45 Syracuse Law Review 999 (1995)

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

Robert M. Gellman [*]

CONTENTS

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]

REPORT DOCUMENTATION PAGE

Form Approved OMB No. 0704-0188

1. REPORT DATE (DD-MM-YYYY)	2. REPORT TYPE	3. DATES COVERED (FROM - TO)
01-01-1995	Final Report	xx-xx-1995 to xx-xx-1995

4. TITLE AND SUBTITLE
Twin Evils: Government copyright and copyright-like controls over government information
Unclassified

5a. CONTRACT NUMBER
5b. GRANT NUMBER
5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)
Gellman, Robert M. ;

5d. PROJECT NUMBER
5e. TASK NUMBER
5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME AND ADDRESS
Syracuse Law Review
Syracuse University College of Law
E.I. White Hall
Syracuse, NY13244-1030

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME AND ADDRESS
,

10. SPONSOR/MONITOR'S ACRONYM(S)
11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
APUBLIC RELEASE
,

13. SUPPLEMENTARY NOTES

14. ABSTRACT
The policy of the United States against government copyright is clearly stated in the Copyright Act of 1976. 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. Regulatory policies, such as OMB Circular A-130, also direct agencies to share information resources with the public. Nevertheless, several factors work together to allow agencies to deny public access to or effective use of uncopyrighted government information, restrict use of that information, or charge royalties. 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.. This article has attempted to show that the exercise of control by government over public information generated or compiled by government can have political, economic, and bureaucratic effects that are inconsistent with existing statutory policies supporting openness in government.

15. SUBJECT TERMS
Information exhange; Policies; United States Government; Copyright; Intellectual property; FOIA

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE	Public Release	65	Fenster, Lynn lfenster@dtic.mil
Unclassified	Unclassified	Unclassified			19b. TELEPHONE NUMBER International Area Code Area Code Telephone Number 703767-9007 DSN 427-9007

REPORT DOCUMENTATION PAGE

Form Approved OMB No. 0704-0188

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	1995	Final

4. TITLE AND SUBTITLE

Twin Evils: Government copyright and copyright-like controls over government information

5. FUNDING NUMBERS

5. AUTHOR(S)

Robert M. Gellman

6. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

Syracuse Law Review
Syracuse University College of Law
E.I. White Hall
Syracuse, NY 13244-1030

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSORING/MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES

Published in Syracuse Law Review v.45 ('95) p.999-1072. 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 the this article in the public domain pursuant to Sec. 105 of the Copyright Act of 1976. The views expressed are solely those of the author.

12a. DISTRIBUTION/AVAILABILITY STATEMENT

Approved for Public Release; Distribution Unlimited

12b. DISTRIBUTION CODE

A

12. ABSTRACT (Maximum 200 words)

The policy of the United States against government copyright is clearly stated in the Copyright Act of 1976. 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. Regulatory policies, such as OMB Circular A-130, also direct agencies to share information resources with the public. Nevertheless, several factors work together to allow agencies to deny public access to or effective use of uncopyrighted government information, restrict use of that information, or charge royalties. 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.. This article has attempted to show that the exercise of control by government over public information generated or compiled by government can have political, economic, and bureaucratic effects that are inconsistent with existing statutory policies supporting openness in government.

13. SUBJECT TERMS

Information exhange; Policies; United States Government; Copyright; Intellectual property; FOIA

15. NUMBER OF PAGES

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19, SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT
UNCLASSIFIED	UNCLASSIFIED	UNCLASSIFIED	UL

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 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 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 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 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 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.

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 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 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]

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

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

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 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 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 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 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 allows the government to control the form and content of the information reaching the public. [65]

These comments clearly support the argument in this article that political control over government information is inconsistent with American democracy.

The court of appeals was apparently concerned about the likelihood of political control over information as a consequence of government monopoly. The state contended that it was regulating access not to suppress speech but to prevent free riding on the state's effort in compiling the database. [66] While the district judge accepted this argument, the court of appeals questioned its applicability to this case. [67] The appeals court agreed that the incentive to compile and disseminate information would be destroyed without protection from free riders. [68] This is a basic copyright principle, and the court was willing to borrow from copyright jurisprudence despite the absence of a formal copyright claim by the state. [69] The court then described what it called an unspoken premise of the copyright laws, namely that "the profit motive which is the incentive for creation is also a disincentive for suppression of the work created, a premise of doubtful strength in the case of government." [70]

In other words, a rational database owner would license others to use the database as long as the price was sufficient to offset the loss from free riders. The court of appeals found the state's unwillingness to grant a license at any price as evidence of the absence of a profit motive:

> The profit motive's weakness where government is concerned is starkly evident in [the New York law's] own provisions, which prohibit potential retransmitters from subscribing to them at prices that eliminate the potential for free riding. To revert to the copyright analogy, LRS is refusing to license reproduction at any price even though reproduction would increase purchases of the product without reducing LRS' incentive to produce more information. [71]

The court of appeals expressly declined to discern ulterior motives underlying the legislative restrictions. [72] Having so declined, however, it went on to observe that one effect of the restriction was that the full text of bills, campaign contributions made to legislators, and attendance and voting records were not available on-line in New York State. [73] This was the service that Legi-Tech offered to its subscribers in other states. [74] The political implication of wider availability of this information was just as obvious to the court as it must have been to the legislature. The ready availability of information about the

legislative process is likely to expand effective participation in the political process by a broader range of players than are traditionally involved and to increase criticism of legislative actions and legislators.

Whether the court's suggestion about the motivation behind the law is correct depends in part on whether it would be difficult for Legi-Tech to create an equivalent database from other sources. This was precisely what the lower court was directed to consider on remand. [75] The court of appeals wanted to know whether Legi-Tech had access to the text of bills on substantially the same terms as LRS and whether the costs of converting the bills to a computerized format were neither avoidable nor de minimis. [76] A positive finding on both of these points was necessary to support the law's validity. [77] Basically, if similar information were readily available at reasonable cost, then there was no prejudice to Legi-Tech and no advantage -- political or otherwise -- to the state. [78] The court's focus on access and cost was entirely appropriate because these practical considerations make a significant difference to the utility of information. It is not enough to allow limited use of the database on the state's terms. Legi-Tech was properly entitled to unrestricted reuse of the data at reasonable cost.

There is much to debate in this case about the constitutional obligations of government to provide government information and about the right of the press and of others to obtain that information. Those are issues for another day. For present purposes, this case illustrates several points. First, the state chose to restrict electronic uses of data and declined the opportunity to restrict uses of the same data in other formats. It was the new technology that gave rise to the interest in restricting data because the technology made the data more useful and more accessible and, therefore, more valuable. [79]

Second, it is reasonable to infer that the state's restrictions were not imposed for the same economic reasons that motivate private owners of information. [80] No direct evidence on motivation exists. [81] Yet it seems an unlikely coincidence that the state legislature rushed to restrict uses of information that just happened to have highly political content. It is certainly possible that a manager of a legislative information system could use the system to delay access to newly introduced legislation, to withhold information about the current status of legislation, to monitor queries to the system by political opponents, or for other politically motivated purposes. [82] At times, legislators and lobbyists can significantly influence the legislative process when they possess current information about activities and agendas that is unavailable to others. Similarly, the ability to protect against premature disclosure of legislative activities may offer some participants an advantage. Given the political nature of the data, the First Amendment concerns, and the potential mischief of government information monopolies, it is easy to see how the court concluded that the state was not acting in an economically rational way as would be expected of a copyright holder. [83]

Finally, whether restrictions are imposed through formal copyright or through copyright-like controls, the effects on public access to government information are the same. The appellate court's examination of copyright principles [84] was appropriate to the case as well as helpful to this analysis. Economic motives will frequently be available that may mask or overlap the true purpose of any government information restrictions. A legislature may restrict information to further political goals, and an agency may act similarly to further the bureaucratic goals of their organizations. In all cases, close examination is appropriate to identify the real purposes.

3. Information and Politics: Is All Information Political?

Is the New York statute an unfair example? One might argue that it was precisely because the data was overtly "political" that the legislature attempted to exert dominion over it. Can government be trusted to

exercise ownership in an even-handed way when data is more objective or scientific and less political? This argument can be tested by considering some of the objective data that the government collects and disseminates.

One of the federal government's major information collection programs is the decennial population census. It might seem that the counting of population is a basic, objective, and non-discretionary activity. Even if this is so, the applications of census data raise the stakes to a very high political level. Under the Constitution, the apportionment of representatives among the states is based on the "actual enumeration." [85] In addition, the census results are used to direct the distribution of federal aid, estimated to total $116 billion in fiscal year 1991. [86]

With the completion of a census, states and others unhappy with the loss of seats in the House of Representatives or potential loss of federal funding have often objected to the methodology used. In 1990, the dispute over the census centered in part over access to unofficial population counts that had been statistically adjusted by the Bureau of the Census to compensate for an undercount. Ultimately, the Bureau decided not to make any adjustments.

Not surprisingly, the fight over the 1990 census data developed a very intense political dimension. A House Subcommittee controlled by Democrats fought with the Bureau of the Census [87] over access to the adjusted statistics. The resulting compromise gave the subcommittee half the requested data. [88] A coalition of states and cities filed a suit in federal district court that accused the White House of using political pressure to block an adjustment to the census. [89] Others, including some state legislatures, sued under the Freedom of Information Act and other laws seeking access to all adjusted population counts from the Census Bureau. [90]

For present purposes, it is not important to determine the extent to which the 1990 census was actually "politicized" or whether the adjusted figures were improperly withheld. The point is that controlling the timing and terms of access to basic "objective" data like the census can have significant political ramifications. There can be no question that the gatekeeper to census data will, from time to time, not just appear to have an incentive to act with political motives, but will actually act for the purpose of achieving overtly political goals. [91]

Is the census also an unfair example? The constitutional requirement for using the results to reapportion the U.S. House of Representatives [92] adds an intense political flavor to census data although the data itself may be objective. Perhaps other objective government data -- weather information, to pick one example -- would not raise concerns that the data would become entangled with political matters.

While the potential political stakes over weather data are not as large as for census data, controversy can even be found lurking at the National Weather Service. Forecasts -- or the absence of forecasts -- about hurricanes, tornadoes, and snowfall can save lives; affect whether preventive measures such as evacuation will be undertaken; and result in or avoid wasted expenditures by utilities, construction companies, and other businesses. One estimate is that improved forecasts could save $5 billion per year in the United States. [93]

Can we find politics lurking in the background of weather forecasts? Forecasting failures and errors by the Weather Service have been the subject of congressional hearings. [94] The Weather Service's ability to collect, analyze, and report weather data must be at the heart of any evaluation of its actions. The inability of the Weather Service to provide adequate, modern weather satellites has been the

subject of criticism. [95] Also, there have been pressures from time to time to privatize the Weather Service in whole or in part. [96] All of these issues have a political element, and all relate in part to the quality and timeliness of the information and information services provided by the Weather Service. Whoever controls access to and use of the information will have an advantage in any potential public controversy. The stakes are lower than for census data, but there are still political and bureaucratic interest involved.

As a government agency, the National Weather Service cannot avoid being a political creature. Its budget is submitted by the President to the Congress, where it is voted upon annually. National Weather Service activities and officials are subject to public and political scrutiny. Information from the agency may have direct political significance in some contexts. Even when there may be no discernable general political effect to its information activities, an agency's general reputation and ability to obtain appropriations from the Congress can be affected by the availability of information about agency operations and competence. [97] An agency's desire to protect its own existence can provide a strong incentive to control or influence public discussion about the agency.

Of course, a government agency's reasons for controlling information can include the raising of revenues. This does not necessarily avoid politics. While a private vendor of information may be expected to attempt to maximize revenues and profits, a government agency's motivation is likely to be different and to contain political elements. Revenues may be needed to satisfy the demands of a budget office or an appropriations committee. The agency may itself seek to subsidize other activities for which appropriated funds are not forthcoming, or the Congress may direct that revenues be raised to support an activity that the Congress is unwilling to fund directly. Also, given the nature of government budgeting and accounting, there may be no relationship between revenues, profits, and the flow of funds to agency budgets. [98] For all of these reasons, an agency cannot automatically be assumed to be operating in an economically rational manner when it charges for information. Other motives--political or bureaucratic--are likely to be present and to influence the terms under which information is offered for sale.

Whatever the nature of its data, every federal agency -- from the Department of Defense to the Marine Mammal Commission -- operates in an environment that may give rise to political and bureaucratic reasons to control information. The reasons for political control will be stronger for some data and weaker for other data, but the reasons will persist for some, if not most, government data. [99] There is, therefore, no class of data that the government can be trusted to regulate with confidence that no political or bureaucratic interests will ever arise and be asserted. [100]

B. The Legal Framework

1. The Copyright Act of 1976

The ability of the federal government to control its information through copyright is specifically restricted by law. Section 105 of the Copyright Act of 1976 provides:

> Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise. [101]

The predecessor to this section first appeared in law in the Printing Act of 1895. [102] Prior to 1895, it was generally recognized that copyrighting of federal government materials was improper. [103]

According to one authority on federal government copyright issues, "[t]here was no statute on the subject because none was necessary." [104]

The current provision was included in the Copyright Act of 1976. The legislative history states that the purpose was "to place all works of the United States Government, published or unpublished, in the public domain." [105] The Register of Copyrights later characterized section 105 as representing "a conclusion by Congress that the public interest is served by keeping governmentally created works as free as possible of potential restrictions on dissemination." [106]

When revision of copyright laws was under consideration in 1976, [107] an attempt was made to change the longstanding policy against government copyright. The House Judiciary Committee approved a provision that would have allowed the National Technical Information Service--a Department of Commerce clearinghouse for the collection of scientific, technical, and engineering information--to copyright its publications for a limited period. [108] Opposition by the press and library groups and from the Senate led the conference committee to drop the proposal. [109]

The policy against federal copyright permits anyone to reproduce federal agency documents or data in any way. [110] There are no restrictions on reuse or redisclosure and no royalties due to the government. No license is required, and no advance or other notice need be provided. It is common practice for government documents to be reprinted, and federal printing laws even require the Public Printer to sell copies of printing plates from which government publications have been printed. [111] In effect, this requirement enforces the Copyright Act's policy of unrestricted reproduction of printed government publications. Enforcement of that policy for information in electronic formats is much less certain.

Ownership of information through copyright is possible at the state level, [112] although the ultimate scope of state copyright claims under the Copyright Act is uncertain. A recent survey found that 28 states claim copyright in their statutes, statutory headnotes, indexes, or other legislative materials. [113] These claims are controversial and of uncertain validity. [114] Regardless, state copyright claims are routinely made for some categories of state data and states employ copyright like other copyright owners. It is not the purpose of this article to resolve the validity of state copyright claims. [115] It is sufficient to note that formal copyright controls over government data are made by state governments even though the federal government has no such ability. The arguments presented in this article about the consequences of government controls apply equally at the state and federal level. [116]

2. The Freedom of Information Act

Another law that is directly relevant to the federal government's ability to control its information is the Freedom of Information Act. The FOIA requires each federal agency to accept from any person a request for any record [117] in the possession of the agency. [118] The statute sets a strict deadline for processing requests, [119] although agencies frequently do not comply with this requirement. [120] Records that are exempt from disclosure [121] or that are excluded [122] from the request process may be withheld from a requester. Other records must be disclosed. [123]

Adverse agency disclosure decisions may be appealed by the requester to the head of the agency [124] and then to federal district court. [125] Cases in court are determined de novo, [126] and there is a statutory presumption that records in the possession of agencies are available to any person. [127]

The FOIA was passed in 1966 to replace the so-called "housekeeping" section of the Administrative Procedure Act, [128] a provision that generally addressed disclosure of agency records but was found wanting because it did not afford effective access. [129] In the legislative report accompanying the FOIA, the House Committee on Government Operations found that federal agencies routinely and improperly avoided disclosing information under the housekeeping law:

> Improper denials occur again and again. For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon [the "housekeeping" section of the Administrative Procedure Act] has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases. [130]

This conclusion illustrates that one purpose of the FOIA was to establish a general philosophy of full agency disclosure and to provide a comprehensive procedure permitting requesters to seek records wrongfully denied. [131] It also illustrates that the problem of agencies denying access to information is one of long-standing [132] and that current practices restricting electronic databases represent to a large degree an extension of an old pattern to a new form of technology. [133]

No provision in the FOIA recognizes an economic interest that the federal government might have as an owner of copyrighted material. This is not surprising since the government generally owns no copyrighted materials. [134] The FOIA's fourth exemption covering confidential commercial information underscores the absence of a federal economic interest in government information. The exemption covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." [135] The requirement that information within the scope of the fourth exemption be obtained from a person has been held to exclude information that was generated by the federal government because the government cannot be a person. [136] This distinction is important because only the fourth exemption provides authority for withholding records that are copyrighted by persons. [137]

The fees chargeable under the FOIA are consistent with a policy of eschewing an economic interest in government information. The fee structure is complex, with charges depending on the status or purpose of the requester. There are three fee categories. The highest charges are imposed when records are requested for "commercial use." [138] Fees for these requests may include the cost of search, duplication, and review. The lowest charges are imposed when records are requested by an educational or noncommercial scientific institution for scholarly or scientific research purposes or by a representative of the news media. Fees may only include duplication costs. [139] For all other requesters, fees must be limited to charges for search and duplication. [140]

All fees must be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." [141] In addition, no fees may be charged for any noncommercial request for the first two hours of search time or for the first 100 pages of duplication. [142]

The FOIA fee structure is designed to recover only some of the costs of responding to requests. The statute expressly provides that agencies may only recover the direct costs of search, duplication, or review. [143] When review costs may be charged to a requester, "only the direct costs incurred during the initial examination of a document" may be recovered, and costs incurred in resolving issues of law or

policy are expressly excluded. [144] There is no doubt that the FOIA recovers only a fraction of its costs, [145] and this is clearly the intent of the law. Recoverable FOIA costs bear no relationship to the commercial value of the information.

Also, the FOIA does not authorize an agency to restrict the use of information in the hands of a recipient. [146] The only alternatives under the FOIA are disclosure or nondisclosure. The Act does not recognize degrees of disclosure such as permitting viewing but not copying. [147] An agency cannot use the FOIA to justify releasing information on condition that it not be distributed to others.

The economic consequences of the FOIA and the Copyright Act on the dissemination and availability of government information are significant. Information is not naturally a scarce commodity because of the ease and low cost of allowing another person to possess the information and because no one is necessarily deprived of possession when it is shared. [148] It is the ability to restrict secondary distribution that permits information to appear to be scarce. Copyright is a device that permits creators of information to sell it at a price higher than the cost of reproduction, by making the information appear to be in scarce supply. [149]

Unrestricted reproduction of government information in an open marketplace should drive the price of the information to the marginal cost of reproduction. The Copyright Act puts federal information in the public domain, and the FOIA makes it available to anyone to use and to reproduce as he or she sees fit. The fees that can be charged under the FOIA are already consistent with or below the marginal cost price. [150]

In theory, this statutory framework should prevent federal agencies from limiting subsequent use of government data or from supporting a price for the information that is higher than the FOIA allows. In practice, agencies have occasionally found ways around the statutory policies. In some cases, federal agencies have relied on FOIA loopholes and bureaucratic devices to exercise copyright-like controls over data and to pursue economic and other interests reserved to copyright holders.

The FOIA and the Copyright Act offer a policy framework for assessing any agency information restrictions. The goals of these laws are met when: 1) federal information is readily available for use without any restrictions on reuse or redissemination and without the imposition of any royalties; and 2) any fees for the information are based on and do not exceed the cost of reproducing the information. It is not enough that information simply be available for use in some manner. The price and conditions under which the information is made available are important elements in fulfilling the objectives of the laws.

C. Policy Interplay and Policy Failures

A major concern about copyright or copyright-like restrictions on government information is that the restrictions can conflict with laws requiring the public availability of government records. This section focuses on how the exercise by government of copyright or copyright-like controls can directly undermine general openness-in-government principles reflected in open records laws and in the Copyright Act.

Each of the fifty states has an open records law [151] as well as the ability to copyright information. As a result, conflicts between access and ownership principles should be sharper at the state level than at the federal level where no copyright is available. The reality is somewhat murky at both levels.

1. FOIA and Copyright Conflicts: State Open Record Laws

In a recent essay, Professor John A. Kidwell explored the potential conflict between the principles that underlie state open records laws and the Copyright Act. [152] Professor Kidwell stated the subject of his essay this way: "Can state and local governments exploit the commercial value of information they collect by claiming copyright in compilations embodying it? Or are such compilations effectively in the public domain by virtue of state open records laws?" [153] By asking these questions, Professor Kidwell identified a key economic issue raised by state government use of copyright and called into question by open records laws. There are several other observations in the essay that are relevant here.

First, he noted that the Copyright Act of 1976 provides that copyright subsists in a work from the time that it is first embodied in a tangible medium. [154] This means that state government documents may be considered to be copyrighted from the time of their creation without any formality, process, or application. [155] Thus, by virtue of the federal Copyright Act, state- created documents are in fact copyrighted. [156] Whether a copyright can be enforced or whether a copyright is actively pursued by the state is another issue. [157]

Second, it is possible to apply an open records law and still preserve a copyright interest. For example, permitting inspection of records rather than copying [158] can fulfill some of the purposes of an open records law and can be consistent with a state's proprietary interest in copyrighted material. It depends, of course, on just how those purposes are defined. The Copyright Act itself principally regulates reproduction and distribution of materials rather than inspection or access. [159] Similarly, a degree of copying that would constitute a fair use under copyright principles would not defeat a copyright interest. [160] To the extent that copyrighted compilations are large in size and electronic in format, inspection is of limited utility. By contrast, the federal FOIA makes data available in a manner that -- at least in theory -- permits full reproduction.

Third, Professor Kidwell found that the wide variety of state open records laws made it impossible to generalize about the intent of the states in passing these laws. The manner in which specific state laws are drafted may affect the terms of a state's copyright interest or whether a state can be deemed to have placed its documents in the public domain. [161] For example, a state law limiting fees for copying information might be read as affecting the ability to exploit a copyright rather than to deny a copyright interest altogether. [162] Overall, it is apparent from Professor Kidwell's essay that the states have not fully addressed the overlapping policies of their open records laws and their status as copyright holders. [163]

There is no need here for a resolution of the conflicts identified so clearly by Professor Kidwell. It is sufficient to identify the policy conflicts involved and to be aware that aggressive application of copyright by the states will undermine full implementation of freedom of information principles. Any expanded assertion of copyright by the states will necessarily shrink the scope and effectiveness of open records laws. To the extent that copyright is available, the states do not have to resort to the use of copyright-like controls.

2. The Failure of the FOIA: SDC v. Mathews

The most important use of FOIA loopholes to support copyright-like controls over uncopyrighted government information can be found in SDC Development Corp. v. Mathews. [164] This controversial

[165] case illustrates the economic consequences when government finds itself with the ability to restrict access to and use of government data. The result in this instance was a higher price for public use of government data than permitted under the FOIA and more restricted availability of the data. It was that higher price that sparked the litigation.

The data at issue in SDC was the Medical Literature Analysis and Retrieval System (MEDLARS) created by the National Library of Medicine (NLM), a component of the Department of Health, Education, and Welfare. [166] The MEDLARS database contains citations and abstracts of millions of biomedical research articles from thousands of medical and scientific journals. [167] It is a basic and important database widely used in the biomedical and research communities. [168] A printed version of the database -- the Index Medicus -- is available. The printed version is not copyrighted or restricted in any way. But a printed listing of such a large database is of limited value because of the expense of rekeying the text, building the indices, and supporting the computerized search capability. A printed text is also not as valuable because it is not updated as quickly as the computerized version. The lack of interest in or relevance of the printed version illustrates a premise of this article that the ability to control the use of information in electronic formats can be much more valuable than the ability to control equivalent data on paper.

The NLM made the computerized MEDLARS database available to the public in two ways. [169] Online access to the NLM computer was provided for a hourly charge that varied with the time of day. [170] In addition, the computer database was available for purchase on computer tapes for $50,000. [171] This high price for the entire database caused a commercial vendor to file a request under the FOIA for a copy of the tapes. [172] The requester enclosed $500, "an amount it estimated to be in excess of the cost of search and duplication of the first set of tapes." [173]

The court correctly restated the requester's argument as a simple syllogism. [174] The FOIA requires reproduction for nominal fees of all agency records that are not exempt. [175] The MEDLARS tapes are agency records and are not exempt. [176] Therefore, the tapes must be provided at nominal FOIA fees. [177] The court rejected the minor premise that the tapes are agency records and held that the request was properly denied. [178] This holding was clearly erroneous. [179] The National Library of Medicine is a federal agency. [180] The database is created by federal employees under a statutory mandate. The costs of creating the database and the capital costs of the computer hardware used to support the system were paid by funds appropriated by Congress. [181] On the surface, it is difficult to understand how data created under these circumstances could not qualify as an agency record.

The court reached this result because it saw the NLM statute as setting out a disclosure scheme that it was unwilling to disturb. [182] The court feared that the statutory mandate of the NLM might be "substantially impaired if [NLM] is not permitted to charge for use of its retrieval system as expressly authorized" by law. [183] In an effort to reconcile the NLM statute and the FOIA, the court delved into the purpose of the FOIA with the goal of interpreting the law consistently with the purpose of the NLM statute. [184] The opinion states that the types of documents that the Congress was seeking to make available under the FOIA "were primarily those which dealt with the structure, operation, and decision-making procedure of the various governmental agencies." [185] The key paragraph of the opinion distinguishes NLM information from the type of information that Congress intended to make available under the FOIA:

Here the agency is not seeking to mask its processes or functions from public scrutiny. Indeed, its principal mission is the orderly dissemination of material it has collected. The agency is seeking to

protect not its information, but rather its system for delivering that information. Congress specifically mandated the agency to prepare this system and hold it as its stock in trade for sale to the public. As such the system constitutes a highly valuable commodity. Requiring the agency to make its delivery system available to the appellants at nominal charge would not enhance the information gathering and dissemination function of the agency, but rather would hamper it substantially. Contractual relationships with various organizations, designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free. [186]

The court stated expressly that the NLM database was not the type of record that the FOIA was designed to be made available to the public because agency secrecy is not a consideration. [187] Therefore, the court concluded that the database did not constitute a record within the meaning of the FOIA. [188] This conclusion about the meaning of an agency record under the FOIA is important to understanding the decision.

Since there is no definition of "agency record" in the FOIA, the court looked to the definition of "records" in the Records Disposal Act, [189] a law that regulates the disposition of records by federal agencies:

> As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included. [190]

The exception in this definition for "library and museum material made or acquired and preserved solely for reference or exhibition purposes" was used as the specific basis for determining that the MEDLARS tapes were library records and therefore not agency records. [191]

The decision in SDC is filled with misrepresentations of facts, errors of law, and a basic misunderstanding of what was really at stake in the case. Much of the underbrush in the opinion must be cleared out in order to highlight the economic, copyright-like interest that the court upheld notwithstanding the statutory policies against government copyright and supporting the availability of federal information through the FOIA.

The exception in the Records Disposal Act for library material was misread by the court. Nothing in the legislative history of the Records Disposal Act provides an explanation of the exception, [192] but the purpose can be inferred clearly from the statute. The Records Disposal Act established a formal procedure for agencies to follow prior to the disposal of federal records. [193] The basic idea is that an agency must obtain the permission of the Archivist of the United States before disposing of any records. [194] This assures that the Archivist will be able to review all agency records so that the Archivist may identify and, where appropriate, accession records of historical interest for permanent preservation. [195] The law exempts several categories of records from review by the Archivist because the records

will never have any permanent archival interest. [196] It is here that the reference to "library materials" is found.

Library materials do not qualify for permanent preservation. Library materials are not the type of record that the National Archives would ever seek to preserve as a federal record of permanent historical value. Most library material is not produced by federal agencies but comes from other sources. [197] When a federal library receives the latest edition of the Encyclopedia Britannica, this year's almanac, a new pocket part, or any other regularly published book or periodical, it may discard the older edition without the Archivist's approval. In the same vein, the law permits agencies to dispose of duplicate copies of records without the Archivist's approval because no archival interest is at stake.

The MEDLARS database is not library material as intended in the Records Disposal Act. There is no reason to believe that the database would ever be discarded because of its continuing value as a resource. It is true that the database was created by an agency with the word "library" in its title and that the database might be used in a library, but that does not make the database library material subject to casual disposal. Having established a comprehensive scheme to avoid the casual disposition of federal records without the intervention of the Archivist, the Congress surely would not have sanctioned the permanent disposition of such an important agency product without consultation with the Archivist. Instead, the best reading of the Records Disposal Act is that the MEDLARS database falls squarely with the part of the definition of record that covers "materials appropriate for preservation by that agency . . . because of the informational value of data in them." [198] The court's reliance on the library material exemption either reflected a lack of understanding of the Records Disposal Act or provided a thin pretext for reaching a result that could not otherwise be justified.

In addition to this error of law, the court also made errors of fact. The court's factual conclusion that low cost dissemination of the MEDLARS tapes would destroy NLM's contractual relationships is unfounded. [199] Asked about this at a congressional hearing in 1985, the NLM Director strongly asserted that the fees do not affect NLM's contractual ability to acquire and catalog the medical information. [200] Further evidence is provided by a 1993 reduction in NLM fees made at the suggestion of the House Committee on Appropriations. The reduction was implemented without any apparent adverse consequences to NLM's contractual relationships. [201] On this issue, the court was likely misled by misrepresentations made by the government. [202]

Another element of the decision was the court's apparent assumption that the NLM statute established a dissemination scheme that necessarily entailed charging of fees. This is not the case. The law requires ("shall") that the agency publish and disseminate its catalogs, indexes, and bibliographies, [203] but the agency is authorized ("may") to provide services without charge, or upon a loan, exchange, or charge basis. [204] There is no express statutory requirement to charge fees, recover costs, or generate any specific stream of revenues. [205] The agency appears to have complete discretion in setting fees. When a review of fees was suggested (not mandated) by the House Appropriations Committee, NLM reduced its fees administratively and without the need for a statutory amendment. [206] It is, therefore, reasonable to conclude that there is no statutory basis for the court's view that requiring the agency to make its delivery system available to the appellants at nominal charge would substantially hamper the information gathering and dissemination system. [207]

There was another argument that might have been used to justify denying the FOIA request, and the court's failure to use this alternate approach sheds some light on this point. Instead of finding that the tapes were not agency records, the court might have justified withholding on the grounds that the

MEDLARS tapes were exempt under one of the FOIA's exemptions. If, for example, the court found a statutory intent to establish a specific, controlled dissemination scheme, then it might have concluded that the records were exempt under the FOIA's third exemption that permits the withholding of matters that are "specifically exempted from disclosure by statute." [208] Had there been a basis for concluding that Congress intended to control dissemination to support a pricing scheme or otherwise, then the third exemption might have been invoked. [209] It was not. The failure to reach this result further undercuts the court's view that nominal fees would hamper NLM's information gathering and dissemination system.

In the end, it appears that the decision turned on the reasonable assumption that data given away at cost could not be sold at a higher price. The court clearly thought that this was the wrong result. The argument here is that this result is not only compelled by the Copyright Act and by the FOIA, but that it is the correct policy result as well. The court's basic misconception of this case is illustrated by the terms 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 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 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.

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 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]

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 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, 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 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 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 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 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]

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 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]

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 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.

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]

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 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 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 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 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 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 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 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 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.

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 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 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.

FOOTNOTES

*. B.A. 1970, University of Pennsylvania. J.D. 1973, Yale Law School.
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.

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 pounds sterling200,000 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.

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, s 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 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.").

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 9 (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 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).

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, s8, 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).

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).

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.").

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 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).

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.
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).

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).

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.

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.

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.

65. Id.

66. Id. at 735.

67. Id.

68. Id.

69. Legi-Tech, 766 F.2d at 735.

70. Id. (emphasis added). Copyright represents:

> [A] balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author"'s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Twentieth Century Music Corp v. Aiken, 422 U.S. 151, 156 (1975) (footnote omitted). See also infra note 101.

71. Legi-tech, 766 F.2d at 735.

72. Id.

73. Id. at 735-36.

74. Legi-Tech, 601 F. Supp. at 371-72.

75. Legi-Tech, 766 F.2d at 736.

76. Id.

77. Id.
78. Id.

79. Id. at 732.

80. Even if the state is assumed to have acted for economic reasons, there is still a significant political content to its actions. Suppose that the true motivation for the legislation was to maintain a monopoly over the electronic distribution solely for the purpose of maximizing revenues. The revenues might have been used to subsidize the legislature's own use of the information system, to support other legislative activities, or to provide general revenues to the state treasury. Regardless, the raising of revenue by a legislature in any manner is not a politically neutral event.

81. Legi-Tech, 766 F.2d at 735.

82. For example, in 1986, there was a dispute between political parties in the Indiana Legislature in which one political party attempted to deny the other political party access to recorded records of debates. The tapes were held to be public records. See American Bar Association, Section of Patent, Trademark & Copyright Law, Committee Report 224 (1989) [hereinafter ABA Committee Report].

83. See Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, 57 U. CHI. L. REV. 1009, 1043 (1990) ("[T]he copyright owner's pursuit of a

non-monetary interest could give an economically-oriented court special reason to inquire into the weight of the affected interests rather than simply deferring to the plaintiff's claim of right.").

84. It is highly uncertain that a state (or a legislator) could copyright a bill introduced in the legislature. See infra note 101 and accompanying text.

85. U.S. CONST. art. I, §2, cl. 3.

86. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: 1990 RESULTS SHOW NEED FOR FUNDAMENTAL REFORM 14 (1992) (GAO/GGD-92-94).

87. The Bureau of the Census is part of the Department of Commerce. At the time the litigation commenced, the Secretary of Commerce was an appointee of a republican administration.

88. See, e.g., House Panel Given New Census Data, N.Y. TIMES, Jan. 11, 1992, at 8.

89. Coalition of States and Cities Accuses White House of Politicizing 1990 Census, N.Y. TIMES, May 12, 1992, at B3.

90. See, e.g., Assembly of California v. Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992); Florida House of Representatives v. Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992); Senate of California v. Mosbacher, 968 F.2d 974 (9th Cir. 1992).

91. In at least one of the 1990 census cases, the court found that the government was motivated by politics. When the State of California sought attorneys fees for a Freedom of Information Act request for census data, the court commented that the Department of Commerce's (parent agency of the Census Bureau) "obstinacy under the circumstances reeks of political motive. . . . " Assembly of California v. Dep't of Commerce, No. Civ. S-91-990, slip. op. at 16 (E.D.Cal. May 28, 1993) (request for attorney's fees).

92. The Supreme Court extended the reapportionment requirement to state legislative bodies. See Reynolds v. Sims, 377 U.S. 533 (1964).

93. Alper, Mostly Sunny and Cooler. . . With a Chance of Flurries. . . , SCIENCE 86, Jan/Feb 1986 at 66-73; see also Piacente, Favorable Forecast, in 22 GOVERNMENT EXECUTIVE 15-17 (1990) (describing how Weather Service failures resulted in announced, deadly tornadoes in North Carolina, and how an incorrect hurricane forecast resulted in unnecessary and costly measures including closing of schools and government offices in Washington, D.C.).

94. See, e.g., Tornado Forecasting and Severe Storm Warning: Hearing Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science, Space, and Technology, 101st Cong., 1st Sess (1989).

95. See, e.g., Satellite Woes Undercut U.S. Hurricane Forecasts, N.Y. TIMES, Sept. 15, 1992, at 1A.

96. See Piacente, supra note 93, at 15-17.

97. In Assembly of California v. Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992), the Commerce Department argued that release of adjusted census data would diminish the Census Bureau's reputation for reliability. The court rejected this argument on the grounds that concealing information from the public in order to protect agency reputations is precisely the sort of behavior the Freedom of Information Act was enacted to eliminate. 968 F.2d at 923.

98. See infra note 205. The nature of governmental operations and budgeting make it difficult or impossible for agency entrepreneurs to flourish. Budget cycles can extend over several years, making it impossible to accumulate necessary capital, respond to market conditions in a timely manner, or hire needed staff. Expenditures for marketing activities may be difficult to explain or justify to bureaucratic or political budget administrators. Government accounting systems may be unable to track costs and identify profits.

99. For an example of data that appears to have no substantive political content, see infra note 110. While standard reference data may have no political significance, the agency that holds the copyright may have a bureaucratic interest to further.

100. One troublesome class of information that does not fit neatly in any category is computer software. Software is viewed by some not as information but as a tool by which records are created, stored, and retrieved. Based on this characterization, arguments have been advanced to justify the treatment of government-created software in a manner different than "mere" information. For example, regulations of the Department of Defense exempt software from the Freedom of Information Act. 32 C.F.R. s286.5(b)(2) (1994). Whether these regulations would be upheld in court is unclear.

Legislative proposals to permit the copyrighting of federal software have been considered from time to time in the Congress. See, e.g., HOUSE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY, TECHNOLOGY TRANSFER IMPROVEMENTS ACT OF 199 H.R. REP. No. 415, 102d Cong., 2d Sess. (1991) (report to accompany H.R. REP. No. 191). The legislation did not become law because of opposition elsewhere in Congress.
The view of the Science Committee was that the ability to copyright software would encourage its transfer to the private sector. In response to concerns expressed by the information industry, libraries, and public interest groups, the legislation would not permit the copyrighting of data, data bases, and data base retrieval programs. The distinction between software and data is not a sharp line, and this is a significant part of the policy problem. The concern is that control of software could permit direct or indirect control of agency data.

101. 17 U.S.C. s105 (1988). Works commissioned by the federal government through grant or contract may be eligible for copyright protection. The House Report on the Copyright Act of 1976 makes it clear that an agency may withhold copyright protection from a commissioned author if it would be in the public interest to do so or if the commission is merely an alternative to producing the work in-house. H.R. REP. No. 1476, 94th Cong., 2d Sess. 59 (1976). The Federal Acquisition Regulations establish basic rules for the copyrighting of data produced under federal contract at 48 C.F.C. §27.404(f)(1)(ii) (1993). The standard is that permission for a contractor to copyright data produced under a federal contract should be granted "when copyright protection will enhance the appropriate transfer or dissemination of such data and the commercialization of products or processes to which it applies." Id.

The clause permitting the federal government to hold copyrights by transfer is potentially mischievous if it permits assignment to the government of the copyright of a federally commissioned work. A copyright treatise raises the issue expressly:

> Could the U.S. Government thus claim a copyright in a work by this indirect method which it would be precluded from claiming if the work were in the first instance made in a for hire relationship? It seems unlikely that the courts would permit such a subterfuge.

I. NIMMER, COPYRIGHT s5.06[b][3] (1993).
This circumstance was raised in a case involving a film prepared for the bicentennial of the United States by a public television station at the commission of the Administrative Office of the United States Courts and subject to editorial control by the Administrative Office. The film was copyrighted, and the contract called for the copyright to be assigned to the United States. The validity of this arrangement was challenged in part on the ground that the film was a work of the United States government and not subject to copyright. The challenge to the copyright was based in part on the degree of editorial control exercised by the government. These challenges were rejected in part because of a reluctance on the part of the court to question the discretion of the government to permit the contractor to obtain a copyright in this case. The court did, however, suggest that a different result was possible if the assignment were found to be a "subterfuge." Schnapper Pub. Affairs Press v. Foley, 667 F.2d 102 (D.C. Cir. 1981). For a critical discussion of this decision and an argument that all assignments to the government of copyrights in commissioned works are necessarily a subterfuge, see Simon, supra note 23 at 436-37 n.67.

102. Ch. 23, 28 Stat. 601 (1895).

103. SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHT OF THE SENATE COMM. OF THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT IN GOV'T PUBLICATIONS 27 (Study No. 33) (Comm. Print 1961) [hereinafter 1961 Senate Study] ("Prior to [1985] the courts had held that individuals could not have copyright in books consisting of the text of Federal or State court decisions, statutes, rules of judicial procedures, etc., i.e., governmental edicts and rulings. Copyright was denied on the ground of public policy: Such material as the laws and governmental rules and decisions must be freely available to the public and made known as widely as possible; hence there much be no restriction on the reproduction and dissemination of such documents." (footnote omitted)).

104. M.B. SCHNAPPER, CONSTRAINT BY COPYRIGHT 98 (1960). Schnapper has been a strong opponent of any type of copyright by government. He brought lawsuits to prevent a government entity and a government official from maintaining copyright over materials prepared at public expense. See Schnapper Pub. Affairs Press, 667 F.2d 102; Pub. Affairs Assocs. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960).
It is not clear why the policy for copyright of government information diverged so greatly from the British model. In Wheaton v. Peters, 33 U.S. 591 (1834), there is a discussion of relationships between British, American, and common law copyright principles, but not with respect to government copyright. The Supreme Court did hold that there was no copyright in court opinions, but this may not have been different than the policy in Britain.

105. H.R. REP. No. 1476, 94th Cong., 2d Sess. 59 (1976) (report to accompany S. REP. NO. 22). The Judiciary Committee report also stated that the prohibition on copyright protection for federal government works was not intended to have any effect on the protection of the works abroad. It noted that works of most other governments are copyrighted and that there are no valid policy reasons for denying protection to United States government works in foreign countries. Id.

Prior to 1976, the law restricted the copyrighting of government "publications." See 28 Stat. 608 (1895); 35 Stat. 1075 (1909). The term was not defined and was a source of ambiguity. The 1976 copyright revisions attempted to eliminate the ambiguity by using the term "work of the United States Government." See H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976) (report to accompany S. REP. NO. 22). See also 1961 Senate Study, supra note 103, at 31- 33, 40.

106. Letter from David Ladd, Register of Copyrights, to Sen. Charles Mathias (Oct. 11, 1983), reprinted in The Freedom of Information Reform Act: Hearings on S.774 Before a Subcomm. of the House Comm. on Gov't Operations, 98th Cong., 2d Sess. 1138 (1984) [hereinafter cited as Ladd Letter] (discussing S. REP. NO. 774).

107. There were earlier proposals that would have allowed the government to copyright its work in "exceptional cases." By the time the 1976 copyright revisions were being considered, these proposals had been rejected in favor of what became Section 105. For a discussion of "exceptional cases" proposals, see Simon, supra note 23, at 432-33.

108. See H. R. REP. NO. 1476, reprinted in 17 U.S.C. §105 (1988).

109. See 122 CONG. REC. E35,586-87 (1976) (statment of Rep. Joseph E. Karth) (reprinting Washington Star and Washington Post editorials). See also Ladd Letter, supra note 106.

110. There is one class of federal government information that may be copyrighted by law. 15 U.S.C. §290e (1988) permits the Secretary of Commerce to secure copyright in "standard reference data." This is quantitative information related to a measurable physical or chemical property of a substance of known composition and structure. Id. The information is primarily used by scientists and engineers. The justification for the copyright offered in the legislative history was that much of the data is of interest to specialized users in the scientific and technological community. At the time the legislation was passed in 1968, the Senate found that "the usual publication announcement channels available to Government agencies are not well suited to reaching some of the specialized audiences." S. REP. No. 1230, 90th Cong., 2d Sess. (1968). The scheme was to rely on private publishers for dissemination of the reference data, and the publishers "emphasized the need to copyright reference data publications to protect the publisher's investment." Id.
There has been no evaluation of the importance of copyright to the operation of the Commerce Department's Standard Reference Data Program. Certainly with the availability of modern computer networks for the rapid and low-cost dissemination of government information, it is fair to question whether the assumptions on which the copyright of this data were based remain valid, if they were ever valid in the first place.
A better explanation of the copyright protection may come from the statutory provision that directs the Secretary to recover the costs of "collection, compilation, evaluation, publication, and dissemination" of the data. 15 U.S.C. §290d (1988). By copyrighting the data, the government is in a better position to generate revenues from the sale of the data by private publishers. The recovery of these costs is inconsistent with later developed administrative policies that limit user charges for information dissemination products to the cost of dissemination and that expressly exclude recovering costs associated with collection and processing of information. See Office of Management and Information Resources, 59 Fed. Reg. 37,906, 37,910 (July 25, 1994) (Circular A-130).

111. 44 U.S.C. §505 (1988). The price for duplicate plates may not exceed "the cost of composition, the metal, and making to the Government, plus 10 per centum." Id. Compare this with the statutory

price for government publications sold by the Superintendent of Documents of cost plus 50 percent. 44 U.S.C. §1708 (1988). Prior to the passage of the 1976 copyright revisions, this section included a prohibition against copyrighting of publications reprinted from government plates. 28 Stat. 608 (1895).

112. See Nat'l Conference of Bar Examiners v. Multistate Legal Studies, 495 F. Supp. 34 (N.D. Ill. 1980).

113. See ABA Committee Report, supra note 82. Colorado makes one of the broadest copyright claims to its statutes. See COLO. REV. STAT. ANN. §§2-5- 115, 2-5-118(b)(II) (West Supp. 1991). For a review of recent state copyright developments, see also FLORIDA LEGISLATURE JOINT COMMITTEE ON INFORMATION TECHNOLOGY RESOURCES, ELECTRONICS RECORDS ACCESS: PROBLEMS AND ISSUES 116-128 (1994).

114. See NIMMER, supra note 101, §5.06[C] ("It is likewise true that state statutes, no less than federal statutes, are regarded as being in the public domain.") (footnotes omitted); 1961 Senate Study, supra note 103, at 36. ("The common law rulings before 1895 denying copyright in the text of statutes, court decisions, official rulings and pronouncements, governmental proceedings, etc., are still deemed applicable to such materials emanating from the States and their political subdivisions."). See also Building Officials & Code Administrators v. Code Technology, Inc., 628 F.2d 730, 734 (1980) ("The law thus seems clear that judicial opinions and statutes are in the public domain and are not subject to copyright.").

115. See supra note 23.

116. It has been suggested that a principal motivation for the states to secure copyright in publications is to enable them to give exclusive rights to private publishers as an inducement to print the publication. 1961 Senate Study, supra note 103, at 36. It is highly unlikely that this argument could be sustained in today's era of electronic publication. Regardless, the federal government, with its own printing facilities, certainly does not need to rely on private publishers.

117. The FOIA pointedly applies to records and not to information. This means that an agency is not required to create records that do not exist or to produce or create explanatory materials. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975). There is no definition of the term record in the FOIA. See infra text accompanying notes 189-194.

118. The FOIA also contains several affirmative publication requirements. Agencies must publish in the Federal Register: (1) descriptions of its organization and of the methods whereby the public can obtain information and submit requests; (2) statements of the general course and method by which its functions are channeled and determined; (3) rules of procedures and descriptions of forms; and (4) substantive rules of general applicability. 5 U.S.C. §552(a)(1) (1988). In addition, agencies must make available for public inspection and copying final opinions, statements of policy, administrative staff manuals, and indexes of selected agency materials. Id. §552(a)(2). These materials may not be requested under the FOIA's general request procedures. Id. §552(a)(3).

119. The law requires that agencies determine within ten days after the receipt of a request whether to comply with the request. 5 U.S.C. §552(a)(6)(A). A ten day extension of the time limits may be invoked under unusual circumstances specified in the statute. Id. §552(a)(6)(B). The statutory time limits apply to the determination whether to comply with a request for the records. Once a determination has

been made to disclose, the agency must make the records "promptly available" to the requester. Id. §552(a)(3).

120. See supra notes 36-38 and accompanying text.

121. There are nine exemptions in the FOIA itself, covering (1) information properly classified in the interest of national defense or foreign policy; (2) internal personal rules; (3) matters specifically exempted from disclosure by statute; (4) trade secrets and confidential commercial information; (5) pre-decisional memoranda and privileged material; (6) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) law enforcement investigatory records when disclosure would result in specific harms; (8) information relating to regulation or supervision of financial institutions; and (9) geological information. 5 U.S.C. §552(b).

122. There are three categories of records that an agency may treat as not subject to the requirements of the FOIA. They are (1) records about non-public ongoing law enforcement proceedings; (2) records requested by third parties that would identify an informant; and (3) records whose existence is classified. 5 U.S.C. §552(c).

123. Information that is exempt from disclosure under the FOIA is not within the scope of this article. See supra note 24. Exempt information is sometimes released on a discretionary basis by the agency, frequently on the grounds that disclosure would not result in any foreseeable harm. See, e.g, Applying the 'Foreseeable Harm' Standard Under Exemption Five, XV FOIA UPDATE 3 (1994)(Office of Information & Privacy, Dep't of Justice). To the extent that the FOIA exemptions are more broadly stated than is necessary, the exercise of discretion in releasing exempt-but-harmless information could constitute another type of agency control over information, albeit one tolerated if not encouraged by the loosely drafted statute.

124. 5 U.S.C. §552(a)(6)(A)(ii).

125. 5 U.S.C. §552(a)(4)(B).

126. 5 U.S.C. §552(a)(4)(B); see also id. §552(a)(4)(A)(vii) requiring that actions regarding the waiver of fees shall also be determined de novo.

127. The presumption in favor of disclosure arises from 5 U.S.C. §552(a)(4)(B), which provides that an agency that has withheld a record from a requester has the burden of sustaining its action when a complaint is filed by a requester to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.

128. Act of June 11, 1946, ch. 324, s3, 60 Stat. 238 (1946).

129. HOUSE COMM. ON GOVERNMENT OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d. Sess. 1 (1966) (report to accompany S1160). The replaced provision required that records "be made available to persons properly and directly concerned except information held confidential for good cause found." Administrative Procedure Act, ch. 324, s3, 60 Stat. 238.

130. HOUSE COMM. ON GOVERNMENT OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. at 5.

131. See SENATE COMM. ON THE JUDICIARY, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) (report to accompany S1160).

132. FOIA requesters have regularly complained about unreasonable and unlawful agency withholding practices. At a 1978 hearing to consider alternate dispute resolution mechanisms for FOIA disputes, most representatives of the requester community opposed any limitation on the de novo judicial review for FOIA cases. The strong support for judicial review is one measure of continuing resistance of agencies to disclosure. See generally FOIA: Alternate Dispute Resolution Proposals: Hearings Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 1st Sess. (1987).

133. The FOIA also provides additional advantages from a policy perspective when government information is made available in an electronic information environment. For a discussion of this point, see Perritt, Federal Electronic Information Policy, 63 TEMP. L. Q. 201, 240-41 (1990).

134. The federal government may hold copyright transferred to it by assignment, bequest, or otherwise. See supra note 101 and accompanying text.

135. 5 U.S.C. §552(b)(4).

136. See, e.g., Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970).

137. The Copyright Act itself has been held to not qualify as a statute under the third exemption of the FOIA which incorporates other statutes that specifically exempt records from disclosure. St. Paul's Benevolent Edu. and Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980). This leaves the fourth exemption as the only appropriate approach for protecting copyrighted documents owned by non-federal entities. DEPARTMENT OF JUSTICE, FOIA UPDATE 3-5 (1983). Even if the federal government could copyright its records, it could not withhold them under the fourth exemption. Of course, if federal copyright had been permitted, the FOIA might have been drafted differently.
The federal government can receive and hold copyrights transferred to it by assignment, bequest, or otherwise. 17 U.S.C. §105 (1988). The status of such copyrighted material under the FOIA is not clear. The Copyright Act appears to contemplate that the federal government can act like any other copyright holder in this circumstance. There is no FOIA case law that addresses whether the fourth exemption would recognize a commercial copyright interest owned by the government when a copyright is transferred from a person. However, the fifth exemption has been interpreted to incorporate a qualified privilege for confidential commercial information when disclosure would put the government in a negotiating disadvantage. See Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979); Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 663, 665 (1st Cir. 1982) ("FOIA should not be used to allow the government's customers to pick the taxpayers' pockets."). This principle might be expanded to protect a commercial interest in a copyright. Such an expansion would also raise concerns about political control and other types of mischief.

The Government did attempt to extend the Merrill holding in Petroleum Information Corp. v. Dep't of the Interior, 976 F.2d 1429 (D.C. Cir 1992). The Department of the Interior argued unsuccessfully that a confidential commercial interest existed for a government developed databank containing information on public lands. See infra note 255 and accompanying text.

138. 5 U.S.C. §552(a)(4)(A)(ii)(I) (1988). There is no definition of "commercial use" in the statute. There is a definition in the Office of Management and Budget FOIA Fee Guidance, 52 Fed. Reg. 10,013 (1987).

139. 5 U.S.C. §552(a)(4)(A)(ii)(II).

140. Id. §552(a)(4)(A)(ii)(III).

141. Id. §552(a)(4)(A)(iii).

142. Id. §552(a)(4)(A)(iv)(II). In addition, fees may not be charged if the costs of routine collection and processing are likely to equal or exceed the amount of the fee. Id. §552(a)(4)(A)(iv)(I).

143. Id. §552(a)(4)(A)(iv).

144. 5 U.S.C. §552(a)(4)(A)(iv).

145. See 20 ACCESS REPORTS 4 (1994) (reported government-wide costs for FOIA for calendar 1992 were $108 million and fees collected were $8 million).

146. See Baldridge v. Shapiro, 455 U.S. 345, 350 n.4 (1982) (noting that there was no provision in the FOIA for releasing information but swearing all users to secrecy.)

147. Berry v. Dep't of Justice, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984).

148. See Braunstein, The Functioning of Information Markets, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, ISSUES IN INFORMATION POLICY 57, 58 (1981) (NTIA-SP-80-9).

149. See 1986 HOUSE INFORMATION POLICY REPORT supra note 7, at 24.

150. See supra text notes 138-145 and accompanying text. There are other federal laws that establish a policy of selling information at a price based on reproduction costs rather than the value of the information or the cost of compiling the information. One example is 44 U.S.C. §1708 (1988), which sets prices for government publications sold by the Superintendent of Documents at cost plus fifty percent. There is no accompanying restriction on private reproduction of these publications in order to protect the government's ability to charge a higher price. The surcharge may only represent an intent to recover indirect costs rather than to make a profit. See generally 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 24-27 n.98.

151. See Kidwell, Open Records Laws and Copyright, 1989 WIS. L. REV. 1021, 1027 (1989).

152. Id.

153. Id. at 1021.

154. 17 U.S.C. §102 (1988).

155. Kidwell, supra note 151, at 1026. A state could forfeit or abandon its copyright, and it is possible that an open records law could be interpreted to accomplish this. But it is not clear that this is the effect of any open records law. Id. at 1028.

156. Id. at 1024 ("Those unfamiliar with copyright laws are often surprised to discover the breadth of its coverage and might not realize just how much copyrightable material governments author.").

157. See supra note 26 and accompanying text.

158. Some state laws refer to a right to inspect without referring to a right to copy. Other laws are the reverse. See Kidwell, supra note 151, at 1029. This does not appear to be an issue with the federal FOIA. The federal law presupposes that requesters can have a copy of a record when it requires agencies to have fee schedules for document duplication. 5 U.S.C. §552(a)(4)(A)(ii). See Weisberg v. Dep't of Justice, 631 F.2d 824, 829 (D.C. Cir. 1980) (noting the government's acknowledgement that the FOIA would seem to presume that records must be duplicated on request); but see Oglesby v. Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990) (agency is not required to mail copies of records to requesters if it would rather make the records available in one central location for the requester's perusal). The Justice Department has advised agencies to decline to follow the Oglesby holding unless the requester has agreed. See U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 22 (Sept. 1993).

159. The Copyright Act requires that copyrighted materials be open to public inspection at the Copyright Office. 17 U.S.C. §705(b) (1988). The federal FOIA requires that records be made available to requesters, and requesters clearly may obtain copies because the law also establishes charges for document duplication. See 5 U.S.C. §552(a)(3), (a)(4)(A)(ii)(II). State laws vary. Some mention a right to copy and some a right to inspect. See Kidwell, supra note 151, at 1029.

160. Kidwell, supra note 151, at 1028.

161. Id. at 1030.

162. Id. at 1029.

163. Id. ("Most statutes have not been interpreted with respect to the question posed by this Essay. There appear to be no judicial decisions which directly address the question.") (footnote omitted).

164. 542 F.2d 1116 (9th Cir. 1976).

165. In 1986, the House Committee on Government Operations described the decision as "incorrect both as a matter of law and as a matter of policy." The Committee recommended that the case should not be followed. 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 11, 27-36.

166. SDC Development, 542 F.2d at 1118. The Department later became the Department of Health and Human Services.

167. Id. at 1117.

168. Electronic Collection and Dissemination of Information by Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 277-78 (1985) [hereinafter 1985 House Electronic Information Hearings] (testimony of Dr. Donald Lindberg, Director, National Library of Medicine). See also Technical Memorandum from the Office of Technology Assessment, MEDLARS and Health Information Policy (1982).

169. SDC Development, 542 F.2d at 1117.

170. Id. at 1118 n.1.

171. Id. at 1118.

172. Id.

173. Id. There is no direct evidence of the actual cost of reproducing the tapes, but it is obvious from the request and the requester's estimate that the cost was considerably less than the $50,000 charge. The 1986 review by the House Committee on Government Operations concluded that "licensees must be paying charges that are in excess of the cost to the NLM of providing copies of the tapes." 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 29.

174. SDC Development, 542 F.2d at 1118.

175. Id.

176. Id.

177. Id.

178. Id.

179. 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 33. A later Supreme Court case clarified the meaning of "agency record" under the FOIA. In Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989), the Court found that two requirements must be satisfied for materials to qualify as "agency records." First, an agency must create or obtain the material. Id. at 144. Second, the agency must be in control of the requested materials at the time the FOIA request is made. Id. at 145. The Court applied these criteria to copies of judicial decisions in the possession of the Justice Department and held that the opinions were available from the Department under the FOIA. Id. The Court reached this conclusion despite the public availability of the decisions at their source and despite the absence of any direct relevance to agency structure, operation, and procedure. This decision underscores the weakness of the SDC Development holding. Yet, the argument here is that the SDC Development decision was also wrong when it was made and without reference to the later, authoritative decision.

180. 42 U.S.C. §286(a) (1988).

181. 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 27-28. There are some databases included in MEDLARS that are privately owned and that are made available through the system by agreement with the copyright owner. See id. n.114. Obtaining copies of these databases was not at issue in the litigation.

182. For a discussion of the relevance of the FOIA's third exemption that permits withholding of information specifically exempt by other statute, see infra note 208 and accompanying text.

183. SDC Development, 542 F.2d at 1120.

184. Id. at 1118. Subsequent to the decision in SDC Development, the NLM statute was repealed and reenacted. See Act of Nov. 20, 1985, Pub. L. No. 99-158, §§2, 3(b), 99 Stat. 857, 879. The repealed provisions had been maintained at 42 U.S.C. §§276-280a-1, and the reenacted provisions are at 42 U.S.C. §§286-286(c) (1988). Citations to the NLM statute taken from the opinion have been adjusted to the current code.

185. SDC Development, 542 F.2d at 1119.

186. Id. at 1120.

187. Id.

188. Id.

189. See 44 U.S.C. §§3301-3324 (1988).

190. 44 U.S.C. §3301 (emphasis added); see also 44 U.S.C. §2901 (1988).

191. SDC Development, 542 F.2d at 1120.

192. Regulations issued by the National Archives and Records Administration provide no help on this point. See 36 C.F.R. §1222.34(d)(1) (1993).

193. Id. §§1222.30-1222.50.

194. Id. §1222.32(d).

195. About two percent of federal records are preserved permanently. See HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, TAKING A BYTE OUT OF HISTORY: THE ARCHIVAL PRESERVATION OF FEDERAL COMPUTER RECORDS, H.R. DOC. NO. 978, 101st Cong., 2d Sess. 4 (1990).

196. 36 C.F.R. §1222.34(d)(1).

197. Where library material is produced by a federal agency, that material may be a federal record in the hands of the producer but not in the hands of another federal agency. Thus, the Statistical Abstract

of the United States may qualify for archival preservation by its author, the Bureau of the Census, but each federal library that acquires a copy need not seek approval from the Archivist of the United States before discarding old editions that are no longer needed.

198. 36 C.F.R. §1222.34.

199. SDC Development, 542 F.2d at 1120.

200. 1985 House Electronic Information Hearings, supra note 168, at 285.

201. In 1993, following a reduction of fees to "the bare minimum marginal cost," the Director of NLM testified that "the lowering of the fee structure has been widely applauded by the health professional community." No problems were reported. Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations, 103d Cong., 1st Sess. 623, 650 (1993) (Part 3 - National Institutes of Health) (testimony of Donald A.B. Lindberg). The change in fees followed criticism of NLM fees by the House Committee on Appropriations and a suggestion in a report accompanying an appropriations bill that NLM "should carefully review all of its fees to make sure that they are compatible with the mission of the organization." HOUSE COMMITTEE ON APPROPRIATIONS, DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS BILL, H.R. NO. 708, 102d Cong., 2d Sess. 89 (1992).

202. In 1986, the House Committee on Government Operations undertook a review of the arguments presented by NLM to the court, and the Committee found no basis for some of the agency's representations. See 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 28-36.

203. 42 U.S.C. §286(b)(3) (1988).

204. 42 U.S.C. §286(d)(2)(A),(B).

205. Unless an agency has statutory authority to do otherwise, all money received from any source, including the sale of services, must be deposited in the Treasury as a miscellaneous receipt. See 31 U.S.C. §3302(b) (1988); GENERAL ACCOUNTING OFFICE, II PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-105 (1992) (OGC-92-13). NLM has no statutory authority to retain its receipts and deposits net revenues in the Treasury. See 1985 House Electronic Information Hearings, supra note 168, at 283 (testimony of Dr. Donald Lindberg, Director, National Library of Medicine).

206. See supra note 186.

207. The House Committee on Government Operations found that "there is no reason to believe that lower user fees would have any effect on the information gathering function of the NLM. Information dissemination, however, should be positively enhanced. Common sense suggests that a lower price would permit people to make more use of the information." 1986 HOUSE INFORMATION POLICY REPORT, supra note 7, at 34 (emphasis in original).

208. 5 U.S.C. §552(b)(3). The FOIA's third exemption was amended in 1976 to make it slightly more restrictive. This amendment passed in 1976, the year of the decision of the court of appeals. See Act of

Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1247. For purposes of this analysis, the amendment does not make any difference to the conclusion.

209. Until the FOIA was amended in 1986, there was no clear basis for arguing that an alternative statutory pricing structure justified the withholding of records. The Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, title I, §1802, 100 Stat. 3249-50, provided for the first time that the fee schedule in the FOIA does not supersede fees chargeable under another statute specifically providing for setting the level of fees for particular types of records. 5 U.S.C. §552(a)(4)(A)(vi) (1988). There is no formal legislative history for this provision, but a floor statement from the Chairman of the House Subcommittee with legislative jurisdiction over the FOIA expressly stated that the statute governing the National Library of Medicine is too general to qualify under this provision. See 133 CONG. REC. H9,465 (daily ed. October 8, 1986)(statement of Rep. Glenn English).

210. See supra note 160 and accompanying text.

211. SDC Development, 542 F.2d at 1120.

212. Id.

213. Id.

214. See supra note 186.

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 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).

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 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.

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.

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)).

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).

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.

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.

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, s8, 59 Fed. Reg. 37,906 (July 25, 1994).

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, s6, 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.

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).

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.

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).

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).

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).

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.

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

310. Id.

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.

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. s401 (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.

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. s1707 (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).

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.

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.

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, 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).

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.

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.

363. See Gellman, The Three Pillars of United States Government Information Dissemination Policy, 72 REVUE FRANCAISE 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).