, that is not necessarily the case. One might as easily conclude that there are and have been a variety of opinions on intellectual property questions among those in the state legislature who have confronted these issues.

Second, we do not construe the FCA to give state agencies general authority to exploit the commercial value of public government data beyond the recoupment of data development costs contemplated in Minn. Stat. § 13.03, subd. 3 (1994), unless otherwise specified in state statute.

Finally third, even a private copyright owner's "bundle of rights" is subject to a number of statutory exceptions, the most important of which is the so-called "fair use" doctrine. Under 17 U.S.C. § 107 (1988), a fair use such as "criticism, comment, news reporting, teaching, scholarship, or research" is not an infringement of the exclusive rights of a copyright owner. The courts are to consider four factors in determining whether a particular use is a "fair use" under the FCA:

> 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.

Id. Pursuant to that statutory direction, the courts have adopted certain principles to guide future decisions. First of all, commercial use of copyrighted material is "presumptively" an infringement, and not a "fair use"; the "contrary presumption" applies to "noncommercial, nonprofit activity." Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449, 104 S. Ct. 774, 792 (1984) (home videotaping). Second, the scope of "fair use" is greater for informational works than it is for more creative works. Stewart v. Abend, 110 S. Ct. 1750, 1769 (1990). Third, unpublished works are generally entitled to more protection than published ones, because

"first publication" is considered a core part of the copyright owner's "bundle of rights." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 540, 105 S. Ct. 2218, 2220 (1985) (Nation's pre-publication printing of excerpts from Gerald Ford's memoirs held not to be a "fair use"). Therefore, although we believe, for example, that state agencies have the authority to use licensing or authorizing agreements to manage the subsequent sale or dissemination of taxpayer-funded data for commercial purposes, we see no basis for concluding that state agencies have any authority to use licensing or authorization agreements to protect themselves from criticism, comment, or news reporting, to stifle research, teaching, or scholarship, or to in any way restrict the "fair use" of public government data.

Our opinion, therefore, is that Mr. Boe had the right to inspect and copy the fish data as required by the MGDPA and to use the underlying facts as he deemed appropriate, but the State also had the legal authority to assert its rights under the FCA to manage the subsequent distribution and use of its "original work of authorship."

It is, of course, ultimately the legislature's role and responsibility to make or change policy in this area.[7] The management of the state's intellectual property raises a number of crucial policy issues: when to permit, when to encourage, and how to administer the commercial use or resale of government data; what principles should determine whether the taxpayers or the users of government information should bear the greater share of the costs of data generation and compilation; what kind of guidelines should state and local government agencies have to

[7] There are policy arguments for placing strict limits on agency assertion of intellectual property rights both to prevent potential abuse and to offer citizens a greater measure of clarity about their legal rights and responsibilities. See, e.g., Gellman, Twin Evils: Government Copyright and Copyright-Like Controls over Government Information, 45 Syracuse L. Rev. 999 (1995).

interpret concepts like "fair use"; and what impact will rapidly changing communications technologies have on the public's need and interest in a broader range of government information. We certainly encourage the legislature to consider these issues carefully.

Very truly yours,

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Attorney General

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Report on Minnesota Government Use of Copyright and Intellectual Property

January 15, 1996

Appendix III:

Use/Copyright Principle Proposal as Adopted by the full GIAC on December 18, 1995

"October Group" side-by-side with Information Access Principles Work Group Draft Proposal

Information Access Principles - Use/Copyright Principle Proposal - DRAFT

12/04/95 - (Draft incorporates adopted amendments from 11/27/95 and 12/04/95 meetings)

Revised Proposed Principle 5:

Government information shall exist in the public domain to the greatest extent possible. Stewardship of government information, and the value of that information, is a function of government. Government shall protect the right of citizens to use public government information for any legal purpose and shall promote the use of public government information to meet public purposes. Use of government information should not be constrained by copyright or copyright-like controls except under limited circumstances. A government unit may exercise copyright on certain government information only pursuant to criteria established by the legislature. In no case should government's exercise of copyright be used to deny public access for inspection or to receive copies of public government information.

Issues of Public Domain and Copyright

A. To the greatest extent possible public government data, on which a government unit may claim original authorship under United States copyright law, shall exist in the public domain.

B. A government unit may exercise copyright in certain 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:

1. literary works,

   (a) The following literary works or any compilations thereof shall exist in the public domain, including but not limited to the following:
   [Note: Works in the public domain may not be copyrighted.]

      (1) the text of adopted or proposed statutes, rules, regulations, ordinances, codes, other laws and general legislative and rule making information, and any materials that explain or justify the foregoing (excluding training manuals);

      (2) judicial and quasi-judicial pronouncements, orders, decisions, dockets, calendars and opinions; rule related and government units' pronouncements, orders and opinions;

      (3) text of reports created by or on behalf of government units;

(4) directories or a directory index of government services and institutions or listings of records, assets, products, employees or offices, grants of permission or license; and,

(5) government policies and procedures, memorandum, agendas, correspondence, notes, meeting notices, meeting minutes, schedules, speeches, news releases, contracts, audits, investigative reports, and government financial and budget information.

(b) Government units may be granted copyright for public government information that are copyrightable as literary works if all of the following three criteria are met:

(1) There is a compelling need for the copyright; and,

(2) The original and creative material will clearly advance the public mission or the purpose of the government unit; and,

(3) The copyright will not prevent access to the public government data.

(c) Computer software programs are literary works which are copyrightable and which need not meet the criteria set forth above to be copyrighted. Provision to treat computer programs as trade secrets, as provided by current law, shall continue. In no case shall copyright of a software program be used to prevent access to the underlying public government data.

(d) Copyright will be granted in the case of public/private partnerships or collaborations where the exercise of copyright is required by negotiated contract or when the exercise of copyright is needed for protection of joint ownership of a copyright.

(e) Maps may be copyrighted under certain conditions as outlined in B.1.(b), (c) or (d).

2. musical works, including any accompanying words;

3. dramatic works, including any accompanying music;

4. pantomimes and choreographic works;

5. pictorial, graphic [Maps, see B.1.(e)], and sculptural works;

6. architectural works;

7. motion pictures and other audiovisual works; and,

8. sound recordings.

C. Pursuant to the criteria and conditions specified in this recommendation and under federal copyright law, government units may exercise the full copyright protections on copyrightable public government data except under the following circumstances:

1) if the exercise of a specific copyright protection is contrary to the public mission or purpose of the government unit; and

2) if the exercise of copyright has the affect of limiting the liberty of the press, free speech, or ability of persons to alter, modify or reform government;

Further, the government unit shall:

1) never condition a person's access to public government data on the execution or signing of a copyright agreement or license;

2) claim only actual damages in any infringement suit or action taken; and

3) never be permitted to collect attorney's fees in any infringement suit or action taken unless the court determines that an action brought under this subdivision is frivolous and without merit and a basis in fact, in which case the court may award reasonable costs and attorney fees to the responsible authority.

D. The legislature shall establish a process that will:

1) monitor the registration and exercise of copyright authority by government units; and,

2) encourage the use of Alternative Dispute Resolution (ADR) techniques to resolve disputes concerning that exercise.

E. Government units may claim and exercise copyright on public government data only if the copyrightable work meets the above criteria and has been registered, prior to any dispute, with the U.S. Copyright Office. A copy of the federal copyright filing must be submitted to the Commissioner of Administration. The commissioner shall make copies of copyright registrations available to the public and shall publish on a regular basis listings of newly registered copyrights. Copies of public government data that have been registered by state agencies and are in a form or media which can be reproduced, shall be distributed to the state document depository libraries, pursuant to MN. STAT. 15.18.

F. All public government data which are original works of authorship and eligible for copyright protection under Title 17 of the U.S. Code, but which have not been registered, shall exist in the public domain. No person or entity may claim original copyright on public domain government data.

G. A notice of copyright must appear on all copyrighted public government data when the medium permits such notice. All notice of copyright on public government data by a government unit must state that the claim does not limit public access to public government data, as established in the Minnesota Government Data Practices Act. The notice shall include a statement that defines the public's right to exercise ***fair use*** of the copyrighted work as granted under federal copyright law, and other disclaimers that clarify the acceptable use of copyrighted materials.

H. The duties of the government unit's data practices responsible authority, as defined in MN STAT 13.02, Subd 16 (see below), shall include the documentation of criteria compliance, copyright registration, and application of procedures and decisions to ensure that this section and the criteria are applied uniformly across the government unit. The responsible authority shall maintain a publicly accessible list describing all registered copyrights filed by that government unit. The responsible authority shall also receive, administer and respond to, in a timely fashion, all inquiries or complaints related to that government unit's claim or exercise of copyright. A government unit may not copyright public government data before the designation of the responsible authority.

> *[MS 13.02, Subd. 16. Responsible authority. "Responsible authority" in a state agency or statewide system means the state official designated by law or by the commissioner as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data. "Responsible authority" in any political subdivision means the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data, unless otherwise provided by state law.]*

I. The University of Minnesota and Minnesota State Colleges and Universities may claim and exercise full copyright protections available under Title 17 of the U.S. Code on all their public government data except for that data described in B.1.(a) and in compliance with G) and H) of this recommendation.

J. Two years following the enactment of statutory authority for government unit to exercise copyright on certain public government information pursuant to criteria established by the legislature, a panel created by the legislature shall review issues and trends, criteria application, appeals by citizens or others, and assess any positive or negative impact on the public based on government units' exercise of copyright.

Patent, Trademark, Service Mark

L. Nothing in this recommendation shall be construed to prevent a state agency, statewide system, or political subdivision from acquiring a patent or registering a trademark or service mark.

GOVERNMENT INFORMATION ACCESS COUNCIL
Information Access Principles Work Group
Principle #7 - Government information shall exist in the public domain to the greatest extent.
Comparison of IAP Work Group Proposal and "October Group" Proposal

IAP Work Group Proposal	October Group Proposal
Principle - *Government information shall exist in the public domain to the greatest extent possible.* Stewardship of government information, and the value of that information, is a function of government. Government shall protect the right of citizens to use public government information for any legal purpose and shall promote the use of public government information to meet public purposes. Use of government information should not be constrained by copyright or copyright-like controls except under limited circumstances. A government unit may exercise copyright on certain government information only pursuant to criteria established by the legislature. In no case should government's exercise of copyright be used to deny public access for inspection or to receive copies of public government information.	Principle: (same) Identical language.....
Issues of Public Domain and Copyright	
A. (same)- Restates claim of public domain.....	A. (same) Restates claim of public domain.....
B. (same)- Government unit may claim copyright under limited circumstances.....	B. (same) Government unit may claim copyright under limited circumstances.....
B.1.(a) [Significant Differences]: adds "or any compilations thereof" [Effect: prohibits copyright on any combination of the listed public domain "literary works"..... Example: A local watershed district wishes to produce a pamphlet which explains federal, state and local jurisdiction's laws, rules, regulations regarding Wetlands. May have creative/original thought regarding application of laws, who to contact regarding those regulations, how to create a wetlands, etc. That pamphlet would not be eligible for copyright by a government unit. A private citizen could, however, claim copyright on such a work.]	B.1.(a) Defines (lists) "literary works" which will always remain in the public domain and therefore, are NOT COPYRIGHTABLE by anyone. Copyright of **compilations** is not forbidden. It leaves the decision up to the government unit to determine if a compilation is a "literary work" that is eligible for copyright.

GOVERNMENT INFORMATION ACCESS COUNCIL
Information Access Principles Work Group
Principle #7 - Government information shall exist in the public domain to the greatest extent.
Comparison of IAP Work Group Proposal and "October Group" Proposal

IAP Work Group Proposal	"October Group" Proposal
adds "including but not limited to the following" [Effect: Brings to question what --if any-- literary work would qualify for copyright under the criteria in the IAP Proposal under B.1.(b)(1-3). Could the "infamous Bird Book" (of the DNR) be challenged as a "report" which is clearly prohibited from copyright in B.1.(a)(3).]	(No similar wording)
B.1.(b) Criteria Government units may be granted copyright for public government information that are copyrightable as literary works if all of the following three criteria are met: (1) There is a compelling need for the copyright; and, (2) The original and creative material will clearly advance the public mission or the purpose of the government unit; and, (3) The copyright will not prevent access to the public government data.	B.1.(b) Criteria Copyright in a "literary work" by a government unit may be exercised if one or more of the following criteria are met: (1) the reproduction of public information, or the proposed inclusion of public information in a derivative work, must be reviewed by the government unit for accuracy, currency (timeliness), comprehensiveness and notice of the original source of the information; (2) the exercise of copyright is necessary to ensure the broadest public access to and dissemination of the information; (3) the literary work is a substantial and creative publication in book or electronic form, and copyright is necessary to assist the government unit in recovering the cost to produce and disseminate the information; (4) the exercise of copyright is required by statute or budget authorization to maximize a financial return to the public by recovering costs or generating revenues; (5) the literary work contains copyrighted materials from non-government sources, and attribution of individual copyrights in not practical; or, (6) the literary work is created as the result of a public/private collaboration, and the exercise of copyright is required by negotiated contract, or the exercise of copyright is needed for protection of joint ownership

GOVERNMENT INFORMATION ACCESS COUNCIL
Information Access Principles Work Group
Principle #7 - Government information shall exist in the public domain to the greatest extent.
Comparison of IAP Work Group Proposal and "October Group" Proposal

IAP Work Group Proposal	"October Group" Proposal
	of a copyright.
B.1.(c) Continues current practice of allowing copyright for computer software programs as literary works without application of criteria.	B.1.(c) Essentially the same language.
B.1.(d) Grants copyright in case of public/private partnerships or collaborations.	This language is found in the **Criteria** section, B.1.(b)(6).
B.1.(e) Limits copyright of maps.	Maps are not addressed in the October Group proposal. The federal courts are now debating the issue of whether or not a map is a creative/literary work. The group did not choose to make that decision.
B.2-8 (2-8, except for modification in 5 is from Federal Copyright Law.) Essentially same as October Group Proposal except change in B.5. (Maps)	B.2-8 Same except for B.5. (Maps)
C. (similar) with the exception of (3): Prohibits government unit from recovering attorney's fees in any infringement suit or action taken (unless case is determined frivolous.)	C. (similar) Does not include prohibition of government unit collecting attorney fees.
D. Requires the legislature shall establish a process that will: 1) monitor the registration and exercise of copyright authority by government units; and, 2) encourage the use of Alternative Dispute Resolution (ADR) techniques to resolve disputes concerning that exercise.	No similar language.

GOVERNMENT INFORMATION ACCESS COUNCIL
Information Access Principles Work Group
Principle #7 - Government information shall exist in the public domain to the greatest extent.
Comparison of IAP Work Group Proposal and "October Group" Proposal

IAP Work Group Proposal	"October Group" Proposal
E. Requires registering copyright with U.S. Copyright Office prior to any dispute. Also requires filing with Commissioner of Administration and requires that agency to make the registrations available to the public and publish, on a regular basis, listings of government unit copyright registrations.	D. (same) Requires registering copyright with U.S. Copyright Office. No notice to Commissioner of Administration.
F. (similar) Restates public domain claim to government information.	E. (similar) Restates Public Domain claim to government information. Also requires Attribution of Authorship.
G. (same) Requires notice of copyright, fair use, and other disclaimers to assure greatest use and full access.	F. (same) Copyright notice, fair use notice, other access and use notices
H. (same) Responsible Authority section - Defines duties, restrictions.	G. (same) Responsible Authority section
No similar language.	H. Appeal Process: Provides for citizen to challenge a government unit copyright through an Administrative Law Judge (ALJ). The ALJ will determine if the criteria [B.1.(b)(1-6) has been met, and C. and D. have been abided by. The ALJ may uphold, modify, or revoke copyright. The ALJ's decision can be appealed to the Minnesota State Court of Appeals.
I. (same) Academia excluded from most restrictions.	I. (same) Academia
J. (similar) Two year review of this process.	J. (similar) 2-Year Review of the process
Patent, Trademark, Service Mark (same)	Patents, Trademarks & Service Mark (same)

Report on Minnesota Government Use of Copyright and Intellectual Property

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Appendix IV:

Examples of Public Information Copyrighted by Minnesota Government Units

A number of Minnesota government units currently place copyright notices on many of their publications. Most do not. State agencies that are quite deliberate in their use and policies around copyright are the Department of Natural Resources (DNR) and the Department of Trade and Economic Development (DTED). Hennepin County has a copyright policy and actively looks for markets often outside of the state for its materials. The DNR copyrights a number of print publications and sells them through the Minnesota Bookstore among other places. Revenues from the "bird book" help support the non-game wildlife fund. The DNR makes the choice to exercise copyright on a case-by-case basis. In some cases copyright notice appears as a matter of general practice not deliberate policy. In those cases it is unlikely that anyone from the agency is monitoring for copyright infringements. It must also be noted that copies of some copyrighted materials are given away for personal use without a fee attached.

Other examples of copyright include the Pollution Control Agency's copyright on training manuals, Office of the Revisor's copyright on the compilation of the State Statutes, and the Print Communication Division's, Department of Administration copyright on the compilation of agency description in the Minnesota Guidebook to State Agency Services. It is also likely that curriculum developed in some school districts may be copyrighted as well as many creative works like government owned/produced artwork. A number of government developed computer software products are also copyrighted pursuant to a special section in the MGDPA.

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Appendix V:

Members of the Information Access Principles Work Group, Participants in the "October Group," and full Government Information Access Council Membership List

Report on Minnesota Government Use of Copyright and Intellectual Property

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Members of the Information Access Principles Work Group

Full Council Members:

Merry Beckmann, David Clarkson, John R. Finnegan, Senator Dennis Frederickson, Milda Hedblom, Richard Johnson, Representative Virgil Johnson, Representative Steve Kelley, Bijoy Khandheria, Allan Malkis, Vance Opperman, Julia Wallace

Additional Citizen Work Group Members:

Linda Hopkins, Working Group Chair
Dennis Fazio, Richard Neumeister, Mick Souder

The following government units/organizations participated to some extent or had representatives at the "October Group" meetings.

A number of interested citizens also participated in the discussions.

Attorney General's Office, Department of Natural Resources, Department of Trade and Economic Development, Hennepin County, the Association of Minnesota Counties, League of Minnesota Cities, Department of Children, Families, and Learning, Intergovernmental Information Systems Advisory Council, Land Management Information Center - Minnesota Planning, Minnesota State Universities and Colleges, and University of Minnesota.

Government Information Access Council
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http://www.state.n.us/ebrnch/admin/ipo/giac/

The primary documents about GIAC and its activities are now being made available via Gopher on the Internet. The information will be an accessible via
the State of Minnesota Gopher:

gopher.state.mn.us
http://www.state.mn.us/

In the directory "Minnesota Government Information Access Council."

Report on Minnesota Government Use of Copyright and Intellectual Property

January 15, 1996

Appendix VI:

Other Papers of Interest

INFORMATION INDUSTRY ASSOCIATION

STATE COPYRIGHT CLAIMS AND GOVERNMENT INFORMATION POLICY IN THE NII/GII

An Analysis of the Issues

Prepared by

the

Information Industry Association

July 1995

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EXECUTIVE SUMMARY

This paper examines state government assertions of copyright or copyright-like controls over government, or public, information and the impact of these efforts on the anticipated benefits of the National and Global Information Infrastructures. The Information Industry Association ("IIA") prepared this analysis in order to highlight the constraints that such assertions of government copyright place on the free flow of vital information. As both the public and private sectors embark on efforts to develop a robust information infrastructure, it is appropriate to re-examine existing restraints on access to and dissemination of public information.

Government may attempt to control information through both explicit assertions of copyright as well as through controls over access to or redissemination of public information. Regardless of whether these controls are asserted by the government directly or through an officially appointed agent performing a governmental obligation, they effectively suppress competition and diversity, and ultimately offer the public reduced access to information collected and stored at taxpayer expense.

There are existing constraints on government assertions of control over government information. The Constitution , and public policy principles inherent therein, restrict even state and local government assertions of control over public information such as texts of court decisions, statutes or regulations and legislative history material. On the federal level, Section 105 of the 1976 Copyright Act prohibits the federal government from claims of copyright. Even though Section 105 does not apply to state or local governments, any government information produced at that level must meet the threshold originality requirements mandated by the Copyright Act before any copyright protection will be available. In addition, the recently enacted Paperwork Reduction Act of 1995 statutorily prohibits even copyright-like controls by the federal government. IIA believes that both these federal statutes serve as excellent models for designing public information policies for all levels of government.

Notwithstanding these constraints on governmental control of information, significant impediments to the free flow of information frequently exist. In many cases, government agencies have not made formal claims of copyright over public information, but have imposed other types of controls that depend upon a claimed property interest in the information and that seek to achieve the same control over access to and dissemination of the information that a copyright owner would enjoy. This paper examines a number of instances in which federal and state authorities have rejected these controls. These examples, as well as scholarly analysis, demonstrate that government assertions of control over public information inhibit dissemination of such data that is collected on behalf of the public.

As a final matter, this paper analyzes some specific areas where states have claimed there is a particular factual situation which justifies an assertion of copyright over public information. On closer analysis, however, copyright does not appear necessary to vindicate legitimate government interests in these situations.

To the extent that government at any level controls access to and dissemination of public information, the public is denied the ability to make informed decisions. IIA believes that current attempts by decision makers to finalize the blueprint for developing the National and Global Information Infrastructures make it timely to examine whether governmental controls over information will hamper the development and ultimately deny the public the full benefits of the NII/GII.

Introduction

The Information Industry Association (IIA) is an organization of over 550 companies involved in the creation, provision and distribution of the world's leading information products and services. Throughout its 27-year history, IIA has been an active participant in shaping government information policies.[1] These efforts have led to the proliferation of a wide range of public and private sector products and services to serve the information needs of citizens worldwide. Recognizing the wisdom of our Founding Fathers, the Association endorses the notion that a broad variety of sources and formats of data concerning government is the best means of assuring an informed citizenry. A crucial contributor to the flow of public information is the private sector information industry. Allowing government to control access to its information or to oversee in any manner how the public, including private sector redisseminators, uses such information, will lead to censorship and undermine the citizen's ability to gain the knowledge necessary to participate effectively in a democratic society.

IIA has long advocated the broadest possible access to government information, no matter the level or branch of government that may gather and provide such data. At the same time, the Association supports policies that prevent government from controlling how its information is used once it is made available to the public. These two overriding principles provide a sound foundation for the effective government information policy structure that is the cornerstone of our participatory democracy.

It is perhaps because of the American experience in this area that the Administration has already identified government information policy as a crucial component in realizing the benefits of a Global Information Infrastructure ("GII"):

> Representative democracy is founded on the premise that the best political processes are those in which each citizen has the knowledge to make an informed choice and the power to express his or her view. The GII will allow wider and greater citizen participation in decision-making by providing the additional means for individuals to keep informed. . ."[2]

IIA believes that this worthy goal is equally relevant to development of an effective National Information Infrastructure ("NII"). Especially now that recommendations to set the policy framework for the NII are being discussed in many fora, IIA believes it is timely to look at

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[1] For purposes of this paper, the terms "government information" and "public information" are used interchangeably. In either case, the term refers to information generated or held by government agencies.

[2] Ronald H. Brown, "Global Information Infrastructure: Agenda for Cooperation," (February 1995), p. 7.

current government information policies and to determine the obstacles to realizing the full benefits of this vital NII/GII resource.

IIA has often viewed the issue of government assertions of copyright, particularly those claimed by state and local governments, in the context of overall government information policy. From that perspective, there is little doubt that when government decides to use its power to assert claims of copyright, the results are generally less access to public information and greater restrictions, whether in terms of price or use, on its availability.[3]

Since 1895, U.S. law has contained provisions to preclude federal government assertions of copyright. As part of the 1976 Copyright Act, Congress included Section 105, which specifically bars copyright in any "work of the United States Government," a term defined in the statute as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." Passage of the Paperwork Reduction Act of 1995 (P.L. 104-13) erased any remaining doubt about the ability of federal executive agencies to attempt any type of copyright-like control over their information, including downstream use restrictions or excessive fees for access to or further dissemination of public data.

State and local officials are not subject to the same explicit strictures, although as discussed below, such officials may not restrict disclosure of statutory and certain other materials, because general constitutional and other public policy principles may limit their ability to assert copyright. Nevbertheless, the 1976 Copyright Act is silent on the issue of copyright claims by state and local governments. In terms of government information policy, especially in the electronic era, this omission is an aberration that could prove troublesome.

Significant public data already rests in the hands of state and local officials. Those public servants are assuming ever greater responsibilities and decision-making authority that will in turn generate the collection and dissemination of even more information necessary to individuals, educators, businesses and other governmental bodies. These developments come at a time when advances in information technology, including computing and telecommunications, have the potential to expand dramatically public access to public information, both directly and through private sector redisseminators. State and local governments, like many other individuals and entities now use and operate online systems, and they already have begun producing information products in electronic formats that should be increasingly accessible in the NII. It is uncertain how quickly this trend will accelerate, but in planning for the NII government cannot ignore its obligation to provide unfettered access to such data by any member of the public, including private sector providers who help meet the demand for it.

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[3] See generally "Serving Citizens in the Information Age: Access Principles for State and Local Government Information," Information Industry Association (July 1993); and "Principles for Federal Dissemination of Public Information: An Analysis," Information Industry Association (June 1995).

This paper will provide an overview of state and local government assertion of copyright and the effects on society of government copyright controls as a policy issue that is particularly relevant to the NII/GII. It will then discuss general statutory and constitutional restrictions on government assertion of copyright and copyright-like controls over public data. Finally, it will address in a general fashion some of the more common arguments that state and local governments invoke in order to justify their perceived need to impose certain restrictions on access to and dissemination of government information. Throughout the analysis, examples of government practices -- both good and bad -- are provided to illustrate broader policy concerns.

Government Assertions of Copyright

Although claims of ownership in information can be made under a variety of legal theories, copyright is the main statutory mechanism by which creators of information can control access to and use of information. The exclusive rights of authors in regard to reproduction of their works, distribution of copies, and preparation of adaptations and other derivative works are powerful tools for managing information flow. In the hands of private sector authors and publishers, these tools provide incentives for the considerable investment in human creativity and other resources needed to develop information products and services that are timely, accurate, and serve market needs.

However, copyright tools are mismatched to the job our system assigns to government agencies. Unlike the private sector, where commercial competitors must constantly attempt to meet changing customer demands and where copyright provides owners the means to seek a fair return on their investment, government has legal duties to collect and disseminate public information only in furtherance of its public purpose, not for economic gain. Providing the incentive of copyright protection is unnecessary.[4] Government claims of copyright reduce the flow of its information to the public by creating a government monopoly over the dissemination of public information. Whether exercised by government directly or through an officially appointed agent performing a governmental obligation, this monopoly power suppresses competition and diversity, and ultimately offers the public less and less access to information collected and stored at taxpayer expense.

A monopoly power of copyright for government is the vestige of Crown copyright inherited from the English system. Under Crown copyright, the King or Queen was determined to own all of the intellectual product of the state, including statutes, court interpretations, and other materials produced by the government and was given the right to collect "royalties" for the subsequent use of such information. As already mentioned, the concept of Crown copyright was

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[4] In fact, it has been argued that because copyright incentives are not needed to induce the government to produce information, Congress may lack the constitutional authority to extend copyright protection to works of government at any level. See Henry Perritt, Jr., "Sources of Rights to Access Public Information," 4 Wm. & Mary Bill Rts. J. 179 (1995).

specifically rejected by the United States government for its records in the 1976 Copyright Act. Yet, because the Act remains silent as to state and local government copyright, a vestige of this policy is deemed to still exist under U.S. law.

The spectrum of information generated by state and local government agencies is indeed broad. At the same time, assertions of copyright over all types of public information are becoming increasingly common. One reason is undoubtedly government's desire to recover the costs involved in purchasing the equipment and expertise necessary to provide the information products that the public may demand. However, development of these systems should be viewed first and foremost as a general public good. Only general revenues should fund the procedures and equipment that improve government efficiency. If, as a by-product of these improvements, public information is made more accessible, government should not impose excessive fees or other control mechanisms that impede the public's ability to access or use the data.

Such exercises of governmental control over public information have deleterious political and economic effects that are inconsistent with centuries-old policies favoring openness in government. As James Madison observed, the unrestricted flow of information is essential for the proper operation of our democratic society.[5] This has led one U.S. Court of Appeals to observe, when faced with a state's effort to control the dissemination of legislative materials: "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion."[6]

Information held by the government that can be readily released is both a public good and an unregulated commodity. If an agency can disclose a government document because its contents pose no threat to government security, or to reasonable personal privacy or business expectations of confidentiality, then no legitimate governmental purpose is served by permitting the agency to limit the public's use of such information. Because they allow government to restrict the dissemination of public information, government claims of copyright or similar ownership can seriously threaten democratic values and processes.[7] Such claims also frustrate the goal of fostering a competitive marketplace in the dissemination and use of public information, which is the key to ensuring that the public has the widest possible choice of high-quality information products and services at the lowest prices.

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[5] The Writings of James Madison, vol IX, 103, G.P. Hunt, ed. (1910) (quoting letter to W.T. Barry, August 4, 1822).

[6] Legi-Tech, Inc. v. Keiper, 766 F.2d 728 (2d Cir. 1985).

[7] See generally Robert M. Gellman, "Twin Evils: Government Copyright and Copyright-Like Controls over Government Information," 45 Syracuse L. Rev. 999-1072.

Statutory Restrictions on Government Assertion of Copyright

Both federal and state governments have imposed statutory restrictions on attempts by agencies to assert copyright and copyright-like controls in regard to their information. Because of the explicit prohibition on federal claims of copyright, such statutory initiatives are more evident in federal law.

The logic behind the prohibition in Section 105 of the 1976 Copyright Act, which is the direct descendant of similar provisions dating back to 1895, applies equally well to state and local government. A 1959 study by the Copyright Office, apparently its last detailed assessment of government copyright, notes that "[i]n theory, at least, there seems to be little reason to differentiate between the Federal and State Governments" with regard to copyrightability of their works.[8] At the same time, however, the study did not make any recommendations to disturb the status quo as it then existed.

Other limitations in the Copyright Act relating to the subject matter of copyright protection also may restrict the ability of any government agency -- whether federal, state or local -- to legally assert copyright controls over public information. Copyright subsists only in "original works of authorship,"[9] not in facts or ideas. Similarly, a compilation of facts may be protected by copyright, but only "if it features an original selection or arrangement of facts."[10] One important aspect of such originality is the Court's linkage of copyrightable originality to choice in the selection and arrangement of facts:

> The compilation author typically *chooses* which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These *choices* . . . so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.[11]

Because nearly all information generated by government is factual in nature and most government selection and arrangement of data is done pursuant to an agency mission or some other *obligation*, this element of choice is often absent. Thus, there would seem to be very little, if any, justification for claims of copyright by government in such databases.

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[8] Caruthers Berger, "Study No. 33: Copyright in Government Publications," at 36 (October 1959).

[9] 17 U.S.C. § 102(a).

[10] Feist Publications v. Rural Telephone Service Co., 111 S. Ct. 1282, 1290 (1991).

[11] Id. at 1289 (emphasis added).

State governments have also been subject to restrictions on assertion of copyright. Although some state legislatures have occasionally granted agencies the right to charge fees for their information -- a copyright-like control when such fees exceed the marginal cost of dissemination -- attempts to broaden such authority and exert other restrictions on the use of public information have been soundly rejected. In re Boe v. Department of Natural Resources is a 1994 decision of the Minnesota Department of Administration, which has jurisdiction to issue advisory opinions about other Minnesota agencies' denials of a citizen's request for government-generated data. In determining whether the Minnesota Department of Natural Resources could deny a citizen's request to copy and freely use data about a particular species of fish, the Department of Administration stated that "the public's right of access to and use of public government data cannot be curtailed by a government entity's claim of intellectual property rights."[12]

In Florida, the Attorney General issued a 1984 opinion stating there was no statutory authority for record custodians to provide remote access to records for a fee.[13] This decision led to a study by the Florida legislature and ultimately resulted in passage of Section 119.085, F.S., a law designed to allow use of remote electronic means as an alternative to providing public access to electronically-stored public records. The statute mandates that "public records custodians . . . shall charge a fee for remote electronic access . . . which fee shall include the direct and indirect costs of providing such access." The law further established a dual fee structure -- one where costs for the general public were limited to the cost of materials and supplies but were not to include labor and overhead; and the other aimed at private redisseminators, which permitted nearly full cost recovery, by allowing agencies to factor in labor or overhead expenses.[14]

The intent of the statute was to encourage agencies to disseminate information in new formats by allowing them to recover reasonable costs for providing the data once it had been gathered. However, by imposing excessive fees on private sector redisseminators, the law risked stifling non-governmental sources of information to provide the same public data in useable formats to also serve the public's need to know.

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[12] In stating its opinion, the Department of Administration made explicit its belief that unless "specific legislative authorizations to . . . claim intellectual property rights" have been enacted, the presumption must be that "government entities do not have general authorization to make [such] claims." In re Boe v. Department of Natural Resources (Minn. Dept. of Admin. Opinion, 12/28/94), reported in Finance and Commerce (April 14, 1995) at 76.

[13] 1984 Op. Att'y Gen. Fla 084-3 (Jan. 19, 1984), reported in "Remote Electronic Access to Public Records: An Assessment of Florida Law & Initiatives," Florida State Legislature, Joint Committee on Information Technology Resources, March 1995, at 15.

[14] "Remote Electronic Access to Public Records: An Assessment of Florida Law & Initiatives," op. cit., at 15-16.

Ever since enactment of this legislation, concerns about the effect of its provisions on the availability of government information in Florida have been voiced by the public, including IIA and private sector redisseminators of the data. As a result, the Florida Legislature's Joint Committee on Information Technology Resources recently issued a study that concluded in part that "[s]ince § 119.085, F.S. requires the recovery of all costs associated with providing remote access to subscribers, the law may be a disincentive for the provision of free or relatively-free remote electronic access to public records to the general public." [15] The study goes on to recommend amending the statute to grant greater flexibility to agencies in pricing their information products and services, in order to remove that disincentive.[16]

Both the Minnesota and Florida situations demonstrate an important point to consider when recommending policy changes for the NII. Even when agencies avoid direct assertion of copyright, practices that mirror private sector copyright holders' control over the price and use of information, particularly in electronic formats, can hamper the public's right to know. Government agencies should create and disseminate information products only as part of their mission, and such activities should be funded by taxpayer dollars just like other essential government functions. Once the determination is made that it is an obligation of any government entity to provide information, then it should do so only in a manner that will not encumber the citizen's -- including the private information sector's -- ability to both access and use it. Otherwise, government will hinder, not advance, the widest possible dissemination of public information.

While some states continue to grapple with these issues, at the federal level Congress has passed the Paperwork Reduction Act of 1995 (P.L. 104-13), which statutorily prohibits even copyright-like controls by government. That Act explicitly states that federal agencies -- unless specifically authorized under another statute[17] -- must not:

(1) establish an exclusive, restricted or other distribution arrangement that interferes with timely and equitable availability of public information to the public;

(2) restrict or regulate the use, resale, or dissemination of public information by the public;

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[15] Id. at 9.

[16] Id. at 100.

[17] In relation to copyright, such a limited exception is The Standard Reference Data Act, Pub. L. 90-396, 82 Stat. 339 (1968), codified at 15 U.S.C. 290e(a). See also Nimmer, n. 22 infra, at Sec. 506[A] n. 6, with respect to the exception for postage stamp designs and related material of the United States Postal Service.

(3) charge fees or royalties for resale or redissemination of public information; or

(4) establish user fees for public information that exceed the cost of dissemination.

These principles, along with the general admonition of the Paperwork Reduction Act to assure that government actively encourage a diversity of public and private sources for public information, are a critical building block for the development of the NII. Their extension to policies governing state and local agency dissemination activities would only further enrich the amount and quality of information available through the National Information Infrastructure.

Constitutional Restrictions on Government Assertion of Copyright

Even if the Copyright Act and state law seem to permit government assertion of copyright in some types of data, the U.S. Constitution -- and policy concepts rooted therein -- clearly prohibit states from exercising this same control in relation to other classes of public information. These constitutional limitations have been recognized for more than a century.

At least five federal and state court decisions, dating back to 1834, have held that judicial opinions and statutes are in the public domain and therefore not subject to copyright claims by federal or state officials. Courts have consistently held that copyright protection is inapplicable to the texts of courts decisions,[18] statutes,[19] and legislative history materials.[20] As noted in a more recent court decision involving state statutory material, even though Section 105 of the Copyright Act does not apply directly to the states, "states, like individuals, may not copyright what is in the public domain."[21]

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[18] See, e.g., Wheaton v. Peters, 33 U.S. 8 (Pet.) 591 (1834) (denying reporters of Supreme Court decisions copyright on the opinions); Nash v. Lathrop, 6 N.E. 559 (Mass. 1886) ("all should have free access to the opinions, and . . . it is against sound public policy to prevent this.").

[19] See, e.g., Building Officials & Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980).(public may not be prohibited from copying the official version of a privately developed building code that had been licensed to governmental agency after it had been adopted as law); State of Georgia v. Harrison Co., 548 F. Supp. 110, 114 (N.D. Ga. 1982), vacated per stipulation, 559 F. Supp. 37 (1983) ("The public must have free access to state laws, unhampered by claim of copyright, whether that claim be made by an individual or the state itself.").

[20] See, e.g., Legi-Tech, Inc. v. Keiper, 766 F.2d 728 (2d Cir. 1985).

[21] State of Georgia v. Harrison Co., 548 F. Supp. at 114.

The outer boundary of the constitutional limitation on government claims of copyright in public information has not been clearly marked. However, as the leading copyright treatise notes, "on a constitutional level *any* statute which purported to prohibit the reproduction or distribution of governmental documents by reason of the Government's property interest in the ideas or expression contained therein arguably would run afoul of the First Amendment guarantees of freedom of speech and press."[22]

In one leading case,[23] the court identified several constitutional doctrines that militated against copyright protection for a state building code. First, the court invoked a metaphor of citizen authorship associated with both the public's interest in works produced by those whose salary it pays (i.e., government employees) and the notion that "the law derives its authority from the consent of the public, expressed through the democratic processes." Second, the court referenced the public's right to know the law to which it is subject. "[C]itizens must have free access to the laws which govern them. This policy is, at bottom, based on the concept of due process." Because the state's building code would not be available to the public through reasonable means of access to alternative sources, the plaintiff's copyright claim could not be recognized: "We are, therefore, far from persuaded that [the plaintiff's] virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when, where, and how the Massachusetts building code is to be produced and made publicly available."

Furthermore, to the extent that many public documents consist of collections of facts, both the First Amendment and the Constitution's Copyright Clause would appear to prohibit any person from asserting a copyright in those facts.[24]

Nevertheless, states continue to assert copyright claims in even the most essential forms of public data, despite judicial admonitions that date from the early days of the Republic. A recent survey found that nearly thirty states claim copyright in their statutes, statutory headnotes, indexes, or other legislative materials.[25] Colorado, for example, makes one of the broadest claims

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[22] 1 Nimmer on Copyright § 5.06[B] (1985) (emphasis added).

[23] Building Officials & Code Admin., 628 F.2d 730.

[24] See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985). The Copyright Act draws the same distinction between uncopyrightable facts and a copyrightable compilation of facts. See 17 U.S.C. § 103. See also discussion of the Supreme Court's unanimous opinion in Feist, 111 S.Ct. 1282 (1991), supra, pp. 6-7.

[25] See American Bar Association, Section of Patent, Trademark & Copyright Law, Committee Report 224 (1989). The Report includes Resolution 308-1, which states in part "that the Section of Patent, Trademark & Copyright Law opposes in principles the exertion of control in the nature of copyright, quasi-copyright, license, or unreasonable financial or media restrictions, by government agencies on the availability or distribution of inherently governmental works . . . ." (at 20).

to its statutes. Its copyright law states that the "Colorado Revised Statutes and supplements and ancillary publications thereto . . . shall be the sole property of the state of Colorado . . . and shall be copyrighted." It then requires that "[a]ny person . . . desiring to publish, reprint, or distribute . . . all or any part of the statutes . . . must make prior written application" to a special state committee. The committee may authorize the distribution if it "finds from the application that such distribution . . . will not be detrimental to the interests of the citizens of the state" and the applicant makes satisfactory arrangements for payment of the appropriate fees. Colorado's "official" copyrighted statutes "shall be the only publication of the statutes entitled to be considered as evidence in Colorado courts." Anyone distributing the official Colorado statutes without the committee's prior permission is subject to penalties of $500 for every volume or computer representation so distributed in a suit authorized by the committee.[26] It is doubtful that such practices can be halted without a clear, statutory prohibition.

Restrictions on Copyright-Like Controls by Government

As already referenced to some extent above, in many cases, government agencies have not made formal claims of copyright over public information, but have imposed other types of controls that depend upon a claimed property interest in the information and that seek to achieve the same control over access to and dissemination of the information that a copyright owner would enjoy. One commentator, analyzing actions by federal agencies, provides the following catalog:

> Copyright-like controls used or attempted in recent years include license agreements, royalties for use of data, restrictions on redisclosure of information products, limitations on qualified recipients, and denial of access to digital versions of publicly available data.[27]

In some cases government entities providing value-added information products or services to the public wish to deny access to the underlying data to non-governmental entities that they view as competitors. One of the best known illustrations of this phenomenon is Legi-Tech, Inc. v. Keiper,[28] which involved a state statute denying the sale of otherwise publicly available services from a state-owned computerized database to entities offering competing electronic information retrieval systems. The state-owned database contained the full text of legislation and other related information. Legi-Tech, a competitor of this service, argued that the law was unconstitutional. The state relied on the statute in denying Legi-Tech access to the underlying data because the state was concerned that resale by Legi-Tech would undercut the profitability of the state's own

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[26] See Colo. Rev. Stat. Ann. §§ 2-5-115, 2-5-118.

[27] Gellman, supra note 7.

[28] 766 F.2d 728 (2d Cir. 1985).

business. The state defended the law as a reasonable protection of the state's "natural monopoly" on computer-supplied legislative information.

The Court of Appeals for the Second Circuit rejected the state's "natural monopoly" argument, finding instead that Legi-Tech had a right of access to the database's information. Any such monopoly by the state was simply a product of its special access to information and the legislative prohibition on access to the information by competitors. On the subject of government information monopolies, the court stated:

> When the state creates an organ of the press, as here, it may not grant the state press special access to governmental proceedings or information and then deny to the private press the right to republish such information. Such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public.[29]

Despite the absence of a formal copyright claim by the state, the court in Legi-Tech engaged in a type of incentive analysis that it borrowed from copyright jurisprudence. It noted that the state's unwillingness to sell the information to Legi-Tech at any price undermined the copyright law's premise that "the profit motive which is the incentive for creation is also a disincentive for suppression of the work created."[30] The court concluded that this was "a premise of doubtful strength in the case of government."[31]

The court remanded with directions for the trial court to determine several factual issues, including how difficult it would be for Legi-Tech to create an equivalent database from other sources. In effect, if similar information were readily available at reasonable cost, then there was no prejudice to Legi-Tech and no advantage to the state. In short, whether the First Amendment allowed the state to impose copyright-like controls on this public information depended on the availability of the underlying information to competitors and other members of the public through reasonable means of access.

The lesson is clear: to ensure the widest dissemination of public information, governmental entities must not be able to regulate the public's redissemination of public information through the imposition of copyright-like controls over such information.

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[29] Id. at 733.

[30] Id. at 735.

[31] Id.

Employees, Contractors and "Quality Control"

Some state and local government officials have pointed to particular factual situations as justifying assertions of copyright over public information. On closer analysis, copyright does not appear necessary to vindicate legitimate government interests in these situations.

Some officials have expressed concern about whether, in the absence of government copyright assertions, valuable research and publications by faculty at state universities and colleges will fall into the public domain. The rights and roles of public higher education faculty and staff raise some complex issues, but from a legal standpoint, many of them are issues of contract law and official status rather than of copyright law. If two prerequisites are met -- first, that the faculty member is a state employee, and second, that the work in question has been prepared within the scope of his or her employment -- then copyright law considers the employer (in this case, the state) to be the author, and the issue of government copyright assertions is relevant. But in many cases, these prerequisites will not have been met. In those instances, the faculty member, not the state, is treated as the author. Furthermore, even in an employment relationship, section 201(b) of the Copyright Act allows for a contract providing that the employee (the faculty member) may "own all the rights comprised in the copyright." The particular terms of an employment contract can thus be used to distinguish truly public information from the fruits of a faculty member's private research, barring copyright claims over the former while preserving proprietary interests in the latter.

Similarly, some government officials are concerned that foregoing copyright claims will make it harder for them to attract non-governmental partners for joint projects such as the production of promotional audiovisual materials.[32] Here again, close attention to the specific provisions of contracts with non-governmental parties may obviate these concerns. To the extent that the resulting product is the outcome of creative contributions by private parties, they retain control under copyright law over their separable contributions. To the extent that private parties and governmental employees (within the scope of their employment) are truly joint authors whose contributions to the work cannot be separated, contractual provisions can be crafted to protect both the public and private interests involved. Of course, while government contractors generally are not directly affected by the statutory limitations on copyright in federal government works, the

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[32] Presumably, joint projects would be more attractive to non-governmental partners if the government agency were able to deliver to its partner exclusive rights over the cooperatively-produced work. A 1959 study by the Copyright Office, citing a 19th-century judicial decision, notes that "perhaps the principal motivation for the States to secure copyright in their publications is to enable them to give exclusive rights to a private publisher to induce him to print and publish the material at his own expense." Berger, "Study No. 33: Copyright in Government Publications," at 36 (October 1959). This argument is of dubious relevance under current circumstances. Especially with regard to information in digital formats, state and local government are rarely dependent upon private firms for making information available. Even if they were, this would not be an adequate justification for imposing restrictions on public information.

constitutional concerns summarized above can operate to prevent enforcement of copyright in materials authored by private parties under government contract. More often, these problems can be anticipated by contractual provisions or statutory strictures that prevent the contractor itself from asserting monopoly control over the types of public information which must, on constitutional grounds, be available to the public without restriction.[33]

Finally, government officials have worried about quality control problems if they lose the ability to control the redissemination and downstream use of public information. As a leading commentator has noted, "[t]here is no legal basis or policy justification for government information restrictions to protect data integrity." The same author points out that "an open marketplace of ideas and information is likely to provide self-correcting mechanisms that do not involve any type of information controls by government." [34] Certainly if there is a market demand for a certain type of public information, a non-governmental product that reported the information inaccurately would not last long in the marketplace. In any event, the government's legitimate interest in maintaining the downstream integrity of the data it originates can be satisfied through warnings, disclaimers, or perhaps an optional, voluntary program for the agency to certify the accuracy or timeliness of a non-governmental information product based on public information. Copyright controls are not needed and are unwise even in those instances when they are not clearly unconstitutional.

Conclusion

To the extent that government at any level controls access to and dissemination of public information, society in general suffers. Whether those seeking the wealth of data contained in government agencies are everyday citizens, educators, business executives or other government officials, unless they can access and use public information without restraint they cannot make informed decisions and contribute to economic and social progress. These consequences of government control over information are already well recognized. It will be even more important to overcome them as demands for all types of government information from a variety of sources grows in the NII.

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[33] A relevant example of how this problem has been resolved at the federal level is the approach that Congress adopted in authorizing the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system. Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181 § 101, 101 Stat. 1249, 1251 (1987) (adding 15 U.S.C. § 78-11 regarding the EDGAR system). Congress assured that "the rules governing EDGAR must provide for equitable public access and must assure complete, meaningful, and useful dissemination of securities filings." House Comm. on Energy & Commerce, Securities and Exchange Commission Authorization Act of 1987, H. Rep. No. 296, 100th Cong., 1st Sess. 16 (1987).

[34] Gellman, supra note 7.

The United States has a long tradition of policies that encourage the widest possible dissemination of government information. Both constitutional and statutory restrictions clearly prevent federal agencies from asserting controls over public information, including assertions of copyright or imposition of copyright-like pricing mechanisms and use restrictions. However, state and local governments do not always view themselves as similarly restrained, and in the area of copyright, they may deem themselves able to exert the type of controls on public information that have traditionally been reserved as incentives for the continued creation of private sector information products and services.

This paper has briefly reviewed major aspects of the justification for state assertion of copyright. In so doing, it has pointed to specific practices and policies that demonstrate the detrimental effects that government assertions of copyright can have on maintaining the widest possible dissemination of public information in a democratic society.

Since its founding in 1968, IIA has had an interest in promoting sound government information policy and has often pointed to the ability of state and local governments to assert copyright as a policy flaw. As discussed throughout this document, state and local governments from time to time have sought to assert copyright or copyright-like conrols over public information. The examples provided above of the statutory changes in Florida and those that resulted in the Legi-Tech case indicate that state and local governments may attempt to increase their control over government information as they move into the electronic environment.

Therefore, the issues raised in this paper should be considered in light of the important role that public information is to play in the NII/GII. Now that decision makers are finalizing the blueprint for development of these two vital infrastructures, IIA believes it is time for them to consider whether the anticipated benefits of the National and Global Information Infrastrucutres can be fully realized as long government at any level is encouraged or allowed to exert control over public information.

SYRACUSE LAW REVIEW

ARTICLES

NOTES

TWIN EVILS: GOVERNMENT COPYRIGHT AND COPYRIGHT-LIKE CONTROLS OVER GOVERNMENT INFORMATION

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CONTENTS

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The author thanks Timothy Sprehe, Henry Perritt, Jr., David Plocher, Paul Schwartz, and Peter Weiss for their criticism of earlier drafts.

Much of this article was drafted while the author served as Chief Counsel, Subcommittee on Information, Justice, Transportation, and Agriculture, House Committee on Government Operations. As a result, the text of this article is in the public domain pursuant to § 105 of the Copyright Act of 1976. The views expressed are solely those of the author.

INTRODUCTION

In 1993, the Queen of England sought damages for copyright infringement from a British newspaper that published the text of her annual Christmas message two days before it was broadcast.[1] In reporting on this incident, the *New York Times* stated that it came at a time when the royal family was said to be incensed over a barrage of press reporting and speculation about marital difficulties of the Queen's children.[2] The lawsuit was settled a few days later when the newspaper agreed to print a front-page apology and to donate 200,000 pounds (about $280,000) to charity.[3] These events dramatically illustrate how a government's ability to copyright information can be used to control or affect the flow of official information, punish those who infringe on a copyright, and accomplish or justify other objectives—political or otherwise—that may be unrelated to a specific use of information.[4]

Unlike the Queen of England, the President of the United States cannot use the copyright laws to recover damages for unlicensed publication of a presidential speech leaked to the press. The laws of the United States provide that copyright protection is not available for any

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1. William E. Schmidt, *Queen Seeks Damages from Paper Over a Speech*, N.Y. TIMES, Feb. 3, 1993, at A3. The Queen's speech was recorded in advance for broadcast by the British Broadcasting Corporation, and 120 copies were sent out to radio and television stations in Britain and overseas with the understanding that the contents would remain secret until Christmas day. Alan Hamilton, *Editor Links BBC Worker to Leak of Royal Speech*, THE TIMES (London), Dec. 24, 1992.

2. Schmidt, *supra* note 1.

3. Richard Perez-Pena, *Chronicle*, N.Y. TIMES, Feb. 16, 1993, at B7. The newspaper (*The Sun*) also agreed to pay the Queen's legal costs. Suzanne O'Shea, *The Queen Accepts the Sun's £200,000 Apology*, DAILY MAIL (London), Feb. 16, 1993.

4. Immediately following publication of the speech by *The Sun*, the paper's press accreditation to photograph the royal family attending church on Christmas day was withdrawn. Hamilton, *supra* note 1.

work of the federal government.[5] The prohibition against federal government copyright is a key element of national information policy, and one whose importance has not always been recognized. Although the First Amendment to the U.S. Constitution and the Freedom of Information Act[6] are more likely to be identified as establishing the basis for federal information policy, the copyright prohibition is being recognized as increasingly important in an era of digital information, computer networks, and economically valuable government databases.[7]

A policy against government copyright is not universal.[8] In many foreign countries, copyright by government is both lawful and routine. Great Britain, Canada, and other British Commonwealth countries have a tradition of Crown copyright.[9] Within the United States, there is no

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5. 17 U.S.C. § 105 (1988). A President might copyright a work that was not created as part of official duties. There is a line of cases that identifies works that were created by government employees within and without the scope of official duties. *See, e.g.*, Public Affairs Assocs. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962). Because a President's official duties are so broadly defined, the circumstances under which a sitting President might produce a copyrightable work are necessarily narrow. For an interesting speculation on the possibility of presidential copyright, see Richard W. Schleifer, *On Behalf of Richard M. Nixon: The Copyrightability of the Nixon Presidential Watergate Tapes*, 26 COPYRIGHT L. SYMP. (ASCAP) (1981). The President does undertake political activity that is not part of official duties, but any copyrighted works of a political nature owned by a President might be subject to broader application of the fair use doctrine. *See infra* note 32.

6. 5 U.S.C. § 552 (1988).

7. *See, e.g.*, HOUSE COMM. ON GOVERNMENT OPERATIONS, *in* ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H. Rep. No. 560, 99th Cong., 2d Sess. 23 (1986) ("Another key element of government information policy — and one whose significance is not widely appreciated — is found in copyright law.") [hereinafter 1986 HOUSE INFORMATION POLICY REPORT].

In 1993, the Office of Management and Budget circular on information resources management stated for the first time that agency restrictions on secondary uses of federal information were impermissible in light of the federal government's inability to copyright information. There was no comparable statement in the 1985 version of the same circular. *Compare* Management of Federal Information Resources Notice, 58 Fed. Reg. 36,068, 36,084 (1993) (Circular A-130) (Appendix IV — Analysis of Key Sections) *with* Management of Information Federal Resources Notice, 50 Fed. Reg. 52,730 (1985) (Circular A-130).

8. The Berne Convention for the Protection of Literary and Artistic Works provides that "[i]t shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts." Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 2(4), S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. (1986).

9. The Canadian copyright provision, Copyright Act R.S.C., ch. 55, § 11 (1952), derives from the United Kingdom Imperial Copyright Act of 1911. The current British copyright provision can be found in the Copyright Act, ch. 74, 1956 (U.K.). Similar

statutory limitation on use of copyright by state and local governments. Of course, copyright is not the only means that a government can use to protect its political, national security, commercial, and financial interests in information, and other control mechanisms can sometimes produce the same results.[10]

The federal copyright prohibition and the underlying policy that federal government information is in the public domain are increasingly pivotal for several reasons. First, the volume of information produced

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provisions can be found in the copyright laws of Australia, India, and New Zealand. *See generally* Law Library of Congress, Copyright in Government Publications in Various Countries (June 1992) (unpublished manuscript on file with author).

See also Creative Ways of Using and Disseminating Federal Information: Hearings Before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations, 102d Cong., 1st & 2d Sess. (1992) (testimony of Gail Dykstra, Senior Director, Policy and Programs, Canadian Legal Information Centre, Toronto, Canada) (discussing the effects of Canadian Government copyright). [hereinafter *1992 House Dissemination Hearings*]

According to a German information scholar, all European Community countries allow the public sector to hold copyrights, but the extent to which copyright is used varies a great deal. In most EC countries, other than Ireland and Great Britain, works of a regulatory character are excluded from copyright. For the remainder of public sector information, the situation is less clear. Herbert Burkert, *Public-Private Cooperation: Some Observations on the European Situation*, Presentation for the Public Policy Global Forum, Washington, D.C. (1993)(on file with author); *see also* Henry Perritt, *Commercialization of Government Information: Comparisons Between the European Union and the United States*, 4 INTERNET RESEARCH 7 (1994).

10. Copyright may be one of the milder legal tools that governments can use to control the use of official documents. Compare the response of the Queen of England with the response of the People's Republic of China to similar conduct. An editor at China's official news agency was sentenced to life in prison for selling a copy of a major speech of the Chinese Communist Party Chief a week before it was delivered. The crime was selling state secrets. Lena H. Sun, *China Jails Reporter for Life for Selling Leader's Speech*, WASH. POST, Aug. 31, 1993, at A20.

The U.S. government controls some public and private information through a variety of national security laws and executive orders. For example, information concerning the national defense and foreign relations of the United States that is "owned by, produced by or for, or is under the control of the United States Government" can be classified under the Executive Order on National Security Information, Exec. Order No, 12,356, 47 Fed. Reg. 14,874 (1982). Enforcement of laws protecting national security information is typically accomplished through criminal penalties rather than the civil enforcement available to copyright holders. But see the discussion of Snepp v. United States, *infra* note 33.

A copyright may, in some circumstances, also be used by governments to control privately owned publications. *See* Schnapper v. Foley, 667 F.2d 102, 115 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("We are aware that there is at least a theoretical possibility that some copyright laws may be used by some nations as instruments of censorship. Fears had been expressed, for example, that the Soviet Union would, through use of a compulsory-assignment provision in its domestic copyright laws, attempt to prevent foreign publications of dissident works whose copyright it had assumed.").

by the federal government is enormous, and its political and economic significance can be considerable. "The [f]ederal [g]overnment is the largest single producer, collector, consumer, and disseminator of information in the United States."[11] Some information produced or disseminated by federal agencies has direct, immediate, or major political and economic consequences.[12] Examples include the President's annual budget; unemployment and other economic statistics; crop reports and other agricultural information; the decennial census; financial filings with the Securities and Exchange Commission; the *Federal Register*, *Commerce Business Daily*, the *Congressional Record*; and proposed legislation and agency regulations.

Second, federal information is increasingly being collected[13] or created in digital formats. This permits the data to be more easily used, shared, and disseminated. Both for-profit and not-for-profit organizations seek federal data for electronic distribution to a variety of users.[14] As a result, the information may have a wider audience, greater economic value, and increased political significance. The ability to control the use of information in electronic formats can be much more valuable than the ability to control the same data on paper, and the manner in which electronic information is made available can make an important difference to how it can be utilized by recipients.[15] Placing

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11. Management of Federal Information Resources Notice, § 7a, 59 Fed. Reg. 37,906, 37,910 (1994) (Circular A-130).

12. "Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy — past, present, and future. It is a means to ensure the accountability of government, to manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace." *Id.* § 7b.

13. *See* Management of Federal Information Resources Notice, § 8a.3, 59 Fed. Reg. 37,906, 37,911 (1994) (Circular A-130).

14. *See generally*, *1992 House Dissemination Hearings*, *supra* note 8 (testimony of Gary Bass, Executive Director, OMB Watch; Nancy M. Cline, Dean, University Libraries, Pennsylvania State University; Robert A. Simons, General Counsel, DIALOG Information Services).

15. Electronic dissemination of information, especially in a networked environment, affords an agency with greater opportunity to assist or to inhibit effective use of information. Dissemination of electronic data is not simply a matter of availability and currency. The manner in which the information is organized can be crucial in an electronic environment. For example, electronic data can be embedded with internal and external pointers that permit the selection, coordination, and arrangement of subsets of the data. When pointers and similar aids are included, the data will be more readily usable by others. If there are no pointers or if the pointers are removed, then agencies make it more difficult and more expensive for others to use the data effectively. Henry H. Perritt, Jr., *Unbundling Value in Electronic Information Products: Intellectual Property Protection for Machine*

federal government information — especially in electronic formats — in the public domain is a step in the direction of permitting unfettered use of the information.

The absence of copyright does not by itself make federal government information available for general use. There is, however, a statutory mechanism that permits the public to request and to obtain government data. The Freedom of Information Act[16] (FOIA) allows anyone to request records in the possession of a federal agency. Because of the absence of a copyright, those who obtain it should be able to use it without restriction. In theory, the Copyright Act and the FOIA work together to ensure public availability and unrestricted use of government data. The two laws are complementary parts of policy that supports public access to federal information resources.

Problems arise, however, because the policies of the Copyright Act and the FOIA have been circumvented from time to time by federal agencies. Shortcomings in the implementation or interpretation of the FOIA and other agency actions sometimes permit agencies to retain the ability to restrict access to or use of information. Most notably, the FOIA's access mechanism may not operate as effectively for electronic data as for printed or other hard copy data.[17] The most significant failures of the FOIA — which have in turn undermined the policy reflected in section 105 of the Copyright Act — have arisen when electronic records are at stake. Some federal agencies have used and are using copyright-like controls to limit access to and use of public databases and other information developed under federal programs or using federal funds. Copyright-like controls used or attempted in recent

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Readable Interfaces, 20 RUTGERS COMPUTER & TECH. L.J. 415, 418-22 (1994).

16. 5 U.S.C. § 552 (1988).

17. *See, e.g., Federal Information Dissemination Policies and Practices: Hearings Before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations*, 101st Cong., 1st Sess. 420-22 (1989) [hereinafter *1989 Dissemination Hearings*] (testimony of Scott Armstrong, Executive Director, National Security Archive, describing the refusal of the Central Intelligence Agency to provide a copy of an existing electronic index of documents previously release by the CIA). Armstrong stated that "[t]he enormous value of such an index to researchers is obvious, both in facilitating the broader dissemination of the released documents and in avoiding redundant FOIA requests." *Id.* The CIA only agreed to provide a paper copy of the index, a 5000 page printout described by Armstrong as a "random data dump." *Id.* Litigation under the FOIA proved fruitless, but the CIA ultimately released the electronic index in 1992. *See* National Security Archive v. CIA, No. 88-119 (D.D.C. July 26, 1988), *aff'd on mootness grounds*, No. 88-5298 (D.C. Cir. Feb. 6, 1989).

See infra note 182; *see also* Jamie A. Grodsky, *The Freedom of Information Act in the Electronic Age: The Statute is Not User Friendly*, 31 JURIMETRICS J. 17 (1990).

years include license agreements,[18] royalties for use of data,[19] restrictions on redisclosure of information products,[20] limitations on qualified recipients,[21] and denial of access to digital versions of publicly available data.[22]

The purpose of this article is to explain why governmental control of government information—whether directly through formal legal restrictions such as copyright[23] or indirectly through effective denial of access to or use of information in electronic formats—is bad policy and not in the public interest. Since there is no copyright at the federal level, the focus will be more on the copyright-like controls used by agencies. These controls may afford fewer rights and narrower legal protections than copyright, but the restrictive effects are likely to appear much the same from the perspective of the data user. The negative consequences that result from the restrictions may be identical to those that result from copyright.

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18. *See infra* text accompanying notes 225-235, 314-318.
19. *See infra* text accompanying notes 221-224.
20. *See infra* text accompanying notes 267-275, 283-297.
21. *See infra* text accompanying notes 229-245.
22. *See infra* text accompanying notes 253-259.
23. The Constitution gives the Congress the power to grant copyrights "to promote the progress of science and useful arts." U.S. CONST., art I, §8, cl. 8. If governments do not need monopoly incentives to induce them to produce information, then, arguably, Congress may lack the ability to extend copyright to works of the government. The constitutional validity of government copyright is beyond the scope of this article. Even if governments were found to be constitutionally unable to copyright information, they could still use copyright-like mechanisms to control the availability and use of their information.

Several commentators have set out the constitutional argument in greater length. For a discussion of the validity of copyright by government contractors, see Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425 (1984). Another commentator addresses the ability of the states to employ copyright. Barbara A. Petersen, *Copyright and State Government: An Analysis of Section 119.083, Florida's Software Copyright Provision*, 20 FLA. ST. U. L. REV. 441, 463 (1992).

The case for unrestricted public use of public data[24] in the hands of government must be set out clearly now because the stakes are higher than they were when information existed primarily on paper. Computerization, computer networks, and growing economic, commercial, and political uses of government information make government access and dissemination policies more important. Government bureaucracies have always displayed a tendency to control the information of their agencies, and the temptation increases as the value and the uses of the information expand. Legislatures may also be tempted to impose statutory restrictions on information in order to raise revenues from new sources or to accomplish other purposes. A clear understanding of these practices and of the negative political and economic consequences is necessary in order to identify copyright-like controls, resist calls for additional controls, and begin to curtail existing restrictive practices.

II. THE JURISPRUDENTIAL AND STATUTORY BACKGROUND

A. The Dangers of Political Control over Information

1. Information and Democracy

An important argument against government information controls is that political control over government information is inconsistent with American democratic principles. A starting point for discussion is the First Amendment's prohibition against abridging the freedom of speech or freedom of the press. A major purpose of the Amendment is to protect the free discussion of governmental affairs, including discussions of candidates, structures of government, the manner in which government is operated, and the political process.[25] A principal concern is that politicians and bureaucrats may abuse the ability to control

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24. For purposes of this article, "public data" is information that can readily be released by the government. It includes those classes of information that are publicly disclosable because of a law, agency rule or regulation, or existing agency policy or practice. It does not include data that is entitled to be withheld from disclosure in order to protect a legitimate public or private interest, such as information classified in the interests of national defense or foreign policy; information that is restricted from disclosure by the Privacy Act of 1974, 5 U.S.C. § 552a (1988), or other statutes; or information that is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1988). For a discussion of the definition of "public information," see PAPERWORK REDUCTION AND FEDERAL INFORMATION RESOURCES MANAGEMENT ACT OF 1990, H.R. REP. No. 927, 101st Cong., 2d Sess. 30-34 (1990) (report to accompany H.R. 3695).

25. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

government information in order to accomplish political objectives or to unfairly interfere with public discussion of political issues.

Use of formal copyright offers the clearest example of the consequences of information controls.[26] Under the Copyright Act of 1976, a copyright owner has a bundle of exclusive rights, including the right to reproduce the copyrighted work, to prepare derivative works based on the copyrighted work, and to distribute copies by sale, rental, lease, or lending.[27] For present purposes, the most important of these rights is the right not to publish a copyrighted work.[28] For example, if the federal government were able to copyright a publication, information that is embarrassing, inconvenient, or inconsistent with official pronouncements could not only be withheld, but publication by others might even be prevented since publication violates the rights of the copyright holder.

If a federal agency/copyright holder chose to license publication of information, then political criteria could be used to decide who may obtain a license.[29] The overt application of political criteria when

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26. While it is beyond the scope of this article, it is possible to argue that the copyright law and the First Amendment are contradictory. For a discussion of the need to reconcile copyright and the First Amendment, see I. NIMMER, COPYRIGHT § 1.10[A] (1993). In a general review of this broad issue, Nimmer suggests that technological advances, together with the public's increasing appetite for education and culture, "requires a constant rethinking of the place of copyright and the proper scope of the First Amendment within our burgeoning society." *Id.* § 110[D]. If the United States had experience with federal government copyright restrictions on the use of government information, the conflict with First Amendment principles could be much sharper than is suggested in a non-governmental context. Pressures for increased access to and dissemination of federal data might well be focused directly against the government's ability to copyright. Since the states can copyright information, it remains to be seen if such pressures will develop at the state level. For discussion of potential conflicts between government copyright and the First Amendment, see Simon, *supra* note 23, at 446-63.

27. 17 U.S.C. § 106 (1988). There are other exclusive rights that pertain only to literary, musical, dramatic, motion picture, and similar works. *Id.*

28. *See* Stewart v. Abend, 495 U.S. 207, 228-29 (1990) ("But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work."); *see also* H.R. REP. No. 1476, 94th Cong., 2d Sess. (1976) ("Under [clause 3 of section 106 of the Copyright Act of 1976], the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work.").

29. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 689(1993) ("To the degree copyright converts politically relevant information into excludable property, it allows the owners of that information to condition access to that information on the receivers' willingness to pay or, perhaps more insidiously, on the receivers' prior political viewpoint.").

granting a license to reproduce information might well violate other constitutional principles such as equal protection. Thus, a policy that permitted reproduction by Republicans but not by Democrats would be difficult to justify. The creative bureaucrat or politician who is also a copyright holder has a broad range of options available that allow for considerably more subtlety than a crude political standard. For some information (e.g., criticism of a Republican Administration), only Democrats might have a political incentive to reproduce it. It would be easy to deny a license to everyone while only adversely affecting Democrats. For other information, the terms under which reproduction is permitted would be more welcomed by some than by others. Suppose, for example, that everyone is required to reprint a presidential statement as a condition of reproducing copyrighted budget data. Those who support the President might not find this objectionable, but presidential opponents are not likely to feel the same way. It is not difficult to develop facially neutral licensing principles that will have pointed political effects.

Another way that an agency might control the availability of government information is through price. If government information were subject to copyright and if the government were able to establish a price for information products and services just like a private company, then the price setting ability would provide another way to apply political criteria to the dissemination of information. Information that an agency wanted to disseminate widely could be free or inexpensive. Higher prices could be used to make less favorable information less accessible. Within an agency, some information or information services might be offered at a loss in order to generate good will or to attract customers for high priced services. By selecting among information products and users of those products, an agency could easily offer favorable treatment to some classes of users. On the surface, everyone might benefit equally from a subsidized service offering photos from the Hubble telescope, but astronomers would clearly benefit the most because they are the most likely users. An agency could also use price to undermine private sector competitors by lowering prices where there was competition and subsidizing the losses with higher prices where there was no competition.[30]

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30. An example of the use of price to accomplish broader, political, purposes can be found at the National Technical Information Service ("NTIS"), a component of the Department of Commerce. NTIS is a clearinghouse for the collection and dissemination of scientific, technical, and engineering information. 15 U.S.C. § 1152 (1988). NTIS is

Another way to apply political criteria is through the selective use of remedies. Not all violations of a government copyright would necessarily be prosecuted. The government could choose to bring infringement actions only against those who hold different views. Consider copyright infringement brought by the Queen of England and discussed in the first paragraph of this article. Had the Queen's speech been reprinted by a newspaper viewed favorably by the Royal Family, the infringement action may not have been brought.[31]

Whether the federal government would be able to pursue copyright interests to the same extent and in the same way as other copyright holders is an unexplored subject. There is some reason to believe that

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required by law to be self-sustaining and may set a price for its information products and services accordingly. *Id.* § 1153.

NTIS is partly in competition with the Government Printing Office ("GPO"), which operates under a different statutory pricing scheme. *See infra* note 111. When it disseminates the same document as GPO, NTIS has lowered its normal price to stay competitive. Presumably, purchasers of other documents are paying higher prices to make up for any loss incurred while NTIS battles with GPO in the market for federal documents.

Another example of how an agency can use price to accomplish political purposes can be found in the Fedworld service offered by NTIS. Fedworld is an on-line service that provides information to callers and connections to other on-line services offered by other agencies. The service has been free to callers, and it has attracted a considerable number of users and has experienced capacity problems. *Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 1995: Hearings before a Subcomm. of the House Comm. on Appropriations*, 103d Cong., 2d Sess. at 718 (1994) (Part 1A)(responses to submitted questions). Having created a high-profile and politically popular service, NTIS was able to go to the Congress and ask for money to support the expansion of the system because it was unable to expand the system on earned revenues. *Id.* at 567 (statement of Mary L. Good, Under Secretary of Commerce for Technology). It is not clear whether the indirect revenues attributed to Fedworld from possible increased sales of other documents or from contributions from other agencies were sufficient to cover the costs. Yet another example of how agencies are detached from the real world of profits and losses can be found in NTIS' history. In past years, NTIS had experienced shortfalls in its revolving fund. The agency did not go bankrupt. It requested and received a bailout by the Congress. *See id.* at 719 (responses to submitted questions).

The statutory requirement that NTIS must be self-sustaining ultimately lead to a request by NTIS to be able to copyright government documents. The proposal made it part way through the legislative process before it was killed. *See infra* note 108. This illustrates how the need for revenues can create a demand for greater control over information in order to protect and increase the stream of revenues.

31. A rough parallel to selective enforcement of copyright might be found in the selective attempts by federal government political officials to track down the source of leaks of government information. *See, e.g.*, HESS, THE GOVERNMENT/PRESS CONNECTION 75-94 (1984) (Chapter 7, *Leaks and Other Informal Communications*). There are many more leaks than investigations, and it appears that overtly political criteria are used to decide whether and how to investigate the leaks. *See also* "Plumber" in SAFIRE, SAFIRE'S POLITICAL DICTIONARY 540 (1978).

the courts might use existing copyright or First Amendment principles to limit government's power,[32] but this is far from certain.[33]

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32. There are two limitations on the exclusive rights of copyright owners that might ameliorate the political consequences of a governmental refusal to permit the reproduction of copyrighted government information. Copyright laws do not protect ideas but only the form of expression. In the Pentagon Papers case, Justice Brennan addressed concerns that copyright might be used to prevent publication:

> [C]opyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

New York Times v. United States, 403 U.S. 713, 727 (1971).

Whether this doctrine would apply where the Government was equally interested in protecting an interest in the form of words (e.g., a presidential speech) is not entirely clear. If the government were seeking to protect an economic rather than a political interest, it might be more difficult to reach this same conclusion.

A second limitation comes from the concept of fair use. *See* 17 U.S.C. § 107 (1988). Since there has been no federal government copyright, neither the statute nor the case law appears to explore how principles of fair use might be interpreted with respect to federal copyrighted works.

In Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (1978), the court resolved a dispute over a copyright infringement claim involving the use of a privately owned musical composition in a political campaign. The court evaluated the first statutory fair use factor ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes") with reference to First Amendment issues of freedom of expression in a political campaign. *Id.* at 960. The court found that the use was a fair use. The same principle could arguably apply to uses of government copyrighted works for political or news purposes. See Harper & Row v. Nation Enter., 471 U.S. 539 (1985), where the Supreme Court refused to expand fair use to cover advance publication of portions of the memoirs of a public figure (former President Gerald Ford) on the grounds of the news value of the information. There is, of course, a significant distinction between a current government document and the private memoirs of a former government official.

See also Schnapper Public Affairs Press v. Foley, 667 F.2d 102, 116 (D.C. Cir. 1981) ("We are confident that should the day come when the Government denies someone access to a work produced at its direction on the basis of a copyright, and if the doctrine of fair use and the distinction between an idea and its expression fail to vindicate adequately that person's interests — although we have no reason to believe that they would — the courts of the United States would on the basis of facts, not hypotheses, consider afresh the First Amendment interests implicated thereby.").

33. Of some relevance to this discussion is the decision of the Supreme Court in Snepp v. United States, 444 U.S. 507 (1980). Snepp was a Central Intelligence Agency employee who violated an agreement not to publish any information relating to the CIA without pre-publication clearance by the CIA. *Snepp*, 444 U.S. at 508-09. When Snepp published a book without clearance, the Court found that he had breached a fiduciary obligation notwithstanding the fact that he did not divulge any classified information. *Id.* at 511. The Court granted the government's request for a constructive trust for the government's benefit on all profits that Snepp earned from publishing the book in violation of his fiduciary obligation. *Id.* at 510.

The process of licensing people to use copyrighted information offers additional methods of imposing controls on the use of the information. Asking a government bureaucracy for a license to use copyrighted material could be as complex, time-consuming, and expensive as the bureaucracy chose to make it. Licensing offers the enterprising bureaucrat or politician a procedural method of controlling use of information by placing limitations on users without the need for constitutionally suspect access standards.[34] Licenses could be readily available for favorable information or to favored users, but the process for other data or other users might be made more complex.

The experience under the Freedom of Information Act is instructive here. Agencies are required to make records available under a short statutory deadline.[35] Despite the clearly stated legislative policy of rapid responses to FOIA requests, many agencies have failed to comply with the time limits, in some cases consistently missing the statutory deadlines by months[36] and years.[37] This has been a problem with the FOIA since it was first enacted.[38] In addition, there have been constant complaints from newspaper reporters and other FOIA requesters that agencies misuse the withholding authority of the FOIA

While this case did not involve copyright, it raises the notion that a breach of a different fiduciary duty could arise with respect to copyrighted information owned by the government. The Court refused to recognize that Snepp had a First Amendment interest that overcame his contractual obligation. *Id.*

Because of the national security overtones in this decision, it is difficult to extrapolate the result to a case involving purely economic loss to the government/copyright holder. At a minimum, however, the decision suggests that First Amendment principles might not outweigh fiduciary obligations, at least with respect to government employees.

34. Licensing by government of uncopyrighted data is one type of a copyright-like control. *See infra* text accompanying notes 225-228.

35. *See infra* note 119.

36. *See, e.g.*, GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: STATE DEPARTMENT REQUEST PROCESSING 24 (1989) (GGD-89-23) (three-quarters of requests took over six months to complete); *FBI Oversight and Authorization Request for Fiscal Year 1991: Hearing before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 17 (1990) (FBI chart showing average turn around time for FOIA requests that required actual processing of documents ranged from 200 days in 1983 to 326 days in 1989).

37. *See, e.g.*, HOUSE COMM. ON GOVERNMENT OPERATIONS, CENTRAL INTELLIGENCE AGENCY INFORMATION ACT, H.R. REP. No. 726, 98th Cong., 2d Sess. 7 (1984) (report to accompany H.R. 5164) (two to three-year backlog of FOIA requests at the Central Intelligence Agency).

38. *See, e.g.*, HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. No. 1419, 92d Cong., 2d Sess. (1972).

to deny access to disclosable documents that are embarrassing or politically sensitive.[39]

Would federal agencies do a better job in deciding whether to grant copyright licenses than they do in providing documents under the FOIA? Evidence from Canada, where government information is subject to Crown copyright, suggests that bureaucratic delays in dealing with requests for permission to reprint government publications can be significant.[40] One Canadian publisher has written that the cost burdens of dealing with the bureaucracy makes reproduction of Canadian government information in new formats "commercially unattractive."[41] It is difficult to conclude that a formal American government information licensing bureaucracy would necessarily be more rapid, efficient, or cooperative.

In Canada, some practical problems inherent in government copyright of basic statutory material are avoided because publishers and other users do not always seek permission to reprint the material. For traditional printed publications, it appears that the Canadian Government does not object.[42] However, for electronic publications, the Canadian Government is asserting Crown copyright, apparently because it wants some of the revenues.[43] This underscores one of the premises of this article: Computerization makes government data more valuable and raises the stakes in information policy debates. In the words of Canadian Information Commissioner John Grace: "In the age of

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39. *See, e.g., Freedom of Information Oversight: Hearings before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 1st Sess. 100 (1981) ("The FBI has made extensive use of what Carl Stern, a journalist and lawyer with extensive FOIA experience, calls the 10th exemption — the 'we don't want to give it to you' exemption. Simply by recalcitrance and footdragging, agencies suppress information that doesn't fall within the nine express exemptions.") (testimony of Edward Cony, Vice President, News Operations, Dow Jones, on behalf of the American Society of Newspaper Editors.).

40. *See 1992 House Dissemination Hearings*, *supra* note 9, at 243 (testimony of Gail Dykstra, Senior Director, Policy and Programs, Canadian Legal Information Centre, Toronto, Canada).

41. Gibson, *Canadian Government Information Policies and the Demise of Reteaco*, CD DATA REPORT (July 1990).

42. *See* Information Commissioner of Canada, *Annual Report 1991-1992*, at 27 ("Lawyers do not ask for permission when they take and reproduce statutes, regulations or decisions from government publications. Publishers, as well as the legal profession, have been doing this since Confederation. With notable exceptions, those who publish without permission are not prosecuted.") [hereinafter *Annual Report 1991-1992*].

43. *See 1992 House Dissemination Hearings*, *supra* note 9, at 243 (testimony of Gail Dykstra, Senior Director, Policy and Programs, Canadian Legal Information Centre, Toronto, Canada).

electronic databases, Crown copyright is even more quaint and more inhibiting to the free flow of information."[44]

2. *Information and Economics: Legi-Tech v. Keiper*

Revenues from the sale of information may be attractive to a government copyright holder just like any other copyright holder. Copyright is supposed to protect the economic interests of the owner, and it is possible that government may act in its economic interest rather than its political interest. A New York case supports the view that government information controls are not likely, in fact, to be used just to further economic goals. The case is *Legi-Tech v. Keiper*,[45] and while it does not appear to involve a copyrighted product, copyright-like controls were imposed through access limitations and legislative restrictions and were evaluated by the court of appeals using copyright principles.[46]

In 1984, the Legislative Bill Drafting Commission of the State of New York began to offer public access to its Legislative Reference Service ("LRS"). The LRS provided public access to a computerized database containing the text of bills introduced in the legislature. Legi-Tech, a company that electronically disseminated a variety of information on state legislative activity to subscribers, sought access to LRS data but was denied. Six days after Legi-Tech began an action in state court seeking an order requiring that LRS be offered to it in the same manner and on the same terms as other subscribers, legislation was introduced in the New York State Legislature that would have authorized the sale of LRS services:"to such entities as the temporary president of the senate and speaker of the assembly, in their joint discretion, deem appropriate, except those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature."[47]

There are three noteworthy things about this statute that are relevant here. First, it was enacted within a month of the filing of the original lawsuit and was signed into law eighteen days after it was introduced.[48] Swift legislative action is rare and suggests that there

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44. *Annual Report 1991-1992*, *supra* note 42, at 28.

45. Legi-Tech v. Keiper, 601 F. Supp. 371 (N.D.N.Y. 1984), *remanded*, 766 F.2d 728 (2d Cir. 1985). The factual description in this article is taken from the two decisions.

46. *See infra* note 70 and accompanying text.

47. *Legi-Tech*, 601 F. Supp. at 373.

48. *Id.*

was a significant threat to an important governmental or legislative interest.[49] Second, it gave two legislative officials unrestricted discretion to decide who may receive the LRS data.[50] There was no requirement that economic criteria be considered when that discretion is exercised, and the decisions were to be made by high-ranking elected officials.[51] Finally, the statute expressly prohibits the sale of the data to resellers of electronic data.[52] Those who resell paper copies of information from the database are not excluded from access.[53] Thus, it was the digital nature of the database that gave the state a reason to restrict access.

Following passage of the statute, Legi-Tech challenged its constitutionality in federal district court.[54] After wading through several complex and interesting free speech/free press issues, the trial court declined to issue an injunction because it found no merit to Legi-Tech's claim of a violation of the First Amendment.[55] The court saw no denial of access to information, just a requirement that the information must be gathered by Legi-Tech in a less convenient matter.[56] The district court's economic analysis is most relevant here:

> There is no question that the regulation here is reasonable since it only seeks to protect the state's natural monopoly on computer supplied legislative information. Indeed, were the state not able to restrict access to LRS, competitors could easily retransmit the state's data at lower prices and thereby eliminate LRS entirely.[57]

In other words, the judge appeared to be swayed because he saw the state acting in a rational economic manner. The denial of access by

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49. The legislation preserved the ability of the New York State legislature—not the executive branch—to control legislative information. The control was vested in the temporary president of the senate and speaker of the assembly, in their joint discretion. This explains the speed with which the legislation was proposed and passed. It also illustrates that any branch of government may have its own reasons for controlling information.

50. *Legi-Tech*, 601 F. Supp. at 373; *see also* N.Y. Laws, chapter 257, § 21 (McKinney 1984).

51. *Legi-Tech*, 601 F. Supp. at 373: See also N.Y. Laws, chapter 257, § 21.

52. In its pleadings, Legi-Tech asserted that it was the only entity other than LRS itself that offered electronic retrieval service to the public. It was also the only entity denied access to LRS. *Legi-Tech*, 601 F. Supp. at 373.

53. *Id; see also* N.Y. Laws, chapter 257, § 21.

54. *Legi-Tech*, 601 F.Supp. at 371.

55. *Id.* at 382.

56. *Id.* at 375.

57. *Id.* at 381.

the state preserved the state's position in the market for electronic services by declining to provide a competitor with the database.[58] Although the judge did not use these terms, he apparently saw the state's restriction as an appropriate action that might be taken by any rational information owner.

The court of appeals took a sharply different view.[59] It recognized immediately that the case arose "out of advances in a developing technology"[60] and that the ultimate effect of the legislative restriction in question "depends upon the development of that technology and of the commercial uses to which it may be put."[61] The appeals court understood that access to an electronic version of information otherwise available in print may have a bearing on the ability of Legi-Tech to republish bills in a timely fashion.[62] The court also commented on the political importance of the information at stake: "Information about legislative proceedings, and in particular, pending legislation, is absolutely vital to the functioning of government and to the exercise of political speech, which is at the core of the First Amendment."[63]

The district court's "natural monopoly" analysis was rejected by the court of appeals with the observation that any such monopoly was simply a product of LRS' special access to information and the legislative prohibition on access by competitors.[64] The court also took a dim view in general of government information monopolies:

> The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion. Government may add its own voice to the debate over public issues, . . . but it may not attempt to control or reduce competition from other speakers. . . . When the state creates an organ of the press, as here, it may not grant the state press special access to governmental proceedings or information and then deny to the private press the right to republish such information. Such actions are an exercise of censorship that

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58. Applying the same analysis to earlier forms of technology, the judge's reasoning might support restrictions on the distribution of printed copies of bills to anyone with an electrostatic printing device. Such a restriction could be viewed as a protection for the state's "natural monopoly" on printed legislative information.

59. Legi-Tech v. Keiper, 766 F.2d 728 (2d Cir. 1985).

60. *Id.* at 732.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Legi-Tech*, 766 F.2d at 733.

it used to describe the MEDLARS system: "stock in trade" and "highly valuable commodity."[210] Had the NLM been a private business that sold copyrighted information, this characterization would be reasonable. But the federal government has expressly disclaimed any ownership interest in its own information, notwithstanding that much of its data would be a "highly valuable commodity."[211] Nothing in the NLM statute supports a contrary conclusion for NLM data, and certainly nothing in the FOIA creates or recognizes an economic interest in federal agency.

Unlike the *Legi-Tech* court, the *SDC* court apparently was not aware of the relevance or importance of copyright policy. Looking only to the FOIA, the court saw a database that was available to the public.[212] Since the agency was not shielding the database from public use or access, the court saw no compelling reason to apply FOIA principles strictly.[213] But the FOIA not only makes information available, it make the information available at a low price and without restrictions. The *Legi-Tech* court saw that basic availability was not the end of the discussion and that the terms under which information is disclosed make a difference. The *SDC* court did not make this connection, and its decision allowed the NLM to establish restrictive terms for disclosure.

NLM's copyright-like controls illustrate the importance of the FOIA to effective implementation of the statutory policy against government copyright. When the court in *SDC* failed to apply the FOIA to the MEDLARS tapes, NLM was successful in asserting several rights of a copyright holder (high price and controlled dissemination) because potential users had no alternate recourse at law to obtain access to the tapes. Until external political pressures caused a change in pricing policy,[214] NLM had a free hand in establishing the terms of disclosure for the computer tapes and in protecting an economic interest notwithstanding the Copyright Act's disclaimer of such an interest. NLM controlled dissemination of the complete electronic version, and anyone who wished to offer a computerized information service had to

210. *See supra* note 160 and accompanying text.
211. *SDC Development*, 542 F.2d at 1123.
212. *Id.*
213. *Id.*
214. *See supra* note 186.

accept NLM's terms.[215] Because the court refused to allow the use of the FOIA's access mechanism for the computer tapes, a requester had no other choice.[216]

The role of the FOIA in enforcing the policy in Section 105 of the Copyright Act did not become fully apparent until the government began to amass electronic data. Anyone seeking to reproduce a printed government publication will not normally need to use the FOIA. A copy of the publication might be purchased from a government bookstore or obtained from the agency. The printing plates for the publication can even be purchased from the Government Printing Office.[217] With an electronic database, there is no source for the entire database in digital form other than the agency that created it, and there may be no access mechanism other than the FOIA.[218] When the

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215. Private, off the record, discussion with private vendors of MEDLARS data revealed a concern that challenges to NLM's restrictions would result in retaliation by NLM and a disruption of ongoing commercial activities.

216. Dismukes v. Dep't of the Interior, 603 F. Supp. 760 (D.D.C. 1984), is a FOIA case similar to SDC Development v. Mathews, 542 F.2d 1116 (9th Cir. 1976), in that it involved computer records that the agency made available in a hard copy format. The requester sought the names and addresses of participants in oil and gas leasing lotteries. *Dismukes*, 603 F. Supp. at 761. The agency did not argue that the information was exempt, but it chose to fulfill the request by providing the information on microfiche cards. *Id.* The requester sought the information on computer tape because the information would be less expensive and more convenient. *Id.* at 762. The court dismissed the action, finding that the agency had no obligation under the FOIA to accommodate the plaintiff's preference. *Id.* at 763.

The agency's motivation in *Dismukes* is not immediately apparent. The agency may just have wanted to keep an entrepreneur from making use of agency data, even though the agency had no apparent economic interest of its own. The agency may have found it more convenient to provide the microfiche. It also has been suggested that the agency action may have been influenced because the request was for names and addresses, a type of request that the Government Operations Committee fairly characterized as "troublesome." 1986 HOUSE INFORMATION POLICY REPORT, *supra* note 7, at n.151.

The agency decision in *Dismukes*, upheld by the court, allowed disclosure but in a form that made the information significantly less useful. This result was criticized by the House Committee on Government Operations because it provides another way to reach "the same troublesome result that was reached in SDC v. Mathews." *Id.*

See also *supra* note 17 for a discussion of a document index that the Central Intelligence Agency provided on paper but not in an electronic format.

217. *See supra* note 111 and accompanying text.

218. It is unclear whether the FOIA needs to be amended to clarify its applicability to electronic records and to provide the requester with a choice of format. *Compare* the testimony of Patti A. Goldman, Public Citizen Litigation Center ("The [FOIA] has very workable standards that can insure public access to electronic information to the same extent as paper records are made available under the act.") *in 1989 Dissemination Hearings, supra* note 17, at 474, *with* the Electronic Freedom of Information Improvement Act of 1991, S1940, 102d Cong., 1st Sess. (1991) (A bill to amend title 5, United States Code, to provide

FOIA fails as an effective access mechanism, the agency may be able to control the terms under which others can use the information.

III. METHODS AND MOTIVES FOR GOVERNMENT CONTROLS ON INFORMATION

The reasons agencies, government officials, and legislators want to control the information in their domain are many and varied. Information may be a source of power that can be best exploited in an environment of secrecy.[219] Information may be closely held in order to avoid embarrassment, to evade oversight, to establish a function and create jobs at an agency, to develop a constituency of users, or to develop a source of revenue. While not every agency, bureaucrat, or politician will find a motive to control every government information product or service, the temptations are there.

Government officials can be creative in finding methods to exercise control even when copyright is unavailable. These methods cannot reproduce all of the rights that a copyright holder would have, but they can come close. More importantly, from the perspective of those wishing to use the information, the legal distinctions between the rights of a copyright holder and the authorities exercised through non-copyright controls may make no practical difference. If the information is unavailable or must be used on terms dictated by the agency, then the reasons are not likely to be of great importance to the user. This section will review some of the methods actually used by federal agencies and then will evaluate the principal justifications offered for information controls.

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for public access to information in an electronic format, to amend the Freedom of Information Act, and for other purposes). *See also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ELECTRONIC ACQUISITION AND RELEASE OF FEDERAL AGENCY INFORMATION 101-110 (1988). In the 103d Congress, the Senate passed the Electronic Freedom of Information Improvement Act of 1994 to address information access issues prompted by electronic information. *See* S1782, 103d Cong., 2d Sess. (1994); S. REP. No. 365, 103d Cong., 2d Sess. (1994). The House of Representatives took no action on this legislation.

219. Perhaps the best recent example of this is provided by former FBI Director J. Edgar Hoover. *See, e.g*, CURTISS GENTRY, J. EDGAR HOOVER: THE MAN & THE SECRETS (1991); RICHARD G. POWERS, SECRECY & POWER: THE LIFE OF J. EDGAR HOOVER (1988).

A. *Copyright-like Methods of Agency Information Controls*

1. *Regulating Use Through License Agreements and Royalties*

The copyright-like controls used by the National Library of Medicine to control the use of the MEDLARS database have already been discussed in part.[220] The price for the database has varied over the years. The fixed fee that was at issue in *SDC Development v. Mathews* was later replaced by a royalty based on usage. In 1986, for example, the charge was a $15,000 minimum yearly fee that was offset by actual usage charged of $3 to $4 dollars per hour of connect time and one cent per citation.[221] Following congressional criticism, the usage charges were eliminated in 1993.[222] It does not make any difference to this analysis whether fees are flat or are based on usage.[223] NLM's practice of charging fees in excess of the cost of reproduction is a copyright-like control over information.[224]

The instrument that NLM uses when providing the complete database to a purchaser is a license agreement. MEDLARS licensees are required to prevent duplication, resale, and redistribution of all or part of the databases provided in machine readable form by NLM.[225] The use of a license agreement that expressly restricts redisclosure of the MEDLARS database is another copyright-like control.[226] This

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220. *See supra* notes 164-216 and accompanying text.

221. 1986 HOUSE INFORMATION POLICY REPORT, *supra* note 7, at 28.

222. *See supra* note 201.

223. For a chronology of the MEDLARS charges from 1969 to 1985, see *1985 House Electronic Information Hearings*, *supra* note 168, at 421.

224. NLM has asserted that all of its fees, both for online service and bulk sale to licensees, recover the costs of supporting use of the MEDLARS system. No specific evidence to support this assertion was offered. *See, e.g., 1985 House Electronic Information Hearings, supra* note 168, at 279. The House Committee on Government Operations found in 1986 that "it is apparent that licensees of the tapes must be paying charges that are in excess of the cost to the NLM of providing copies of the tapes." *See* 1986 HOUSE INFORMATION POLICY REPORT, *supra* note 7, at 29. Additional information about NLM charges can be found in GENERAL ACCOUNTING OFFICE, INFORMATION DISSEMINATION: CASE STUDIES ON ELECTRONIC DISSEMINATION AT FOUR AGENCIES (1992) (GAO/IMTEC-92-6FS).

225. For a copy of the license agreement used in 1985, see *1985 House Electronic Information Hearings*, *supra* note 168, at 422-27. NLM's General Counsel has testified that the agency has not specific authority to prohibit the duplication or resale of the MEDLARS tapes. *1985 House Electronic Information Hearings*, *supra* note 168, at 286 (testimony of Robert Lanman).

226. The redisclosure restriction was not discussed in the court's opinion in *SDC Development*, 542 F.2d 1116. Information released under the FOIA is not subject to any

restriction goes hand-in-glove with NLM's pricing structure since NLM could not support a high price if licensees could provide complete copies to other users. NLM would also lose dominion over users of the database if complete copies were freely available.[227] NLM has defended the redisclosure restrictions as essential to maintaining the quality of its service. This argument will be addressed at more length later in this article.[228] For present purposes, it is sufficient to conclude that the license agreement restrictions offer further evidence that NLM has controlled its information in a manner similar to a private business that is eligible to copyright its information products. The effects on the public are diminished access and the higher prices that can be supported by diminished access. The conflict with the policies of the Copyright Act and the FOIA is apparent.

2. Limiting Access to Selected Recipients

Another illustration of how a federal agency can create out of whole cloth the means to control the use of its information products is provided by the Federal Law Enforcement Training Center (FLETC). FLETC is a central training facility operated by the Department of the Treasury for federal law enforcement personnel. The agency prepares video training films and distributes them using a audiovisual distribution service run by the National Archives and Records Administration (NARA).[229] The August 1993 NARA video catalog also included films from the Federal Bureau of Investigation, National Institute of Justice, National Highway Traffic Safety Administration, Federal Judicial Center, and the Federal Emergency Management Agency.[230]

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limitation on use or disclosure. *See* Baldridge v. Shapiro, 455 U.S. 345, 350 n.4 (1982).

227. In late 1994, NLM announced the availability of "The Visible Man," a detailed atlas of human anatomy. Users will be required to sign a licensing agreement stating how the information will be used. The data will be made available at no charge to "those who suggest promising uses for the data and who have sufficient computer storage space." *NLM Unveils 'The Visible Man'*, NATIONAL LIBRARY OF MEDICINE NEWS 4-5, Nov.-Dec. 1994. This is another example of how license agreements can be used to deny access and to exercise control over users of government data.

228. *See infra* notes 299-307 and accompanying text.

229. National Archives and Records Administration, Multimedia and Publications Distribution Division, *Video Training for Law Enforcement Agencies* (Feb. 1993)[hereinafter *NARA Catalog*]. The distribution function of NARA is being transferred to the National Technical Information Service. *See* 59 Fed. Reg. 35,389 (1994). The transfer is not relevant to this analysis.

230. *NARA Catalog*, *supra* note 229.

Of all the films distributed through this catalog, only the films of FLETC were restricted.[231] The catalog included a "Letter of Indemnification" that a law enforcement official was required to sign as a condition of purchase.[232] The letter stated that the films were produced and designed for training law enforcement personnel attending training sessions at the FLETC facility in Georgia.[233] The purchaser was required to agree to these conditions included in the letter of indemnification printed in the catalog:

> 1. Sale is limited to United States law enforcement officials only.
> 2. FLETC programs cannot be duplicated in whole or in part.
> 3. FLETC programs can only be used by and shown to other law enforcement officials in the United States.
> 4. FLETC programs cannot be broadcast in whole or part in any type of system.[234]

In some respects, the letter of indemnification is similar to the license agreement used by the NLM. The FLETC letter went further by requiring the purchaser to indemnify the United States Government from liability for use of the films:

> We hereby agree to indemnify, save, and hold you, the United States Government, its agencies, officers and/or employees harmless from and against all liability, including costs and expenses, based on the violation of rights of ownership, *infringement of copyright*, or invasion of the rights of privacy, resulting from our use of such film and/or footage pursuant hereto.[235]

This are strong and intimidating restrictions. They directly limit the ability of purchasers to duplicate the films and to show them to audiences. A copyright holder might impose similar restrictions.[236] What was the agency's authority to restrict the use and dissemination of the films? When asked this question by the Chairman of a House Subcommittee, Charles Rinkevich, Director of FLETC, denied that the

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231. Letter of Indemnification, *in NARA Catalog*, *supra* note 229, at 14.

232. *Id.*

233. *Id.*

234. *Id.*

235. Emphasis supplied. The NLM license agreement only contained a disclaimer of liability. *See 1985 House Information Policy Report*, *supra* note 168, at 31.

236. There is nothing in the letter of indemnification that expressly prohibits resale of the films, although resale to some purchasers would violate the terms of the letter of indemnification.

agency claimed copyright or ownership over any of the films.[237] He asserted that many of the videos contain information that may be withheld under the FOIA's exemptions for law enforcement records that would reveal investigative techniques or endanger the life or physical safety of law enforcement personnel.[238] He also said:

> The videos are produced as training tools. In order to ensure the *full benefit of the investment* through distribution to law enforcement agencies while at the same time protecting the information from those who may use the information to circumvent the law, the restricted distribution system was devised.[239]

Rinkevich also stated that "[f]urther disclosure by any of the recipients presents an opportunity for the loss of control and the opportunity for improper disclosure."[240] In response to a question about possible invasions of privacy that could result from use of the films, Rinkevich wrote that "[c]oncerns arise when one considers the further utilization that is possible should the video be modified/edited in any way."[241]

The Subcommittee Chairman persisted in his inquiry about the restrictions. Seven months later, Director Rinkevich responded with the results of a complete review of the films. After this review, only six of the more than 30 films listed in the catalog were found to contain information qualifying for withholding under the FOIA. These films were withdrawn from distribution by NARA. The procedures for ordering the remaining films—including such innocuous titles as *Customs Careers—Exceeding Expectations*, *Introduction to Firearms*,

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237. Questions about the restrictions were raised in a series of letters in 1993 by Rep. Gary Condit, Chairman of the Subcommittee on Information, Justice, Transportation, and Agriculture, House Committee on Government Operations. The letters were addressed to Mr. Charles F. Rinkevich, Director, Federal Law Enforcement Training Center, Glynco, GA, and responses were from Mr. Rinkevich. (Copies of all cited correspondence are available from the author or the Subcommittee.).

238. 5 U.S.C. § 552(b)(7)(E) & (F) (1988).

239. Rinkevich Letter (Sept. 23, 1993) (emphasis added). The interest in preventing circumvention of the law is a recognized basis for withholding information under the FOIA. *See, e.g.*, DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 63-75 (1993).

240. Rinkivich Letter (Sept. 23, 1993).

241. *Id.* Rinkevich also stated that when actual case data was used in the films, consent forms are obtained that restrict the release of information to law enforcement personnel. However, the consent form actually used contains no such restriction. In fact, it authorizes any distribution to the public, including through radio, television, or satellite. The form also contains a general release of claims of any kind against the United States Government. *General Release, Audio Visual Production Participation Without Compensation* (Form FTC-MSD-21b (10/89)).

Ethics, Values, and Conduct, and *Legal Review of 5th & 6th Amendment Issues*—were changed, the letter of indemnification was no longer required, and all restrictions and conditions were lifted.[242]

The original distribution rules and letter of indemnification gave the impression that the information was copyrighted and highly sensitive. Of course, none of the information was subject to copyright, and little was sensitive in any way. The agency's contention that all of the information was exempt from disclosure under the FOIA was also wrong.[243] This casual and incorrect reliance on FOIA exemptions is both characteristic of agency misapplication of the FOIA and illustrative of the use of the FOIA to maintain control over information.[244]

FLETC also contended that unrestricted distribution would prevent the full benefit of the agency's investment. It is difficult to interpret this unsupported suggestion that the agency considered that it had some type of proprietary or financial interest in the films. The argument might have been supported by the lower court in the *Legi-Tech* case, but the court of appeals clearly would not have accepted it. In any event, the agency received none of the proceeds from the sale of the films and was under no statutory obligation to raise funds through the sale of its films.[245] FLETC's information restrictions were unauthorized by law and were inconsistent with the policies of the FOIA and the Copyright Act. The agency was successful in implementing and maintaining the restrictions as long as no one questioned them. This illustrates that policies of the FOIA and the Copyright Act are not self-enforcing.

3. *Denying or Delaying Access to Digital Versions of Public Data*

In the early 1980s, the Bureau of Land Management at the Department of Interior began development of a computer data bank

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242. Rinkevich Letter (May 25, 1994). Letter from John Osborne, Chief, Media Support Division, FLETC, to Pam Gorman, National Archives Fulfillment Center (May 16, 1994).

243. The FOIA provides that an entire document cannot be withheld because part of it is exempt. The Act requires agencies to provide "any reasonably segregable portion of a record" after deletion of exempt portions. 5 U.S.C. § 552(b).

244. To the extent that some films actually contain exempt information, it is no longer of interest here because the agency had other authority to limit public disclosure of the information. *See supra* note 24 and accompanying text. The Subcommittee did not explore whether the withdrawn films were actually covered by FOIA exemptions.

245. The NARA distribution service bore all of the costs of filling film orders and retained all of the receipts. The service was operated by the National Archives Trust Fund Board, a statutorily established revolving fund that supports distribution of government publications. *See* 44 U.S.C. §§ 2301-2308 (1988).

containing information on over one billion acres of public lands and mineral holdings.[246] The data bank was designed to automate records with geopolitical, land use, and geographical information.[247] The data had always been public, but the records were maintained on paper or in separate and incompatible computer systems.[248] A comprehensive, computerized, land description database is a useful resource with applications in and out of government.

While the new system was being prepared, a private company that compiles and sells oil and gas exploration information filed a FOIA request for a copy of the magnetic tape containing many of the new data elements.[249] The company planned to make the data available to its customers through a private, commercial service.[250] This request illustrates how the FOIA can be used by a private firm to obtain government records in electronic form to create a new line of business, meet the needs of additional users, and ultimately help the government fulfill its own obligations to make information available to the public by establishing an alternative distribution channel.

The agency denied the FOIA request citing the exemption for predecisional records.[251] This exemption protects the deliberative process, applying to materials that bear on the formulation or exercise of agency policy-oriented judgment.[252] Although the format of the requested records had changed, the records were entirely factual and had been available to the public.[253] There was nothing deliberative about the records. Both the district court and the court of appeals held that the denial of the records was improper.[254]

What actually appeared to be at stake here was the bureaucratic interest of the agency. There were some suggestions that the agency

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246. *See* Petroleum Info. Corp. v. Dep't of Interior, No. 89-3173 (D.D.C. 1990).

247. *Id.*

248. *Id.*

249. Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1432 (D.C. Cir. 1992).

250. *Id.* at 1432.

251. *Id.*

252. 5 U.S.C. § 552(b)(5).

253. *Petroleum Info.*, 976 F.2d at 1437. The agency argued that the decision in Dismukes v. Dep't of Interior, 603 F.Supp. 760 (D.D.C. 1984), was applicable to this case. *See supra* note 180 and accompanying text. Since the requested information was available in two formats (paper and computer), the argument was that the agency and not the requester could choose the format of released data. While suggesting that *Dismukes* may no longer be good law, the court of appeals avoided the issue on the grounds that the paper and computer records were not identical. *Petroleum Info.*, 976 F.2d at 1437 n.11.

254. *Petroleum Info.*, 976 F.2d at 1439.

itself had plans to offer a computerized information service containing the newly developed land information.[255] Premature release of any of the information to someone who would offer a competing service would have interfered with any agency plans by allowing a "competitor" to reach the marketplace first with its service. The agency's argument that the computer records should be exempt as confidential commercial information[256] suggests that the agency thought that it had some commercial interest in the data. The argument was easily dismissed by the court.[257]

This case illustrates another method for retaining agency control of information. By denying access to a digital version of publicly available data, the Department of the Interior enhanced the agency's ability to be the first to exploit its data commercially and protect the agency against competition. In this case, the attempt failed, and the agency lost any ability to control the use of the computerized data. This was clearly the correct result.

Why did the requester win here but lose in *SDC Dev. Corp. v. Mathews*?[258] In the years between the *SDC* decision in 1976 and the *Petroleum Information* decision in 1992, the courts may have gained a better understanding of the issues involved with dissemination of electronic records.[259] The holding in *SDC* had not been followed by other courts, and even the Ninth Circuit that decided the case seemed to shy away from the rationale in a later opinion involving FOIA access to computer tapes.[260] Another difference is that there was no existing agency information product or service at the time of the FOIA request so the Interior Department was unable to show any immediate effect on

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255. Direct evidence of the agency's motive is hard to obtain. The requester's brief in the court of appeals stated: "The fact is that Interior in this proceeding has acted like a competitor in the marketplace of products rather than like a government agency serving the public. The entrepreneurial motivations behind the agency's efforts at withholding the LLD tapes have never been far from the surface." Brief for Appellee at 39, *Petroleum Info.*, 976 F.2d 1429 (No. 91-5059).

256. This is another branch of the FOIA's deliberative process exemption. *See supra* note 137.

257. *Petroleum Info.*, 976 F.2d at 1439.

258. 542 F.2d 1116.

259. It is worthy of note that the district court judge who decided *Petroleum Information* was the same judge who decided *Dismukes*, but her opinion in *Petroleum Information* did not cite her earlier opinion. *Petroleum Info.*, No. 89-3173 (D.D.C. 1990). *See supra* note 216.

260. In Long v. IRS, 596 F.2d 362 (9th Cir. 1979), the court characterized the holding in *SDC Development* as based "solely on the nature of the information contained in the tapes." 596 F.2d at 365.

an ongoing agency activity.[261] In *SDC*, NLM offered a statutorily mandated, high-quality, long-standing, widely-used information service.[262] The NLM court was obviously convinced that NLM's controls were an important part of the operation and any change could have disrupted the service. This was not a concern at the Interior Department since there was no agency information service or legislative scheme to disrupt.

The *Petroleum Information* case also illustrates how a procedural shortcoming with the FOIA may give an agency a different way to interfere with timely public access to information. As discussed above,[263] FOIA delays can extend for lengthy periods. By forcing requesters to use the FOIA process to obtain obviously public information, an agency can make it impossible for the requester to have current information. Since FOIA principles generally call for the processing of requests on a first-in, first-out basis,[264] an agency that maintains a large backlog can use the inherent delays to interfere with the availability of current information. Also, by denying requesters access to records and forcing them to go to court, delays can extend for years.[265] If an agency is planning to offer its own information product or service, delaying access by others may enhance the agency's ability to reach the marketplace first. Whether this was a motivating factor in *Petroleum Information* is hard to document. In contrast, a cooperative agency that does not use the FOIA's procedures as a shield may facilitate use by others by providing for direct access to a database or by affirmatively publishing the database on CD-ROM or otherwise on a regular basis.[266] This is more consistent with the spirit and purpose of the FOIA and the Copyright Act.

4. Agreeing to Restrict Disclosure of Digital Data

In 1983, the Patent and Trademark Office ("PTO") entered into so-called "exchange agreements" with private companies under which the companies converted PTO documents into machine readable form on

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261. *Petroleum Info.*, 976 F.2d at 1438.

262. *SDC Development*, 542 F.2d at 1120.

263. *See supra* notes 36-37 and accompanying text.

264. The first-in, first-out approach was accepted as a sign of an agency's good faith processing of FOIA requests in Open Am. v. Watergate Special Prosecution, 547 F.2d 605 (D.C. Cir. 1976).

265. *See supra* note 39.

266. This behavior is encouraged by the OMB circular on Management of Information Resources. *See* OMB Circular A-130, §8, 59 Fed. Reg. 37,906 (July 25, 1994).

behalf of PTO. As part of these barter agreements, PTO provided the companies with copies of agency documents. All of the information in the documents was in the public domain. The companies converted the documents into a machine-readable format, provided a copy to PTO, and retained a copy for their own use. For its part, PTO agreed to apply its best efforts to avoid providing a copy of the computerized data to others. In the event that a FOIA request was made for the computer tapes, PTO agreed to provide a printed paper copy "in a style and format that will prevent or discourage conversion to computer processable form" unless otherwise ordered by a court.[267] The agreements were heavily criticized[268] and eventually prohibited by law.[269]

There is no doubt why the agency entered into these agreements. It was not motivated by a bureaucratic desire to retain control over the use of its data. The PTO did not have funds to pay for the data conversion.[270] A congressman characterized the transaction as "giving away public rights under the FOIA in exchange for computer services that could have been purchased."[271] This copyright-like control succeeded, but only for a while. In general, however, restricting disclosure of digital data is another copyright-like control.

There is evidence that the National Library of Medicine engaged in similar exchange agreements. In *SDC Development v. Mathews*, the court noted that no one had actually paid the $50,000 purchase price for the MEDLARS tapes established at the time of the court case.[272] The NLM had

> entered into profitable contractual agreements with universities and foreign governments whereby tapes are furnished in exchange for valuable assistance in the cataloguing, indexing and abstracting of medical publications to update the data base.[273]

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267. The exchange agreements are reprinted in *1985 House Electronic Information Hearings*, *supra* note 168, at appendix 10.

268. *See*, e.g., 1986 HOUSE INFORMATION POLICY REPORT, *supra* note 7; General Accounting Office, *Patent and Trademark Office Needs to Better Manage Automation of its Trademark Operations* (1985) (IMTEC-85-8).

269. *See* Patent and Trademark Office Authorization, Pub. L. No. 99-507, §6, 100 Stat. 3472 (1986).

270. *See 1985 House Electronic Information Hearings*, *supra* note 168 (testimony of Donald J. Quigg, Commissioner of Patents and Trademarks).

271. *Id.* (statement of Rep. Glenn English, Chairman, House Subcommittee on Government Information, Justice, and Agriculture).

272. 542 F.2d at 1118 n.4.

273. *Id.*

A major distinction between the NLM exchanges and those of PTO is that NLM was statutorily authorized to enter into such transactions.[274] Regardless of the statutory authorization, the ability to establish a price for information combined with authority to barter for services enhanced NLM's control of information. The agency could set a high price and then selectively provide free products or services to friends, favored customers, or to those who provide something of value in exchange. This is very powerful authority indeed, and it could be exercised in a manner that allows the agency a great degree of control over its information and users of the information.[275] The PTO had no clear legislative authority for its exchange agreements and could not sustain them politically. It is unlikely that the agreements would have been sustained if challenged in court. Of course, regardless of the outcome of any litigation, a lengthy court battle would have extended the monopoly position of the company for an additional period of time.

5. Hiding the Data

One effective method for controlling the use and disclosure of agency information is to avoid creating information or to avoid disclosure of the existence of the information. An illustration of this practice is provided by the Board of Governors of the Federal Reserve System.[276] Because of the influence of the Federal Reserve on the economy, its activities have always been controversial. In particular, there has been considerable public and congressional interest in the activities of the Federal Open Market Committee[277] (FOMC), the policy arm of the Federal Reserve.

Prior to May 1976, the FOMC routinely released to the public a Memorandum of Discussion containing a detailed account of the proceedings of FOMC meetings, including attribution of remarks to individual participants. These memoranda were released after five years. Apparently, in response to FOIA litigation and the passage of the Government in the Sunshine Act,[278] the FOMC substituted a much

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274. *See supra* note 180 and accompanying text; *see also* 1985 *House Electronic Information Hearings, supra* note 168 (testimony of Bradford Huther, Assistant Commissioner for Finance and Planning, Patent and Trademark Office).

275. In later years, NLM altered its price structure. There is no evidence of later exchange agreements or of any specific use or misuse of the exchange authority by NLM.

276. 12 U.S.C. § 241 (1988).

277. 12 U.S.C. § 263 (1988).

278. 5 U.S.C. § 552b (1988).

more summary policy directive released a few weeks after the meetings.[279] The policy directive has been described as vague and useless.[280] Whether done deliberately or not, the new policy directive gave the appearance that the information previously released was no longer available.

It was not until 1993 that the Congress and the public became aware that transcripts of the FOMC meetings had been maintained since 1976.[281] A staff report prepared by the House Committee on Banking, Finance, and Urban Affairs called the existence of the transcripts "one of the best-kept secrets in Washington."[282] The extent to which the Federal Reserve may have actively misled the Congress about the existence of these transcripts is a contested issue, but it is not one of importance here. The lack of public and congressional knowledge of the existence of the transcripts assisted in preventing access and disclosure of the information outside the confines of the Federal Reserve. For seventeen years, no one asked for the transcripts because no one outside the Federal Reserve knew they existed. In this instance, there was no direct circumvention of the policies of the FOIA or the Copyright Act, but the "hidden document" gambit is clearly illustrated.

6. Restricting Use Through Contracts

A federal government entity that is not subject to the FOIA may have considerably broader discretion to establish restrictive terms for the public dissemination of information to the public. A good example is the manner in which the Supreme Court of the United States provides for public access to the audiotapes and transcripts of oral arguments. The judicial branch of the federal government does not qualify as an agency for purposes of the FOIA,[283] nor is there is a general law regulating the disclosure of Supreme Court records.[284]

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279. *See* STAFF OF THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, 103D CONG., THE FEDERAL RESERVE'S 17 YEAR SECRET 1, 7-8 (Comm. Print 1994).

280. *Id.* at 1.

281. *Id.* at 2.

282. *Id.* at 2.

283. 5 U.S.C. §§ 551(1)(e), 552(f) (1988).

284. 28 U.S.C. § 411 (1988) contains rules for printing, binding, and distribution of Supreme Court reports, but is silent on other documents. 28 U.S.C. § 457 (1988) requires that obsolete records of district courts and of courts of appeals be disposed of with the approval of the court in accordance with the Records Disposal Act, 44 U.S.C. §§ 3301-3315 (1988), and the rules of the Judicial Conference. This section does not apply to the Supreme Court.

For some years, the Supreme Court has deposited the oral argument tapes and transcripts with the National Archives and Records Administration, an independent agency in the executive branch. The Archives Administration considers itself a mere physical custodian providing public access to the material pursuant to authority granted by an agreement with the Supreme Court.[285] Under a 1988 agreement, the transcripts are available to the public without any restriction on copying.[286]

Public access to and use of the tapes has been subject to greater restriction. The Supreme Court allowed use of the tapes on the premises of the National Archives "for research and teaching purposes."[287] However, prior to furnishing a copy of a tape, the Archives Administration was required to "obtain a written statement from the requestor detailing the purpose or purposes for which the requestor wishes to use the audio tape."[288] If the Archives Administration detected a "commercial purpose" behind the request, then the approval of the Marshal of the Court must be sought.[289] The Archives Administration was expressly prohibited from identifying the voices of the members of the Supreme Court,[290] furnishing any tapes or broadcasting any tapes by radio, television, or similar medium, for any commercial purpose without the approval of the Marshal.[291]

Beginning in 1990, Professor Peter Irons, Department of Political Science at the University of California, obtained copies of the tapes pursuant to the procedure established by the Supreme Court and the National Archives. As a condition of obtaining a copy, Professor Irons signed an agreement with these conditions:

> 2. The Purchaser agrees not to reproduce or cause or allow to be reproduced for any purposes any portion of such audiotape.
> 3. The Purchaser agrees to use such audiotape for private research and teaching purposes only. Such use shall not include any

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285. Letter from Gary L. Brooks, General Counsel, National Archives and Records Administration, to Peter Irons, University of California (Nov. 4, 1993)(on file with author).

286. Agreement Between the Supreme Court of the United States and the National Archives and Records Administration [hereinafter *Agreement*] (March 1988)(on file with author).

287. *Id.* at (b). Prior to 1988, there had been a variety of earlier restrictions on access to or use of the tapes. *See generally* Irons, *May It Please the Court. . .Or Will It?*, 5 CONSTITUTION 25-29 (1993).

288. *Agreement, supra* note 286, at (b).

289. *Id.*

290. *Id.* at (e).

291. *Id.* at (e), (f).

> broadcast of all or any part of such tape by means of radio, television or similar medium.[292]

This was part of the standard contractual agreement that the Supreme Court required everyone to sign as a condition of obtaining copies of tapes.

When Professor Irons published a set of tapes including excerpts from arguments in 23 Supreme Court cases, the Supreme Court instructed the National Archives that it would review any further requests from him.[293] The Archives told Professor Irons that it would comply with the directive of the Court.[294] The press officer for the Court said: "In light of these clear violations of Professor Irons' contractual commitments, the Court is considering what legal remedies may be appropriate."[295] This statement hinted at the unusual prospect that the Supreme Court might sue over this violation.

In some respects, the final result was even more extraordinary. In November 1993, the Supreme Court informed the National Archives that all use restrictions on the tapes were being lifted.[296] The Court determined that the restrictions "no longer serve the purposes of the Court."[297] It may be that when the Court was faced with the option of trying to enforce the restrictions in a public proceeding, it determined that the policy was unenforceable for legal, public relations, or other reasons. The Supreme Court had successfully restricted the tapes for almost forty years, but the restrictions fell at the first sign of a challenge. No public reasons were offered for the original restrictions or for the decision to remove them. In the absence of the FOIA, the Court was apparently able to set any terms for public access to the tapes.

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292. Letter from Alfred Wong, Marshal, United States Supreme Court, to Trudy Peterson, Acting Archivist of the United States (Aug. 31, 1993)(on file with author).

293. *Id.*

294. Letter from Michael J. Kurtz, Acting Assistant Archivist for the National Archives, to Professor Peter Irons, University of California (Sep. 23, 1993)(on file with author).

295. *Id.*

296. William Safire, *Court's Greatest Hits,* N.Y. TIMES, Aug. 19, 1993, at A23 (statement of Toni House).

297. Letter from Alfred Wong, Marshal, Supreme Court of the United States, to Trudy Peterson, Acting Archivist of the United States (Nov. 1, 1993).

B. Justifications for Controlling Information

For most copyright holders, the reasons for controlling the use and dissemination of information are economic. For government agencies, economics is an occasional — although frequently misplaced — motive. It is not, however, the only justification offered. In many instances, however, it is difficult or impossible to assess and to document the actual motive for controlling information. Conversations with agency bureaucrats sometimes reveal that they have developed a personal stake in the information and they simply do not want to "give it away" or let others exploit the data. In other instances, there is evidence of "empire building" as bureaucrats create fiefdoms with information resources. Other hidden motives include the desire to avoid public accountability and congressional oversight and to control the public image of the agency.[298] The bureaucratic secrecy imperative can conflict directly with the statutory policies of the Copyright Act and the FOIA. The official reasons fall into several broad categories.

1. Data Integrity

A government agency will sometimes claim that it needs to control its data because the information will be misused, misquoted, or misunderstood. The argument was raised with respect to three of the information products discussed earlier in this article.

The most specific case for data misuse was made by the National Library of Medicine for the MEDLARS database. The Director of NLM has stated that the licensing agreements are essential to maintaining the quality of the service: "We also want to be certain that the quality of the services provided are suitable, that is to say, that the integrity of the data base is maintained. That particularly shows up in the question of updates."[299]

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298. In an article discussing the secrecy controversy at the Federal Reserve discussed *supra* notes 278-282 and accompanying text, Milton Friedman and Anna Schwartz offer this conclusion:

> We see only one explanation for the Fed's insistence on secrecy. Over the whole of its history, two things have been constant: The Fed's desire to avoid accountability and its efforts to maintain a favorable public image. They explain both its secrecy and its consistent opposition to every attempt to establish clear criteria for judging its performance.

Friedman & Schwartz, *A Tale of Fed Transcripts*, WALL ST. J., Dec. 29, 1993, at A12.

299. *1985 House Electronic Information Hearings*, *supra* note *168*, at 286 (testimony of Dr. Donald Lindberg).

This argument was reviewed at some length by the House Committee on Government Operations in 1986.[300] The Committee found, for example, that corrections to the database are provided monthly but that licensees are only required to post corrections within three months of receipt.[301] If there was a great concern over integrity and accuracy, the Committee reasoned that more rapid posting of updates would have been required.[302] The Committee concluded that the reasons offered by NLM "fail to justify the restrictions."[303] The Committee also suggested that any problems would be solved in the marketplace because the users would demand timely and accurate information.[304]

The Federal Law Enforcement Training Center, which imposed restrictions on training videos,[305] expressed concern about "the further utilization that is possible should the video be modified/edited in any way."[306] The harm that would result from modification was unexplained and remains unclear.

Similarly, the Department of the Interior expressed concern about public confusion as a result of the release of the public land information that was at issue in the *Petroleum Information* case.[307] The court of appeals found that the agency did "not convincingly explain why its concerns with public confusion and harming its own reputation could not be allayed" through a warning and a disclaimer of responsibility for errors or gaps.[308]

In each of these instances, the misuse argument was put forward in a manner that suggested an after-the-fact justification for a decision that had already been made for other reasons. None of the agencies attempted to show a specific nexus between the restrictions and the avoidance of harm. Information is always subject to misuse in some fashion, and the agency restrictions may not have significantly contributed to prevention. Even if benefits could be identified, it is

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300. 1986 HOUSE INFORMATION POLICY REPORT, *supra* note 7, at 30-32.
301. *Id.*
302. *Id.*
303. *Id.* at 32.
304. *Id.*
305. *See supra* notes 229-245 and accompanying text.
306. *See supra* note 241.
307. *Petroleum Info.*, 976 F.2d 1429; *see supra* notes 252-259 and accompanying text.
308. *Petroleum Info. Corp.*, 976 F.2d at 1437. The court further stated that the FOIA does not support an exemption for information marred by errors, particularly when the information is in large part already public. *Id.* at 1436 n.10.

entirely possible that the costs of the restrictions may have outweighed benefits.

It is not clear that any of the agencies considered other solutions to the possibility of misuse. Possible alternatives include labels, warnings, or statements from the agencies about incomplete products or inaccurate representations made by vendors. If warranted, an agency might offer vendors the ability to have products certified by the agency as complete or timely. The Office of Management and Budget has also suggested the possibility of offering the use of a trademark to redisseminators who have appropriate integrity procedures.[309] In addition, an open marketplace of ideas and information is likely to provide self-correcting mechanisms that do not involve any type of information controls by government.

There is nothing in the policies of the FOIA or the Copyright Act that support control over information to prevent possible misuse. Both laws contemplate unrestricted use of released information. The Office of Management and Budget has properly stated that an agency's responsibility to protect against misuse of government information "does not extend to restricting or regulating how the public actually uses the information."[310] There is no legal basis or policy justification for government information restrictions to protect data integrity.

2. *Revenues Needed to Support Information Service*

An important justification for information controls is the desire to raise revenues in order to support the information activities of the agency. A good example comes from the Educational Resources Informational Center (ERIC). ERIC is a nationwide information network designed to provide users with access to educational literature. It includes references to hundreds of thousands of documents and journal articles used by educators, scholars, and others interested in education. The ERIC database is sponsored by the Department of Education and is operated by a contractor to the Department. The database has always been in the public domain and sold by the

309. Management of Federal Information Resources, Appendix IV, 59 Fed. Reg. 37,906, 37,924 (1994) (Revising Circular A-130).

310. *Id.*

government in its entirety at the cost of reproduction.[311] There are both commercial and non-profit providers of online services.

In 1991, the Department of Education modified the contract for the production of the ERIC database tapes to allow the contractor to copyright the database and collect fees. The agency's justification for the fees is a good example of the case that is made by agencies that want to use revenues from public domain databases to support the production of the databases.

At the time the copyright/fee proposal was being discussed, the cost of operating the ERIC program was about $7 million a year, fully funded by appropriated funds.[312] Commercial usage revenues derived from the ERIC database were estimated by the Department at around $4 million per year.[313] None of the commercial revenues derived from the sale of the database through online vendors such as DIALOG, BRS, and ORBIT were received by the federal government or the ERIC contractor.[314]

The proposal was for a ten percent fee on commercial online use and CD-ROM sales.[315] A one-time fee of $500 in addition to a flat annual fee of $1000 for an institution of higher learning or other non-profit agency that mounted the ERIC tapes to serve faculty and students was also proposed.[316] No charge was to be imposed on public libraries or state and local educational agencies. The proposed fees were estimated to produce between $200,000 and $300,000 annually.[317] Those who purchased copies of the ERIC database would have been required to sign a licensing agreement.[318] The fees were to be collected by the contractor and placed in a separate account to be used

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311. HOUSE COMM. ON EDUC. AND LABOR, EDUC. RESEARCH, DEV., AND DISSEMINATION EXCELLENCE ACT, H.R. REP. NO. 845, 102d Cong., 2d Sess. 41-43 (1992)(report to accompany H.R. 4014) [hereinafter HOUSE EDUC. COMM. REPORT].

312. Letter from Robert M. Stonehill, Director, Educ. Resources Info. Center to ERIC users (Nov. 3, 1992) (on file with author).

313. *Id.*

314. HOUSE EDUC. COMM. REPORT., *supra* note 311, at 43; Stonehill Letter, *supra* note 317.

315. HOUSE EDUC. COMM. REPORT, *supra* note 311, at 43.

316. *Id.*

317. *Id.*

318. Stonehill Letter, *supra* note 312. Earlier proposals were for different level of fees that would have produced as much as $350,000 annually. *See* HOUSE EDUC. COMM. REPORT., *supra* note 311, at 43.

only with the approval of the Education Department.[319] The money was to be used for database improvements and enhanced dissemination efforts for which appropriated funds were not available.[320]

Ultimately, the fee and copyright proposal was dropped.[321] There was unified opposition from the information policy community, including the Information Industry Association and the American Library Association, two groups that frequently disagree on dissemination issues.[322] There was also strong opposition from the House of Representatives.[323] A general educational bill that passed the House in 1992 included a specific prohibition against copyrighting the ERIC database and against charging of royalties.[324]

The arguments made by the Education Department in support of the ERIC fees are characteristic of any agency seeking to justify user fees for information.[325] The Department contended that its appropriated funds were insufficient to support expanded activities.[326] It cited a reduction in funding for the ERIC program in fiscal 1993 and the poor prospects for additional funding in the future.[327] The Department argued that fees would be used to benefit the users of the database by funding improvements.[328]

Perhaps the most telling point about these arguments is that they are always true. Governments, like others, almost never have sufficient resources to expand their activities as much as they would like. There are always improvements that can be made to any product or service and there may be additional users that can be identified and served if more funds are available. If the arguments are accepted, they justify the

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319. This aspect of the proposal drew fire from the House Committee on Education and Labor. The Committee report noted that the funds will be completely outside of the congressional appropriations process and concluded that the arrangement was unwise but declined to assess its constitutionality. HOUSE EDUC. COMM. REPORT, *supra* note 311, at 45.

320. Stonehill Letter, *supra* note 312. The House Committee on Education and Labor found proposed uses of the fees—such as payment of dues in professional associations and supporting participation by ERIC in international conferences—to be "less than compelling." HOUSE EDUC. COMM. REPORT, *supra* note 311, at 45.

321. *See* 3 ELECTRONIC PUBLIC INFORMATION NEWSLETTER 68 (1993).

322. *See* HOUSE EDUC. COMM. REPORT, *supra* note 311, at 44.

323. *Id.*

324. H.R. 4014, 102d Cong., 2d Sess. §401 (1992) (as reported by the House Comm. on Educ. and Labor). The House bill was not taken up in the Senate.

325. Stonehill Letter, *supra* note 312.

326. *Id.*

327. *Id.*

328. *Id.*

charging of fees for and the copyrighting of all government information. The conflict with FOIA fee policies is apparent.[329]

3. General Revenue Raising

Revenues raised through the sale of information products or services can be used for any purpose. There is no legal principle requiring that revenues be used to support the information activities that generated the revenues. An example can be found in the High Seas Driftnet Fisheries Enforcement Act.[330] In this Act, the Congress legislatively mandated a fee for use of information in the Automated Tariff Filing and Information System (hereinafter "ATFI") operated by the Federal Maritime Commission.[331] At the time the legislation was passed, ATFI was being designed and built to increase efficiency and reduce paperwork by requiring the filing of maritime tariffs with the FMC electronically rather than on paper.[332]

The statute requires that the FMC charge 46 cents for each minute of remote computer access to the ATFI database on the FMC computer system.[333] The same fee was also imposed on any person who obtained ATFI data directly or indirectly from the FMC and who operates or maintains a multiple tariff information system.[334] The result is that any person who uses the ATFI database must pay a fee to the government for the use of tariff information that is required by law to be filed with the government and open to public inspection.[335] It does not matter whether the service is provided by the government on a government owned computer or by a private person on a privately owned computer.

The purpose of the ATFI fee was to generate sufficient revenue to permit the repeal of a user fee on recreational boats that was imposed

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329. *See supra* notes 138-146 and accompanying text.

330. Pub. L. No. 102-582, 106 Stat. 4900 (1992).

331. *Id.*

332. The tariff filing requirements can be found at 46 U.S.C. app. §1707 (1988).

333. 46 U.S.C. § 1707a(d)(1) (as added by Pub. L. No. 102-582, 106 Stat. 4900 (1992)).

334. *Id.*

335. This represented a reversal of earlier legislation required the sale of ATFI data on a timely and nondiscriminatory fashion and at fees consistent with the FOIA. The earlier legislation also required that ATFI data could be used, sold, and redisseminated without restriction and without payment of additional fees or royalties. Pub. L. No. 101-92, § 2, 103 Stat. 601 (1989).

in the Omnibus Budget Reconciliation Act of 1990.[336] Under the terms of the Budget Enforcement Act of 1990, if the user fee were repealed without providing offsetting revenues, then reductions in other parts of the federal budget would have been required.[337] As a practical political matter, it was essential to raise sufficient revenues at the same time that the boat user fee was repealed.[338] Under the budget rules, the Committee that proposed the repeal had to raise revenues from sources within its jurisdiction. The Congressional Budget Office originally estimated that the ATFI fee would raise more $700 million over five years.[339] There was no question that the ATFI revenues were intended to offset the revenue loss from the repeal of the boat fees.

Nevertheless, the legislative history went to some length to justify the fee. It explained that the fee was not imposed for use of the information but only for the capabilities of the FMC's computer system that allow for availability of and access to the information.[340] The fees were calculated on the basis of the number of users with secondary access to the system.[341] This was characterized in as *indirect access* to the FMC computer.[342] The report explains that if the FMC were required to provide bulk copies of the database to many users, it could impose significant burdens on the agency.[343]

The report added this explanation:

> This bill would not create a Government copyright, but it would provide unlimited computer access to information in the System. Absent this statutory change, the Government is under no obligation to provide computer access to the information in the Automated Tariff Filing and Information System. Charges imposed under this

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336. Pub. L. No. 101-508, § 10401(a), 104 Stat. 1388-97 (1990) (codified at 46 U.S.C.A. § 2110(b) (West Supp. 1994)).

337. Pub. L. No. 101-508, § 13001 et seq., 104 Stat. 1388-573 (1990).

338. The legislative report from the House Comm. on Ways and Means makes it clear that a budget shortfall would not be permitted. *See* HOUSE COMMITTEE ON WAYS AND MEANS, RECREATIONAL BOAT USER FEE RELIEF ACT, H.R. REP. No. 182, 102d Cong., 1st Sess., pt. 2, at 7 (1991)(report to accompany H.R. 534). The original legislation reported by the House Committee on Merchant Marine and Fisheries proposed a fee of 35 cents per minute. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPEAL OF RECREATIONAL BOAT USER FEE, H.R. REP. No. 182, 102d Cong., 1st Sess., pt. 1 (1991) [hereinafter MERCHANT MARINE COMM. REPORT].

339. *See* MERCHANT MARINE COMM. REPORT, *supra* note 338, at 7. The CBO estimates were highly controversial. Later budget estimates were lower.

340. *Id.*

341. *Id.*

342. *Id.* at 9.

343. *Id.*

> bill are for the remote computer access required to be provided by the FMC, and not for any "use" of the information.[344]

This explanation bears little resemblance to the reality of the situation. First, the fee established by the statute is completely unrelated to the cost of providing direct or indirect access to FMC computers. The fee was set at a level sufficient to raise the revenue needed to repeal a user fee on boat owners. During consideration of the legislation, when estimates of revenues were lowered, the fee was raised from an initially proposed 35 cents per minute[345] to 46 cents per minute[346] to make up the revenue difference. Second, the actual cost of providing bulk copies to users is relatively small and could be contracted out if the agency were not capable of meeting a large demand. Third, the enormous sums required could never have been raised through bulk sales. At the time the law was enacted, there were few companies engaged in providing automated tariff services. The gross revenues of the leading company were less than ten million dollars per year.[347] As originally reported by the House Committee on Merchant Marine and Fisheries, the legislation's revenue requirements were over $140 million for each of three fiscal years. Fourth, bulk sale of the data at a high price would not work unless there was some way to prevent unrestricted resale of the data. Purchasers could resell the entire database. Finally, if the agency had no obligation to provide for computer access to public filings that are required to be submitted electronically, how was the public to obtain access to the filings?[348]

This is an interesting and highly controversial model for charging for information.[349] The tariffs are public filings and are required by

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344. MERCHANT MARINE COMM. REPORT, *supra* note 338, at 9.

345. HOUSE COMM. ON WAYS AND MEANS, RECREATIONAL BOAT USER FEE RELIEF ACT, H.R. REP. No. 182, 102d Cong., 1st Sess., pt. 1 (1991).

346. Pub. L. No. 102-582, 106 Stat. 4911.

347. *See The Dangers of Fees for Government Information*, 137 CONG. REC. H5638-06 (daily ed. July 18, 1991)(statement of Rep. Wise).

348. An alternate way to accomplish the same objective might have been for the Congress to give the Federal Maritime Commission the ability to copyright the database. It is not clear if this had been considered, but inclusion of copyright authority would have allowed the House Committee on the Judiciary to seek referral of the bill. This would have complicated parliamentary consideration of the legislation and could have prevented its passage.

349. The ATFI fees were opposed by the Information Industry Association, American Civil Liberties Union, American Newspaper Publishers Association, OMB Watch, American Library Association, and others.

law to be submitted and to be made available to any person.[350] The fees, however, are not paid to the maritime carriers that created the tariffs and that were required by law to submit them to the FMC. Instead, the fees are collected and retained by the government.[351] To the extent that the fee covers use of a federal government computer to retrieve and display the information, a fee can be viewed as a user charge for a service. However, the fee is also imposed for use of the information on a non-government computer system. The explanation that this is a fee for indirect use of a government computer and not for use of the information simply makes no sense. The reality is that the government has legislated for itself a monopoly over electronic access of the FMC's public tariff files.[352]

In theory, this model could be applied to any type of public information filed with the government or that the government produces, including the Congressional Record, Federal Register, or Statutes at Large. Could people be required to file with the government other types of useful information for the sole purpose of imposing a usage fee? Consider, for example, if the government required the reporting of all telephone numbers and then imposed a fee every time a number was retrieved from a computer database, CD-ROM, a printed telephone book, or perhaps even a pocket directory. Obviously, there are legitimate questions about whether some or all of these fees could be supported politically or constitutionally. The point here is to illustrate that information controls do not just originate with bureaucracies. The legislature can be the source of restrictions as well, and legislative actions are likely to be more troublesome.[353] In this case, while there

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350. 46 U.S.C. § 1707a(b)(2) (Supp. 1994). It appears from the law that the no fee is imposed for using the ATFI system at the FMC's headquarters. The fee is only for remote computer access.

351. 46 U.S.C. § 1707a(d).

352. President Bush's signing statement is instructive:

> Contrary to long-standing Administration policy, this Act unfortunately requires the Government to charge access fees for maritime freight rate information that exceed the cost of disseminating the information. It also imposes fees on private sector resale of Government information. These provisions impede the flow of public information from the Government. They run counter to Federal information policy and the traditions of the Copyright Act and the Freedom of Information Act.

28 WEEKLY COMP. PRES. DOC. 2281 (1992).

353. Legislative actions can also be inconsistent. In the 101st Congress, the House Committee on Appropriations provided funding for the ATFI system, but it expressed its expectation that the system should not compete with private sector providers and that remote access should be rudimentary. HOUSE COMM. ON APPROPRIATIONS, DEP'TS OF COMMERCE,

was some concern expressed about the controls, the political appeal of the tax repeal that was financed by the ATFI user fee was overwhelming.[354] If information is viewed as a general source of revenue, then any information with a real or perceived market value is at risk. The statutory policies of the Copyright Act and the FOIA may always be trumped by later legislation. Raising revenue for any purpose from the sale of government information is a step down a very slippery slope.

IV. CONCLUSION

The policy of the United States against government copyright is clearly stated in the Copyright Act of 1976.[355] Other statutes, most notably the Freedom of Information Act, support public access to government information and should limit the ability of federal agencies to restrict or regulate public use of agency data.[356] Regulatory policies, such as OMB Circular A-130, also direct agencies to share information resources with the public.[357] While these statutes and policies do not form a seamless web, their scope is broad, their purpose is apparent, and their support for unrestricted government information is firm.

Nevertheless, several factors work together to allow enterprising agencies to deny public access to or effective use of uncopyrighted government information, restrict use of that information, or charge royalties. These factors include loopholes created by unfortunate or erroneous interpretations of the law, by lack of resources, or by poorly drafted legislation; the ease of exercising dominion over information in electronic formats; the absence of organized opposition to restrictive agency activities; the lack of effective oversight and enforcement by the Congress and the executive branch; and misplaced agency zeal, entrepreneurial or otherwise. The result can be the effective imposition of copyright-like controls that restrict government information despite the Copyright Act's prohibition against government copyright and the FOIA's support for public availability of government information.

JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS BILL, FISCAL YEAR 1990, H.R. REP. 173, 101st Cong., 1st Sess. 31 (1989). The ATFI legislation passed in the 102d Congress took an approach to the sale of ATFI information than was much different than contemplated in the earlier Congress.

354. *See The Dangers of Fees for Government Information*, 137 CONG. REC. H5638-06 (daily ed. July 18, 1991) (statement of Rep. Wise).

355. 17 U.S.C. §§ 101-1010 (1992).

356. 5 U.S.C. § 552 (1992).

357. O.M.B. Circular A-130 (Dec. 12, 1985).

This article has attempted to show that the exercise of control by government over public information generated or compiled by government can have deleterious political, economic, and bureaucratic effects that are inconsistent with existing statutory policies supporting openness in government. The principal control mechanisms have also been identified. With this as background, is it possible to prevent agencies from imposing new information controls and to limit existing restrictions that are inconsistent with public access policies?

The creativity of agencies in furthering their own bureaucratic interests and agendas through attempts to control the use of agency data has to be accepted as a constant in the future. Certainly not all agencies will seek controls for all databases. Nevertheless, opportunities to exercise dominion over the availability or utility of government information will continue and may even expand in an environment characterized by growing electronic information capabilities and tight budgets. Legislative attempts to redefine the rules that apply to specific information products and services may also be expected from time to time. There is no reason to believe that legislation will uniformly favor continued openness. Executive branch policies supporting expanded information availability may change with administrations and transitory political pressures.

New constitutional limitations could prevent restrictive government information activities. It is, however, unrealistic to expect any relief through constitutional amendment, and such an extreme remedy is not warranted in any event based on the current record. The concerns are serious, but a case for amending the constitution cannot be made at this time. The First Amendment might afford protection against government restrictions for at least some categories of government information, although this is a largely unexplored area.[358]

A general statutory response to agency information restrictions has little realistic hope of being effective. Existing statutes have only been partially effective in restraining the inventiveness of agencies. Improvements in individual laws authorizing agency information activities might be helpful in preventing specific agency practices and

358. In Legi-Tech v. Keiper, 766 F.2d 728 (2d Cir. 1985), the court of appeals engaged in a discussion of the First Amendment, but the decision did not turn on the constitutional issues. The court did suggest that information about legislative proceedings may have some special status under the First Amendment. *See supra* note 57 and accompanying text.

abuses, and other legislative actions might produce desirable results.[359] But this article has demonstrated that existing general information policy statutes are circumvented by agencies from time to time, and it is hard to conclude that new statutes would not be subject to similar circumvention. Imaginative bureaucrats may simply ignore the law, find new loopholes, or develop administrative practices that permit some type of information controls. As a result, it is unlikely that the legislative process could be a source of broad, permanent relief. It could, however, provide an additional weapon for use by those who support unrestricted government information, and it is a weapon that would certainly prove effective at times.[360]

Overall, it does not appear that there is any permanent, automatic, or self-executing response to the problem of agency-imposed copyright-like controls. Statutes, regulations, congressional oversight, public pressure, and court decisions may all play a part in preventing an agency from abusing the power that it acquires when it creates an information product. None of these remedies will be appropriate or available in all circumstances, but one or more may be effective at times. Battles over access may have to be fought case by case, agency by agency, and database by database. In the case of the FLETC videotapes[361] and the Supreme Court audiotapes,[362] restrictions were removed when questioned or challenged. In each case, the external pressures came from a single source and did not require a large-scale political or legislative campaign.

There are some general actions that can help to stage these battles on firmer ground. An important step in combating unwarranted information restrictions is greater awareness on the part of agencies and users. Some restrictions come about through inadvertence or habit rather than to accomplish a specific objective. It may take nothing more than a question or objection from inside or outside the agency to

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359. *See supra* note 201.

360. An example of general legislation that could be helpful is S560, the Paperwork Reduction Act of 1994, passed by the Senate at the close of the 103rd Congress. Section 3605(d) would have established general standards for agencies with respect to information dissemination. The bill would have, among other things, prohibited agencies from charging royalties, from regulating use or redissemination of government information, or from establishing user fees that exceed the cost of dissemination. The bill was not considered by the House. *See* SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, S. REP. NO. 392, 103d Cong., 2d Sess. (1994).

361. *See supra* notes 229-245 and accompanying text.

362. *See supra* notes 284-297 and accompanying text.

remove or avoid a restriction. Publicity about information restrictions may also be effective, and the press may be willing to assist when it finds that its own access to information will be limited. Public opposition may also be effective in dissuading the Congress from imposing restrictions of its own.

Another step is the continued expansion of the openness-in-government culture[363] that was sparked by the passage of the Freedom of Information Act.[364] In the years since passage of the FOIA in 1966, bureaucrats have become more accustomed to disclosing information, and a formal process for disclosure have developed and taken root. More recently, President Clinton and Vice President Gore have been strong advocates of using the developing information superhighway for a wide variety of purposes, including increasing the availability of government information.[365] As agencies see that the public release of information is encouraged by the White House, fewer bureaucratic barriers are likely to be erected. Rewards in the form of increased appropriations, broader public support, and new constituencies for agency activities would also encourage sharing and discourage restrictive proprietary actions.

In the end, the price of unrestricted government information may be eternal vigilance. Continuing vocal resistance may be needed to maintain the flow of government information and to prevent the direct or indirect exercise of agency information controls.

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363. *See* Gellman, *The Three Pillars of United States Government Information Dissemination Policy*, 72 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE (forthcoming).

364. 5 U.S.C. § 552.

365. *See, e.g.*, Exec. Order No. 12,864, 58 Fed. Reg. 48,773 (1993) (establishing an Advisory Council on the National Information Infrastructure).