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ABSTRACT

Presentations at the June 9-10, 1976, meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU) concentrated on computer software protection. There were a panel discussion, a briefing from a General Services Administration spokesman, and a presentation by representatives of the educational community. The testimony and discussions covered definitions of computer software, copyrightability, advantages and disadvantages of copyrights, costs to users, present practices in software protection, taxation, computer abuse of proprietary rights, detection of theft, security of computer systems, federal government software programs, educational exemptions to copyright, compulsory licensing, and the point at which raw data become copyrightable. There was also testimony on information policy and the right to privacy, and there were two discussions about photocopying--one on the formation of guidelines for federal legislation and one on staff planning for research studies. (LS)

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Seventh Meeting

Room 910
CONTU Conference Room
1921 Jefferson Davis Highway
Arlington, Virginia

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TRANSCRIPT OF PROCEEDINGS

Place: Arlington, Virginia

Date: June 9 - 10, 1976

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NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES
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(CONTU)

Seventh Meeting
June 9, 1976

June 10, 1976

Room 910
CONTU Conference Room
1921 Jefferson Davis Highway
Arlington, Virginia

BEFORE:

STANLEY H. FULD -- Chairman
Retired Chief Judge,
New York Court of Appeals
Special Counsel, Kaye, Scholer, Fierman,
Hays and Handler

MELVILLE B. NIMMER -- Vice Chairman
Professor of Law
UCLA Law School

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Ziff-Davis Publishing Company

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Executive Director
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Register of Copyrights.

Alice E. Wilcox
Director

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1 JUDGE FULD: I call this meeting to order.

2 Gentlemen, I welcome you to this meeting. We are
3 going to start the day with a discussion on Photocopying
4 Guidelines.

5 Mr. Levine will open up the subject.

6 DISCUSSION ON PHOTOCOPYING GUIDELINES

7 By

8 ARTHUR J. LEVINE
9 EXECUTIVE DIRECTOR

10 MR. LEVINE: Just reviewing: The Commission, in
11 its April 1 and 2 meeting, offered to assist Congress in
12 aiding the parties in developing wide guidelines on Library
13 Photocopying.

14 The House Subcommittee accepted the offer of
15 CONTU and, on April 21, Commission Staff sent out a letter
16 to approximately 20 individuals and associations, requesting
17 responses concerning guidelines for implementation of the
18 revised Section 108, as revised by the House Subcommittee on
19 April 7.

20 We have now received a majority of the responses. There
21 are still one or two that are to come in. The Commission is
22 now to decide how to proceed with those responses.

23 In addition, Senator McClellan -- Chairman of
24 the Senate Subcommittee on Patents, Trade Marks and Copy-
25 rights -- wrote Judge Fuld on May 27, asking that the
26 Senate Subcommittee be kept informed on the progress in

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1 drafting guidelines, and that CONTU, in addition to assisting
 2 the parties in drafting guidelines, also take appropriate
 3 initiatives in coordinating the establishment of necessary
 4 clearance and licensing mechanisms concerning Library
 5 photocopying practices not authorized by S-22--particularly
 6 as it came out of the Senate and as it will, perhaps, come
 7 out of the House. That is: for Libraries; and not-for-
 8 profit-institutions; and for-profit institutions.

9 Several of the Commissioners and Staff met
 10 informally last evening and, with the Commissioners' permis-
 11 sion, I will just summarize what the consensus of that
 12 meeting was, as to how we proceed from here.

13 It was suggested that the appropriate tack to tal
 14 now would be to get the parties together informally--not
 15 to come up with firm language for guidelines but, rather,
 16 to discuss generally what should be in the guidelines and
 17 approaches to guidelines.

18 It was suggested that this be done by bringing
 19 the parties together for a two-day conference away from
 20 the noises of the big cities, and from telephones, in an
 21 isolated setting, and see whether that kind of an informal
 22 situation might produce ideas which the Commission staff
 23 would then reduce to writing and use as a basis for
 24 proceeding further.

25 That is pretty much it.

1 That reflects the viewpoint, pretty much, at this
2 time.

3 MR. SARBIN: The image that flashed through my
4 mind was "Ten Little Indians"!

5 (Laughter)

6 MR. LEVINE: That is interesting. I said the same
7 thing last night!

8 MR. DIX: We also started a pool on who would
9 be the last Indian left.

10 MR. SARBIN: Anyhow, I hesitate to comment on it,
11 only because I was not a participant in last night's
12 discussion.

13 VICE-CHAIRMAN NIMMER: You are here now!

14 MR. SARBIN: I am not sure what kind of environment
15 would produce a meaningful discussion. Certainly, an informal
16 gathering seems worthwhile.

17 After thinking about "Ten Little Indians," the second
18 thought I had was that the only way to accomplish anything
19 in an informal weekend of that nature was to think of it as
20 an "encounter session" and have a facilitator there, in
21 order to try to get people there --

22 VICE-CHAIRMAN NIMMER: That was also suggested.

23 MR. SARBIN: I merely want to say that I would
24 worry about a weekend like that not really being productive.
25

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When you create pressures on people by taking them away from their families and other things, with the hope that something will come out of it, and they are frustrated in that effort, I think sometimes that seems to produce greater tension and they cannot escape, because they have agreed to be there.

MR. LACY: I think one of the thoughts that had been had -- and I think we are all conscious of that, Hershel -- was that no effort would be made to reach an agreement at that weekend and that everybody would be told, "Nothing is going to be presented to you that you have to say 'Yes' or 'No' to. There will be no negotiation, actually. We simply want to explore. We want to understand more clearly what your feeling is about this, about that, and about the other."

I think that removes a little bit of that.

MR. SARBIN: Probably. I just want to express my worry. That is all.

MR. HERSEY: I think, beyond that, virtually, the notion was that the new language of 108(g)(2) was a situation that looked promising for a possible agreement on guidelines, and that this might -- since all of the parties have now submitted their suggestions about this -- give a chance for them to exchange ideas about these suggestions and move it one step further along.



1 MR. LACY: I am told there would be substantial
2 representation of the Commission, there, to do more than to
3 facilitate -- to, in effect, keep everybody on their good
4 behavior!

5 MR. SARBIN: Okay.

6 MR. PERLE: I am sorry that I have been late. I
7 have slept on this --

8 MR. SARBIN: Overslept?

9 MR. PERLE: No. I did not oversleep. I felt last
10 night, as I left, that there was a lot of merit. It came to me
11 in my dreams, like Abu-Ben-Adam that this could very well
12 be more counter-productive than productive.

13 We have the expression in writing of the views of the
14 interested parties. The interested parties can supplement
15 those views between now and whenever we have to get something
16 on paper.

17 The danger, I think, is that it is a perfect
18 opportunity for confrontation--no matter how well intentioned
19 we are--before we have a program, or before we have something
20 that we feel would fly with all interested parties. And I
21 am really terribly afraid that it is risky in terms of
22 bringing together people who have had a long history of
23 sitting on opposite sides of the table. And even though
24 it is informal; and even though Members of the Commission
25 are there to keep the sides from negotiating and bargaining,

1 they are going to regard it as an opportunity to make
2 points.

3 MR. HERSEY: What do you propose?

4 MR. PERLE: I would propose that the Commission,
5 after having seen the views and studied them -- there will
6 be a document -- will get whatever questions it has, and
7 address them to the parties informally on the telephone,
8 through the staff -- call them up, and say, "We would like
9 to know A.B.C.D." Again, this is to keep written materials
10 out of this. The more we have people writing things, the
11 tougher it is for them to back away from it; and the more
12 they are forced into positions.

13 Then let the Staff come back to us with an expression
14 of what has been said, and then let us meet and see if
15 anything further is needed. But just to have a session
16 where they present more views, I think, is dangerous.

17 MR. WEDGEWORTH: I think I would like to support
18 that point of view. I think I understand the objective
19 of those who thought the retreat would be a profitable
20 way to proceed, but I think I would support Gabe's position.

21 I have observed a number of sessions in which the
22 parties that were considering / attempted to come together
23 and discuss or negotiate, or develop some kind of a dialogue,
24 and they all seem to be the same. I think what it is likely
25 to produce is not so much a confrontation, but a continuation

1 of the kind of oratory -- and I must admit that the Commission
 2 has not been exempt from that -- that has tended to confuse
 3 the situation, more than anything else. And, looking at the
 4 long and short range objectives, what we need to do is to
 5 give some advice, on a short term basis, to the Congress as to
 6 how they should proceed immediately, and to give it our
 7 best judgement, and get it off of our agenda so that we can
 8 proceed with a long term objective of looking at some data
 9 that we have generated--or that we take from various sources--
 10 to give them a more considered opinion of the issues.

11 I think we could waste a lot of time in going
 12 to this other way of proceeding, when what the Commission
 13 needs to do is to simply come to grips with the task for
 14 which we volunteered.

15 JUDGE FULD: My view last night -- very tentatively
 16 advanced -- was that I did not think it would serve any
 17 purpose to seek a median amongst parties who have been trying
 18 to do so for several years.

19 I thought that our function would better be served
 20 if we were to prepare tentative guidelines; and submit them to
 21 the various groups; and get reactions from them. I think we
 22 are under a necessity -- time is going awfully quickly. I
 23 am rather discouraged at the slow progress that has been
 24 made. I think we ought to prepare tentative guidelines; submit
 25 them to the various contesting groups and, after getting their

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reactions, submit these guidelines to the Congressional Committee. I think it would be much more effective and, certainly, much more direct and it will, perhaps, bring to a conclusion the efforts that everyone is trying to make, to have the parties come to a conclusion.

VICE-CHAIRMAN NIMMER: Well, Mr. Chairman, I think we all agreed last night that that ultimately should be our procedure: namely, that we should not merely try to get an agreement between the parties -- which is most unlikely -- but that we should submit CONTU's proposed guidelines, but guidelines that we think are within range of agreement by both sides, even though there has been no explicit agreement by either side.

I suppose the rationale of this encounter, before, was the hope that that would lessen the areas of difference even though it would not eliminate them.

Now, many of you here have much more of a feel as to the psychological stance of each side, and whether such an encounter is going to increase or decrease the chances of minimizing the differences.

I am perfectly happy to go along with whatever those who are more in a position to know feel about that, but my feeling is that--whichever way we go--we should realize that we are not going to get agreement from both sides, but we are going to try to evolve our own document,



1 based upon as much common ground as there is.

2 MR. PERLE: I respectfully submit that we are going
3 to get agreement on both sides, but only upon the document
4 that we submit.

5 JUDGE FULD: I think we should get to that im-
6 mediately.

7 MR. PERLE: Let's do it just for the Commission.

8 MR. HERSEY: May I say just one more word for
9 the kind of one-stage, before that, that Dan proposed last night.

10 I think the precedent, here, is the agreement between
11 the Publishers' and the Authors' groups and the teachers--
12 on guidelines for copying for teaching. There, the principals
13 did manage to come to an agreement, and the great strength
14 of that agreement was that it was arrived at by the principals;
15 and I think that one concern here may be that guidelines
16 which may seem to be imposed upon the principals from us or
17 from Congress, may be less effective in the long run than guide-
18 lines would be if the parties could arrive at them, them-
19 selves.

20 JUDGE FULD: There are as many differences betwixt
21 them as there are groups.

22 MR. HERSEY: There are differences.

23 JUDGE FULD: With the teachers.

24 MR. HERSEY: No. There was not as long a history
25 of controversy as this, it is true, but there were serious

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1 differences, and there still remain areas of controversy
2 about it. I think the one hope was that one stage of
3 conversation might open up a process in which --

4 JUDGE FULD (Interposing) I personally think it
5 would be more effective if we imposed, upon them, suggested
6 guidelines, and got a reaction.

7 MR. LACY: I am not at all wed, necessarily, to
8 the idea of the retreat, but if I were in Mr. Levine's
9 position as Chief of the Staff, and was asked to prepare
10 a set of tentative guidelines for the consideration of
11 the Commission, I would feel that it would be essential to
12 have some opportunity to explore, with both or the several
13 sides of this controversy, their reactions to a range of
14 suggestions.

15 It is true: we have gotten responses from a
16 number of people to the original queries, but those responses
17 simply don't deal with some questions -- perhaps deliberately,
18 and in some cases the questions just may not have arisen in
19 their minds.

20 For example, we have suggested the possibility
21 of different numbers of copyings might fall on one side or
22 the other of the criterion in 108(g)(2)--depending on the
23 kinds of material copied.

24 It might be one thing for an article in a 100-copy
25 circulation translation journal; another for a journal of



1 5,000-copy circulation; and perhaps quite different altogether
 2 for a mass magazine, or for a literary magazine. And we don't
 3 have any reaction to that. We have not sat down with anybody
 4 and said, "Look! Let's forget for a moment our present
 5 situation. What sort of system for the publication of articles
 6 do you want to see emerge ten years from now, and how can we
 7 shape it?"

8 There are a number of conversations that have not
 9 been had.

10 Now, it may well be that the kind of conversation
 11 which I would feel is essential to have -- were I in Mr.
 12 Levine's position -- could take place one at a time
 13 with the two sides, rather than with both together. It
 14 would be more convenient. It would have a practical advantage
 15 of being able to be done more quickly than arranging a big
 16 meeting.

17 Certainly, I would feel perfectly comfortable
 18 with an arrangement under which the staff -- perhaps with
 19 the participation of some members of the Commission -- could
 20 explore, informally and without commitment, the reactions
 21 and the ideas and the views of the different groups involved --
 22 to some of the kinds of questions that we have been kicking
 23 around in our informal discussions, as a preliminary to
 24 preparing guidelines.

25 I agree completely with the Chairman, that we will

1 get a better result in the long run if we come to the sides
2 with a specific proposal rather than await the process of
3 agreement.

4 MR. DIX: Mr. Chairman, I was going to say something
5 similar to that, I think. It does seem important that the
6 members of the Staff feel that they approach this with some
7 confidence.

8 I mean, really, I think, Art, that you ought to
9 speak out and not defer too much because you are the one that
10 has to do this job. I have thought of it since last night.
11 I think I am more in favor of some kind of a face-to-face
12 meeting than I was last night. At the same time, I think I
13 am more opposed to the retreat idea -- that enforced
14 proximity for a short time, it seems to me, is highly explosive
15 and dangerous.

16 I can see a meeting in these offices -- a one-day
17 meeting -- of various people who wanted to attend, being
18 done very well, particularly if it did not have to be -- and
19 I don't know the legality of this -- a public meeting. In
20 other words, I don't think we want to set up any situation that
21 encourages posturing of the various parties.

22 MR. LACY: One-at-a-time sessions might avoid some
23 of that posturing, too.

24 MR. DIX: I really would like to know what you
25 think about it, Art.

1 MR. LEVINE: Well, two things:

2 (1) At the last meeting, I made the analogy to
3 Henry Kissinger in the Middle East. I really don't think
4 that the "sides" -- if you will -- in these issues are quite
5 -- I think we are building up the difficulty of negotiating
6 among the parties a bit. I think there has been a lot of
7 controversy up to this point; and a lot of disagreement.

8 I think that 108(g)(2) has now been marked up
9 in the House, and I think the parties -- and I think it is
10 reflected in the communications that we have done -- are
11 now seriously at the point of attempting to reach some
12 agreement.

13 I have had second thoughts since last night, too,
14 about the retreat approach. It just seems that we are going
15 to get a lot of very busy people off for a couple of days
16 and arguing simply to fill the time, because we have two days
17 to do it.

18 My own feeling is that the best approach, now, would
19 be for me individually to sit down with the Librarians, on
20 one side, the Authors and Publishers on the other, and then,
21 after that, bring the parties together.

22 As I say, at this point I think the situation is
23 ready for resolution and, if we are not able to solve this
24 and if, in fact, our efforts result in failure, it is really no
25 CONTU's failure. It is the parties' failure.

1 We don't want to face that as a possibility, but it
 2 seems to me the parties are now where they have to fish or
 3 cut bait and come up with some sort of agreement, and we
 4 will act as the catalyst in that situation; sit down with
 5 one group and sit down with the other group, and then bring
 6 the parties together.

7 JUDGE FULD: I really think there is enough expertise
 8 amongst the Commissioners and the Staff to accomplish this
 9 without too-long-detailed, face-to-face discussion.

10 VICE-CHAIRMAN NIMMER: Arthur's remarks were not
 11 clear to me.

12 Art, you were not suggesting, were you, that we
 13 simply try to get agreement between the parties, and not create
 14 our own guidelines that we hope, then, will lead to agreement?

15 MR. LEVINE: My thinking was this: that I get
 16 together with both groups.

17 MR. LACY: At one time?

18 MR. LEVINE: No. Separately; and decide at that
 19 point whether that is the time to attempt to draft some guide-
 20 lines based upon areas of common agreement, or decide at that
 21 point whether we will bring the groups together; and, after
 22 that, draft some guidelines for common agreement that
 23 reflects some common agreement resulting from that meeting.
 24 Then have another meeting, perhaps; or circulate those.

25 I think we cannot, necessarily, lay down too precise

1 an area right now but, at some point, we are going to have to
 2 sit down and, based on what we have learned from each of the
 3 sides, come up with guidelines.

4 Are you suggesting, in addition to what the
 5 parties agreed to, that we make recommendations above and
 6 beyond that?

7 VICE-CHAIRMAN NIMMER: If the parties do agree;
 8 that depends on what they agree to.

9 As we talked, the other night -- and Dan Lacy's
 10 letter previously suggested -- our duty as a public group
 11 should not be to simply rubber stamp anything the parties
 12 agree to. On the other hand, I think the reality is that, if
 13 the parties do agree, it likely would be acceptable to us,
 14 too. But, on the assumption that the parties don't agree--
 15 then we will plan the alternative planning.

16 MS. WILCOX: I wonder whether it would not be
 17 helpful, since the Register of Copyrights is here, if she
 18 could say anything about the time framework that we are
 19 dealing with?

20 JUDGE FULD: That might be very helpful.

21 MS. RINGER: The Subcommittee is marking up
 22 tomorrow, and I notice Carol's notes here; which bring us
 23 up-to-date.

24 JUDGE FULD: We really have not had a chance to
 25 read them.

1 MS. RINGER: Yes. I realize that.

2 The Subcommittee has twice addressed Section 118
3 -- which is the last big issue, the Public Broadcasting
4 Issue -- I think, clearly, and it is coming, I think, to a
5 head tomorrow. My prognosis is pretty good. I think that
6 the chances of them adopting some language tomorrow on that
7 are better than 50-50. They are probably quite substantial.

8 JUDGE FULD: Giving them a license?

9 MS. RINGER: Well, it has taken a different form,
10 now. The Staff draft that is attached to these minutes
11 called it "compulsory arbitration"; but I think that that term
12 seemed to be dropped.

13 There is an element of oversight, or regulation,
14 involved. I should hasten to add that non-dramatic literary
15 works are not included in the Staff draft. Whether they
16 get back in depends on what happens tomorrow but, at least,
17 what has been put forward by the Staff does not include it.
18 As of now, the scheme -- which is different from the 118
19 that the Senate adopted -- applies only to non-dramatic
20 musical works and pictorial and graphic works, and does provide
21 for a form of negotiation that would eventually lead to a
22 determination of rates in terms of royalty payments by the
23 Royalty Tribunal. It is a different system. I am not sure
24 you can, exactly, call it either "compulsory licensing"--or
25 "compulsory arbitration".

1 There does seem to be some supporting craft around
2 this. I think something like this will go, although variations
3 are now under consideration. This is in a very, very fluid
4 state, but everything looks pretty good.

5 Meanwhile, they went on to Chapters 2, 3 and 4,
6 last time, and I believe finished their work on Chapters 2 and
7 3, and the material that is left on Chapter 4 is relatively
8 technical and minor. I would say probably the main issue
9 involves changes in the mandatory deposit provision that
10 would lay the basis for setting up the television archives.

11 VICE-CHAIRMAN NIMMER: In Chapter 3, did they
12 change the preemption provision?

13 MS. RINGER: Yes, they did.

14 MR. LEVINE: The language is in there.

15 MS. RINGER: It is in here. They did not change the
16 "mis-appropriation". I think that is probably what your question
17 was addressed to. They left that in; but they did change
18 the leaving of sound recordings under common law, forever.
19 In other words, under the amendment that the Senate had
20 adopted, the preemption did not apply to sound recordings
21 fixed before February 15, 1972, and they put in a date
22 which is February 15, 2047. 2047! Ponder that for
23 a while!

24 (Laughter)

25 MS. RINGER: In any case, I don't think this need

1 concern us.

2 JUDGE FULD: We won't have any input on that!

3 MS. RINGER: I doubt whether we will!

4 The one point that was nervously approached and
5 not quite tied down, was the term. But I think nothing
6 will be put forward on the length of the term unless someone
7 on the Subcommittee wants to raise it.

8 In Chapter 5 -- which we are now preparing -- there
9 are a couple of items of unfinished business that are very
10 technical. I don't think they need concern you. They
11 may take a while in the Subcommittee. But we are almost up
12 to the "Manufacturing" clause. I don't think that will take
13 a good deal of time.

14 It is a little unclear what they are going to do
15 on the Royalty Tribunal. I would say that, while it is not
16 a flamingly controversial issue, there is still quite a bit
17 of work to be done on that. It ties in with the Copyright
18 Office and Royalty Tribunal interrelation. I would say that
19 the chances of the Bill being reported by the end of this
20 month are extremely good.

21 JUDGE FULD: Which seems to me to make it all the
22 more important for getting agreement, or submitting guidelines,
23 as quickly as we can.

24 MS. RINGER: There are two ways of handling this.

25 There is only so much that this group can --

1 JUDGE FULD: Accomplish?

2 MS. RINGER: Yes! Obviously! "Accomplish," as
3 a matter of input into the Subcommittee Bill, and I think
4 this needs to be considered very carefully. It does not
5 seem to me, on the basis of what I heard today, that it is
6 possible for you to come up with an agreed set of guidelines
7 by the time they will need to put their report in and have it
8 published -- which would be around the end of the Democratic
9 Convention, I would say, roughly. It is just not possible.
10 I don't see how you could conceivably do it.

11 It is a very big question in my mind as to how the
12 Subcommittee, in its Draft Report to the Full Committee, and
13 the Full Committee, itself, will want to deal with this
14 problem.

15 The Subcommittee will draft a report which will
16 be the report of the Full Committee, when it finally acts.
17 It will be fluid; but I would say that the Full Committee
18 action will not take very long, either. The projected time
19 goals involved are in the period between the two Conventions,
20 for that. I don't think you can do that, either.

21 So that my feeling is that, somehow, this will
22 have to be -- I don't like to say "glossed over" -- but
23 dealt with in a provisional way that does not blow everything
24 up. And I am very concerned about that! I don't conceal it
25 from you. I think what I am really saying is that your goal

1 should be the Conference Report-- as far as input into the
2 ultimate legislative history of this Bill--and that would
3 probably be in August or September.

4 JUDGE FULD: You don't think a tentative submission
5 of guidelines would prompt the parties to a more definitive
6 conclusion?

7 MS. RINGER: Internally, as far as your activities,
8 certainly; but I would not see this going into the Legisla-
9 tive format, in any form, until you are ready. I think that
10 this might cause more problems than it is worth, although
11 there may be others that have different viewpoints.

12 MR. WEDGEWORTH: I think that there is a tendency
13 for us to confuse what we can do in the long run with
14 this issue--with what we can do right here and now. As I look
15 at the chart which the Staff provided to us, of submissions
16 of information in terms of what input the Commission can
17 have to the current legislation, I think that it is possible
18 to do something quite directly.

19 The issues that I noted that really come up are
20 few. There is the issue of, you know: How do you
21 define aggregate quantity?

22 There is the issue of, on the one hand: How
23 do you establish some internal controls in the Photocopying
24 activity? On the other hand, how do you determine upon
25 whom the burden of proof lies?

1 Then you have two issues that I consider to be
2 quite difficult. The three previous ones, I think, can
3 be resolved directly from the submissions that have been
4 presented, because there are not terribly many options there.

5 The two most difficult issues I see are
6 considering whether there ought to be differentials for
7 different types of libraries, and whether there ought to be
8 differential treatment for different types of works.

9 Now, those, I would say, are the most difficult
10 issues.

11 JUDGE FULD: Can we decide that amongst ourselves?

12 MR. WEDGEWORTH: I think you can, but I am saying
13 that they are a little more difficult than the three previous
14 issues and, for this reason, I would look at that and say that
15 I think it is possible for the Commission to come to the point
16 of making input to the report, based on the submissions that
17 we have received and with some limited contact with the
18 principals involved -- leaving aside the long term considera-
19 tions of this issue.

20 I would just say that, personally, I would consider
21 it extremely important for this Commission, at its conclusion,
22 to have come to the point where it will recommend, to the
23 Congress, provisions that will enter into any type of Copyright
24 Law that establishes quite clearly -- somewhat consistent with
25 Senator McClellan's letter -- says quite clearly what the

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1 rights and responsibilities are for the users, and what the
2 rights and responsibilities of the copyright proprietors are.

3 I think in the long run it is quite clear that we
4 have got to move in that direction, but we don't have the
5 data to do that right now. we should admit that, and provide
6 the kind of submission that we volunteered our services for
7 providing, and go on with our real objectives.

8 MR. HERSEY: That is rushing it a little bit,
9 isn't it, Bob?

10 Are you suggesting that we should get it in the
11 process now, before the Subcommittee Report is ready?

12 MR. WEDGEWORTH: I am saying that we recognize that
13 we are providing what we would consider to be tentative
14 suggestions on the issue that will facilitate the current
15 legislation. That is what we agreed to do. That it, by no
16 means, will be a final resolution of the issue -- at least
17 from my point of view. I don't see how it can be a final
18 resolution of the issue, because it does not satisfy Authors.
19 It will not satisfy Publishers, and it will not satisfy
20 the interests of libraries and their users.

21 MR. HERSEY: What you are saying then is that
22 we have to resolve this at this meeting.

23 MR. WEDGEWORTH: At this meeting?

24 MR. HERSEY: Aren't you?

25 MR. WEDGEWORTH: No. I am saying that we can define

1 the task at this meeting, and move ahead to accomplish it,
2 rather than saying that, "Well, maybe we ought to talk to
3 this group. Maybe we ought to talk to this group."

4 Let's see if we can agree on what the issues are, and
5 move directly to resolve them and make a submission to the
6 Congress.

7 MR. HERSEY: I am for that, but I sort of mis-
8 understood you.

9 MR. WEDGEWORTH: And say, "Do we agree that these
10 are the primary issues"?

11 If we agree that these are the primary issues, I thi
12 we ought to have some discussion on how we feel about this,
13 based on the submissions that we have received.

14 JUDGE FULD: I am not too sure I understand. I
15 have a one-track mind.

16 You are opposed to our preparing tentative guide-
17 lines; submitting them and getting reactions?

18 MR. WEDGEWORTH: No. I am opposed to spending all
19 of our time talking about processes and ignoring issues.
20 I think the Commission, itself, ought to have some state-
21 ments on record as to how it feels about the definition
22 of aggregate quantity, before Art gets to the point of
23 talking with the parties involved. That gives him a well
24 rounded approach to the problem.

25 JUDGE FULD: I would think that we have in our own

1 body, sufficient knowledge and expertise to answer the questions
 2 that are presented and that, on the basis of that knowledge
 3 information, we should submit guidelines and perhaps get
 4 responses from it which will be the basis for submission to
 5 the Committees of Congress.

6 MR. WEDGEWORTH: I would tend to agree.

7 JUDGE FULD: It seems to me that, looking at the
 8 history -- even for the present moment -- it is impossible
 9 to get the groups together to agree. Therefore, we should
 10 submit to them and we should make the decision and get
 11 comprehension from them.

12 VICE CHAIRMAN NIMMER: I think there is general
 13 agreement with that approach. The only divergence was,
 14 first of all, to get further input from the parties in the
 15 hope that that would decrease their differences.

16 The other was that, then, the staff would go
 17 forward and draft tentative guidelines which would then be
 18 subject to our discussion.

19 Now, Bob is suggesting, I gather, that before that
 20 occurs, we should first get some input to Art for the guide-
 21 lines -- which makes good sense to me.

22 JUDGE FULD: Do you suggest that we go to the
 23 questions?

24 MR. WEDGEWORTH: Yes.

25 JUDGE FULD: The Staff queries.

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1 Do you want to have the Staff Draft before you?

2 In what order would you suggest that we take them
3 up, Mr. Wedgeworth?

4 MR. SARBIN: May I make a suggestion?

5 JUDGE FULD: Please!

6 MR. SARBIN: If the Staff has recommendations
7 on the issues, or understands, on the basis of its informal
8 discussions with the Members of the Commission, that there
9 is a certain consensus--a certain feeling about it--I
10 would like to hear that as we start on the discussion of each
11 of those issues.

12 JUDGE FULD: Is it agreeable that we take the items
13 in order?

14 MR. SARBIN: Yes. Take the items in order.

15 MR. HERSEY: Mr. Chairman, before we do that, I
16 would like to repeat what I said last night, for the benefit
17 of the Commissioners who were not here then.

18 I think this chart - form of analysis, taking the
19 specific suggestions of the various parties, does not give
20 a clear picture of the thrust of the Authors' and Publishers'
21 memoranda which, as I understand it, is that there are
22 different sorts of animals here, and that one number on the
23 aggregate quantity would certainly not meet the needs.

24 Not only does there need to be a consideration of
25 possible variation in the number with respect to literary

1 work, as opposed to journal articles, but there may be a
2 need for different kinds of works within the area of journal
3 articles, and the Library memorandum itself suggested that
4 there may be need for different treatment with respect to
5 different kinds of libraries.

6 So I think there is a very fundamental issue
7 that runs all through these items if you take them one by one.

8 JUDGE FULD: This is Item 6? Is that what you are
9 talking about, on the draft?

10 MR. SARBIN: The Staff working draft, I think. Yes.

11 JUDGE FULD: The request to make a specific
12 suggestion on treatment?

13 MR. WEDGEWORTH: Item 9, also.

14 MR. HERSEY: No. That deals with the issue whether
15 literary work should be dealt with differently from journal
16 articles, but it does not deal with the issue whether various
17 types of journal articles might, in turn, be dealt with in
18 different ways. Nor does it deal with the issue of
19 Libraries, although there is an item on that in the chart.
20 But I suggest there is an area here of fundamental
21 philosophy about these quantities that may have to be thought
22 about. This is one of the last few things that you talked
23 about, Bob.

24 MR. WEDGEWORTH: Yes. I would agree, John.

25 The only thing I would say is that it may be that

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this -- as one of the more difficult issues, would have to be one that would be given greater consideration in the on-going deliberations of the Commission. I am not sure that we can arrive at that at this state, but I do think we ought to give it attention.

MR. HERSEY: Speaking on the side of the publishers and Authors, I don't think we would want a situation in which a formula had been agreed on, as the desirable basic formula, which did not take into account this fundamental philosophy.

Do you see what I am saying?

MR. WEDGEWORTH: Yes. I understand what you are saying, and I don't disagree. I am saying that, in a practical sense, it may not be possible within the framework of this particular responsibility. In the long run of the work of the Commission, I think we will have to come to grips with that issue.

MR. HERSEY: But it is inherent in this responsibility, if the issue of different types of journal articles is one of the things that should be considered, you see. That is primary.

This is one of the reasons, I think, it is very hard for us here.

Go ahead.

MR. SARBIN: If we don't proceed as we discussed before, and then simply allow for the kind of view that you



1 are now expressing to be inserted into the discussion,
2 how would we proceed?

3 MR. HERSEY: Well, what I am saying is: I think
4 that, at our last meeting, in order to keep the atmosphere
5 as open as possible, we drew back and said we would suggest
6 that general principles be advanced in the first round by
7 the various parties; and that has been done on the side of
8 the Authors and Publishers. I think there is a need for one
9 more round to get a little more explicit views from them
10 about the actual specific recommendations that would be
11 made.

12 JUDGE FULD: What do you understand is the view
13 of the Publishers and Authors?

14 MR. HERSEY: I am not in a position to give that
15 view, Judge Fuld.

16 I don't have that expertise. There have been people
17 who have been discussing this for five years. I am in the
18 analogue of a Librarian. I am not qualified, as Bob is --
19 nor do I think Dan is, although he knows much more than
20 I do about all of this. I don't mean to suggest that you
21 should not say that you are qualified!

22 MR. LACY: I agree.

23 MR. PERLE: Most of what I am going to try to say
24 I said last night. Over the years, I think that the people
25 on both sides have been groping toward solutions, and have

1 more or less reached agreement in certain areas on both
2 sides, without really being aware of the fact that they have
3 reached agreement.

4 I think we can tackle it, right now, by breaking the
5 whole question down -- not as was done here by specific
6 questions, but by approach.

7 First, what are we talking about in 108(g)(2)?

8 The controversy is not the universe of the written
9 word but, rather, as I read it, technical, scientific, and
10 scholarly publications; periodicals; journal articles.
11 So that I would take an approach of having a draft written
12 up which first says: This is the subject matter. The
13 other subject matter is subject matter of various positions.

14 Second: What type of journal article are you
15 talking about?

16 The problem arises with recent journal articles
17 and--if you chart the demand for journal articles--I
18 understand that the demand comes up for photo-reproduction
19 and Library duplication, of the journal articles soon after the
20 are published and, when they appear in the indices, that is
21 when the big thrust comes.

22 I don't think anybody -- Librarians or Publishers
23 alike -- is concerned about library copying of 10-year old
24 journal articles. So that we can tackle it that way.

25 Next, having done that, we come to the type of

1 Library copying reprography that we are talking about.

2 First, there is the substitute for the manual
3 note-taking of the person within the Library. That is one
4 type of reprography which is quite easy to deal with, I think,
5 because that which is a machine substitute for the person
6 physically sitting within the Library at a counter and copy-
7 ing things out, is not as difficult as regarding the retro-
8 graphic machine as a printing press.

9 So we have the face-to-face request for a
10 duplication of material within the library, itself. That is
11 easy. The tough part comes when you ask: How do we
12 properly regulate that which we have already narrowed down --
13 when one library, at the request of one of its clientele,
14 is requesting another library to supply materials to it. and
15 at that point, has a purely interim solution. We can go into
16 the quantity -- not quantities as it is now phrased -- but
17 quantity of material that is the appropriate quantity,
18 to say, "That is enough! Go subscribe!"

19 There is another factor, here, that was pointed out
20 by Ms. Wilcox: which is that there is a self-policing element
21 in this, on the Library end, which is at the cost of making
22 an inter-library loan -- and correct me if I am misstating
23 you -- and reaches a point where, after you have requested
24 a couple of them, it is cheaper to subscribe than to request
25 another library to supply it to you. So I don't think, if

1 we break it down this way, that it is such a tough problem.
 2 I think that if the Staff and Members of the Commission are
 3 willing to sit down together, they could, along these lines,
 4 come up with an acceptable mechanism in not too much time.

5 I mean, those of us who are lawyers are faced
 6 with problems a lot more complicated than this. There, we
 7 have specific guidelines. There are time deadlines. You have
 8 to appear before Judge Fuld in the Court of Appeals on June 27.
 9 You have to have your brief ready. How are we going to do it?

10 I think it is just a question, not of spending the
 11 time now, but of getting the Staff and the interested
 12 Commissioners to sit down and, if necessary, have another
 13 meeting of the Commission in a hurry after they have
 14 prepared something, and do it. But I think we should just
 15 do it.

16 JUDGE FULD: What is your suggestion? I gather
 17 that it is hard to find ways to do it.

18 MR. PERLE: If you want a suggestion, I suggest
 19 that, next weekend, or next week at whatever place, whether it
 20 be here, or our offices in New York, or in Washington --

21 MR. WEDGEWORTH: Or my office in Chicago, or Mel's
 22 office in Los Angeles.

23 MR. PERLE: I think it is probably more convenient
 24 here -- that the Staff and the interested Commissioners
 25 sit down and start writing something and circulating it as

1 soon as possible among the rest of the Commissioners.

2 VICE CHAIRMAN NIMMER: Mr. Chairman, isn't the
3 immediate question whether we follow Mr. Wedgeworth's
4 suggestion of first, at this meeting -- if there is time --
5 giving some input as to the substance? Or whether the
6 first input of substance occurs at the meeting that Gabe
7 speaks of?

8 I have no strong feeling about it, but I think we
9 should make a decision on what we are doing.

10 MR. PERLE: With all due respect, I do have
11 strong feelings. I think we can give input only
12 addressed to a specific tangible approach.

13 VICE CHAIRMAN NIMMER: That is what I am talking
14 about. Either do it here, or there.

15 MR. PERLE: I move -- I don't want to "move" --
16 I encourage that it be done there, not here. I think that
17 here, we are just going to waste our time, if we try to do it
18 now.

19 VICE CHAIRMAN NIMMER: Why is the frame of
20 reference available there and not here?

21 MR. PERLE: Because I think there are enough
22 people on this Commission who are aware of all of the arguments
23 Bob can give them to you. Dan can give them to you. I can give
24 them to you. Bill can give them to you -- at all sides.
25 At this stage of the game, Bob Wedgeworth can argue the

1 Publishers' side as well as he can argue the Librarians' side.

2 VICE CHAIRMAN NIMMER: Why isn't that going to
3 occur when we meet at your office?

4 MR. PERLE: Because if we do it just head-to-head,
5 manhole-to-manhole, I think--with all of our fixed positions
6 aside -- all of us, as Commissioners, can rise to the job
7 of being Commissioners, rather than parochial representatives.

8 VICE CHAIRMAN NIMMER: I still have not heard why
9 the different requirements are necessary.

10 MR. SARBIN: I will give you a reason. As I look
11 at my watch, we may have 15 minutes in which to do it here,
12 and that won't get us any further than we have gotten in the
13 last 15 minutes. I just think that that is probably the best
14 idea under those circumstances and, certainly, the session
15 to do that is going to take some hours.

16 I am satisfied to have the Staff address itself
17 to these issues, and do these things, and then have the
18 interested Commissioners -- those that are able to -- meet
19 with the Staff, and iron out any differences that there might
20 appear to be.

21 MR. LACY: But I take it that you are not thinking
22 of a formal meeting of a designated Subcommittee on the
23 record--but an informal discussion of the Staff.

24 MR. SARBIN: Yes. I think so.

25 JUDGE FULD: I thought that is what was suggested

1 initially: that the Staff prepare a tentative set of guide-
 2 lines; take it up to the Commissioners, and those Commissioners
 3 have the expertise and knowledge to consider it as quickly
 4 as ^{is} possible by the entire Commission.

5 I would think we would be able to do it today, but
 6 if time does not permit, perhaps we cannot.

7 MR. WEDGEWORTH: We can all do it tonight.

8 MR. FRASE: I think if we are going to do it this way,
 9 the Staff has to know whether the Commission accepts
 10 Perle's recipe -- cutting this thing down to technical,
 11 professional periodicals in a certain limited time frame,
 12 and ignoring everything else.

13 VICE CHAIRMAN NIMMER: Well, taking the two
 14 separately: First, on the time frame; I agree. I agree
 15 on the substantive point that the only real dispute, I would
 16 think, is as to current and relatively current materials.
 17 But I don't know how far that takes us. That is like saying
 18 that we don't have to worry about work in the public domain
 19 when we talk about copyright. Well, that is true, but it
 20 still leaves the disputed area.

21 On the question of limiting it to scientific
 22 publications, that, simply, presents more difficult
 23 problems. You have the text of 108 which clearly is not
 24 limited to scientific publications. So that if the
 25 guidelines -- which are, ultimately, we hope, the Legislative

1 commentary by the Congress -- says we are only talking about
2 scientific publications, that could have one of two possible
3 consequences.

4 It could mean that they are saying that 108 does
5 not mean what it says -- it really only refers to scientific
6 publications, which is a possible interpretation. But
7 I think that is a very difficult way to control the Statutory
8 language. That is, when you have ambiguities, you look to the
9 Legislative history but, if it is not ambiguous, then to have
10 that kind of a contradiction in the Legislative history
11 is something that the Courts are going to hesitate to go along
12 with. They might, or might not, but it seems to me doubtful
13 that they would.

14 It is true that there is one theory of Statutory
15 interpretation that, when there is an ambiguity in the
16 Legislative history, then you look to the Statutory text but,
17 usually, it is supposed to be the other way around.

18 So, if the thought is to control the substantive
19 content of 108, and eliminate from 108 anything but scientific
20 journals by the Legislative History:

21 No. 1: I don't think it is going to fly, as far as
22 the Courts are concerned, which is the ultimate question.
23 But even if it would fly, as far as the Courts are concerned,
24 I wonder how the Library people feel about that. I don't
25 know.

Are they unconcerned with 108, except in the

1 scientific areas?

2 MR. WEDGEWORTH: Let me just answer that directly.
 3 It came up very early in the discussions over the past several
 4 years. I must admit this is a point of view that has been
 5 pursued by, primarily, publishers. The librarians I have
 6 talked to have never been prominent in pursuing that point of
 7 view, for the very simple reason that either they know something
 8 about classification and indexing that we don't know that
 9 will allow you to clearly divide scientific and technical
 10 publications from other types of publications, or it just is
 11 not a practical thing to pursue. I just don't see how it is
 12 possible. Apart from the legal difficulties, you know, it
 13 just is not possible to divide them.

14 VICE CHAIRMAN NIMMER: Suppose it were, Bob.
 15 On substance, would there be no problem?

16 MR. WEDGEWORTH: Well, yes, but that is just a
 17 difficult "if"; that it just defies a logical view.

18 MR. HERSEY: I would suggest one clear difference,
 19 from the side of the publisher and author, is: Is the
 20 author paid for the work?

21 MR. WEDGEWORTH: That does not define "scientific
 22 and technical". For example, the Russians' definitions of
 23 what is scientific are completely different from ours.

24 MR. HERSEY: Well, there are difficulties!

25 MR. WEDGEWORTH: We never disagreed. We just

1 said that it was not practically possible.

2 MR. LACY: I don't think the difficulties are
3 insurmountable--if one wants to surmount them. Obviously, you
4 are never going to get a criterion as to which there is no
5 dispute about its application to a particular thing, but if
6 one said, for example, that there was a different quantity
7 or, essentially, no quantity, if what you were talking
8 about was a short story, an essay, or a poem, the number of
9 disputes would be negligible. In any event, these things
10 are not coming up for adjudication before Courts. They are
11 going to be applied by Librarians in good faith in their
12 day-to-day practice. The Librarian, in good faith, really
13 has no difficulty telling the Atlantic Monthly or the
14 Partisan Review from a journal on Subatomic Physics. He
15 really does not. That is not a real problem.

16 MR. DIX: The Librarian does not, but the fellow
17 operating the Xerox machine has a great deal of trouble.
18 And certainly we don't want to have trained professional
19 Librarians operating Xerox machines!

20 MR. LACY: There is no question, in all of
21 Copyright, that you can't say, "It's impossible to draw
22 a fine line." There is not and, basically, we have to re-
23 cognize that. You can tell major differences, if you want
24 to.

1 MR. WEDGEWORTH: Is it important, though?

2 MR. LACY: Yes, it is very important -- absolutely
3 crucial to reaching an agreement!

4 MR. WEDGEWORTH: I can understand John Hersey's
5 position saying we ought to make some distinctions for
6 literary work, but this, to me, doesn't really mean that we then
7 have to go and define what a scientific/technical publica-
8 tion is.

9 MR. LACY: No. I don't think you have to say
10 "scientific and technical" works, but I think literary works
11 have got to be exempted.

12 MR. WEDGEWORTH: All right. But the issue is
13 determining the differential works that need special treatment--
14 which is the obverse of defining what scientific and technical
15 publications are.

16 MR. PERLE: Well, if there is some sort of
17 consensus, then -- that is what you are reaching for -- then
18 it is a question of semantics. I think no language ever
19 satisfies all of the demands on that language--so it has to
20 be interpreted. But I think there are enough people
21 who define the line well enough so that you can say, "108(g) (2)
22 is an additional right over and above 107."

23 So that what you can say is for the purpose of
24 108(g) (2). These things have one set of rules; the others
25 have another set of rules. There is a guideline. You can

1 phrase it in a way that is fairly specific. You can never
 2 reach absolute certainty, but, after all, that is why lawyers
 3 make money, because we have to resolve those differences
 4 when those questions arise and every Statute has some
 5 ambiguity, and every guideline has some ambiguity.

6 But I think we can reach for it, and I think we
 7 can solve 99% of the problem areas.

8 MR. WILCOX: This discussion seems to indicate
 9 that there is a need for definitions, but we are not in
 10 complete agreement on where it could be. It seems to me,
 11 perhaps, that earlier in the discussion we were talking about
 12 procedures of how we would proceed. There was some difference
 13 there -- one being that the Staff would prepare these guide-
 14 lines, and the other being that the Commission would parti-
 15 cipate actively in this. That can mean maybe, a crucial
 16 thing: whether the first cut through these guidelines is
 17 done by the Staff after whatever direction we had this
 18 morning, or, indeed, whether it is done by Commission input
 19 at the time the guidelines are written.

20 MR. LEVINE: What concerns me, in part, is the time
 21 and we can send drafts back and forth among one another
 22 and spend a lot of internal activity on it without going out
 23 to the parties that are the ones that are involved, and to
 24 whom we have offered our good offices to assist.

25 It seems to me we have expertise, obviously, on this
 26 Commission but, for the most part, it is not the people who

1 have been negotiating directly, and those are the ones that
2 have, I would think, in their minds at this point what they
3 understand "aggregate quantity" to mean; the distinctions
4 between "scientific" and "technical" and other works; and I
5 would like to hear what they have to say about what they are
6 thinking about, and see if we can't begin pulling people
7 together rather than spending a lot of the Commission's time
8 deciding how we are going to go about getting these people
9 together.

10 I think the time is ripe for me to sit down with
11 these people, with some questions -- with questions, without
12 necessary definitions or answers.

13 MR. WEDGEWORTH: Is that a rejection of Gabe's
14 approach?

15 MR. LEVINE: A modification -- probably a rejection.
16 Probably a rejection.

17 MR. PERLE: I feel rejected. I reject the
18 rejection. In all due respect, Arthur, I think that
19 is not a good source.

20 MR. SARBIN: In the interest of ~~pre~~preserving your
21 voice, I don't find a real incompatibility between these
22 ideas. It seems to me that your discussions with the parties
23 at interest, may be more meaningful if you start out with
24 something on paper that says, "This is what we think" and
25 if, informally, you are able to get some input from the

Commissioners who are concerned, into that.

It does not mean that you need consensus. What it means is following a process that I certainly find very useful in our business, which is to do a first draft and let everybody see it, because then you will get input. Or let everybody discuss it. Just put something down on a sheet of paper, Arthur, that is a basis for discussion.

MR. LEVINE: That is really fine! I did not really mean that I was rejecting Gabe's position, but what I am concerned about is a great deal of activity within the Commission. Section 108 was marked up on April 7. We sent out our letter approximately two weeks after that. The last response that we received was mailed to us on June 1 and things have to be speeded up. That is what concerns me.

I would suggest that, rather than -- I think this weekend is too early. I think next weekend is too late. I would suggest perhaps at the end of the day on Wednesday, next, that we can get together here, there --

MR. SARBIN: Having done some preliminary work.

MR. LEVINE: Oh, yes. Obviously. That will give us a few days to get some preliminary work done on it.

JUDGE FULD: I am not too sure what the arrangements would be.

Would it not be feasible to -- is there no one amongst us that has a judgement as to what the number should

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1 should be--after all of the discussion and after all of
2 the years, what the quantities should be -- forgetting for
3 the moment the differentiation between different periodicals
4 and books.

5 MR. FRASE: The two sides are pretty far apart.
6 One says "two", and one says "ten".

7 JUDGE FULD: And some say "none".

8 MR. WEDGEWORTH: There are times when several of
9 us may wish to be Czars and just resolve the problem directly,
10 if that is what you are asking.

11 JUDGE FULD: I would think that would be our
12 function.

13 MR. SARBIN: Do you want to do a Commission pool?

14 JUDGE FULD: After all these years?

15 MR. SARBIN: Put the numbers in a hat, and pick
16 from one-to-ten.

17 JUDGE FULD: Well, you are not going to get any
18 more helpful suggestions from the contending side.

19 MR. SARBIN: No, but I would feel better about it if
20 what I had on the table was all that experience that the
21 Staff has had and us just saying, "Here is the way to do it."

22 I would feel better about it than I would pulling
23 it out of a hat.

24 JUDGE FULD: But we have the hat here!

1 MR. SARBIN: I know.

2 MR. WEDGEWORTH; May I make a specific suggestion
3 since we are running out of time for this discussion?

4 I would like to suggest that a few of us get
5 together at the conclusion of today's meeting and come to
6 an agreed-upon procedure that we will present the first
7 thing tomorrow morning. I think that would save us a lot of
8 time on how we proceed.

9 JUDGE FULD: Yes. I think that entitles us to a break
10 and a cup of coffee.

11 (Brief recess.)

12 JUDGE FULD: It is now our pleasure to hear a discussion
13 about software protection by two authorities in the area.

14 The first speaker is Mr. Nicholas Henry. He is
15 Director for the Center for Public Affairs of Arizona State University
16 at Tempe, Arizona.

17 He is the author of Works on Copyright and its Role
18 as an Instrument of Public Policy.

19 His interest in research is mainly in the assessment
20 of the effects of new information technologies under the
21 development, distribution, and use of knowledge in a highly
22 technical, democratic society.

23 His publication on Copyright and Public Policy earned
24 him the 1974 Author of the Year Award from the Association
25 for Scientific Journalists.

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1 One of his books is: Copyright Information,
2 Technology, Public Policy.

3 It is a pleasure to have you here.

4 STATEMENT OF NICHOLAS HENRY
5 ASSOCIATE PROFESSOR OF PUBLIC AFFAIRS AND
6 DIRECTOR, CENTER FOR PUBLIC AFFAIRS
7 ARIZONA STATE UNIVERSITY
8 TEMPE, ARIZONA

9 MR. HENRY: I am very pleased to be here before
10 you this morning. In fact, four Members of this Commission
11 are mentioned in this book.

12 JUDGE FULD: Only four?

13 MR. HENRY: Yes.

14 My interest in public policy for the new information
15 technologies, while longstanding, does not derive from being
16 an advocate of a special interest group, computer scientist, or
17 lawyer. I am none of those. I appear here simply as an owner
18 and user of copyrights but, paramountly, as a citizen hopeful
19 of seeing an extraordinarily complex facet of public policy
20 finally resolved in a way that promotes the public interest.
21 So my comments on the elusive question of copyrights and
22 computer programs should be heard in that light.

23 A computer program may be defined as instructions that
24 set a computer's switches, in order that it can function in a
25 particular way. There are three kinds of programs:

26 Systems programs which control the operations of
27 the machinery itself; such as an operating system, or an



1 executive system:

2 Application programs which solve particular
3 problems, such as the various programs used by scientists; and

4 Utility programs which can be used by a variety
5 of users, such as a debugging program that corrects mistakes
6 in other programs.

7 The question of registering them is a hazy issue.
8 Copyright owners contend that Copyright protects the
9 programmer's expression and the effort required to compile
10 some kinds of programs -- not the program's idea -- and
11 that copyright thus provides motivation to produce computer
12 programs by distributing its cost among its users.

13 Since 1964, when the first copyright for a computer
14 program was registered, only 1200 programs had been registered
15 by late 1975. This low number indicates that program developer
16 find copyright unsuited to their needs. There are several
17 reasons for this. One is that systems programs frequently
18 are sold by computer manufacturers as part of their sales
19 package and development costs are absorbed in those sales.

20 Utility programs, which one might think should
21 derive the greatest benefit from copyright, are accompanied
22 by expensive supporting items, such as documentation annuals,
23 debugging arrangements, and periodical hardware adjustments
24 that are made specifically for the individual client. The
25 cost of these supporting items often equals or exceeds the

1 cost of the original utility program. This is a fact that
2 tends to undercut the suitability of copyright for even these
3 relatively mass-oriented computer programs.

4 It seems possible that copyright protection might
5 be appropriate for certain kinds of systems programs and
6 utility programs -- such as those that are generally usable,
7 off-the-shelf, low-priced programs which are sold separately
8 from computer hardware, and to widely dispersed buyers
9 who would be unlikely to find it practical to agree on time-
10 sharing arrangements. But copyright does not now appear to
11 be a public policy that benefits the distribution of information
12 as it is formatted to most computer programs.

13 Finally, application programs which, by definition,
14 must be written in accordance with a particular user's needs,
15 account for about 60% of all program development costs. These
16 individually-tailored programs are hardly compatible with
17 mass-oriented copyright concepts. Beyond such broadly-based
18 caveats, however, application programs have particular
19 utility for academic researchers, and copyrighting applica-
20 tion programs could hinder their usefulness to researchers.

21 Let me focus on my own field -- public affairs --
22 for explaining these potential disadvantages.

23 The Interuniversity Consortium for Political
24 Research -- the ICPR -- at the University of Michigan, for
25 example, would probably be very vulnerable to copyright

1 legalities concerning application programs, because the Con-
 2 sortium serves as an effective creator/distributor of such
 3 programs. Take OSIRIS III, which is a set of programs of
 4 substantial utility that is available from ICPR. OSIRIS III
 5 is the end-product of at least three different groups of
 6 "creators"; ICPR staff members, staff members of the Survey
 7 Research Center of the University of Michigan, and "other"
 8 contributors, such as members in the Department of Political
 9 Science at the University of Michigan.

10 Had ICPR or any of these groups of OSIRIS III's
 11 creators opted to copyright all or parts of OSIRIS III, then
 12 considerably inflated transaction costs would plague the
 13 operation of the ICPR, and likely would prove expensive to
 14 member universities. In other words, permission would have
 15 to be obtained from the copyright owner or owners before the
 16 program could be distributed and used, and the charging of
 17 use fees could be extracted, by owners of the copyright, from
 18 users of the code.

19 Such a charge could have a particularly detrimental
 20 effect on students, since many departments of public affairs,
 21 public administration, and political science use application
 22 programs for educational and training purposes. Increasing the
 23 transaction costs probably would be felt most keenly by students
 24 since faculty are wont to consider their own needs first,
 25 when limited departmental research budgets are allocated.

1 Coming back to the larger picture, what are the
2 more general advantages and disadvantages of copyright protection
3 of computer-based data and computer programs?

4 The advantages of the copyright protection seem
5 reasonably straightforward. One such advantage is that
6 registering a work in the Copyright Office is simple and
7 cheap--which is not necessarily the case in patent registra-
8 tion or trade secrets protection, and also, under copyright law
9 once infringement is proven, a copyright owner can collect
10 damages even though no actual damage is demonstrated.

11 These advantages of copyright protection of
12 computer systems are predicated on the notion that such
13 protection of the program developer is, indeed, desirable
14 as a public policy, because it facilitates the growth and
15 use of knowledge. Many of the disadvantages of copyright
16 as a public policy for computers are premised on the same
17 presumption. For example, copyright does not protect the
18 original idea behind the program. Rather, as a concept --
19 at least as it currently is expressed in S.22 -- prohibits
20 only the outright copying of the program and not the
21 originality, creativeness, and inventiveness of the
22 program's designer, as patent protection is designed to do.

23 Second, copyright protection probably would not
24 protect against a computer "using" the program. This
25 certainly pertains to fair use, but, I think, more directly

1 to a related court-created idea.

2 In 1879, the U.S. Supreme Court ruled in Baker v.
 3 Seldon (101 U.S. 99, 26 Lawyers Ed. 841) that the "methods
 4 and diagrams" used in an art book for purposes of showing
 5 ~~the reader how to improve his art book for purposes of~~
 6 ~~showing~~ the reader how to improve his art were not protected
 7 by copyright. Such techniques were "necessary incidents to the
 8 art, and given therewith to the public," because they were
 9 used "for the purpose of practical application."

10 This decision still stands and, in 1967, the Deputy
 11 Register of Copyrights relied on it in explaining copyright and
 12 the computer use of computer programs, and said, "If you had
 13 a copyrighted program which somebody finds it necessary to
 14 use, such use is not an infringement."

15 I am not sure, but I think that the Information
 16 Industry Association, in the testimony given last month by its
 17 president before the House Subcommittee, interprets
 18 Baker versus Seldon differently. By arguing that the holding,
 19 in effect, protects the program developer "against copying
 20 of the discretionary elements" found in his or her program,
 21 the IIA seems to be contending that, indeed, a program's
 22 "methods" are, or at least should be, copyrightable. It
 23 appears to me that "methods" in a computer program simply
 24 are the end-products of a developer's series of "discretionary"
 25 judgments that were made precisely to develop certain "methods"

1 which are suitable for "practical application."

2 So the very fine line drawn here by the IIA between
3 "discretionary elements" and "methods" strikes me as (a)
4 fine to the point of translucence, and (b) designed to
5 undermine the reasonably valid distinction made in
6 Baker versus Seldon.

7 Finally, policing the use of computer programs,
8 as with the photocopying of copyrighted works, is extremely
9 difficult. In both cases, technology has skipped away from
10 the cumbersome authority of the State. As the president of
11 the Computer and Business Equipment Manufacturers Association
12 noted to this Commission: "The proprietor of a program is
13 literally at the mercy of anyone with an office copier or
14 computer."

15 He believed that the enactment of stringent copyright
16 protection of computer programs would change all that. I am le-
17 sure. Is it really practical to believe that the State can
18 enforce copyright as applied to the new information technolo-
19 gies?

20 And if it is not deemed practical, then should the
21 State enact a law that everyone knows to be unenforcible?

22 The institution of government, and the very
23 concept of justice in this country, are enduring enough popular
24 contempt as it is. Why, then, add to that contempt by
25 passing laws which can be enforced -- even under the most

1 optimistic foreseeable circumstances -- only sporadically?

2 Now, these advantages and disadvantages that I have
3 very briefly
4 reviewed/are practical ones. They implicitly assume that
5 some kind of public control is needed over the use of
6 computer programs.

7 There is a far more fundamental issue: Should
8 information needed for computer manipulation of knowledge be
9 limited at all?

10 Copyright was really not designed with computers
11 in mind, and, as the president of the Computer Industry
12 Association observed last month to this Commission, his is
13 "an industry which has been burgeoning without copyright."

14 In an extensive study of copyright and computers,
15 the Ad Hoc Task Group of the Council on Scientific and
16 Technical Information of the Federal Council for Science and
17 Technology observed that "copyright may hinder the maximum
18 efficient use of national information systems."

19 The effects of such hindrances would squelch the
20 growth of information systems within the disciplines and,
21 perhaps, render illegal, abstracts of articles now used in
22 information systems, and delay inclusion, or possibly
23 exclude, some information from systems, even after the
24 copyright owner is contacted.

25 In response to this view, the owner-based argument,
26 as I understand it, again states that a major value to be

1 derived from protecting computer programs is that the "little
2 guy," the "Mom and Pop" software developer, would have a fight
3 ing chance in a marketplace dominated by corporate giants.

4 This argument is a reasonable argument, but it also
5 should be at least recognized that, in economic terms, it
6 has significant parallels with a public policy recently over-
7 turned by Congress as being not in the public interest: fair
8 trade. Fair trade laws, originally designed to protect the
9 "Mom and Pop" enterprise by fixing price levels for certain
10 goods, may indeed have done so. But the resultant higher-than-
11 market-level price was paid by the consumer.

12 Similarly, copyright, by giving the developer the
13 power to inflate the price of his program beyond that which
14 normally would be charged in a competitive market, would increase
15 the costs of the program user. Now this possibility may not
16 negate the "Mom and Pop" argument, but neither should it be
17 overlooked in deciding the software issue.

18 More significantly, I think, copyright appears to
19 be growing increasingly irrelevant to the actual and practical
20 development of computer-based information systems. In an
21 interview published in 1973 in Publishers Weekly, John Price
22 who was the Director of Exxon Corporation's Information
23 Center -- stated that publishers and other copyright owners
24 should solve the theoretical and technical problems of new
25 of communicating information "before worrying so much about

1 the legalities of copyright." Price, certainly, has not
 2 worried about such legalities, and is a managerial leader
 3 in the business of business information. He believes -- and
 4 possibly rightly -- that these businessmen "are going to have
 5 to restructure their ways of doing business" in light of
 6 the new technologies and the new patterns of informational
 7 needs and use.

8 Now, Price's comments lead me to a final area of
 9 concern. It relates to the software question. But let me
 10 broach, in concluding, a much broader issue.

11 Copyright, as a public policy, has lost its
 12 elegance. If we are to define "elegance" in terms of poli-
 13 tical economy, simplicity, and Mies Van der Rohe's
 14 dictum that "less is more", then copyright law is no longer
 15 elegant. It is nitpicking!

16 Section 110 of S.22 provides a fine example of
 17 this. Section 110 deals with, among other items, classroom
 18 teaching, instructional broadcasting, and certain "not-for-
 19 profit" exemptions, as they relate to the notions of
 20 "performance" and "display", and, in this regard, pertain
 21 directly to the software issue. By its very complexity and
 22 "nitpickingness", the Section implies that the copyright
 23 principle no longer may be adequate as a public policy for
 24 knowledge management in a society possessing a high level
 25 of information technology. While this is true for several

1 other sections of S.22, Section 110, as amplified by
 2 Senate Report No. 94-473, is perhaps the most self-evident
 3 example of the intellectual difficulties that policy-makers
 4 have had in trying to equitably adapt a concept of public
 5 policy that has been outstripped by an information revolu-
 6 tion.

7 This policy myopia becomes all the more apparent
 8 when we read some of the clauses in Section 110. There are
 9 subsections exempting from copyright, certain kinds of
 10 religious performances; performances occurring as a part
 11 of an annual agricultural or horticultural affair; where
 12 the sole purpose of the performance is to promote retail
 13 sales; the admonition that "face-to-face" teaching does not
 14 necessarily mean that a student and teacher have to be
 15 staring at each other; that reading aloud a non-dramatic lit-
 16 erary work constitutes a "display", which would not require
 17 the copyright owner's permission, but that acting it out
 18 as a "performance", would; that, in certain cases, a "fee"
 19 paid to a performer could necessitate permission from an
 20 owner to use his work-but not a "salary" paid to that same
 21 performer using the same work.

22 JUDGE FULD: What do you suggest?

23 MR. HENRY: I don't know! I am not saying I have
 24 the answers, at all.

25 Last, but not least, that teaching activities

1 involving "performances or displays, whatever their cultural
2 value or intellectual appeal, that are given for the
3 recreation or entertainment of any part of their audience",
4 are subject to infringement suits by copyright owners.
5 With that stipulation, the Senate came out foursquare in
6 favor of ~~boredom~~ in schools.

7 The point is: that when policy-makers start
8 addressing themselves to policy issues in terms of this
9 kind of microscopic detail, the public policy in question
10 begins to lose some of the breadth and elegance that --
11 I think, at least -- is essential to sound policy.

12 I, too, regret this greater complexity and movement
13 for something like the Internal Revenue Code.

14 VICE-CHAIRMAN NIMMER: Is it your implication, then,
15 that the Internal Revenue Code likewise is inelegant, as
16 you define it -- as surely it is -- and should be abolished?

17 MR. HENRY: If you say taxation should be abolished,
18 I don't see that as a practical alternative.

19 I do say -- again, just speaking as a citizen on
20 the subject of taxation, about which I have no expertise
21 whatsoever -- I rather like Secretary Simon's proposal
22 of either 20% or 40%. Damn! No exemptions.

23 That is what copyright, in terms of a broadly
24 defined policy originally, was. The copyright owner had ex-
25 clusive license to publish within a certain time frame.

1 VICE-CHAIRMAN NIMMER: Under the existing law, there
2 are complexities that are nowhere in the same degree as
3 are
4 proposed in the new law.

5 MR. HENRY: Sure! Right. I realize the dangers, to
6 some degree, here, because what I am implicitly saying --
7 and I regret this as much as anyone -- is that we should
8 be led by the nose by technology, at least until we
9 know more about it. I don't like that, but I guess I kind
10 of tend in that direction.

11 VICE-CHAIRMAN NIMMER: You are also saying that
12 if laws are complex, it is better not to have laws.

13 MR. HENRY: I am not saying it is better not to
14 have laws.

15 VICE-CHAIRMAN NIMMER: It would be best to have
16 simplified laws, but if simplified laws don't do it, then
17 no laws are better than complex laws?

18 MR. HENRY: I haven't gone that far. What I am
19 trying to do here is simply point to the desirability, if
20 possible, of keeping life simple.

21 VICE-CHAIRMAN NIMMER: I come from Gerry Brown's
22 State, but I cannot fully subscribe to that!

23 MR. HENRY: I come from Barry Goldwater's State.

24 (Laughter)

25 MR. CARY: For the record, if I may, when the
26 first draft of the Copyright Law appeared, it was considerably

1 more simple than you see it today.

2 MR. HENRY: Yes, sir.

3 MR. CARY: And a good part of the confusion and
4 the nitpicking -- as you call it -- took place because people
5 who felt themselves aggrieved went to their Congressmen,
6 and their Congressmen made changes, over the years, And this
7 is the way our laws are made.

8 We can draft beautiful, conceptual articles, and
9 then try to get Congress to pass them and you would not
10 recognize them!

11 MR. HENRY: No. I fully appreciate that. And,
12 again, the tax laws are a good example of that process.

13 MR. LACY: And the details, in almost every
14 case, are added by people seeking exemption from copyright --
15 not by the people who wanted copyright protection.

16 MR. HENRY: That is one way of looking at it.

17 MR. LACY: It is the truth!

18 MS. KARPATKIN: I was interested in your analogy
19 to the fair trade laws. There seems to be a broad
20 spectrum of agreement today--ranging from President Ford to
21 consumerists--that much regulatory legislation unnecessarily
22 keeps prices high and prevents market forces from operating
23 to produce a good market price for the consumer.

24 What do you think the consequence would be if
25 there were no protection whatsoever for computer software

1 except the trade secret protection that now exists in the
2 law?

3 MR. HENRY: Well, I guess I am as much an expert in
4 this area as anyone, simply because I don't think anyone
5 could tell you what the consequences would be--with any degree
6 of certainty.

7 According to what I read from various computer
8 groups in their testimony, my overall impression is that
9 it doesn't seem to make a great deal of difference. They
10 could probably live without it. That is what I gleaned
11 from those groups.-- from testimony presented by those
12 groups. Now, they might well deny this is the case, because
13 I think they might prefer having it but, as the president
14 of the Computer Industry Association said, this industry has
15 done very well without it.

16 MS. KARPATKIN: Where do you think the consumer
17 interest lies?

18 MR. HENRY: The cheapest possible price for the
19 product!

20 MS. KARPATKIN: And do you think that that would
21 develop if there were no protective legislation?

22 MR. HENRY: I think it would be more likely to--
23 but the dangers of that would have to be recognized. It
24 could discourage innovation on the part of computer programmer
25 creators.

1 MR. LACY: Aren't you suggesting, Mr. Henry,
2 that there should be no price?

3 MR. HENRY: No. I am not suggesting that, Mr. Lacy.

4 MR. LACY: Well, why should anybody pay--
5 if he is free to use it without payment?

6 MR. HENRY: Well, they would simply pay the owner
7 -- the distributor.

8 MR. LACY: Well, why should he pay the owner?

9 MR. HENRY: Not under the copyright law; just
10 under the law of fair trade.

11 MR. LACY: What for?

12 MR. HENRY: Because not to pay for it would be
13 thievery.

14 MR. LACY: Suppose you don't have a contract
15 with the owner; yet you come in possession -- in due course
16 of his program.

17 Why should you pay the owner anything?

18 MR. HENRY: Perhaps you should set up the
19 situation a little better for me. I am not following you.

20 MR. LACY: Suppose there were no copyright in
21 books.

22 MR. HENRY: All right.

23 MR. LACY: And you wanted to make a movie from
24 a book. You were not under any necessity of paying the
25 author or the publisher. You could, presumably, make the

1 movie cheaper -- theoretically, it would be cheaper because
2 there is no payment. If there is any payment, there
3 has to be some kind of protection.

4 And the question is: which kind of protection
5 more openly makes the material available? Does it
6 make it more available if the protection comes by trade
7 secrecy and restricted contract and restricted licenses,
8 so that everybody keeps his program under his vest, and
9 makes it known only to people who have taken an oath they
10 won't let anybody else use it?

11 Or is it more available if he has some legal
12 protection other than locking it up in trade secrecy?

13 MR. HENRY: If you are posing this question as
14 an alternative as to which is going to provide the owner
15 with more protection -- trade secrecy or the copyright
16 law --

17 MR. LACY (Interposing) I am saying: Which is
18 going to make it more available to the consumer?

19 MR. HENRY: Oh!

20 MS. KARPATKIN: That is not the same question
21 as the "price" question, though, is it?

22 MR. HENRY: In terms of making it more available,
23 I don't know much at all about trade secrecy, frankly.
24 As a policy, I would have to guess: copyright, simply because
25 it is a simpler policy.

1 MR. LACY: The law of price is one of two things:
2 It is two different people coming into possession of the same
3 program and, because each of them is free to exploit it,
4 there is no exclusive right. They compete against each
5 other in re-selling what the guy created.

6 Or, alternatively, it comes to two different
7 programs: two authors having each written a program
8 addressed to the same problem, competing and offering it
9 for sale.

10 Obviously, if a man has some protection to enter
11 this competitive market and can really sell his product --
12 not give it away -- I think you have a good case to assume
13 more producers are going to be competing with each other
14 to produce more programs for that market at, perhaps, a
15 lower price -- if you are assuming that he is going to
16 pay a price at all.

17 If you are assuming that there is no need to pay
18 a price because there is no need to seek permission to do the
19 work, then you are not talking about lower prices. You are
20 talking about no prices.

21 MR. WEDGEWORTH: Well, if you are going to
22 address that question, isn't it simpler to look at what
23 happens now?

24 Let's take, for example, two very widely used
25 programs: the biomedical programs that are used for

1 statistical purposes, and that social-science statistical
2 package that is made widely available.

3 What controls the price for those?

4 What protection does the consumer have in getting
5 access to those materials?

6 I think that the real thing for SPSS, for example,
7 is that most people buy the documentation in printed form,
8 which is under copyright. Access to the program is nothing--
9 for most of the users.

10 I think we can look at what happens, now, and
11 gain a great deal more than creating a hypothetical situa-
12 tion.

13 JUDGE FULD: Had we interrupted your statement?

14 Is there more to come?

15 MR. HENRY: No. The only thing I was going to
16 say is that, when this happens--when the law gets this
17 detailed and policy gets this detailed--it becomes pedantic,
18 lawyerish, and crablike. When this happens, it is a sign
19 that the policy is predicated on a premise that is no
20 longer suitable. I think that this may be the case with
21 copyright law, and there is no better illustration of it
22 than Section 110 of S.22. I think 110 is a very good
23 example of that process which may be unavoidable.

24 JUDGE FULD: What can be done about it at
25 this point?

1 I would be very hesitant to make a specific
2 recommendation as to what could be done. It may be that
3 this idea of a moratorium should be reconsidered, just
4 to see what the technology does. When you look at the
5 original -- when this public policy started in 1955, which
6 is the date I place on it, when Congress commissioned
7 the Library of Congress to inaugurate studies -- you know,
8 this has been going on for 21 years now; and when they
9 were originally talking about "information machinery", they
10 were talking about juke boxes. You know, this is how
11 far technology has gone, and this has changed the whole
12 complexion of the law.

13 JUDGE FULD: Thank you very much.

14 MR. DIX: Just a brief question.

15 Just to pursue this train of thought that Mr.
16 Lacy started here: You have been concerned with, and
17 thinking about, the public interest.

18 What would happen if, indeed, there were no
19 protection and if, indeed, computer software were not
20 regarded as a saleable commodity at all -- just in your
21 view? In terms of public interest.

22 MR. HENRY: You are creating a situation here,
23 Mr. Dix, saying that you are going to get computer
24 programs working "for free"?

25 MR. DIX: Yes. That is, you are going to have no

1 legal mechanism that prevents anybody from getting that.

2 As Mr. Lacy said, if there were no protection,
3 presumably, there would be no price; then, let's pursue
4 that.

5 MR. HENRY: Addressing your specific question,
6 "not having copyright applied to the computer program",
7 it does not necessarily mean there is no price -- at least
8 not in my view, at all. You are talking about an overall
9 market situation in which there would be a price, You
10 are simply not putting in what, in straight laissez faire
11 economic terms, would be an artificial element.

12 MR. LACY: I am puzzled by your "artificial".

13 I could see where you would buy the artifact,
14 consisting of tape, which can be made for about \$50.00,
15 let's say.

16 Do you think it is an "artificial" element if
17 one charges \$10,000 for that tape because he has invested
18 a half-a-million dollars in producing the material that
19 goes on it?

20 Is that an artificial price?

21 MR. HENRY: I think, Mr. Lacy, you have to keep
22 points of reference in mind, here.

23 I think I am saying "artificial", relative to
24 an idealized free market economy.

25 MR. LACY: I don't see a copyright as interfering

1 with the free market economy. It just establishes the
2 title of what is offered for sale in the free market
3 economy.

4 MR. HENRY: When, in effect, you are giving an
5 exclusive right to a distributor for a specified period of
6 time to distribute a title and, supposedly, with that title,
7 an idea, or some computer program report, in other words,
8 that creates a different situation than other kinds of
9 products in the economy.

10 For example, people who sell vegetables.
11 You know, I have an exclusive license to sell carrots.
12 You don't have that. This is why it is different.

13 I am not saying that it is a bad policy for that,
14 because the intellectual materials are different from
15 carrots, but this is the point I am trying to get across.

16 MR. LACY: The problem is what you are selling
17 when you sell a computer program. When you are selling a
18 carrot all you are selling is the physical object -- the
19 thing that you pick up in your hand and weigh.

20 MR. HENRY: That is a good point!

21 MR. LACY: When you are selling an intellectual
22 product, it may be involved in any one of a hundred
23 different kinds of packages, tapes, discs, printed
24 pages, whatever. You are not really selling a package,
25 any more than you are selling the bag in which the carrots

1 are wrapped.

2 MR. HENRY: Well, you could make that argument.

3 MR. LACY: That is not making an argument.

4 It is simply a statement of the fact.

5 MR. HENRY: Well, you could also take another
6 statement of fact and simply say that when you are selling
7 books on a book shelf, copyright as a policy, applies to the
8 book rather than the notions expressed in that book.

9 MR. LACY: Expressed in the intellectual content
10 of the book.

11 MR. HENRY: I don't know about the legal positions,
12 but I think there are two reasonably different views on that.

13 What seems to be said in one aspect of it is that
14 you don't have the right to take this book and photocopy
15 it. You don't have the right to take this computer program
16 and copy it because copyright prevents you from doing so.

17 Some people are saying that what you are really
18 doing is stealing something. You are stealing a creation,
19 as opposed to just a physical product. It is a computer
20 program likened to a carrot.

21 The reason for this, obviously, is because the
22 traditional forms of printing technology have changed.

23 Copyright was predicated on someone controlling
24 the means of production; a very expensive printing press.
25 Now, every man -- to use another argument -- is a publisher.

1 MR. LACY: No. I don't think that is so.

2 MR. HENRY: That has changed the whole ball game.

3 MR. LACY: I don't think that is true. It applied
4 to hand written play scripts that would be produced,
5 dramatically, on the stage; with no printing process being
6 involved at all. You are protecting the playwright's work.

7 MR. HENRY: I am not talking about playwrights
8 at all. I am saying the technology has changed.

9 MR. LACY: It doesn't have to be involved at all,
10 because you are not selling a physical commodity at all,
11 if you go to a play that is produced and, in shorthand,
12 take down the words that are said, and then produce the
13 same play, later. You are not buying any physical product
14 at all, but you are certainly doing something, of course,
15 that they would make you pay for if you subsequently
16 performed the work.

17 MR. HENRY: That is, perhaps, true.

18 MR. LACY: It is true!

19 MR. LEVINE: Do you think, Mr. Henry, that the fact
20 that computer programs may now be copyrightable has had
21 any effect on the price of the computer program?

22 We know, for example, with sound recordings, that
23 unauthorized sound recordings are being sold at a lower
24 price than the authorized.

25 MR. HENRY: Yes.

1 MR. LEVINE: Is there any effect now?

2 MR. HENRY: Well, at this point, my impression is
3 that if there is an effect, it is very negligible, in terms
4 of the actual pricing. I don't know what the reasons for
5 this are. I don't mean to cast copyright as a villain here,
6 saying that if you put a copyright on a computer program,
7 you are going to jack up the price. I don't think that
8 that necessarily follows.

9 I think it makes it more likely, potentially,
10 depending on what the producers of the program do with the
11 copyright. It is a tool for them to use, if they want to.

12 In terms of transaction cost, I think you could
13 have some real transaction costs, potentially. This has
14 not happened, for example, in the OSIRIS III case that
15 I mentioned -- insofar as I know.

16 MR. LEVINE: Is the fact that there has been no
17 appreciable effect largely due to the fact that the nature
18 of the protection is --

19 MS. KARPATKIN: How do we know there is no
20 appreciable effect? How do we know? Is there a study which
21 answers this question?

22 MR. LEVINE: No. Not that I am aware of.

23 MR. HENRY: Not that I am aware of.

24 MS. KARPATKIN: It is certainly not anything that
25 one can speculate about by the seat of one's pants.

1 MR. HENRY: That is what I am being asked to do.

2 MS. KARPATKIN: I don't see how you can do it.

3 It might be very difficult to even do a study on it.

4 MR. HENRY: It could well be.

5 I hope you understand, this is "seat-of-the-pants"

6 --

7 MR. LEVINE: I recognize that, because I
8 further recognize that there is no effective way of
9 determining that. But I prefaced it by the analogy to
10 the sound recordings, where, in fact, we knew that sound
11 recordings were being sold at a price lower than the
12 authorized recordings. I don't think there is that kind
13 of data, but the impression one has is that copyright is not
14 the means by which price levels are being maintained but,
15 rather, contracts and trade secrets.

16 MR. LACY: You can be sure, on the program, because
17 such a tiny proportion are copyrighted that it is impossible
18 for that to have much effect one way or the other.

19 I would like to come back to one point on the
20 Baker v. Selden analogy. I think it is easy to give that
21 too sweeping a thing. When you are writing a musical score,
22 you are writing a set of directions to a piano player, or
23 a singer, as to what notes he is to sing, or keys on the
24 piano he is to strike, at what intervals, and with what
25 emphasis. One who does not copy this at all, but buys a

1 on the stage,
2 legally licensed copy of it and, before the public for profit,
3 performs in the way he was instructed to do by that score, he
4 infringed the copyright -- as the Courts have always held.
5 So, whether the performance of a thing in accord with the
6 instructions provided is an exclusive right of the copyright
7 proprietor, I think, depends substantially on the nature
8 of the work and what the performance is.

9 If it is the kind of work in which the real
10 intention is to disseminate it by selling copies -- such
11 as a cookbook or an accounting manual -- which is involved
12 in Baker v. Seldon -- you have a different kind of law
13 from a work whose specific intention, and whose one social
14 value, is to tell you how to do something, like a musical
15 score, or the script of a play which has relatively little
16 value as a literary work compared to its value as a set of
17 instructions to actors, as to what to do on the stage.

18 So that here is a possibility of a performance
19 right for copyrighted work which is quite distinct from the
20 right to copy it.

21 I don't think Baker v. Selden necessarily
22 precludes the existence of a performance right in computer
23 programs any more than it does in musical scores or dramas.

24 MR. WEDGEWORTH: I think I would rather see us
25 go on.

JUDGE FULD: Yes. I think we might ask further

1 questions at the conclusion of the next speaker.

2 Thank you, Mr. Henry.

3 MR. HENRY: Thank you.

4 MR. FULD: Our next speaker is Ms. Susan H. Nycum, an attorney
5 associated with a San Francisco law firm. In addition to
6 her legal experience, Ms. Nycum has spent ten years as
7 a computer operations manager; she has been a Council
8 Member of a Standing Committee on Legal Issues of the
9 Association for Computing Machinery; a Council Member of the
10 American Bar Association Section on Science and Technology;
11 a Director of the Computer Law Association.

12 She is one of two authors ^{of} ~~that~~ ^{of} report on Computer
13 ~~Also~~ published by the National Science Foundation.

14 Ms. Nycum, welcome.

15 MS. NYCUM: Thank you.

16 STATEMENT OF SUSAN H. NYCUM, ATTORNEY

17 SAN FRANCISCO, CALIFORNIA

18 MS. NYCUM: It is a great pleasure for me to be
19 here with all of you. I have actually been asked to
20 give two presentations, because Mr. Bigelow is not here.

21 I wonder if Mr. Bigelow's remarks at this time
22 might flow more normally in the course of the morning.

23 JUDGE FULD: He has been prevented from coming
24 in because of his illness, I understand.

25 MS. NYCUM: There has been a death in his family,

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and the funeral is today. He gives his apologies and regrets.

JUDGE FULD: Do you want to read his statement first Is that it?

MS. NYCUM: I think that may be more reasonable.

JUDGE FULD: If you think so, go right ahead.

MS. NYCUM: I guess, since this is Mr. Bigelow's presentation, it would be reasonable for you to introduce Mr. Bigelow rather than myself.

JUDGE FULD: Why don't you describe him?

MS. NYCUM: 6 feet 2-1/2!

JUDGE FULD: That is enough!

(Laughter)

MS. NYCUM: Actually, there is a "bio" on Mr. Bigelow which I gave to someone else.

I might use that as reference material.

JUDGE FULD: I will read it. It is rather long.

He is a practicing attorney in Boston. He is interested in the legal problems of the computer industry. He is Vice President of the Computer Law Association; former Member of the Council of the American Bar Association Section on Science and Technology. He was the first Chairman of the Boston Bar Association Committee on Law and Science and Technology. He is a Member of the Association of Computing Machinery; served as first Chairman



1 of the Special Interest Group on Computers in Society in 1969
2 and 1970; served as ACM National Lecturer. He has also
3 been Director of the Boston Chapter of the Data Processing
4 Management Association; Fellow of the British Computer
5 Society; also a member of the IEEE Computer Society, the
6 Society for Management Information Systems.

7 I gather he is an expert in the field!

8 MR. PERLE: When does he work?

9 JUDGE FULD: He has written a number of books.

10 MR. NYCUM: Yes.

11 This is Mr. Bigelow's presentation:

12 The first consideration is: Where does software
13 fit in the computer industry?

14 He characterizes it somewhat like Mr. Henry;
15 and in some sense, a little differently.

16 Software developed by (1) manufacturers,
17 primarily operating systems, which he here described as those
18 programs which make the machines work.

19 Secondly, new product application programs.

20 An example that comes to mind would be
21 in the electronic transfer system application, which is
22 a relatively new one and, in many cases, is manufactured
23 by manufacturers of hardware.

24 (2) Users for their own use and for possible
25 sale or license to others.

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1 An example of that is the SPSS, given earlier by
 2 Mr. Wedgeworth of such a situation; and by software house
 3 as a product of their business.

4 The EDP Industry Report of March 26 of this
 5 year published by International Data said that EDP users
 6 would spend \$30 billion this year -- 40% on hardware;
 7 33% on salaries; 8-1/2% on data communications; 11-1/2%
 8 on outside services; 4% on supplies; and 3% on software
 9 from outside sources.

10 that
 11 Now, if you consider/the software costs of
 12 manufacture are somewhere between the 3% that IBM
 13 admitted when unbundled, and the 50% found by the Court
 14 to be a reasonable value in the case of the Universal
 15 Computer Association versus the District of Columbia, at
 16 3 CLSR 359, affirmed at 3 CLSR 549, a property case; and
 17 if you consider that the users' in-house expenditure is
 18 a considerable portion of that 33% allocated to salaries,
 19 are
 20 then software purchases/projected by the Industry Report
 21 at \$605 million -- which, incidentally, is an increase of
 22 33% over 1975; and 250% over 1973. If we take that 10%
 23 of the hardware cost, which is \$1.2 billion, and then
 24 10% of salaries, which would be \$1 billion--both of which
 25 Mr. Bigelow feels are probably conservative--and add in the
 outside purchases, we find that users will be paying
 almost \$3 billion for software in 1976.

1 The next consideration is: What kind of software
2 needs protection?

3 First, a study by Richard I. Miller of Harbridge
4 House entitled: Legal Aspects of Technology Utilization,
5 published by Lexington Books in 1974. This was made with
6 the assistance of the Association for Data Processing
7 Service Organizations. The ADAPSO members felt that
8 there were two kinds of software that needed most protection:

9 (1) Business and financial applications. A
10 survey indicated that 26% of the respondents felt that the
11 protection there had some significance; 42% felt it had
12 great significance; and

13 (2) Systems software, where 62% reported it
14 had great significance, and 16% thought there was no
15 significance at all; and no one indicated "some" significance.

16 Here, it is important to realize that most systems
17 of software are provided by the manufacturer or the vendor
18 of the hardware;; therefore, in many senses, can be con-
19 sidered by a software producer to be given away, although,
20 practically speaking, that is not the case. And, also, that
21 in not every instance is an operating system which will do
22 the job supplied by the manufacturer. Not in Mr. Bigelow's
23 remarks, but in my own experience, I know of two times when
24 a major vendor was not interested in the systems software
25 which would do the job, and it had to be developed by the

1 user himself.

2 So those are the two types of software that
3 Bigelow feels need protection.

4 Mr. Bigelow considers the advantages and the
5 disadvantages of patenting and, under that category
6 of Patent, it lists the concern as to:

7 (1) The cost of obtaining the patent on the part
8 of the owner; and

9 (2) The political and policy considerations of
10 the monopoly of 17 years once, and if, said patent is issued.

11 (3) The enforcibility of patents, and the
12 likelihood that they may be found to be unenforcible, once
13 issued; and the

14 (4) International software limitations.

15 By statute, software is not patentable in France,
16 and probably not in Holland. It is probably patentable
17 in Canada. He cites Waldbaum, 3 CLSR 164.

18 Probably in Germany, where a B & T type case
19 was upheld in 3 CLSR 574.

20 And yes, in the United Kingdom: Burroughs 4 CLSR
21 1059.

22 Consideration under "Copyright" includes the
23 fact that the copyright protects a mode of expression, and
24 only that;

25 That the cost is minimal;

1 That it can be expensive and difficult to
2 enforce.

3 There are questions as to proof of infringement.
4 There is a matter of fair use.

5 And there is availability of criminal sanctions
6 which are uniform because it is a Federal situation.

7 As to trade secrets and common law copyright,
8 Mr. Bigelow considers:

9 (1) The cost is high;

10 (2) The enforcement may be expensive but
11 the speed of achieving some sort of protection from the
12 Court may be more certain, and faster, actually.

13 (3) And the effectiveness may also be more
14 attractive.

15 However, the trade secrets situation leaves
16 one open to reverse engineering, and it has some impact
17 on the ability of doing business in other States.

18 MR. PERLE: What is "reverse engineering"?

19 MS. NYCUM: That is when you buy my product
20 and take it apart to see how it was put together.

21 That last item, of course, involves some important
22 considerations if you have registered business to do
23 in another State. It is one thing that a business entity
24 might be concerned about.

25 Secondly, there might be some tax problems when

1 you suddenly find another jurisdiction interested in
 2 considering what you have as a tangible property over them
 3 They might, from the State point of view, assess a sales
 4 tax.

5 The fourth discussion point is:

6 What methods are used?

7 And the I. Miller Study that I referred to
 8 earlier showed that 78% of those surveyed used a lease
 9 with confidential disclosures; and 65% of these people
 10 found that it was very, or completely, effective to do so.

11 65% used the trade-secret license and, of these,
 12 55% found it very, or completely, effective.

13 58% used copyright and only 39% of those, or
 14 23% of all respondents, found it to be very, or completely,
 15 effective.

16 Finally, there are two other legal aspects that
 17 bear on possible deliberations, here.

18 (1) Antitrust considerations -- the tie-in sale.
 19 Either you can't get the hardware without Program X, or
 20 or you can't get Program X without Program Y.

21 In 1969, the then-Deputy Assistant Attorney
 22 General for Anti-Trust, Donald Baker, summarized the tie-
 23 in sales problem as follows:

24 "The implications of this broad tie-in rule
 25 for the computer software field are pretty

"obvious. The common existing practice of providing computer programs on a package basis has not seemed a source of major concern so long as computer programs have only been protected as trade secrets; since successful programs can be largely duplicated by others, a particular program is less apt to be a source of the type of economic power necessary to make it a tying product. (Indeed, most of the complaints to date have been based on the theory that computer programs were the tying product in a hardware-software tie.)

"However, all of this will change if software becomes subject to some type of patent or copyright protection. A particular patented program may become indispensable to users in a particular field; it will thereby become a real source of economic power -- and antitrust will have to be vigorously applied to prevent its use as a tying device. The fact that it is patented will at least assist in such enforcement, since the patent will enable a court to presume that the software supplier has the necessary economic power to be guilty of illegal tying."

The final point of "other related aspects" is

1 in taxes.

2 The Miller study found that, among data processing
3 firms, the method selected "for protecting computer soft-
4 ware is as likely to be governed by a desired characteriza-
5 tion of their product for tax purposes, as for safeguarding
6 or transferring technology."

7 For those of you who are not familiar with what
8 happens to software in the tax arena, it is characterized
9 by the Federal government taxing authorities as an
10 "intangible product", and it must be amortized on a
11 straight line basis unless bundled to hardware-in
12 which case it can be depreciated more quickly.

13 However, on the State side, where there is
14 interest in property and sales taxes, it is characterized
15 as a "tangible", which fits into the taxing category
16 by the State.

17 That concludes Mr. Bigelow's remarks. I regret
18 that he could not be with you.

19 My thanks for permitting me to present them.

20 JUDGE FULD: Will you convey our thanks to him
21 for letting you deliver them?

22 MR. WEDGEWORTH: Mr. Chairman, I have a
23 question. I was not sure I caught this: There were two
24 levels of statistical data that you were giving us on the
25 methods by which software has been controlled. I would like

1 to go over that, briefly.

2 (1) You were giving us a figure related to
3 the number which used a particular type of method, and
4 then there were some statistics of that class of persons,
5 as to the effectiveness of that particular method.

6 Could you repeat those for me so I can get
7 them?

8 MS. NYCUM: Yes. You will find that the first
9 numbers do not add up to 100%.

10 MR. WEDGEWORTH: That is my concern.

11 MS. NYCUM: That is what I thought you were getting
12 to.

13 MR. WEDGEWORTH: Yes.

14 MS. NYCUM: That is because users surveyed used
15 more than one type of protection.

16 MR. WEDGEWORTH: Okay. I see.

17 Was there any complete listing of the total
18 number of different types of protection, in addition
19 to the ones you cited?

20 MS. NYCUM: I have the support material here.
21 Perhaps we can share it with you. I am not familiar with it
22 in detail. It might take a few minutes to find. If
23 you would like to look at it, I think it is on page 58,
24 here.

25 MS. KARPATKIN: Is that the Miller study?

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MS. NYCUM: Yes.

MS. KARPATKIN: Do we have a copy of that?

MR. WEDGEWORTH: Was that in our documentation?

MR. LEVINE: No. Not for today; but we have it in the office, once we get permission --

MS. KARPATKIN: I would like to have a copy of that.

MR. LEVINE: We don't need permission!

MS. KARPATKIN: Find out what he charges for a copy.

(Laughter)

MR. WEDGEWORTH: Thank you very much.

JUDGE FULD: Will you continue with your own presentation?

MS. NYCUM: I will be glad to, unless there are any questions.

JUDGE FULD: I think we might postpone questions.

MS. NYCUM: Now, on my own behalf, I am pleased to address you. I should say that most of what I am going to be talking about comes from a National Science Foundation-supported study on Computer Abuse.

Essentially: What are the bad things that can happen with the use of computer technology?

In addition, I have been asked to comment on two or three questions that were raised by the Staff of the

1 Commission.

2 Computer abuse is a very difficult area to
3 pinpoint, and we finally defined it in a way that is not
4 a legal definition; it is not a technical definition. It
5 just seems to fit, and it is: All those incidences
6 associated with the use of computers in which a perpetrator
7 did or could have received a gain, and/or a victim did
8 or could have suffered a loss.

9 We have been studying this area for several
10 years. We have gathered data on 370 cases of reported
11 abuses. We are aware of the work of other researchers in
12 the area, and we could say that it is likely that there may
13 be a thousand cases of reported abuses, known at this time.

14 It is projected that what we have seen is a
15 tip of an iceberg, and the depth of the iceberg is such
16 that we have looked at 15% of the total size of the problem.

17 That has to be mere conjecture, because there isn't
18 any really clear way to extrapolate, from what we found,
19 how much there exists that we don't know of, yet.

20 We found, however, that in the cases that we
21 are aware of, that mis-appropriation of computer software
22 accounts for approximately 10% of the problem.

23 In terms of dollars, we are talking overall
24 -- since 1958 -- about approximately a \$5 million-a-year
25 loss; in the last four years, approximately a \$10 million

1 a year loss.

2 The problem comes because computer technology
3 is moving very rapidly. It is being applied more and more
4 to sensitive areas in organizations -- both in the public
5 and private sector. And certain of the support functions
6 associated with computer technology have not had the ability
7 to keep pace with this tremendous growth of the technology
8 proper. Those would be security functions; audit
9 functions; management functions; and the like.

10 With that introduction, I will move into a
11 listing of the types of computer abuses that we have seen.
12 Very broadly, and by categories, I think of them as the
13 asset which is the target of the intentional act. The
14 first one is when the computer itself is the target, or
15 the systems software associated with it.

16 The second one is when the applications programs
17 or the data stored within the system are the target of abuse.

18 The third is when the computer itself is a
19 penetrating device; and

20 The fourth is the area where a computer may or
21 may not be even involved, but it is used as a symbol--
22 usually in intimidation, or in deception.

23 Now, for your purposes, the first category where
24 the computer system is a target may be of minimal interest.
25 I would note, however, two areas:

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1 One: where the computer system has some
2 value apart from hardware.

3 The second one: When there has been damage done
4 to a computer itself, the integrity of the stored programs
5 and data may well have suffered, because of this disruption
6 to the hardware or the systems software.

7 So this may be a thrust.

8 Your main thrust of concern will be in the
9 second category where computer programs and data are the
10 targeted asset and, particularly, where we are talking
11 about thefts of programs of data.

12 You probably will be interested to know that, as
13 a perpetrating device, a computer is an excellent means
14 to perpetrating a theft of software or data and has, in
15 fact, been used in a couple of cases that I will be telling
16 you about, in a minute.

17 The fourth category -- the symbol category --
18 we can disregard for our purposes today.

19 Of the 10% of perpetrations to computer software,
20 I have noted some in both the criminal and the civil area,
21 and I think you will find that most of them are not
22 reported cases in terms of our familiar library research
23 capabilities, but two of them are available.

24 The two of them, Hancock v. State and Hancock v.
25 Decker are listed at 1 CLSR 562, and 1 CLSR, 858,

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respectively. It is a case of incurring taxes when a person who is a programmer operations person in program work at a company called Texas Instruments stole a print-out from Texas Instruments and approached a customer of Texas Instruments to sell the program to the customer.

He was apprehended and his defense was, "Look, all I was trying to sell was a listing, and the Texas theft statute says that I am pretty much in the clear if I have not stolen anything over \$50.00 worth, and this paper, by no stretch of the imagination, cost \$50.00."

The Court said, "Not so! The program that it contains is worth \$2-1/2 million, conservatively, and you are clearly guilty of grand theft."

He appealed that it was a denial of the writ of habeas corpus; the Court of Appeals reaffirmed the holding of the Court and, in Texas and in certain other States, the value of the paper includes the value of the intellectual property contained on it.

VICE-CHAIRMAN NIMMER: Can you give us the citation?

MS. NYCUM: 1 CLSR 562. I have a copy with me.

The appeal is 1 CLSR 858. That is: Computer Law Service Reporter.

The second case: We have some reported information about Ward versus the Superior Court of California, County of Alameda, at 3 CLSR 206, which is a denial of the



1 Motion to Dismiss.

2 Mr. Ward had been a programmer at one company.
3 He confessed later and plead guilty to a charge of theft
4 of trade secrets under Section 499(c) of the California
5 Appeal Code and the section on Larceny, generally, when he
6 took a copy of someone else's program from a second computer
7 in which it was stored; caused the program to be sent to
8 his home office's computer machine; printed out a copy of it;
9 and carried that copy to his office.

10 There was a search warrant issued, for the first
11 time that a computer memory had been the subject of a
12 search, and he was confronted with all of this; he did
13 confess; and he plead guilty.

14 It is interesting that the Court, in addressing
15 this issue for the first time. -- it was apparently the
16 first test of the 499(c) -- held with California, and said
17 mere transaction from Computer A to Computer B would not
18 satisfy even the Larceny Statute in California, or even the
19 Trade Secret Statute. When he caused a copy to be made
20 and then escorted that copy to his office, he fulfilled
21 the requirements of the Statute.

22 It leaves open, the question of what would have
23 happened if he had merely looked at the listing on a screen,
24 or otherwise simply used the computer program, without causing
25 a copy to be printed out.

1 That case also gave rise to a Civil suit
 2 which is not reported: ISD versus UCC, for unfair
 3 competition, which was settled out of Court. Prior to that,
 4 the jury had found Mr. Ward's firm guilty of unfair
 5 competition.

6 There are a number of other cases which are un-
 7 on-line
 8 reported, based on /thefts such as Mr. Ward's, or the mis-
 9 use of computer programs by employees who had access
 10 thereto and then, subsequently, left the company.

11 I am informed that, presently in the Federal
 12 Court over in Baltimore, there is a trial involving a theft
 13 of a program from the Federal Energy Agency. I don't have
 14 any details on it, since the people involved are unavailable
 15 for comment.

16 Now, as to the questions that were asked of me:
 17 What enforcibility? Based on our research, what do we
 18 find?

19 We find that detection is extremely difficult. You
 20 can take a computer program and not leave any traces of
 21 that which is there.

22 MR. PERLE: Enforcibility of what?

23 MS. NYCUM: Enforcibility, generally, of protec-
 24 tion.

25 MR. PERLE: Under Criminal Statutes?

26 MS. NYCUM: Under any Statutes.

1 MS. KARPATKIN: By "enforcibility" do you mean
2 "detection"?

3 MS. NYCUM: I consider detection to be an
4 important part of enforcibility.

5 MR. PERLE: What bothers me is that I don't
6 really have a frame of reference as to what you mean by
7 "abuse".

8 Are you talking about the unlawful taking--theft
9 -- coming into possession, illegally, of something?

10 Or the mis-use of something which would come
11 into possession lawfully?

12 MS. NYCUM: You can do both.

13 MR. PERLE: You are talking only in a criminal
14 sense? You are talking only "Criminal", not "Civil"?

15 MS. NYCUM: No! I am also talking about the
16 Civil suits that accompanied the act, which was being
17 categorized as a criminal act; which would be essentially
18 in it; and every example here has been brought on "unfair
19 competition" based on a trade secret type of protection.
20 Right?

21 There are no patents that have been involved.

22 There have been no programs involved which were
23 protected by copyright -- or attempted to be protected by
24 copyright.

25 There has been no mention of the documentation

1 which may be copyrighted. It is all in this context of
2 "trade secret".

3 MR. PERLE: And under trade competition.

4 MS. NYCUM: Yes. Thank you for that question.

5 It helps us back to enforcibility-detection as an
6 essential part of it. This is where we are finding a great
7 difficulty. If we have located 15% of these people,
8 presumably we have not detected 85% of them, and I have
9 to say that, to date, the protection that is taking place
10 has been largely by chance -- some of it fairly amusing.

11 JUDGE FULD: That would be true, no matter what
12 the protected device was.

13 MS. NYCUM: That is right! I am now talking
14 about the type of perpetration that goes on and the technical
15 ease in which this appears to be possible, and I consider
16 "technical" not only in the technology sense but, also,
17 in the auditing sense; the management sense; all of these
18 things. It seems to be something that people can get
19 away with fairly easily, at this point that we are now in.

20 Our security is imperfect, so the opportunities
21 are not provided for in the sense of keeping people out.
22 We have not been able to state that there are any known
23 computer systems which are totally secure. There are none
(inaudible) that are impervious, now, to the so-called "fighter" case
-- trained people who go in and deliberately, on behalf of

1 the "good guys" try to act like a "bad guy" would, and they
2 have succeeded. Most do not seem to be impervious to an
3 inventive individual, and it does not necessarily require
4 one to be a sophisticated computer programmer. One of our
5 more engaging thieves -- and we have interviewed numbers
6 of these people -- stated that he was able to get into any
7 time-sharing system in the country. So we wondered what kind
8 of technical know-how he had to have in his brief case. All
9 it was, was the telephone numbers of the front office. He
10 would call up and "con" somebody into giving him all of the
11 information he wanted, and it is rather frightening to see
12 what we call building steel windows, and having paper doors
13 that you can simply walk right into.

14 However, the future is bright. There is considerable
15 concern with protection and security. Our friends in the
16 Privacy Study with the Protection Commission and elsewhere
17 are putting a great deal of stress, if you will, on the lack
18 of security that is presently available, and I think that
19 there will be a tremendous effort to come up with better
20 methods of protection.

21 Now, I will focus just a moment -- I was asked
22 to talk about trade secret protection; how good it is.

23 In this context, I will say that, very briefly,
24 we have found it to be very ragged. Some States have
25 fairly good protection, and we have studied eleven of the

1 so-called computer-intensive States. Some have very poor
2 protection for this type of an asset. Overall, it looks
3 like there may be a need for a better look at what
4 trade secret protection is available, or/what protection under the
5 Federal Trade Statutes of the various States is available
6 and, possibly, a uniform law needs to be written.

7 There is an interesting number of other types of
8 sanctions which we don't have time for, but it is my
9 understanding that at least in one case going forward in
10 Los Angeles at this time, a prosecutor is using the theory
11 of forgery to try to convict a perpetrator of a theft
12 of some computer time and services, on the theory
13 that he used someone else's account number and identifica-
14 tion number--and that amounts to forgery.

15 MR. WEDGEWORTH: Is it all right if I ask you a
16 question related to that?

17 MS. NYCUM: Yes.

18 MR. WEDGEWORTH: Does your study provide data on
19 whether the first party users or secondary parties dominated
20 in the "unauthorized use"?

21 For example, in the illustration that you just
22 gave; where an organization or an individual may be licensed
23 to use a particular program, well, in your study, are
24 those the persons who dominate in the number of perpetrators?
25 Or is it a second party, like someone getting unauthorized

1 access to that individual's license to use the program?

2 MS. NYCUM: It is usually in the second category.

3 MR. WEDGEWORTH: Because I think that relates
4 to an even larger category of applications, including the
5 testimony we heard from the New York Times Information
6 Panel.

7 MS. NYCUM: Well, the last point I was asked
8 to comment on very, very briefly--and it will be brief
9 because I have only one sentence to say for it--is the
10 idea embodied ^{in computer software separable from the form of} ~~in~~ expression in terms of a software
11 program. My own point of view, and from talking with
12 numbers of people, our feeling is, "No more than with ideas,
13 generally". Period. End of report. Thank you!

14 JUDGE FULD: Thank you very much.

15 VICE-CHAIRMAN NIMMER: Just expanding on that
16 last point, then, are you saying that you think that copyright
17 protection for a computer program would not result in a
18 monopoly of the useful idea embodied in the computer program
19 even though it would prohibit reproduction of the particular
20 mode of expression?

21 MS. NYCUM: Apparently not.

22 MR. PERLE: Do you think that some law in the
23 nature of the Federal law on unfair competition, as applied
24 to computers, would be an appropriate law for protection,
25 to prevent this sort of theft?

1 MS. NYCUM: It might help.

2 One of the things that we are noticing is that
3 a Civil protection is not going to be the sole answer
4 because many times, a perpetrator will be, if you will,
5 supported or funded by an organization which will be fined
6 or otherwise subjected to financial constraints. But it
7 is more than that, necessarily. We have to stop the
8 individual so that somebody says to him, "No. That is
9 wrong."

10 MR. PERLE: What I am so bothered about is
11 that by using the word "abuse", you have already come
12 to a conclusion. That is a conclusory term. Therefore,
13 something has happened. Somebody's rights somewhere have
14 been violated and, therefore, in some context, you already
15 know that something has happened that is immoral, or
16 unethical, or illegal; and we are in here trying to grope
17 for the mode, or the way, of labeling in advance that type
18 of conduct which is immoral, unethical but, above all,
19 illegal, and giving rise to civil or criminal penalties.

20 From what you said before, I got the feeling that
21 the enforcement has been done in the Unfair Competition/
22 Trade Secret area, and there has to be something which is
23 the ideal mode--at this stage of the game--for protection.

24 MS. NYCUM: I wish I could tell you what that
25 was. It has been going through my mind since 1968, what that

1 should be. I would think that, after that amount of time,
2 I would have a better response than to say, "I am not sure."

3 MR. PERLE: If you were sitting on this side of
4 the table--if you were the Commissioner, and you were
5 charged with answering: "Should software be accorded copy-
6 right protection and, if not, what type of protection should
7 software be accorded", could you say anything?

8 What would you say?

9 MS. NYCUM: As an individual, I would like to see
10 some kind of protection, because there is a tremendous invest-
11 ment on the part of someone who develops it. But there are
12 several kinds of software. There are those kinds that have
13 lasting utility, and there are those that have a single
14 application--for a short-term utility. I think that it is
15 possible that it will depend -- among other considerations
16 on what type of protection ought to be given.

17 Copyright seems like a very useful approach.
18 It seems to have the better of two worlds. That is, some
19 of the aspects of patents, in the sense that it is one
20 umbrella -- like a statutory protection -- and yet, at
21 the same time, some forms of the good parts of the Trade
22 Secret Law, which is difficult, because it is a State kind
23 of protection; ~~but~~ ^{stead} which allows other people to come up
24 with similar ideas, in a sense, as long as they are not
25 infringing on a particular expression.

1 So I think that it is quite possible, in the
2 majority of types of programs, that you will be using
3 copyright, providing the opportunity for a person to realize
4 the gain that he should get from the investment of his time
5 and resources; and, at the same time, not shutting off
6 the advancement of technology in a field which is just
7 burgeoning, and has not leveled out, by any means.

8 JUDGE FULD: Does that answer your question?

9 MR. PERLE: Yes.

10 MR. LACY: You spoke of the varying effectiveness
11 and character of protection under the Trade Secret concept
12 in the different States.

13 Could you make any general statement about the
14 varying degrees to which the States, or the varying require-
15 ments the State might have as to the degree of precaution that
16 the proprietor has to take to maintain it as a secret; how
17 limited; at what point his making it available to a
18 number of licensees or users has diluted its secrecy and
19 made it no longer protectible as a trade secret?

20 MS. NYCUM: There is very little experience
21 with protection of trade secrets of this sort. There isn't
22 a standard in the industry as to what kind of security you
23 ought to invoke in protecting a computer program. I know of,
24 really, only the Ward case, in which the Judge there laid out
25 some standards that he saw at the time, based on the first

1 impression to him.

2 He said, "Well, you cannot get in by a list
3 of telephone numbers -- unlisted telephone numbers. You
4 have to have an identification number that is particularly
5 yours and only yours, and you have to have an account
6 number. And this seems to me to be enough protection
7 of that trade secret. It is not open to everybody."

8 Now, that standard may change, because these
9 people have kept that program in source form -- you know,
10 an unreadable form on the system. It is possible, of course,
11 not only to have a program in object form, which is only
12 machine readable, or he would have equipped it so that
13 the standard of what would be adequate protection would get
14 tougher as time passes.

15 MR. LACY: Suppose the mode of access is not
16 permitting the people to have an on-line access to the program
17 in a proprietor's computer, but is done in the form of
18 licensing the use of it, and providing the licensee with
19 a tape embodying the program.

20 How generally could one offer it to licensees,
21 and how much would he have to police whether they did or
22 did not, in fact, confine it to the licensed uses, before
23 you feel he no longer possessed a trade secret?

24 MS. NYCUM: I don't know the answer to that. It
25 is one that I would like to know.

1 MR. WEDGEWORTH: I just wanted to ask a new question

2 As I understand your testimony, it appears that the
 3 problem does not lie with the type of protection that
 4 you considered--as I looked at all of the possibilities--
 5 since you have indicated that the major problem is in
 6 determining that some unauthorized use has taken place.

7 So I would raise the question: Does it really
 8 make any difference whether it has copyright protection
 9 or not, if the major problem is to determine the unauthorized
 10 use?

11 MS. NYCUM: Well, I may have unintentionally misled
 12 you. There is a second consideration. All of these have
 13 arisen under a trade secret situation. It is a limited
 14 experience but, if the trade secret protection is something
 15 that is less than adequate at the present time, ^{it is} because of
 16 the problem with categories in software and tangibles,
 17 and the fact that at least four out of eleven computer-
 18 intensive States that we looked at do not have any kind
 19 of trade secret protection, as such, in the criminal code,
 20 and "use" for their Larceny Statutes or Theft Statutes being
 21 the common law definition which insists that you take and
 22 carry away the personal property of another with the inten-
 23 tion of permanently depriving him of the use thereof, and
 24 it makes it necessary to take something away permanently,
 25 depriving the owner of the use, and that that something is

1 tangible.

2 MR. WEDGEWORTH: Let me see if I understand that.

3 A major difficulty in detection is the extreme
4 variability in the law under which you would prosecute him.

5 MS. NYCUM: Once you protected the perpetrator,
6 there is a difficulty in the protection, to begin with.

7 MR. WEDGEWORTH: Yes. I understand.

8 MS. NYCUM: The next step is finding something that
9 you can use, essentially, against the activity.

10 MR. WEDGEWORTH: Yes.

11 MS. NYCUM: And there is the problem with
12 categorization, under the existing non-trade secrets
13 specific Statute.

14 MR. WEDGEWORTH: It would be the Federal Statute
15 that would improve that. Let's take that one step beyond
16 that. Taking that into consideration, I get the implication
17 that a very limited kind of protection may be appropriate
18 in terms of protecting the investment that has gone
19 into it. For example, it might be possible to, say,
20 limit this protection to five years, with compulsory licens-
21 ing or something to that effect.

22 Is that moving in a direction that would be
23 appropriate, in terms of the kind of protection you think
24 might be useful?

25 MS. NYCUM: I think it depends on the sort of program

1 you are talking about.

2 MR. WEDGEWORTH: The reason that I bring up the
3 limitation of time is because we know how fast the whole
4 scene changes. I don't see the kind of activity where you
5 are going back looking at programs that were developed
6 for first generation computer hardware, you know, to
7 develop new programs for. That is the kind of time frame-
8 work that I am looking at.

9 MS. NYCUM: It has been said, however, there are
10 certain machine-independent programs which will have a useful
11 life considerably longer than other machine-independent
12 programs. So I could not say, flatly, that five years
13 is a good time, for example.

14 MR. WEDGEWORTH: I understand that. I used that
15 as an illustration to get the concept on the table.

16 Even though there are people who would say that
17 these machine-independent programs might have an independent
18 life--to look at the activity in terms of the development
19 of the equipment and the development of programming, it is
20 inconsistent with the activity.

21 Would you not agree?

22 MS. NYCUM: That is true. I am reminded however,
23 of a conference a couple of months ago of the IEEE ---
24 the Electrical people -- and, there, it was stated that the
25 feeling of some of their state-of-the-art practitioners

1 was that the curve which has gone expeditiously high
2 is going to level off in terms of computer development
3 generally. Therefore--since you are considering a very
4 long piece of legislation--that you might begin to wonder
5 whether some of these things will be good for a longer
6 time.

7 MR. DIX: One brief question, in this area, that
8 I think you have not touched on. The question is this: Is
9 there a difficulty in detecting -- I will use the word
10 plagiarism. Suppose you have one program here, and there
11 is another program here that you might suspect may have
12 been derived from the other one.

13 Doesn't this raise a whole series of intellectual
14 problems whether, in fact, it is like the other one, or
15 is not like the other one?

16 MS. NYCUM: Yes. I have heard, recently, of a
17 case that is now going on -- and I speak very generally.
18 It was not, certainly, any infringement of any of your
19 rights because my programmer did it from scratch in three
20 weeks time. The proof is very difficult, but that raises
21 a red flag, you know -- a massive software programming
22 job, to have someone else magically develop it in three
23 weeks. So there are a lot of things that can be used.
24 Of course, the one that is used in books is also applicable--
25 where you simply put in an instruction which does nothing--

1 if it is present in the other's program.

2 MR. DIX: Then you catch him red handed!

3 MS. NYCUM: It is an evidentiary problem.

4 VICE-CHAIRMAN NIMMER: That is an extreme
5 difficulty.

6 MR. DIX: But that is different from stealing
7 a can of beans. You catch him with the beans, and you
8 know they are your beans.

9 MR. LACY: Just a comment on that.

10 MR. SARBIN: I suggest that the statistics show
11 that we are only catching 15% of the bean stealers!

12 (Laughter)

13 MR. LACY: Since the question of whether copyright
14 would be enforcible in this area as a thing to watch,
15 I think perhaps it should be pointed out that it is almost
16 the reverse of the "beans" case. It may be extremely
17 hard -- even impossible -- to detect that a program has
18 been stolen. But it is not nearly as difficult to dis-
19 cover that, having been stolen, it is being used--if it is
20 an extensive program. It is a little bit like stealing a
21 Mona Lisa. You may be able to get it out of the Louvre,
22 but what are you going to do with it once you do it?

23 You have a really, really major, quarter-of-a
24 million dollar program -- a half-million-dollar or \$2 million
25 program -- addressed to solving a particular kind of operation

1 It is fairly easy to see who is using it.
2 I don't think you would have too much of a problem there.

3 One last thing: I think one of the things that has
4 the
5 come out of this is that/trade secret and copyright that
6 have been suggested are somewhat alternate methods of
7 protection. The whole thrust of copyright is always
8 that the way you get it is by publishing the work; by making
9 it available; by offering it to the public in general--
10 and copyright is your reward for so doing it.

11 The whole thrust of trade secret protection is
12 that you get it only by keeping it a secret.

13 They are almost diametrically opposite, in the
14 social goals they serve. It is not at all necessarily
15 true that copyright is a restrictive device-- keeping
16 material from the consumers.

17 MR. PERLE: There is a third mode: unfair competitio
18 where it is published.

19 VICE-CHAIRMAN NIMMER: There is also what is,
20 presently, "common law copyright". Under the new law, there
21 will be the Statutory copyright for unpublished works, where
22 there is not the necessity of even registration.

23 JUDGE FULD: Which I think is a good place
24 to recess. Thank you both very much.

25 (Whereupon, at 12:30 o'clock, p.m., the meeting
26 was recessed until 2:00 o'clock, p.m., on the same day.)

- AFTERNOON SESSION -

JUDGE FULD: Good afternoon, gentlemen.

Are you Commissioner Puckorius?

COMMISSIONER PUCKORIUS: I am Commissioner Puckorius.

JUDGE FULD: Will you be here with others to address us?

COMMISSIONER PUCKORIUS: Yes. There are others that might be here:

George Dodson, Assistant Commissioner for Automated Data Management Services;

Isaac McKinney, Chief, Procurement Policy Branch, Automated Data Management Services;

Robert Coyer, Director, Office of Management Policy and Planning; and

Ms. Allie B. Latimer, Assistant General Counsel, G.S.A.

JUDGE FULD: Are they going to sit with you at the table?

COMMISSIONER PUCKORIUS: Yes.

STATEMENT OF COMMISSIONER THEODORE PUCKORIUS
GENERAL SERVICES ADMINISTRATION

JUDGE FULD: We are here this afternoon to hear more on the software protection problem, from representatives of the Automated Data and Telecommunications Service.

Commissioner Puckorius is going to address us first.

1 COMMISSIONER PUCKORIUS: First, I would like to
2 simply define, in a few words, if I might, why ADTS --
3 Automated Data Telecommunications Services -- is interested
4 in this series of questions.

5 MR. PERLE: Can you tell us, first, what it is?

6 COMMISSIONER PUCKORIUS: Yes. ADTS is a service
7 in the General Services Administration charged with the
8 management of ADP and Communications within the government.
9 We are the procurement arm of the Federal Government for
10 ADP and related services, which we accomplish either
11 through actions ourselves, or through delegations to the
12 agencies involved.

13 The series of programs that exist call for
14 procurement, reutilization of equipment, software exchange
15 -- that is to say, utilization of software that exists in
16 government today to make it available to other agencies in
17 the government.

18 Budgeted dollars in this area, as you know,
19 for ADP -- in the Federal Government for 1977, \$3.95 billion
20 -- are for procurements that we make, or the procurements
21 that we authorize to other Agencies, and should approach
22 \$800 million this year. So it is a substantial business.

23 I would also like to add that, on the other
24 side of the house, we are responsible for the Federal
25 Telecommunications System -- sometimes called "free telephone

1 service". There has been a substantial wedding of
 2 Communications in the ADP activities in the government,
 3 particularly as we go more and more into computer systems
 4 that call for communications between central and remote
 5 terminal operations.

6 For your information, the budget for
 7 Communications for this year, in the Federal Government,
 8 for the control of ADPS is \$329 million. So we have a
 9 billion dollar operation plus, here, it deals with
 10 communications; computers and what runs computers; and
 11 software programs.

12 MR. CARY: Does the original figure that you gave
 13 for your ADP operation include software as well as hardware

14 COMMISSIONER PUCKORIUS: Yes, that is correct.

15 MR. CARY: Thank you.

16 COMMISSIONER PUCKORIUS: I don't know how you would
 17 like to conduct this session today. I hope it is just
 18 very informally. I have a series of questions that have
 19 been put to us. I would like to respond to those questions
 20 and have your reaction to the responses, and then have some
 21 dialogue.

22 Would that be acceptable to you, sir?

23 JUDGE FULD: Surely. You proceed, and we will
 24 determine our actions accordingly.

25 COMMISSIONER PUCKORIUS: The basic, or first

1 question put to us is:

2 Should a computer program be copyrightable?
3 Patentable? Or both?

4 Our position is that the computer programs
5 should be copyrightable, but we do not feel they should be
6 patentable.

7 We believe the criteria for patentability is too
8 difficult to establish with software.

9 The second portion: Should the type of protection
10 afforded vary according to the nature of the programs?

11 VICE-CHAIRMAN NIMMER: May I interrupt on that one?

12 COMMISSIONER PUCKORIUS: Please do.

13 VICE-CHAIRMAN NIMMER: Your answer seems to assume
14 that there should be protectability, and it only goes to
15 the nature of the protectability?

16 COMMISSIONER PUCKORIUS: That is correct. We
17 believe there should be protectability.

18 VICE-CHAIRMAN NIMMER: Can you expand on that --
19 why there should be protectability of any kind -- unless
20 you are going to do so later?

21 COMMISSIONER PUCKORIUS: Well, we believe that
22 the inherent nature of the software is: an intrinsic asset
23 or value that drives equipment, and drives the applications
24 to be used on the equipment -- the intelligence, if you
25 will, of information systems. I think they are created

1 so that performance can be accomplished.

2 We believe they should be protected because they
3 show creativity and they have a value.

4 VICE-CHAIRMAN NIMMER: Should everything of value
5 be protected by law?

6 COMMISSIONER PUCKORIUS: Well, I could say that
7 everything of value is protected, in that if you steal it,
8 it is illegal.

9 MS. KARPATKIN: How about the briefs prepared
10 by government attorneys?

11 COMMISSIONER PUCKORIUS: I sometimes question whether
12 that is creative or not -- or valuable. That is being
13 facetious--I don't have an opinion on that.

14 MR. DODSON: I assume you mean Freedom of
15 Information -- Freedom of Public Information?

16 MS. KARPATKIN: Well, they are filed in Court.
17 Anyone can copy them, or use the information contained
18 therein, without copying it directly. But they are creative--
19 and they are of value.

20 VICE-CHAIRMAN NIMMER: More basically, it is a
21 legal conclusion that something is "property", and
22 "property" is not necessarily everything that is of value.
23 Fresh air is of great value, but it is no one's property.
24 One would have to go back to extremes.

The point is: There is a secondary consideration

1 besides value before you start to put the fence and
 2 sig property around it.

3 COMMISSIONER PUCKORIUS: Yes, I guess that is
 4 correct.

5 MR. DODSON: I would be glad to argue with you
 6 on the fresh air one, if you add some value to it
 7 other than the God-given right, such as the air reduction
 8 business. If you create liquid oxygen, or liquid nitrogen
 9 out of air, with the added value, you do have a copyright
 10 what is protectable.

11 VICE CHAIRMAN NIMMER: Well, ideas are not property,
 12 right? By virtue of the First Amendment, if for no other
 13 reason -- but the idea as such -- the abstract idea --
 14 no one can have a property right on that, for social
 15 reasons that seem to be good and sufficient as to why people
 16 should not be able to have a property right on abstract
 17 ideas.

18 I am trying to get at the social reasons. You may
 19 well be right; that they should be protected, but I would
 20 not simply assume that.

21 COMMISSIONER PUCKORIUS: Let's back off for
 22 just a moment, if we might, and talk about what we are
 23 creating.

24 First, there is the legal brief, which-I think--
 25 is an excellent point that we could argue on.

1 The concept of software -- which we are addressing
2 here -- is a series of decision logic, if you will, which
3 creates a program that can drive many different kinds of
4 applications. Its use can be substantial, and it can be
5 used over and over again.

6 I find that different than a brief which may be
7 a precedent-setting thing, but it is not used every day
8 in some kind of application, and the value -- as I see
9 value in this particular case -- is that if it isn't there,
10 someone is going to have to generate another vehicle to
11 accomplish his task and that is value, in terms of cost,
12 to generate it over and over again.

13 That is why I say if it is value--if someone
14 created it so that it can be used--we think it should be
15 protected.

16 MR. MC KINNEY: The computer program, or the
17 software, really represents a man's ideas that he has taken
18 and has put into a specific logic. It, indeed, is a product
19 of his efforts; and when the finished product is completed,
20 it is a product of his efforts.

21 When you get into software, it is quite expensive,
22 and without some protection, there is concern that the
23 necessary human resources would not be devoted to the
24 development of software, in the absence of some kind of
25 protection against the product that he is creating.

1 MS. KARPATKIN: Is there evidence to support
2 that last proposition?

3 MR. DODSON: At least on the commercial market,
4 there is.

5 MS. KARPATKIN: Yes. Well, taking the situation as
6 we find it today, can we reason backwards and say, because
7 this has been a growing and expanding industry, we have to
8 assume that the quantity and quality of protection today
9 is satisfactory?

10 MR. DODSON: Let me respond to that, in part
11 because it really has not grown as predicted.

12 If you go back to your commercial, general purpose,
13 software market five years ago, everyone was gearing up
14 to produce massive quantities of this to replace the
15 manufacturers' software, if you would, and go into business.
16 It simply has not occurred. That is one of the big
17 disappointments. For one reason or another, protection
18 may be an element of it, independent corporate firms
19 went into business and out of business very rapidly in
20 the last three or four years.

21 MR. SARBIN: Well, many things happened in the
22 last three or four years that were unanticipated. Certainly,
23 one would have to attribute some of that to outside
24 influence. At the same time, we have not heard anything
25 from anyone here about the computer industry as a whole --

1 software or hardware -- that was different. The word
2 "burgeoning" was used several times -- "burgeoning industr

3 Growth figures for the industry certainly would
4 support what Ms. Karpatkin is saying. There has been
5 tremendous growth.

6 MR. MC KINNEY: Granted, there has been tremendous
7 growth but, in dealing with the marketplace, they are
8 now relying on trade secrets to protect those rights.

9 Some of them have fixed copyright labels, and are relying
10 on that. Some of them have used a combination of the two.

11 If the "trade secrets" breaks down, then they
12 have the copyright protection behind it.

13 Indeed, this protection is there, and in the
14 licensing agreement, they get quite adamant on the
15 restrictions on use.

16 So, indeed, there is protection, and I think
17 this has been one of the contributing factors that has
18 caused the investment in the growth.

19 There is protection now.

20 COMMISSIONER PUCKORIUS: I think the question
21 that is being raised here is: You question our proposi-
22 tion that they are being copyrighted.

23 We say that because, from our experience, we
24 find that there is a need for some kind of protection, whether
25 it is trade secrets, copyright, or what-have-you. We believe

1 that there is a need for that kind of support to permit the
2 industry to continue to invest in the development of new
3 vehicles for sale.

4 MS. KARPATKIN: Could you develop, a little, why
5 it is that the General Services Administration has such an
6 interest in the industry?

7 COMMISSIONER PUCKORIUS: Because we procure over
8 \$6 million worth, a year, of this kind of product, and we
9 are working diligently in establishing what we consider is
10 the government's right to software which is both equitable
11 to the government, and equitable to the vendors and
12 suppliers. In fact, we now have established a standard
13 Solicitation Document, which deals specifically with the
14 government's right to computer software.

15 MR. DODSON: Without the software, of which --
16 Commissioner Puckorius is right -- \$6 million last year
17 was the charge for general purpose software supplies to
18 the government. Some of that was the unbundling of
19 manufacturers' software as opposed to independent vendors.

20 The \$3 billion remark he addressed earlier
21 would have no purpose for existing. The function served
22 would be futile -- it would not exist without the software
23 that is essential to it.

24 I think the overall interest in causing software
25 to be developed -- as Mr. McKinney said -- is the vital

1 part of automation. Without it being developed, your
2 automation will not exist.

3 MS. KARPATKIN: Is the best way:
4 for it to be developed by outside manufacturers rather
5 than by the government?

6 COMMISSIONER PUCKORIUS: I don't think you can
7 answer that question with an across-the-board "yes" or "no".
8 I think we have to look at specific instances, and, indeed,
9 we do. When we award contracts for specially designed
10 software to satisfy specific government requirements, we call
11 for the unlimited right, use, and title to that software.

12 If, however, a contractor, under his normal
13 mode of operations, is providing other services, such as data
14 base management, computational tele-processing services,
15 and uses his own proprietary package to provide that
16 service -- which is reflected, perhaps, in his economical
17 cost to us -- that software is his, and not ours.

18 MR. WEDGEWORTH: Mr. Chairman?

19 JUDGE FULD: Yes, Mr. Wedgeworth.

20 MR. WEDGEWORTH: Let me ask: In terms of the scope
21 of your responsibilities for ADP, what benefits would
22 derive -- would be derived -- by your agency by the applica-
23 tion of copyright to this office?

24 MR. MC KINNEY: Well, right now, we are faced with
25 a dilemma every time we go to industry to contract for

1 software and for the design and development.

2 If, indeed, we had a standard industry practice,
3 we would be in a better position to negotiate with industry
4 on a common basis. And that is one of the things that we
5 are looking for--if we can come up with a mechanism that
6 industry will use to protect. It puts us in a position
7 to know what we are facing when we go to the marketplace.

8 MR. WEDGEWORTH: I don't understand that.

9 MR. MC KINNEY: Well, a copyright, or a work that
10 is copyrightable and is copyrighted; along with that, we
11 would assume that certain rights would accrue to the man who
12 leases that. There would be certain restrictions, and we
13 would know what they are.

14 Now, we rely on trade secrets, and there is a
15 different body of rules governing the protection of material
16 covered by that.

17 MR. WEDGEWORTH: You are speaking of your agency
18 as a consumer of software?

19 MR. MC KINNEY: As a procurement agent. And what
20 we are trying to do is to obtain for the government the rights
21 to use software, and our concern, primarily, is with use of
22 proprietary packages. When you get into those that are
23 specially designed and developed, then this is another body.
24 There, we are talking about additional rights and titles.

25 MR. WEDGEWORTH: Let me see if I can boil this down

1 more to my level of understanding.

2 You are saying that, if there were standard
3 industry practice which provided certain kinds of protection,
4 then it would be easier for you to get a clearcut exemption
5 from that?

6 COMMISSIONER PUCKORIUS: No! Let me say it to
7 you this way:

8 In the real-life world that we have in
9 the government today, there is a very broad marketplace
10 for the software industry. If we could establish a set
11 of standards that says: GSA--not as a consumer but as
12 a procurer for the government--could procure this software
13 package with unlimited right for use throughout the
14 government. That would be one criteria which could be very
15 simply understood by the vending world, and they would
16 price it with that understanding.

17 MR. WEDGEWORTH: Which is an exemption from
18 some other kinds --

19 COMMISSIONER PUCKORIUS: Let me say, "perhaps,
20 yes". Versus what happens today, it is a gray world. How
21 does a software firm know that we procure their proprietary
22 software package? It does not universally become information
23 throughout the government. He might want to sell it. I
24 am using this just as a pure example, now: A package
25 for \$20,000 a copy. We could use a thousand copies within

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1 the government. Now, we are not going to pay 1,000 times
2 \$20,000. But he thinks that is his market price.

3 What protection does he have if he sells us
4 one copy and we cannot use it universally throughout the
5 government? That is the problem you are faced with.

6 MR. MC KINNEY: As the conditions now stand,
7 when we contract for software, we address specific limita-
8 tions in each and every agreement, and they differ from
9 manufacturer to manufacturer; from product to product.

10 MS. KARPATKIN: What is the matter with that?

11 Isn't that the free enterprise system -- mixed
12 marketplace?

13 Why is that bad?

14 MR. DODSON: It is not bad; but it is recognizing
15 a property right and our procurement costs for the
16 government -- I would like to go to your question earlier --
17 are diminished by the fact that a commercial market exists
18 and, therefore, when these people plan to create -- do their
19 marketing planning -- they include both the commercial
20 and the government market.

21 I don't know what their protection is on the
22 commercial side. I suspect that since the government has
23 morals, we are more likely to honor our contracts, not to
24 frivolously copy, reproduce, and disseminate, in violation
25 of our agreement.

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1 I don't know what happens in the commercial
2 marketplace, but we urgently need protection in the
3 commercial marketplace for their property right, so that
4 they will make that investment for that purpose.

5 We would like to, only, pay our pro rata share
6 of the development.

7 You asked an earlier question. You inferred:
8 Why doesn't the government just develop it for itself?

9 In a high technology area, where a commercial
10 market has developed, it is the general policy -- and we
11 can go behind that, if you like -- to rely on the commercial
12 marketplace, rather than the government, doing the development.

13 MS. KARPATKIN: Don't you have any of your own
14 programs?

15 MR. DODSON: The program is based in the general
16 policy.

17 MS. KARPATKIN: Does the government write any
18 of its own programs?

19 COMMISSIONER PUCKORIUS: Substantial numbers!
20 But they are, usually, not general purpose software. They
21 have unique, functional applications: payroll, logistics
22 applications; scientific applications; going-to-the-moon
23 applications.

24 In the figures that were being quoted, for
25 example, the government bought analyst-programmer services,

1 the purpose of which was to write software to the tune of \$2 million,
2 last year. These were to write unique functional applications
3 packages.

4 MR. LACY: Do I understand something you said
5 earlier: that you would like to be able to buy the right
6 from a contractor to make an unlimited use throughout all
7 installations of the government, of a computer program,
8 recognizing the price for that would be substantial? But
9 you did not go on to say -- but I thought you were on
10 the point of saying -- that contractors might refuse to do
11 that, today, because they would lose their trade secret
12 protection, and they would not be as willing to give you
13 a blanket government-wide right, even at a high price,
14 as they might be if they felt more confident of their
15 copyright protection?

16 COMMISSIONER PUCKORIUS: I could say that, yes!
17 The point that I was making, however, at the time, was
18 the question that vendors have today of: what assurance
19 do they get--if we buy one copy--that we won't make it
20 frivolously available across all of government--simply
21 because it is a huge marketplace.

22 MS. KARPATKIN: What is the answer to that
23 question?

24 MR. DODSON: We give a contractual assurance.

25 MS. KARPATKIN: Why isn't that enough of an

1 assurance? Isn't the Government's word on a contract
2 sufficient assurance?

3 MR. DODSON: Let's say that a government employee
4 violates that trust. I am not sure where the rights would
5 follow; whether the employee would be personally responsible.
6 I don't know whether the government would be responsible,
7 if an employee, outside of his normal duties, misappropriated
8 it.

9 MR. SARBIN: I would like to suggest, Mr. Chairman,
10 that these gentlemen go ahead through their other questions
11 because as I perceive it, when I get to a question like
12 No. 6, I find an interesting relationship between the
13 conversation we are now having and the response to the
14 question.

15 Moreover, I think we can come back to these
16 questions that have to do with the premise. They do, however,
17 address themselves to some very practical questions: How
18 the copyright notice should be affixed, and so forth, that
19 we have to get to. So may I suggest that we do that?

20 JUDGE FULD: Yes. Would you follow that
21 suggestion, and continue with the other questions?

22 COMMISSIONER PUCKORIUS: Well, sticking with
23 Question No. 1 -- because there are a couple of other
24 questions that I would like to answer on this. You ask:
25 What is the length of time that the protection should be

1 available, assuming that we are going to have protection?

2 We believe that the length of time that the
3 copyright should be applicable should be attuned to the
4 technology. There is no need for excessive protection
5 beyond the applications, on obsolete systems.

6 What that really says is -- I think I may be
7 contradictory later on -- the current copyright laws are,
8 what? Twenty years?

9 MR. DODSON: We were under the impression --

10 MR. CARY: Twenty-eight years.

11 COMMISSIONER PUCKORIUS: We are under the impression that a
12 software system lasts about a system's life and, to us,
13 a system's life is, apparently, about seven, to eight, to
14 ten years.

15 Is that correct?

16 MR. DODSON: Yes.

17 COMMISSIONER PUCKORIUS: It seems to us that that
18 probably is an appropriate length of time, because what
19 they were designed to run is changed. The technology
20 has changed over the years.

21 MR. DIX: Excuse me. When you say a "system's
22 life", you mean a computer "generation", to use another term?

23 COMMISSIONER PUCKORIUS: Or an information system's
24 life. Unfortunately, our hardware technology has
25 advanced at a continually accelerating rate. Software

1 designs, in terms of the applications systems, are still
2 dragging. We have a very powerful computer still running
3 punch card applications--used only to a small degree in
4 the capabilities of the new scale computers.

5 That is a problem of both long range planning
6 and adequate systems and design.

7 I think that is outside of the scope of this
8 discussion, but it is definitely a problem.

9 The second question you raised was: Should the
10 copyright protection of computer software be limited to the
11 right to make and vend copies of the program, or should the
12 right extend to the use of a program to operate a computer
13 in a manner similar to the performance right in a musical
14 or dramatic work?

15 We believe that protection can, and probably should
16 be, achieved through both copyright and licensing processes.
17 Whether or not better policing of multi-passage and reproduc-
18 tion of software would occur with tougher copyright regulation
19 would ultimately depend upon the terms and conditions of
20 contract between software developer and user. Such terms
21 could just as well be exacted via licensing agreements--
22 or at the time software is sold or leased under a
23 copyright arrangement. However, we don't believe that the
24 copyright process should be considered as the vehicle for
25 controlling use of software.

1 Once you establish the fact that there is a
2 copyright, permission to use the copyright--with the laws
3 of copyright, let's not set up a whole new policing operation.

4 The third question: What constitutes copying
5 of a computer program? Making a new version in similar
6 media? Inputting the program into memory for execution?

7 We believe that any action involving the use of
8 a software package involves copying. To use it, it must
9 be read into the computer. There are two pieces we have
10 to look at:

11 One is the documentation side. That would be flow
12 charts, computer listing, what-have-you. That, obviously,
13 is the narrative which we would refer to in terms of
14 copyright protection. But the uniqueness of software is
15 that, once that is punched in the cards, or transmitted
16 in some technique into the memory of the computer, it may
17 be in another format. But it is still the same document,
18 and we believe that should be copyrighted and protected.

19 And we believe that if one computer was to
20 feed the information from Computer X to Computer y, that is
21 copying that program.

22 Any use of written narrative, or the machine
23 processible cards, tapes, and so on, we consider the
24 program as software, and, if you are going to establish
25 protection, you are going to have to establish protection--

1 not only in the written documentation, but how it is used.

2 MR. CARY: Excuse me. Right there -- is that in
3 conflict with the statement at the end of your second
4 question, where you said that it should not be considered
5 as a vehicle for controlling the use of software?

6 COMMISSIONER PUCKORIUS: We don't believe you should
7 have a policing vehicle. What we are trying to say is that:
8 whether it be in a book or a program listing, or a
9 resident in the computer, or some computer-readable document,
10 all of that is a part of the software and should be
11 considered as copywritten. To only establish that that
12 is true, or to establish that that is true, we have a
13 recommendation further down that says that we should make
14 some type of an imprint that identifies--to whoever is the
15 operator--the fact that this is a part of a copywritten
16 document.

17 I guess we have to find another word besides
18 "manuscript". A copywritten product. How is that?

19 The next question was Question 4:

20 What type of additional legal protection for soft-
21 ware is needed--as distinguished from more effective
22 enforcement of the present law?

23 Well, of course, we believe it is recognized
24 that the copyright laws were not, originally, written to
25 protect technological innovations such as computer

1 software. Explicit legal wording, which considers the
2 unique environment in which software is used, should be
3 developed. We are just using -- what do we call it? A
4 product, a manuscript, or what is it?

5 An FPR -- Federal Procurement Regulation --
6 addressing Government Rights in Computer Software has been
7 developed and will be ready for Government-wide review
8 shortly. This regulation attempts to accommodate different
9 industry positions regarding the use of trade secrets and
10 copyrights at the time of contracting with the Government.

11 We have copies of that section with us, do
12 we not?

13 MR. MC KINNEY: No. The FPR staff has made
14 arrangements to provide the Commission with copies of that
15 as soon as it is available. Mr. Walker.

16 JUDGE FULD: Thank you.

17 COMMISSIONER PUCKORIUS: The fifth question is:

18 How can additional protection for software be
19 granted in such a way that it does not lead to a
20 monopolization of the basic ideas and structure upon which
21 the particular program is based?

22 We believe that the existing trade secret and
23 copyright processes are generally adequate.

24 There is an additional sentence I would like to
25 make. It is not the one I have here.

1 We feel that the process is adequate. We did
2 talk about some better definitions. There is another
3 sentence that I want to add later. I don't have it with
4 me right now.

5 Bob?

6 Robert Coyer, my Director of the Office of
7 Management Policy and Planning.

8 MR. COYER: The meaning of the second sentence,
9 I think, is that if there are any additional provisions
10 or deviations that need to be culled out, they can
11 probably be handled in the contractual arrangement made
12 by the Software Director.

13 MR. PERLE: What do you mean by that?

14 MR. SARBIN: What do you mean by "culled out?"

15 MR. COYER: Any uses -- special restrictions
16 on the use of the software which the vendor may feel
17 give him added protection, which he, perhaps, has discovered
18 in the course of vending his software -- perhaps he
19 has discovered ways of violating the copyright or
20 trade secret laws, within the meaning of the law. He may
21 want to build-in some sort of caveat into his contract.

22 What we are saying, here, is that we think,
23 possibly, at the contract time, if the vendor has some
24 special caveats, they can be negotiated,

25 COMMISSIONER PUCKORTUS:--And should not be any part

1 of copyright protection.

2 MR. DIX: Do I understand that you gentlemen
3 are saying, then, that this Commission could make no
4 recommendation for a change in the copyright law -- some
5 future revision of the copyright law -- as it affects
6 computer software?

7 COMMISSIONER PUCKORIUS: No. I think that we
8 said, in the sentence before that, that we need some better
9 explicit legal wording which considers the uniqueness of
10 the software environment.

11 MR. DIX: But you say that "Existing trade secret
12 and copyright processes are adequate".

13 COMMISSIONER PUCKORIUS: In terms of the scope
14 and the breadth, we don't feel there have to be any more
15 restrictive copyright laws.

16 Is that not correct?

17 Is that the consensus of opinion -- that it need
18 be no more restrictive. It just should be more definitive.

19 VICE-CHAIRMAN NIMMER: Well, if I may focus on the
20 other side of the coin--on that question:

21 What he is getting at is: If you are licensed
22 to have a given computer program, you know the nature of
23 that program.

24 Now, suppose you want to accomplish the same
25 results that that program accomplishes -- this is difficult

1 to articulate -- but using the same abstract idea of the
2 program, but filling in your own specific steps -- not
3 copying the steps from the program that you had been
4 licensed.

5 Is it possible for you to do that without --
6 in other words, merely copying the idea and not copying
7 what the copyright owner calls the expression of the idea?

8 Is that physically possible to do?

9 That is important -- that the idea not be
10 monopolized.

11 MR. DODSON: It has not become a legal or a
12 contractual issue with us.

13 VICE-CHAIRMAN NIMMER: I am not talking about it
14 from a legal standpoint.

15 MR. DODSON: No. I am saying it has not been
16 so; based on the record, there is no problem.

17 There is a concept in the use of computers
18 and computer programs called "flow charting" -- Automated
19 Flow Charting. Some of the more profitable -- one or two
20 more profitable -- software packages on the market are some
21 form of an automated flow chart.

22 The basic concept of flow-charting out, diagramming
23 for visual consumption in a computer program, is the nut of
24 the idea. How you go about it -- there are two or three
25 approaches. We, by the way, contract for several different

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1 types of flow charters--and have developed, within the
2 government, other flow charters -- all on the same basic
3 concept of thought process. The same product.

4 Nobody in the commercial market has ever
5 questioned the government's right to design and prepare
6 its own flow charts, except in the area of commercial use.
7 As a general policy, you should not be doing that. But
8 they have not questioned how it is done, or why we do it.

9 COMMISSIONER PUCKORIUS: You are touching on
10 what I think is the real difference in this copyright area,
11 in that the idea -- there is no monopoly on the idea, as far
12 as I have ever seen in this position as Commissioner, and
13 ten years of consulting work as a Management Systems
14 Consultant. The idea may be implemented with a whole
15 series of algorithms, for instance, but the idea of
16 a production control system -- a new technique -- once
17 that new technique has been seen by other people in the
18 industry, it is copied, somehow. It is altered, perhaps;
19 and you don't use that program that has been designed, that
20 may have taken 100,000 man hours to develop, the next
21 man can probably do it in 60,000 hours, because he has your
22 idea -- but not that particular product. You are not
23 monopolizing any ideas, I don't believe.

24 Yes, sir.

25 MR. LEVINE: My understanding, earlier, from Mr.

1 McKinney, was the reason GSA was suggesting copyright
2 protection was so there would be a uniformity of the
3 protection, so that the government could deal with each
4 software house.

5 COMMISSIONER PUCKORIUS: Or simplicity in the
6 whole procurement process. If you are in the contracting
7 process, that is correct.

8 MR. LEVINE: You are saying -- my thought was --
9 that, therefore, what you are recommending to the
10 Commission is that we recognize copyright protection for
11 computer software, and you are suggesting that copyright
12 preempt any other forms of protection, because if the other
13 forms of protection continued to exist, then you are still
14 in the same boat that you were when you came in, this after-
15 noon. But this question seems to suggest that you are saying
16 that you have explicit copyright protection and continued
17 trade secret protection and contractual types of protection.

18 MR. COYER: One thing we found is that the
19 industry is our best policeman, in a lot of ways--in terms
20 of any possible violations of procurement regulations, as
21 well as things like this. I think if they discover end
22 runs of some sort, or new ways to bypass, let's say,
23 a copyright -- still keeping within the order of the law --
24 they will let us know about them.

25 I think there is a particular twist that has

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/? 1 been introduced by some user of the South Berwick, which
2 seems to violate the copyright law. They called it to our
3 attention and it may be necessary to acknowledge that this is a
4 frequently, or surreptitiously-managed violation of their right,
5 and we can build that into the negotiated contract.

6 MR. LEVINE: My question is: Should trade secret
7 protection continue to be accorded to computer programs?

8 COMMISSIONER PUCKORIUS: Let us caucus here.

9 (Brief recess)

10 COMMISSIONER PUCKORIUS: I think I have an answer
11 for you, Mr. Levine.

12 MR. LEVINE: Thank you.

13 COMMISSIONER PUCKORIUS: That may make some sense.

14 I think Bob touched on the fact here, for a moment,
15 that we believe the industry itself is the best policeman.
16 The industry is not sure what they would like. It seems to
17 us that we don't believe that copyrighting should be
18 paramount over trade secrets, or even patentability.
19 I might add that we feel that there are cases where we feel
20 that there are cases where copyrighting is a good vehicle;
21 that trade secrets are a good vehicle; even contractual
22 relations are a good vehicle. We are not ready to take
23 a firm position as to one over the other--or to the exclusion
24 of any one, at this time.

25 It is less a legalistic question than an industry

1 position; industry itself finally deciding where it is
2 most comfortable.

3 MR. DODSON: Let me add to that: We have some
4 conflicting regulations in the government, right now, on the
5 Federal procurement regulations and the Armed Services
6 procurement regulations, on rights in data: rights to
7 computer software.

8 The industry worked with GSA to develop the
9 clauses that we now use in our uniform procurement
10 document. I think you have been given a copy of that.

11 The general purpose of the industry did not agree
12 with the Armed Services regulation: It was developed
13 with the cost-type contractors -- the R & D contractors --
14 who have an entirely different problem than the commercial
15 vendors.

16 The commercial vendors are now stating that they
17 refuse to do business with the Department of Defense for
18 their systems and involved software-until they can get
19 these rights in data to their commercial product
20 straightened out. It is a very vital issue to us to
21 resolve -- at least with industry -- how they will do
22 business.

23 I think Mr. McKinney's point -- this is his
24 dilemma -- is some acceptable and uniform vehicle for
25 doing business with industry.

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MR. LEVINE: I understand that, but I think that is somewhat contradictory with your position, after caucus, that all forms of protection should remain in effect.

I can understand from the producer's side that the maximum protection; every route available--fine! From a consumer's standpoint -- which you, as procurers are -- I could understand your wanting sufficient protection to protect the producer so that you can have access to the materials you want, but if there is adequate protection in, say, copyright, then isn't it to your interest that you not be encumbered by other forms of protection, such as trade secrets?

MR. DODSON: Well, let me get to the dilemma that I was facing.

We have the same software product that the vendor is protecting under trade secrets and, at the same time, he has fixed a copyright label on it.

You have both protections on the same package.

VICE-CHAIRMAN NIMMER: Mr. Levine asked: Would you want the trade secret protection, as a matter of law, eliminated, so that you don't have to worry about that, and still have access to the goods.

COMMISSIONER PUCKORIUS: Let him try to identify the protection on that package--not slap two on there and let us figure out which one takes precedence.



1 VICE-CHAIRMAN NIMMER: Your question is: Why
2 go through that dilemma? Why not pick one, and not the
3 others?

4 COMMISSIONER PUCKORIUS: What we do is--based
5 on the protection he has specified--we have resorted to
6 specifying in the contract the rights that we get. This
7 goes back to her (Ms. Karpatkin's) question. We have
8 been able to do business with them, even in this.

9 MR. DODSON: Let me add one more thing.

10 The trade secret, as far as doing business from
11 an industry point of view, is a very weak vehicle under the
12 Freedom of Information Act, and the Court rule is, on the
13 Freedom of Information Act, that no matter how trade
14 secrets are marked and identified, at least within the
15 government, the employee who has possession of this material
16 has to reach an independent judgment as to whether, indeed,
17 that material constitutes a trade secret. He is held
18 personally responsible for reaching that independent
19 judgement. It is a very indefinite type of protection,
20 so we are in the Federal Courts frequently on whether
21 or not it should be released, or can be released, and then
22 there are the reverse Freedom of Information suits on the
23 types of judgements that are reached.

24 MR. LEVINE: That is why I am surprised that
25 you did not say, "Yes, copyright alone. trade secrets."

1 causes more problems than we care to deal with."

2 COMMISSIONER PUCKORIUS: The answer to your
3 question is that we are not ready to take a firm position.

4 MR. SARBIN: Does that mean that you really
5 don't want to state it as positively as you do in your
6 answer to Question 2?

7 COMMISSIONER PUCKORIUS: Well, I question whether
8 I say it more firmly. I say, " * * * probably should be
9 achieved through both copyright and licensing processes."

10 MR. SARBIN: That is about as affirmative as we
11 ever get, on a work of this subject.

12 Now you are saying you are not quite so sure
13 about that.

14 COMMISSIONER PUCKORIUS: I am saying that I
15 believe we have not researched adequately to know what
16 the impact would be if we said, "Our position today is
17 that trade secrets will no longer be accepted in the
18 software area. The only approach would be the copyright
19 approach".

20 I think that there would be a cascading impact
21 through the industry which may very well turn out to be
22 right in the end, but we are not ready to take that
23 position.

24 MR. FRASE: Mr. Nimmer, can something be copy-

1 righted, and still be a trade secret?

2 VICE-CHAIRMAN NIMMER: In the unpublished area
3 under existing law it would be common law practice --
4 not statutory.

5 MR. FRASE: I am talking about statutory copyright.

6 VICE-CHAIRMAN NIMMER: But, under the proposed
7 new law, statutory copyright would include statutory
8 protection for unpublished works which are not in the
9 register. So I think it would be considered.

10 MR. COYER: We are still left with a dilemma
11 which has been proposed by one of your other questions.
12 That has to do with what constitutes "copyright law."
13 I suppose the new law would have to acknowledge the techno-
14 ology in situations where you are reading a program into
15 a memory. As a matter of fact, are you violating a copyright
16 law at that time?

17 ^{way}
18 The only /you can use the program is to actually
19 copy it. Receive it.

20 COMMISSIONER PUCKORIUS: I think we addressed
21 that in more specific language required in this environment.

22 MR. COYER: It is that sort of thing that puts
23 us in this dilemma and forces us to say, later on, that new
24 language is necessary to take care of this unusual techno-
25 logy.

JUDGE FULD: Go ahead, Commissioner, with the other

1 questions.

2 COMMISSIONER PUCKORIUS: Okay.

3 The next question is Question No. 6:

4 Would stronger copyright protection for software
5 encourage increased sale of proprietary software products,
6 and less reliance on restrictive licensing arrangements
7 based on trade secrecy, now common in the software market-
8 place?

9 We cannot give you a "Yes" or a "No". We believe
10 it depends on the industry's cost-payback analysis,
11 marketing plan, and contractual arrangements made with
12 the client.

13 The environment is substantially different,
14 depending on what the deal is, so to speak.

15 Generally, though, I would assume that, if we
16 could zero in and say we are going to stick with copyright
17 protection -- that is the main thrust of the protection --
18 and it was understood and agreed to by industry -- which is
19 a big problem -- I think there would be an opening up of
20 the sale. It is a question of--once it is understood:
21 would it be used? I think that is the problem.

22 MR. PERLE: When you contract out--when you have
23 somebody develop a program for you--you are paying for it.

24 Do you pay more if you are going to use it

1 throughout the government than if you are going to use it
2 just in one area?

3 The program does not exist except in your
4 Commission, in effect?

5 COMMISSIONER PUCKORIUS: Philosophically, the
6 answer should be that there would be no difference.
7 Philosophically, the answer should be, "No difference".

8 MR. PERLE: Have you had experience in this area?

9 MR. DODSON: You have procurement going on
10 right now for that Cobalt Diagnostic Program.

11 COMMISSIONER PUCKORIUS: We have acquired very few
12 packages to be developed -- general purpose packages to be
13 developed. My feeling -- and, really, I am going to
14 refer to one we acquired about four years ago -- was that
15 the only breakpoint that you got in cost was whether you
16 got only government rights--or you got total rights.

17 Did you leave the producing vendor with commercial
18 rights after it was over?

19 That question arises.

20 Who has commercial rights, or total rights, versus
21 the government?

22 To the extent of the development itself -- I draw
23 a line between the development, the distribution, and the
24 maintenance -- just the sheer development -- we will stop
25 at that point -- of the creation, makes no difference.

1 Once you go to multi-point, then you go into soft-
2 ware maintenance and distribution, and there is additional
3 incremental expense. It makes a difference between whether
4 the government took possession and maintained and distributed,
5 or whether the vendor did; but that is/entirely aside from the
6 development. The point of development only reflects whether
7 you get total rights, or just government rights and leave
8 the commercial rights.

9 MR. LACY: Which do you, typically, do? Take total
10 rights; or do you leave the vendor with the commercial rights?

11 COMMISSIONER PUCKORIUS: In my very limited experience,
12 -- I will address this just to that one instance -- we left
13 the commercial rights.

14 MR. LACY: But you assume that there would be a
15 differential in price? That is, there would be a price
16 reduction if you do not completely recover the initial cost
17 from it?

18 COMMISSIONER PUCKORIUS: Absolutely!

19 MR. LACY: If you want a program in some area
20 where you are aware of a need in the government for software
21 to deal with a problem, how do you go about finding out
22 whether that might be commercially available, and whether
23 there might be existing software?

24 COMMISSIONER PUCKORIUS: Establish the requirement
25 and publish the request for the proposal to include the

1 design and development of that particular program. In
2 that process, if someone has a commercially available program
3 to satisfy it, they can come forward and offer it as
4 a part of the published response to the RFP.

5 Obviously, there is no one central depository
6 or library for available programs, today.

7 MR. LACY: Not commercially.

8 COMMISSIONER PUCKORIUS: Not commercially; although
9 the major manufacturers of ADP all have substantial library
10 listings of what is available. We have no Library of
11 Congress that controls all programs. They are not all ready.
12 They are attempting to start that in the government, right
13 now, with an ADP sharing program--which will be run through
14 the Department of Commerce. It has just been established --
15 where we are going to register, if you will, the software
16 within the government.

17 MR. LACY: If you develop a program yourself,
18 in-house, in the government, or, alternatively, buy total
19 rights from a vendor to a program, what is your practice--
20 if private interests want to use the program?

21 Do you make it available free?

22 Do you charge just the physical cost of re-
23 producing a tape or a set of punch cards with the program?

24 MR. DODSON: I think the question has come up,
25 legally or officially: Is a program developed by the

1 government, and the government rights and the copying
2 documentation available under the Freedom of Information
3 Act?

4 My understanding -- and Ms. Latimer back there
5 is our attorney -- is that it has been determined that it
6 is not available under the Freedom of Information Act.

7 MR. LACY: That is probably the National
8 Library of Medicine case--in which it was determined that
9 "a data base is not a program".

10 COMMISSIONER PUCKORIUS: I understand that the
11 determination is that it is not available.

12 MS. LATIMER: Although there are conflicts in the
13 government, some Agencies have, tentatively, taken the other
14 position that they would make a program available.

15 MR. LACY: Well, NASA for example, under their
16 basic legislation, is supposed to spread technology so,
17 under their basic legislation, they make their technology
18 available. But that is a separate aspect.

19 MS. LATIMER: Well, we are taking the position
20 that it is a copyrighted program and was not intended to
21 be covered under the Freedom of Information Act.

22 MR. LACY: Would not the government be willing
23 to sell or lease access to that right?

24 You know, not claiming its right under the Freedom
25 of Information Act, but just the same way you lease out a

1 a piece of real estate.

2 COMMISSIONER PUCKORIUS: I don't think there is a
3 policy established; that if you would go through the
4 annals of the various agencies of the government, you will
5 find, in some cases, that programs have been made available
6 to educational institutions, and even to commercial institu-
7 tions that perhaps may support the government in certain
8 areas.

9 In other cases, there is a great secrecy devolved
10 around the software. So I don't think you have a common
11 approach to how the government reacts.

12 MR. LACY: There must be a number of programs or
13 things that are common to government and industry, like
14 inventory control; payrolls; fund transfers; and that sort
15 of thing.

16 COMMISSIONER PUCKORIUS: I would hate to tell you
17 how many payroll systems are currently under design within
18 the government today, and have been for the last twenty
19 years; and we still don't have a standard payroll system
20 within the government!

21 As a matter of fact, within GSA, we are designing
22 our own (system), and another Branch of our own Service is
23 selling the same system to other Agencies.

24 JUDGE FULD: Do you want to continue with the
25 other question?

1 COMMISSIONER PUCKORIUS: Yes. Thank you.

2 No. 7: How should the copyright notice be affixed
3 to the software product?

4 In some human, readable language, on reels,
5 card decks, and in headers of tape, discs, or what-have-you.

6 I certainly don't think that you could put it on
7 every card in the card deck.

8 Question No. 8: In what form should registration
9 copies of programs be deposited with the Library of Congress?

10 Listings? Tapes? Flowcharts? Complete
11 documentation packages?

12 Our belief is that a better answer could come
13 from the Library of Congress, itself--with input from
14 the National Archives.

15 By the way, we have had some historical problems
16 in this area. I might touch on one:

17 You know, they store program tapes and there
18 was no standard established, and low and behold! Over
19 the years, the machines that generated the tapes have
20 become obsolete and discarded, and they cannot even read
21 the tapes in some instances. There is a need for an answer--
22 from both the Library of Congress and from NARS.

23 Question No. 9: How would the changes which
24 you suggest affect the proprietors and users of software
25 products?

1 The Government has always honored and
 2 negotiated any limitations imposed by software vendors in the
 3 contract process. Beyond existing trade secret or copyright
 4 regulations, contractual agreements can accommodate most, if
 5 not all, software usage problems such as identification
 6 or use.

7 We see no major change required there.

8 Those are the nine basic questions that were asked.
 9 There were eight very specific questions, and I can quickly
 10 go through those so you can have them for the record.

11 JUDGE FULD: If you will, very briefly.

12 COMMISSIONER PUCKORIUS: All right.

13 1. Do you purchase computer programs for federal
 14 agency use?

15 Yes, we do, through schedules contract
 16 process.

17 2. If so, what is the approximate annual
 18 volume and cost?

19 From six to ten million dollars, for general
 20 purpose software.

21 If you are going to talk about specific application
 22 in software, up to \$200 million, annually.

23 3. Do we employ a standard purchase contract?

24 Yes, we do. There is a standard software schedule
 25 contract. We would be happy to make it available.

1 JUDGE FULD: Please do.

2 MS. LATIMER: We have copies.

3 COMMISSIONER PUCKORIUS: What we are giving you is
4 a specific case example, not a model document -- but a
5 specific case example.

6 Do we distribute federal agency programs outside the
7 federal government?

8 The GSA does not. No.

9 If so, in what way and on what terms?

10 That is not applicable.

11 Would you see any advantages or disadvantages to
12 the federal government in the strengthening of copyright
13 protection of computer programs?

14 I guess, as a summary of the first nine questions
15 asked, we say that possibly--by developing legal language
16 which accommodates unique environment in which software
17 is used and differentiates it from works such as musical
18 scores or textbooks. As the computer technology
19 advances, new questions of uniqueness continually emerge,
20 as for example viewing software on remote CRT's, or
21 terminals; software stored on chips, and so forth.

22 What we are saying is that, as the technology
23 emerges, we are going to be in a slightly fluid state;
24 and if we are going to use unique language, we are probably
25 going to have to change the unique language, or amend the

1 unique language. But the general concept of the copyright
2 law would go forward.

3 Would you see any advantages or disadvantages in
4 new legislative authority for Federal agencies to copyright
5 computer programs?

6 Beyond what we have now, the answer is "No."

7 JUDGE FULD: Thank you very much. We appreciate
8 your presence.

9 COMMISSIONER PUCKRIUS: Thank you.

10 DISCUSSION ON STAFF PLANNING FOR PHOTOCOPYING
11 RESEARCH STUDIES

12 JUDGE FULD: We are going right on with the
13 meeting, and will discuss the Staff Planning for Photocopying
14 Research Studies.

15 Prior to that, Arthur Levine has a couple of
16 announcements.

17 MR. LEVINE: Just a couple of brief announcements:

18 The transcripts of the last meeting are available;
19 and if you would like copies, I think the best thing would
20 be for us to send them to you in the mail. Unless someone
21 says he doesn't want them, we will send them to everybody.

22 We will hand out to you a copy of the material
23 that Ms. Nycum quoted from on the statistics that you
24 asked about. We will pass that out.

25 We have a copy, in our library, of the final report
on Computer Abuse prepared by Ms. Nycum, Don V. Parker and

1 S. Steven Wood, and it will conform with your library
2 side loan.

3 MR. LACY: Does that mean that you will xerox
4 a copy for us?

5 MR. LEVINE: No. I think it is unprofitable
6 to do it. We may prevail on NSF to make additional copies
7 available to us.

8 MR. WEDGEWORTH: I think it would be helpful
9 for our basic library, if you could provide the Commission
10 with copies that are identical.

11 MR. LEVINE: I will see if we can get enough
12 copies.

13 MR. WEDGEWORTH: Who published it?

14 MR. LEVINE: Stanford Research.

15 I think we can get enough. We won't have to
16 copy it.

17 Actually, it has an improper copyright notice, I
18 believe, so perhaps we can copy it with impunity!

19 (Laughter)

20 JUDGE FULD: We will now consider the Staff
21 Planning for Photocopying Research Studies. I will merely
22 add, for the Commissioners' benefit, that after we have
23 completed today's agenda, we will have an Executive Session
24 for a short time--after our audience leaves.

25 (Discussion off the record relative to

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1 approximate time of adjournment.)

2 MS. KARPATKIN: For later reference, can you give
3 us the title of the document that starts with: "8. Copy-
4 writing data"?

5 MR. LEVINE: Yes, I will get it. I will have
6 that for you.

7 JUDGE FULD: Mr. Levine, do you want to pick
8 up the discussion on Staff Planning?

9 MR. LEVINE: It is the Miller Study, but I will
10 give you the title.

11 MS. KARPATKIN: I know. I know it is the Miller
12 Study. I would like the title and the citation for it.

13 MR. LEVINE: Yes.

14 What I would like to do is turn this
15 over to Bob Frase who prepared the material that we sent
16 you on the Research and Statistical Studies that we
17 are concerned with contracting out, and have him speak
18 to them, if he will.

19 MR. FRASE: Both of these are based on the following
20 premise: that no matter how the last details of the
21 Revision Bill are worked out, there will be a substantial
22 amount of photocopying that requires permission, or licensing
23 or getting authorized copies. A large bulk of it will
24 probably be in for-profit organizations.

25 Both of these studies are related to that question

1 dealing with that problem in filling our Statutory obliga-
2 tions to make recommendations not only on Copyright Legisla-
3 tion but on Copyright Procedures -- of which we are reminded
4 by Senator McClellan's recent letter -- and we hope the
5 Commission will get on this -- of developing methods of
6 licensing.

7 The ~~study~~ proposed contract to the University
8 of Indiana Graduate Library School deals with the Publishers'
9 side of this and, particularly, in the area of scholarly,
10 professional, technical, scientific journals, to assess
11 public attitudes: How they would like to go about licensing;
12 or providing authorized copies; or ideas about royalty rates;
13 about kinds of services they might give; whether they would
14 like to do it through authorized agents, or through
15 themselves.

16 The contract is proposed to this organization because
17 they have a basic list of 2,600 U.S. journals of this kind
18 which they developed and categorized by scientific or
19 technical discipline and, also, whether it is a publication
20 by a society, a commercial publisher, or University Press,
21 or others. They have all of this information on computer
22 tape, so they would be in a much better position to do it
23 quickly, and cheaply than anyone else.

24 There has just been passed out a letter from
25 them indicating the breakdown of their costs, which you will

1 see comes to just under \$10,000.

2 It will cost \$10,000 to do this in a period of
3 three months.

4 The timing of the start of the program would
5 probably be after the final shape of the revision material
6 on photocopying is known -- that is, after the Conference
7 Report. I say that because it will have some influence
8 on the questionnaire and, also, make it a good deal more
9 realistic to the respondents that something is in existence.

10 And, secondly, because starting then, the
11 responses -- these opinion responses and factual responses --
12 from the publishers will have no impact on the Bill, itself.

13 If Publisher X says, "I would like to charge \$5.
14 a copy for the authorized reprint", it might have some impact
15 on what the Bill might be because it might be regarded by the
16 other side as an exorbitant price. If this is all done
17 after the Bill is put to bed, then we need have no fears
18 of that kind of impact, and we will get a very much better
19 response.

20 There is no one here from the contractor --
21 the proposed contractor -- but I think that, together
22 with the actual draft of the questionnaire which was
23 received in advance -- which is not frozen but still open
24 to amendment -- it will give you the basic information
25 that you need to act on the proposal.

1 JUDGE FULD: What is the cost again?

2 MR. FRASE: \$10,000.00.

3 MR. WEDGEWORTH: By what procedure do you anticipate
4 modifying this questionnaire?

5 MR. FRASE: Any input for any omission and, also,
6 trying it out. This has already been started in an informal
7 way with a few journal publishers to see whether they
8 think it can be done.

9 MR. WEDGEWORTH: Is there going to be a formal
10 pre-test by this institute?

11 MR. FRASE: Probably not formal, no.

12 MR. WEDGEWORTH: I would suggest that that
13 become a part of the contract.

14 MS. KARPATKIN: Could you explain that a little
15 more for the benefit of the rest of us?

16 MR. WEDGEWORTH: Well, it is simply a standard
17 procedure so that you get some verification that the
18 answers that you are intending to elicit from the questions
19 are, indeed, the answers that people are inclined to put
20 down.

21 For example, I look at several of these questions,
22 and I am not sure what the objective is, and I can see several
23 different questions being asked, and then one question,
24 and the result is that you get back data that you cannot
25 use. And the simple way of handling that is that you

1 develop the instrument, and then you test it by having a
2 few people respond to it. Then you analyze those responses
3 to see if that is what you really want.

4 MS. KARPATKIN: How is that questionnaire
5 developed?

6 MR. FRASE: I developed it, essentially, and
7 tested it informally with Mike Harris.

8 Would you have any objection to the pre-test not
9 being part of the contract, but being done informally in
10 advance by the Commission Staff?

11 MR. WEDGEWORTH: No. I am saying that I think
12 the investigators ought to do this because, if you are
13 contracting the job, it seems to me that this is part
14 of the job. It is their integrity that is going to back
15 the results of the study, not the Commission, you know.
16 They are performing a service for the Commission.

17 MS. KARPATKIN: This is really just exploratory:

18 If what Bob says is correct, should not the
19 investigators have a greater input into the questionnaire
20 before the questionnaire is made final and, perhaps, --
21 and this is a further exploratory question -- should that
22 input come even prior to the pre-test, but come in connection
23 with a review of the questionnaire to see whether it is the
24 best possible questionnaire for the purpose desired, since
25 they have the expertise that we are paying for.

1 MR. WEDGEWORTH: I assume that this was for
2 illustration purposes.

3 Am I correct on that?

4 Or did you intend this to be the actual questionnaire
5 that they would use?

6 MR. FRASE: I intended this to be the actual
7 questionnaire, subject to any inputs from the Commission,
8 for an informal pre-test.

9 So far as the input by the investigators is
10 concerned, you will see that, in this letter which has just
11 been handed out, there is a statement in the third paragraph,
12 the second sentence:

13 "We have looked over the draft questionnaire
14 and find that the fourth draft, dated
15 May 20, 1976, already incorporates suggested
16 changes which had occurred to us from the
17 reading of the previous drafts. Other suggested
18 changes may, of course, emerge from the pre-
19 test which I understand you are planning,
20 on closer scrutiny, after a contract award."

21 MS. KARPATKIN: Where is that sentence?

22 MR. FRASE: This is the last two sentences of
23 the third paragraph, the first page.

24 MS. KARPATKIN: They leave the door open for
25 closer scrutiny after the contract award.

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MR. FRASE: That is right.

MR. PERLE: Bob, what sort of rate-of-return do you expect on this?

MR. FRASE: The time it takes, and the time in question -- which are largely opinion -- it should be good. The unanswered question is the political one -- the emotional, the attitudinal one. If it comes after the Conference Committee meets and we are clear as to what we are operating on -- what the future holds -- I think it ought to be pretty good because they then have to deal with the problems of authorized copying.

MR. PERLE: Is there any track record on surveys, and getting responses on this type of thing?

MR. FRASE: Not directly. Frye used the same basic list of 26,000 technical and scientific journals for the second part of his survey of library interaction with journal publishing.

However, his response was quite poor--but what he was asking for was three years of back-counting information in a standard form; and every publisher did it differently-- so even those who cooperated and were on the Committee like Wiley -- it took him six months because, you know, he was asking for information that they did not keep in their accounting records as a matter of course.

The kinds of things that are asked for, here, ~~are~~

1 are attitudes; prices; would you do it yourself; would
2 you have an agent do it; and so on.

3 MR. PERLE: What percent return do you have to
4 get to have/^astatistical basis?

5 MR. FRASE: Since we are dealing with named
6 titles, I would say it would depend on -- there would be
7 variations of statistical validity within categories,
8 because you might get a better return from University Press
9 than from a commercial publisher. You might get a better
10 return from Science and Chemistry, say, than from the
11 Humanities. It is an attitudinal thing, so I think
12 if you get 50% it would be very helpful in future planning.

13 MR. WEDGEWORTH: Just to move this along: I would
14 like to strongly support the idea of collecting this data.
15 However, I would say that--in commending the staff for
16 developing this draft of the instrument that will be used--
17 that it is important for this to be reviewed by the
18 investigators themselves, and that they give us their
19 assurance that the information will be clean, by pre-testing
20 it prior to actual data collection.

21 MR. PERLE: All they are going to do is distribute
22 and calculate?

23 MR. FRASE: Yes.

24 MR. PERLE: They are not going to investigate?

25 MR. FRASE: That is right.

1 MR. PERLE: Who is going to do the bouncing back?

2 MR. FRASE: Oh, yes. They are going to do the
3 follow-up. The procedure would be to send out a post-card
4 with a questionnaire and a package and an explanation,
5 and have that come back as to who is in charge in that
6 publishing house; when they could get it back. There would
7 be a deadlineset, If people did not send the stuff in,
8 there would be two follow-ups; one by mail and one by
9 telephone. They would have all of that chasing to do.

10 MR. WEDGEWORTH: I am not really sure. Who is
11 going to analyze the data if they are just going to
12 distribute and tabulate?

13 MR. FRASE: We would supply them with the table
14 shelves that they would tabulate the results on.

15 MR. WEDGEWORTH: That is the tabulation.

16 Who is going to tell us what it means?

17 MR. FRASE: The table shelves would be set up to
18 reflect the questions you want answered, and they would do
19 the table shelves; then the Staff would make the report
20 as to what it means.

21 That job could be given to the contractor, too,
22 but I think that probably we know more about it than they
23 do.

24 MR. WEDGEWORTH: I guess I really misunderstood
25 the thrust of the project.

1 You are really doing an in-house project.

2 MR. FRASE: The mechanical work is contracted out.
3 That is right.

4 JUDGE FULD: How do the Members of the Commission
5 feel about it?

6 Do you want approval for it?

7 VICE-CHAIRMAN NIMMER: Personally, I am for it-but
8 I am curious. For example, if the tenor of the results
9 are such that it indicates that most publishers are amenable
10 to licensing at reasonable rates of reproduction, then
11 what does that mean for us?

12 Does that mean on the one hand that, therefore,
13 we should recommend compulsory licensing because,
14 politically, it would be easy to achieve?

15 Or does it mean, on the other hand, that you don't
16 need a compulsory license because they will do it, regardless
17 of whether they are forced to by law?

18 MR. FRASE: I think it depends on the spread of
19 the results. I think it would be helpful in answering a
20 consideration of that question.

21 JUDGE FULD: I wonder if we may consider passing
22 on this -- passing on whether we approve or not.

23 All those in favor of the presentation?

24 MS. KARPATKIN: Could we have a motion?

25 JUDGE FULD: I intended to put it in the form of a

1 motion.

2 Those in favor of the project indicate by a
3 show of hands.

4 MS. KARPATKIN: Which is defined in what document?

5 JUDGE FULD: The letter from Indiana University.

6 MR. WEDGEWORTH: Mr. Chairman, as I said earlier,
7 I am in favor of collecting the data and proceeding in this
8 way, but I am afraid that we have not really put together--
9 in a succinct form--what it is we are going to do, and why
10 we are doing it, with the instrument that we are going to
11 use to satisfy that question.

12 I just don't want to see us move forward because, i
13 you ask me right now, I would have extensive modifications
14 that I would recommend for this instrument. I think
15 it is entirely inappropriate, unless I have a clear idea of
16 exactly where we are going, and that is what I really don't
17 see here in the proposal to do the study.

18 MR. FRASE: Bob, do you mean what the purpose
19 is?

20 MR. WEDGEWORTH: Yes.

21 MR. FRASE: The purpose is to try to get some
22 indication, from this group of journals which we have
23 classified--and which are now in the heavily-copied area--
24 as to the attitudes of publishers about supplying
25 authorized copies, or us doing it directly, or through

1 agents setting up their own clearing house, or using
2 somebody else's clearing house, and what they think the
3 royalty rates might be; what the appropriate kinds of
4 service might be; and so on.

5 MR. WEDGEWORTH: What is the significance of the
6 attitude?

7 MR. FRASE: This is based on the presumption
8 there is going to have to be an area of authorized photo-
9 copying, and that practical methods of dealing with it will
10 have to be developed, and this is one of the Commission's
11 assignments.

12 These are the people that have the product which
13 will have to be supplied in an authorized fashion.

14 MR. WEDGEWORTH: Well, that is the reason that
15 I am, really, saying that I would like to see a proposal--
16 because I am not sure that the constraints to moving or not
17 moving in that direction are a matter of attitudes.

18 MR. FRASE: Well, it is a matter of attitude,
19 and it is also a matter of fact.

20 MR. WEDGEWORTH: On what would you base that
21 statement?

22 MR. FRASE: Well, the facts would be -- and
23 some of the questions deal with: Are you willing to make
24 this freely available to anybody?

25 Are you going to make it free to non-profit

1 libraries?

2 Any kind of a clearing house system has to have
3 some idea as to what the volume of business is, in order
4 to make it work.

5 MR. WEDGEWORTH: I think you misunderstood my
6 question. You are right about that. To me, the issues
7 that may be involved in considering a clearing house or some
8 kind of a licensing system relate to: what is the extent
9 and nature of the activity to which it will be applied --
10 a series of questions in that particular area.

11 My question to you was: What does attitude
12 have to do with this, because attitude cannot change the
13 facts.

14 VICE-CHAIRMAN NIMMER: May I try this one?

15 I think it may go partly to this: Assuming there
16 is going to be an area that is not subject to the 108
17 exemption -- presumably, there is going to be some area
18 that is not subject to the 108 exemption for which payment
19 must be made if photocopies are duplicated.

20 Right?

21 As to that area, if you further assume --
22 as I do -- that it is desirable to have some kind of
23 automatic licensing -- that the libraries don't have to get
24 advance permission to reproduce -- then that leaves, I
25 think, only two alternatives.

- (1) A voluntary clearing house ala ASCAP; or
- (2) A government-imposed compulsory license.

In evaluating which of those two routes would be preferable, I would suppose it is relevant -- although not necessarily decisive -- the attitude of the publishers toward joining in a voluntary clearing house system.

VICE-CHAIRMAN NIMMER: Where are you disagreeing?

MR. WEDGEWORTH: I am not disagreeing at all! I am just saying I am not sure that I really understand where you are. If I were going to approach the question that you just raised, I am not sure that I would go out and ask anybody his opinion of that in general. I would try to define what the problem is and the factors that are determinative in the problem, and lay those out, and ask some questions that were related to those.

VICE-CHAIRMAN NIMMER: To be more specific, on the clearing house, itself?

MR. WEDGEWORTH: Yes. The attitudes might emerge in their answers to those questions related to the determinative factors. But I don't think it would really be the attitude that would be my primary interest.

MR. APPLEBAUM: By that, do you mean you would not ask the question: "For 2,600 rabbits, how much more lettuce you would like to have?" You would ask the question of 2,600 publishers, "If there were a licensing agreement,

1 would you consider passing some of the fees on to the
2 individual authors?"

3 Is that what you mean?

4 MR. WEDGEWORTH: Yes. That is a question they
5 can respond to. Whether or not they like it -- which
6 I consider is an attitude -- to me, is somewhat irrelevant.

7 MR. FRASE: As a preference, for example,
8 you could ask, "Would you like to supply reprints yourself?"

9 "Would you like a cooperative proprietor's clearing
10 house to supply reprints?"

11 "Would you like something like a periodical bank,
12 developed by users, as a method of doing this?"

13 These are not "attitudes". These are preferences
14 with respect to various ways of going about this.

15 MR. LEVINE: In addition, there are questions as to
16 what their current practices are.

17 MR. WEDGEWORTH: I agree with that.

18 What I am saying is that: If I were to look at
19 this questionnaire as a researcher, I see that you have
20 several different kinds of things mixed up.

21 One is: What are you currently doing?

22 That is a very straightforward question to ask.

23 Do you presently provide a reprint service, or
24 some other kind of authorized reproduction?

25 Do you do this yourself, or do you make this

1 available through an agent?

2 Those are questions about current practices,
3 and then there are questions that could be asked that
4 build upon those questions about current practices that
5 project what they might do under certain circumstances.

6 What I am objecting to is asking what somebody
7 might do under undefined circumstances. I will give you an
8 example.

9 No. 6: "Will you be willing to authorize (and
10 to include a printed statement to this effect in each
11 issue) permitting non--profit libraries open to the public
12 to copy articles from all of your journals, current as well
13 as back issues?"

14 "Under what circumstances?"

15 It is a question that is almost unanswerable!

16 I would suggest to you that the answers that you
17 would get back would be unusable because it involves making
18 too many assumptions on the part of the person who is
19 making the response.

20 MR. FRASE: Well, the circumstances would be
21 that the Conference Committee has agreed on this kind of
22 photocopying provision, and this is the circumstance in
23 which some people are going to have to get permission, one
24 way or the other.

25 The question is based on the assumption -- which

1 may be wrong, but I think it is a fair one -- that a
2 certain proportion of journal publishers will say, "Okay."
3 We will let all non-profit libraries copy because it
4 is not that important to us."

5 Like the American Bar Association, they may have a
6 large membership, and it is not an economic matter for them.

7 MR. LACY: Couldn't that question be phrased,
8 "Are you willing", instead of "Would you be willing?"

9 MR. FRASE: Yes.

10 MR. LACY: Would you feel comfortable with that?

11 MR. WEDGEWORTH: No!

12 The point I am posing is -- what I am really
13 trying to get you to see is: What is the answer that you
14 are looking for? Then you back up and pose the question,
15 because I can say that different people making different
16 kinds of assumptions could give you so many different
17 answers that you don't come up with anything that is useful
18 in the end.

19 MR. LACY: I don't know what the assumptions are.
20 You are saying, "Are you willing?"

21 MR. WEDGEWORTH: What is the significance? What
22 is the significance of an answer if I say, "Yes."

23 MR. LACY: That means that you are willing to
24 authorize non-profit libraries to copy.

25 MR. WEDGEWORTH: Not necessarily!

1 MR. PERLE: What if you say, "No"? It may be
2 that you are not willing to show that little thing in your
3 magazine.

4 It is a multiple question.

5 It is a terrible question!

6 MR. WEDGEWORTH: That is all I am saying.

7 MR. PERLE: Legally, it is an objectionable question
8 You could not ask that question over objection in Court.
9 There are too many aspects all the way through.

10 I am not a statistician or an economist. I am a
11 market tester in our business, and I know the way we market-
12 test. We market test with the shortest possible questions
13 in the most unambiguous way that can elicit the shortest
14 possible and most definite response.

15 I, as a layman, look at this and I say, "Cripes!
16 I would not answer this! It raises too many questions for
17 me".

18 As a layman, I say that.

19 I asked you what response you were going to get.
20 If you get a 10% response on this, I think it is miraculous!

21 I think we have to get the data. I think this is
22 not adequate -- it is not the data that we want.

23 The data that we want really relates to punchy
24 little questions.

25 "Overall, are you willing to license?"

1 "If so, will you do A?

2 "Will you do B?

3 "Will you do C?

4 "Would you include this?

5 "Would you include that?"

6 And so on. Any question that is as long as
7 these are, cannot get answered. (Referring to questionnaire)

8 MR. LEVINE: Let me ask, then: You are not
9 opposed to what we are attempting to do?

10 MR. PERLE: We are charged with this. We have
11 to do it!

12 MR. LEVINE: It is a question of going back
13 to the drawing board and making the questions punchier.

14 MR. PERLE: With all due respect, I think we
15 ought to contract this out -- the whole job, including
16 the expertise in the drafting of the questions to elicit
17 the data that we are looking for -- not the answers, but the
18 data.

19 MR. WEDGEWORTH:--But which presupposes that we develop
20 a precise statement of what it is we are looking for.

21 That is what I think is missing--more than anything
22 else.

23 Now, there is no doubt that this data needs to
24 be elicited. I think that Bob knows very well the frame-
25 work within which he wants this questionnaire to operate.

1 MR. FRASE: One of the problems is, Bob, preparing
2 a supporting explanation at this moment.

3 We cannot say now, "This is what the Conference
4 Committee has decided, so these are the types of people
5 who are going to pay and these are the circumstances."

6 I think it won't be done until then, but if
7 we can have that as a background -- have this concrete
8 fact -- then the whole thing would be clear to everybody--
9 and the explanation can be a lot clearer.

10 JUDGE FULD: Why not postpone it until you have
11 that background?

12 VICE-CHAIRMAN NIMMER: You can know, can you not--
13 fairly well--that there will be a certain limited type
14 of reproduction that libraries may engage in without
15 paying. Beyond that, they will have to pay.

16 MR. FRASE: Beyond that, the whole prospect is
17 all for a "profit" world!

18 VICE-CHAIRMAN NIMMER: That is right.

19 ?... MR. WEDGEWORTH: But that is a perjurious
20 question. I think the issue is that you want it to
21 be precise as to what users can do--and what they cannot
22 do.

23 VICE-CHAIRMAN NIMMER: Why is that necessary
24 for publishers' purposes? Does the publisher have to know
25 in advance--before he says he will license--which uses are

1 permissible without a license?

2 MR. WEDGEWORTH: No. No. For the publishers, it
3 will apply as well. This is the information that I thought
4 we were eliciting; that we can foresee down the line
5 that it will be very clear as to how these types of works
6 are made available.

7 What I was objecting to is your stating it in
8 terms of: "We know that libraries are going to have to pay
9 for something".

10 Or saying, "I would like to see it looked at
11 from the point of because I don't have to pay if I
12 don't want it."

13 VICE CHAIRMAN NIMMER: We also know that publishers
14 are going to have to permit their work to be reproduced
15 in given circumstances.

16 MR. FRASE: Yes.

17 VICE CHAIRMAN NIMMER: But we are just focussing
18 on an area where payment will be required, if reproduction
19 is desired. We want to clarify that. I don't think we
20 would have to have that in an exact line--where the one
21 starts and the other one stops--to make these questions
22 now, or even for the publishers to answer them now.

23 MR. WEDGEWORTH: I don't think this is a
24 terribly complex problem, and I don't want to try to make
25 it so. I think it can be done very quickly, and it should

1 not cost a fortune to do it. And I would suggest that
2 we do try to work with these people, or someone else.

3 Frankly, I would be very suspicious of any
4 researcher who wrote back and said, "I find this questionnaire
5 exceptional in its present form", because, based on their
6 previous work there was a lot of very useful data produced
7 by that study; but it was in a stack like this, and if you
8 had a year to go through it, you might find it.

9 MR. LACY: In that connection, by the way, have
10 we data--or have we a research project in mind--to determine
11 just what copying of copyrighted works is now taking
12 place; and can we make a judgement about a licensing system?

13 MR. FRASE: Yes. That is another important
14 ingredient that is involved in the next project, the
15 Minitex project.

16 MR. PERLE: Is someone doing that project now?

17 MR. FRASE: Well, there is a project which
18 came out of a recommendation of the upstairs/downstairs
19 group, which was advertised for bids by the National
20 Commission on Libraries and Information Science, which
21 had two aspects:

22 One was to do a sample study of a month or two
23 months -- a sample of three types of libraries -- public,
24 special and academic -- on the nature and extent of
25 photocopying for inter-library loans.

1 The contract was let to Market Facts, which
2 is a big commercial firm which has done a lot of work in the
3 library field. Mr. Palmer, who was one of the principals
4 in the study, is here.

5 This Minitext Study --

6 JUDGE FULD: Let's finish with the first one.

7 Finish with the university.

8 Let's decide whether the Commission wants to
9 go through with it.

10 VICE CHAIRMAN NIMMER: May I throw in an additional
11 approach at this, or an additional question, or a series
12 of questions which were suggested by something that
13 Mr. Hersey said this morning:

14 Mainly: possibly drawing this line of distinction,
15 that we talked about, between scientific journals and
16 non-scientific journals. Another line of possible
17 distinction is whether the contributing authors are paid.
18 Now, I am not sure that we would want to recommend that,
19 obviously, but it is something that I think is relevant--
20 and something we ought to know about.

21 So, could there be a question or questions going
22 to that issue, with respect to each publisher, whether or
23 not the publisher, or someone, pays the contributing
24 authors, or whether they can submit it without them.

1 JUDGE FULD: May I ask you: Is it desirable
2 that we reconsider the form of the questionnaire and re-
3 direct it?

4 MR. FRASE: I think I would concur with Bob
5 Wedgeworth's suggestion that we get further input.
6 I would be willing to see the contractor make the pre-
7 test. Engage people, or, if anybody else on the Commission
8 wants to make suggestions as to the questions, fine! The
9 thing really cannot be frozen -- put under way in any
10 event -- until we have the basis of the Conference Report.
11 The factual situation, I think, is important here in various
12 ways, including the fact that this will make the thing real
13 to publishers of journals. They have been hearing about
14 Copyright Revision for a long time. They said it would
15 give them some incentive to respond.

16 MR. PERLE: Why is the Conference Report relevant
17 here? We have a Statutory charge, and that has nothing
18 to do with S.22.

19 MR. LEVINE: It goes to the question you asked,
20 Gabe, of the number of responses we would get.

21 MR. PERLE: Political?

22 MR. LEVINE: That is right. People would be more
23 willing and ready to answer these questions after Congress
24 has made known the direction it is going to go on library
25 photocopying.

1 JUDGE FULD: It is desirable that this be done
2 this year, with the budget that we have, and that we get
3 a response from the Commission before that period ends.

4 Can you not re-do it in line with what you have
5 said, and circulate it amongst the Commissioners?

6 MR. FRASE: Yes. We can go beyond June 30th.

7 MR. WEDGEWORTH: I would like to move that we
8 endorse, in principle, the idea of the study on soliciting
9 information from journal publishers with the understanding
10 that the staff, in conjunction with the Commissioners, will
11 review the instrument and expand the authority that will be
12 given to the principal investigators.

13 JUDGE FULD: You heard the motion. Is there a
14 second?

15 MS. WILCOX: Second.

16 JUDGE FULD: Do you have a question, Ms. Karpatkin?

17 MS. KARPATKIN: Yes. It may seem like a small point
18 but I don't know. I think the responsibility for developing
19 excellent questions in this survey should not be passed on
20 to the Commission. I think that, while it is quite nice
21 that we have some resident expertise on this Commission
22 over there, that the responsibility for improving the
23 questions to the point where they are regarded as very
24 good questions is the Staff's responsibility and, if the
25 necessary expertise is not on the Staff, then it is

1 certainly purchasable. It is a very highly developed field
2 -- asking questions for a survey -- and I think we can
3 have those questions readily converted into the kinds that
4 were being discussed without putting that burden on
5 Mr. Perle or Mr. Wedgeworth, or anyone else.

6 MR. FRASE: I would not object to that, at all.

7 Actually, I would prefer that you got that
8 outside but, if the Staff wants to do that, that is all
9 right with me.

10 VICE CHAIRMAN NIMMER: Are you speaking against
11 the motion?

12 MS. KARPATKIN: Well, I was trying to refine it
13 a little.

14 Yes. If I had to vote on it, I would vote against
15 it, because I don't think that the job of developing questions
16 for a survey should be the Commission's job. I think it
17 is a Staff function,

18 MR. WEDGEWORTH: Well, I withdraw the motion,
19 because I did not think that I had expressed that intent.
20 I certainly am not interested in developing questionnaires
21 for the Commission, but I also think it is our responsibility
22 to try to set some standards for the quality of those
23 questionnaires.

24 JUDGE FULD: Your motion was not that?

25 MR. WEDGEWORTH: That was not my intent at all!

1 JUDGE FULD: I just got the recommended principle
2 that the questions be developed and results obtained.

3 I don't think there would be any harm if the
4 Staff wanted to check with one or two of the Commissioners,
5 ex-parte, and determine whether it meets with their approval.

6 The motion, I think, is proper, in principle.

7 Can we have a vote on it, whether you agree with
8 Mr. Wedgeworth?

9 MR. WEDGEWORTH: Well, since it has been seconded,
10 let me state what I thought the problem is..

11 I think the problem is to obligate the funds
12 that we have available for the study which will allow us
13 to go forward and develop the actual study itself. This
14 puts us on record as being in favor of doing such a study
15 without committing us to the details of whatever that
16 study will be.

17 MR. LEVINE: We would like to officially obligate
18 the funds, though, by September 30. And I would say--just
19 in light of that motion--that it was not my expectation --
20 Bob suggested that Gabe Perle's people might look at this
21 as the questions were prepared. I think we can do this in
22 either of two ways that Ms. Karpatkin suggested: either
23 getting in official question writers, or developing them
24 ourselves. I just would like official Commission approval
25 of what we develop before we go ahead with the contract.

1 And I ask whether it is the Commission's wish that this be
2 done by the full Commission, or whether it be delegated to
3 a subcommittee.

4 JUDGE FULD: The Commission agrees in principle with
5 the formulation of a questionnaire.

6 Is anyone opposed to that?

7 (None)

8 JUDGE FULD: The motion is carried.

9 Are there any questions?

10 (None)

11 JUDGE FULD: Then I think it is up to the Staff
12 to prepare the questions with the help, if necessary, of
13 outside personnel.

14 MS. KARPATKIN: Further with respect to this,
15 there is an undertaking on behalf of the Commission
16 that no data of the individual publishers of journals
17 will be made public by the Commission.

18 Do I take it, then, it is a legal opinion that it
19 is immune from the Freedom of Information Act?

20 MR. LEVINE: I must say that I am not absolutely
21 certain on that. I am troubled by that.

22 MS. KARPATKIN: Certainly, I, as a Commissioner,
23 would not want to have the Commission make such a statement
24 in the face of the Freedom of Information Act in particular,
25 but some generalities, as well.

1 MR. LEVINE: This is a memorandum for the
2 Commission and it may be that we will not be able to do
3 that now. That information will be made clear to the
4 people responding to the questionnaire, as to whether
5 it is, in fact, "proprietary" -- not subject to the
6 Freedom of Information Act.

7 MS. KARPATKIN: The government has been in the
8 position of making this commitment to private corporations
9 and private interests, and not being able to deliver on
10 it! My organization has been a plaintiff in such actions.
11 So that I hesitate to be on either side of this box.

12 MR. LEVINE: It is not entirely clear that
13 the Library of Congress comes under the Freedom of Informa-
14 tion Act.

15 It is further unclear as to whether we come
16 under the Library of Congress. So there are uncertainties
17 on uncertainties.

18 PARTICIPANT: Is it important that we know the ~~iden-~~
19 ~~tities~~ of the people returning the questionnaire?

20 MR. FRASE: I don't think so!

21 PARTICIPANT: The question is whether it is
22 a Chemistry journal --

23 MR. FRASE: Yes. We would want to identify the
24 nature of it.

25 PARTICIPANT: Or what the circulation was; whether

1 it is a society publication, or commercial, or what.

2 (Simultaneous discussion)

3 JUDGE FULD: Time is running. Do we have
4 another contract that is to be considered?

5 MR. FRASE: Yes. The second one is a tabulation
6 of 130,000 interlibrary loan transactions by the Minnesota
7 System, over a period of six months.

8 In this case you were given the table shelves of
9 the type of information which could be derived from the
10 basic information which is on the interlibrary loan system
11 slips.

12 This is a kind of information which has never
13 been tabulated. It tells you what the impact of photocopying
14 is on the individual journals; over what period of time;
15 what kind of library; or what kind of users; and there
16 is a sufficient volume so that you can get some data which
17 none of the other interlibrary loan studies in the past
18 have ever yielded.

19 JUDGE FULD: Has the questionnaire been prepared
20 on this, too?

21 MR. FRASE: It is not a question of the question-
22 naire because this is using an administrative document
23 that records the facts about each one of these inter-
24 library loan photocopying operations.

25 This has taken a year's experience--tabulating

1 and analyzing the facts.

2 This information is valuable, again, for planning
3 for the future when there will have to be some kind of a
4 system of making an authorized photocopying arrangement
5 work.

6 It ties in with the contract that Market Facts
7 has for doing this two-part study: One a sample study of
8 interlibrary loans, and devising a clearing house mechanism
9 proposing various clearing house mechanisms.

10 It supplements their sample study, because it
11 is not a sample. It is a universe, and it will help fill
12 out some detail which is not available from the sample
13 study; and that is whether the sample is biased because of
14 the seasonality of the kind of samples that are selected.

15 It will help in devising various authorized
16 systems of authorized photocopying, because it would give
17 you some impact of the density of the business impacting
18 on journals.

19 The technical contracting arrangement would be
20 for the Commission to transfer -- for this Commission to
21 transfer funds to the National Commission for Libraries
22 and Information Science, which has the contract with
23 Market Facts. They would add some money of their own,
24 and this would be in the form of a supplement to the
25 existing contract of Market Facts.

1 So far as the National Commission on Libraries
 2 is concerned, their contribution would have to be made
 3 out of the Fiscal 1975 funds which expire on June 30 and,
 4 therefore, this expeditious method of supplementing the
 5 existing contract is the only practical one of going
 6 about it.

7 There are present: Doug Price, the Deputy Director
 8 of the National Commission on Libraries and Information
 9 Science, and Don King, the Director of the existing project
 10 and his associate, Jean Palmer, who has done many studies,
 11 in the past, on interlibrary loans. Also, since the basic
 12 data comes from Alice Wilcox's operation of Minitex;
 13 she is also available for questions.

14 Doug, would you like to say a few words and then
 15 Don King -- but very few!

16 MR. WEDGEWORTH: Excuse me, Bob. Before we
 17 start with question ^{ing} on this, could I ask a question
 18 about where we go from here?

19 Do you contemplate doing a similar study of an
 20 operation like the ISI in Philadelphia, or University
 21 Microfilms, which would be a for-profit operation?

22 MR. FRASE: Yes. I have gotten some basic
 23 records from ISI already, for example, as to the volume
 24 of their copying of the most copied journals from BLLD to
 25 see what the matching up is. But I am sure ~~they would be~~

1 they would be willing to cooperate in giving us as much
2 parallel information as the Minnesota System has, that
3 may be yielded from their basic records.

4 I also have an inquiry in to John Humphrey of
5 the New York State System, where they have certain informa-
6 tion, on the computer, with respect to their interlibrary
7 loan network transactions. Since it is on the computer,
8 to the extent it gives us anything like this rich variety
9 of data that is available from Minitex, we would have a
10 parallel, there.

11 MS. WILCOX: I would like to state, for the
12 record, that this does pose some very real problems for
13 me, personally. One is conflict of interest but, secondly
14 -- or the possible conflict of interest -- but secondly,
15 that, basically, the fundamental belief/^{is}that the borrowing
16 library should be the library responsible for maintaining
17 records -- not the lending library. It is simply that
18 we have a tremendous body of data that is available, and
19 I would not want to be in a position of saying that it could
20 not be available. At the same time, it is awkward to be
21 sitting on the Commission, and not having it used.

22 MR. FRASE: Doug Price?

23 MR. PRICE: Well, I believe that everybody on
24 the Commission is familiar with the history of the study
25 NCLIS is doing.

1 We have let the contract for that basic study,
2 and we have some modifications which are in process, right
3 now, which came out as a result of suggestions made in the
4 proposal by the contractor.

5 At the same time, Bob approached us, and we do
6 have recognized shortcomings in this study.

7 The fine grain of the distribution curves, parti-
8 cularly in the area between the stuff that is obviously
9 heavily used, and the stuff that obviously is very rarely
10 used; that the slope part, with the small size sample
11 that we can afford to take and pay for, would be very
12 fuzzy.

13 The same thing is true with the distribution with
14 respect to time.

15 The more recent stuff--the heavily used stuff--
16 would be at peaks, but the slope of that peak would be
17 fuzzy.

18 Finally, we have asked for annualization. That
19 is what we need for the clearing house, or the royalty
20 payment mechanism -- feasibility examination. We need to
21 know what annual volumes are, and with the very major
22 seasonality of libraries and differences in these, by
23 types -- the academic libraries have different seasons
24 from public libraries, who have different seasons from
25 special libraries, and so forth. -- so we were a little

1 bit uncertain of this, when Bob approached us with Minitext
2 data being available. We can take a year's data and, with
3 the analysis available -- if we then take, as the year, a
4 year which includes the two periods where we are taking
5 our samples -- then we can adjust and come up with an
6 annualization fee which would be much more precise than
7 anything we can come up with otherwise.

8 As I say, we are very interested in this, too.
9 We are willing to make a contribution to the limit of our
10 resources .

11 For your purposes, the information is tremendously
12 valuable, I think, in comparison with what you can get from
13 other sources. It will provide you with a lot of informa-
14 tion which is very, very useful and at a very modest
15 cost, I think--all things considered.

16 JUDGE FULD: Bob, does this take into account
17 John Hersey's question?

18 MR. HERSEY: The question was whether this is a
19 study which will satisfy our need for data in the whole
20 universe of lending and photocopying.

21 MR. FRASE: Well, this is a State system that is
22 not limited to any particular kind of material. It
23 covers any kind of material: books, journals, periodicals
24 of all types. It will give you a snapshot of a year.

25 MR. HERSEY: I understand that.

1 What I wondered was whether we had in contempla-
2 tion any other studies that may supplement this, and give
3 us the entire range of data. We need to determine that.

4 MR. FRASE: I had an inquiry into the New York
5 State System to see what they have on this, and we can run
6 off and analyze what they do have. I don't think they
7 have as much detail as this. There are other State systems
8 that we can explore. There is the ISI -- a commercial
9 operation -- but that is all scientific, technical, and
10 professional--on 5,000 journals.

11 We will try to piece together wherever there
12 is some information which will feed into the picture --
13 which won't cost a million dollars.

14 MR. LACY: Isn't the real relevance the tying of
15 this to the NCL?

16 MR. FRASE: That is right.

17 MR. LACY: To the last study, because it
18 gives you a detailed study of one particular State for
19 one year, which will enable you to project better from it?

20 MR. FRASE: That is right. It makes their study
21 much more "providable".

22 MR. LEVINE: It is my understanding -- and
23 correct me if I am wrong -- that the type of data that is
24 available in Minitex really does not exist in that volume,
25 or in the form in which it can be used in other systems?

1 MS. WILCOX: As far as I know, I don't know anybody
2 else that has been so meticulous about keeping records!

3 (Laughter)

4 MR. FRASE: Don King?

5 MR. KING: There are two points that I think are
6 to be made here.

7 One point is that we are tying these data together
8 with the National Probability Sample that we are doing
9 with the libraries; and that we are using these data
10 to calibrate those data in a statistical sense. It is a
11 very, very useful tool.

12 The second thing is that I don't know of any source
13 where one can get sufficiently detailed data to be able
14 to get the distributions of usage, and it is a gold mine
15 from that standpoint. It is really very, very useful.

16 MR. DIX: Mr. Chairman, there is a document here
17 called: Questions relating to the Coding of the
18 Minitext Request Slips. On page two of that, there
19 are several things posed in the form of questions. I
20 simply would like to suggest that those be examined
21 rather carefully. For example, it says: "Language.
22 Probably worth coding in order to determine the amount of
23 foreign language material requested."

24 I think this is a relevant factor, for example,
25 and I think it ought to be included.

1 Down in the next category, the question is
2 whether it is worth coding for commercial publishers,
3 society publishers, or university publishers, and so on.

4 My answer would be "Yes". I think it is worth
5 spending some money on that because the data is there. It is
6 a question of pulling it in.

7 It would be very useful.

8 And then, down further, the date. I think that
9 is important because I think there is some indication
10 whether the material is still under copyright or not.

11 MR. FRASE: The date on books?

12 MR. DIX: The date on general issues, too.

13 MR. FRASE: That is in there.

14 MR. DIX: It is in there, but will it be coded?

15 MR. FRASE: It is in the table shelves.

16 MR. DIX: Yes.

17 MR. FRASE: This question was written up for my
18 own thinking, before I prepared the table.

19 MR. DIX: Finally, I would like to see the
20 question, that John Hersey has been raising today, smoked
21 out, to some extent, to prove this, because I personally
22 believe this is a kind of a dead horse you have been beating,
23 John, and this might tell us.

24 For example: How much of this material is
25 what you would consider literary material -- or whatever

1 categories you want. Now, this could be determined by the
2 title of the journal. The title is here. It could be
3 coded in, and one could find out, more or less once and
4 for all, exactly what is being borrowed.

5 I think this would be useful.

6 MR. FRASE: That is the only way it could be
7 done.

8 VICE CHAIRMAN NIMMER: May I add just a small
9 footnote? When you say "once and for all", one of the
10 things that bothers me about this study is that it is going
11 to tell us as of this moment in time what the practices
12 are. Nothing more than that.

13 JUDGE FULD: Is the Commission ready to indicate
14 acquiescence in this project?

15 MR. PERLE: What are we voting on?

16 MS. KARPATKIN: Aren't we going to respond to
17 Ms. Wilcox's comment?

18 MR. LEVINE: As to conflict of interest?

19 MS. KARPATKIN: Yes.

20 JUDGE FULD: Your organization is not paid, is it,
21 Ms. Wilcox?

22 MS. WILCOX: No.

23 JUDGE FULD: You are not paid.

24 MS. WILCOX: No.

25 JUDGE FULD: Offhand, my reaction is that there is

1 no conflict.

2 MS. WILCOX: Well, I think this is something
3 that the Commission has to at least address itself to.

4 MR. FRASE: Free use of her records?-- we are
5 paying for the coding, the key punching, the computer program
6 that turns out analytical tables.

7 MR. LEVINE: That is really why I asked the
8 question, too, about whether this material exists elsewhere.
9 This is really, as far as we know, the best source for
10 this material. So we are not going to Minitext to do this
11 project because Ms. Wilcox is on the Commission. We are
12 going there because that is where the information of data
13 is secured.

14 MR. BERLE: I would like to move that the
15 Commission approve a study such as this in connection
16 with NCLIS.

17 That is the end of my motion.

18 I am not, by that motion, approving or disapproving
19 any of the materials that have been furnished to us.

20 I think that that is something entirely different.
21 I want to save that for the Executive Session.

22 That is my motion.

23 JUDGE FULD: Is there a second?

24 MR. LACY: Second.

25 JUDGE FULD: Is anyone opposed to the motion,

1 based on principle?

2 (No response)

3 JUDGE FULD: Do you want to discuss it?

4 VICE-CHAIRMAN NIMMER: Mr. Chairman, assuming
5 that that is passed, I think Alice deserves a further
6 word, perhaps. I want to say for myself that, even if
7 we did not already have an opinion from the highest Judge
8 of the highest Court in the United States saying that it
9 is all right, I certainly don't see any ground for not
10 agreeing. I think we all agree.

11 MR. PERLE: That is a footnote to the opinion!

12 MR. LEVINE: That is the second opinion that
13 Judge Fuld has written!

14 JUDGE FULD: Well, the Commission has higher
15 jurisdiction than the Court of Appeals!

16 We will take the project up in Executive Session.

17 That brings us to the last item on the agenda.

18 Are the parties here?

19 EDUCATIONAL COMMUNITY PRESENTATIONS ON

20 SOFTWARE PROTECTION

21 JUDGE FULD: You are going to enlighten us on
22 Educational Community Presentations on Software Protection.

23 MR. STEINHILBER: I am August Steinhilber, Assistant
24 Executive Director of the National School Board Association.

25 However, I am here today as Vice Chairma

1 of the ad hoc committee, which is the Educational group
2 coalition looking at copyright revision in the copyright
3 law.

4 The ad hoc committee has been in existence -- I am
5 not quite sure how many years, but I am sure it is at least
6 twelve.

7 With me is Dr. Anna L. Hyer from the National
8 Education Association. Dr. Hyer has submitted a statement
9 to the Commission which, by and large, is the position of
10 the ad hoc committee.

11 I would indicate to you, though, that there are
12 some differences of opinion within the educational community
13 and that is one of the reasons we were waiting for Dr. Hilton
14 -- the fact that he does have a somewhat different position
15 and, as in many industries, there is not unanimity of
16 opinion in all aspects.

17 MR. CARY: Excuse me. What is Dr. Hilton's
18 position?

19 MR. STEINHILBER: I will get to that when we,
20 basically, talk to him, because I think I can give you a brief
21 summation of where our differences are.

22 MR. CARY: I meant, what is his title?

23 MR. STEINHILBER: Oh, I am sorry. That is a good
24 question!

25 When we get outside of our own organization and you

1 ask for the title of someone outside of our own
2 particular organization, I am not quite sure.

3 I gather he is from the University of Michigan --
4 representing the higher education group.

5 Shelley Steinbeck of the American Council of
6 Education is the Chairman of the ad hoc committee. Un-
7 fortunately, he was unable to be here at this time.

8 I think the best way to describe it is that
9 we are, basically, advocates, and I think we ought to explain
10 our advocacy role, and where we have been up to this
11 point in time, Some of you here have heard us before.
12 To those of you who have, I am sorry if I am somewhat
13 boring you with this discussion.

14 In the past, our position, philosophically,
15 has started off with a somewhat different point of view
16 than normal, in that we started out with the philosophy
17 that copyright is not necessarily a proprietary right in
18 and of itself; that that is not the sole purpose of copy-
19 right protection.

20 When we take a look at the Constitutional
21 provision on copyright, it has other bases--outside of the
22 property right.

23 We look at it in terms of scholarly dissemination
24 of information; a clash of ideas, if you will, to di-
25 cuss how our civilization can better itself through this

1 clash of ideas.

2
3 Therefore, we invariably have -- either before
4 the Commission, or before the Copyright Office, or before
5 Congressional Committees -- pushed for an educational
6 exemption, and we have fought hard for an educational ex-
7 emption; and that we have pushed almost to the point of
8 not discussing "fair use".

9
10 There is a very subtle difference -- but it is
11 a very important difference to us -- between the discussion
12 of an exemption, and fair use.

13
14 The basic difference is that, in fair use, you
15 are assuming that infringement has taken place, but that
16 there is a defense to that infringement action.

17
18 What we are saying is that in the scholarly
19 aspects of the copyright law, the exemption takes it out of
20 even being discussed as an infringement in the first
21 instance.

22
23 If there is a position that we support -- that is,
24 exemption over fair use -- I would say that in the compromise
25 which I am sure you have seen -- if not, I will submit one
26 for the record. It is a compromise that we reached
27 with the Authors League and the Association of American
28 Publishers dated March 19, which was sent to the Honorable
29 Robert Kastenmeier.

30
31 We did reach a compromise on what could be

1 copied -- what we would both agree to in terms of both
2 language in law, and in report language on copyright.

3 But one of the items about which we fight
4 most vigorously, even beyond this discussion between
5 exemption and fair use, is compulsory licensing.

6 Lest you get the wrong impression, we will
7 continue our discussion on compulsory licensing because
8 compulsory licensing takes us even one step further beyond
9 fair use. It, in effect, destroys both exemption and fair
10 use by its very nature, because the whole idea is to
11 begin a licensing practice so that there would be no
12 longer a need for fair use.

13 Of course, the exemption would have been lost
14 in a discussion of fair use in the first instance.

15 Now, I indicated to you that there is a slight
16 difference of opinion by a gentleman who will be coming
17 here. If he does not arrive, I will, briefly, explain;
18 the difference of opinion is with respect to computer
19 programming; whether or not it is so different that it is
20 more like the public broadcasting concept of licensing--
21 and it is more likened to that, than it is likened to
22 our question with respect to copying of books and materials
23 and things of that sort.

24 VICE-CHAIRMAN NIMMER: May I interrupt just
25 before you get too far afield on your basic concept of

1 exemption, because it is educational. Do you apply
2 that to text books? That is, not xeroxing or photocopying
3 of text books but simply one text book publisher wants
4 to copy a print -- copy a text book in which the copyright
5 is owned by another text book publisher, but he says,
6 "I am doing it for an educational purpose"?

7 MR. STEINHILBER: No. This is specific. It is
8 not-for-profit exemption for scholarly uses.

9 VICE-CHAIRMAN NIMMER: Suppose it is a University
10 Press, but it is a non-profit press. Would that be all
11 right?

12 MR. STEINHILBER: No. We are getting into the
13 subtle differences between that. That is why I was, sort
14 of, shortcut into the document that we submitted.

15 VICE-CHAIRMAN NIMMER: I am questioning your
16 :that
17 philosophic approach to it/because it is educational,
18 it is therefore exempt.

19 MR. STEINHILBER: There are, obviously, limita-
20 tions. If we want to start discussing limitations: we
21 obviously make limitations with respect to work books
22 which are consumed upon usage, which would destroy the
23 market in and of itself. There are exemptions even
24 with that.

25 I wanted to start off with a philosophical
position which, itself, has limitations.

1 The field of law is not a precise science --
2 at least of this time and place.

3 I think the last kind of question that we have
4 without going into our presentation here -- which we have
5 submitted for the record and I will let Dr. Hyer
6 discuss that -- is that a further concern relates to
7 computer usage, and the inclusion of copyright in the
8 whole area of computer programming. That question is:
9 Are we now moving even a further step down proprietary
10 rights, to the point that data itself becomes copyrightable?
11 Not the presentation, but the data itself -- which is
12 far afield from where copyright started out. But, never-
13 theless, as we talk about the program, how entwined is
14 the program with the data; the difference between what
15 the instructions to the machine are, and the data that is in
16 the machine, so that we now are moving ourselves to the
17 point that information -- raw information -- becomes subject
18 to copyright.

19 There, I think, we would all have problems
20 with respect to the method in which information is kept,
21 distributed, and its accessibility, if it were subject to
22 copyright law in and of itself.

23 Those are some basic philosophical positions, that
24 I think we wanted to make sure the Commission is aware of.

25 With that, I will turn it over to Dr. Hyer, to

1 to go into specifics.

2 DR. HYER: As my colleague said, the National
3 Educational Association has been a member from the very
4 beginning -- I believe it was probably instrumental in
5 organizing the ad hoc committee and, for many, many years,
6 one of my colleagues at the National Education Association
7 served as Chairman of it. So that we have been very
8 supportive. We have been a party to developing the
9 cooperative input -- what is it -- 30, almost 40, organiza-
10 tions that are members of that committee. They are the
11 positions, and they are very well thought out and hammered
12 out within the educational community.

13 The paper that we submitted today deals only
14 with some positions speaking for the NEA itself, and not --
15 although they are in keeping with the ad hoc committee's
16 position -- about the computer program and the copyright-
17 ing of these.

18 I am not going to read the paper that you have in
19 your hand. We have addressed ourselves to the questions --
20 those are the nine on which we felt we had any expertise
21 and we have related those in the paper.

22 I might say we have no objection to the copy-
23 righting of computer programs, although there is a little
24 bit of concern about the copyrightability of them--in case
25 it does lead to any special claims for secrecy or any

1 special, unique protection that would be required in order
2 to satisfy the people that are marketing these.

3 If that were the case, then I think that we
4 would think that, probably, they ought to move to some other
5 mode of protection, rather than the copyright. But, as far
6 as we know at the present time, we have no objection to
7 the copyrighting of computer programs.

8 We do feel that they ought to be treated like
9 other copyrighted materials; and I think we are strongly
10 opposed to the copyright as it would apply to the input
11 into a computer. I think this is because we liken it
12 sometimes--to make it as simple as possible--to the
13 purchasing of a book, and then the reading of the book.
14 The reading of it -- the thing that you have purchased --
15 you are not interfering with the copyright when you do
16 that. It is only when you start copying from it, again,
17 after you have done your reading. It is the output that is
18 in question -- how you use the output from it--rather than
19 the input. And that, I think, will be clearer to you as
20 you read the paper than, perhaps, in the way I am trying
21 to state it very quickly.

22 We would oppose, as I said, any additional
23 protections for the software for the computer. If we feel
24 that they cannot be handled under the usual use of copy-

1 right protection. Then, I certainly think, we would have some
 2 question about adding any special protections for software
 3 for computers.

4 I might add that presently in Education, the
 5 main uses, I would say, were first, in Educational
 6 Administration -- wouldn't you agree? -- with the data
 7 that is financial; with the records -- things of this sort.
 8 That is the major use.

9 The second major use, I think, is in the field
 10 of Research. Would you agree with that?

11 And, lastly, is the use of computer programs
 12 for teaching. That is not as developed for use in
 13 education as are these other two fields. So we do have
 14 quite an interest in data itself, as not being copyrighted--
 15 but merely the conditions under which it is stored.

16 I think, in summary, I just might say that we
 17 believe that a computer program should not be handled
 18 differently from other copyrightable works. If that result
 19 does not provide the industry with the protection that it
 20 thinks is necessary, then we think that they should
 21 seek protection in some other way than the copyright field.

22 We think that input should not be subject to
 23 copyright restrictions; output would be handled as would
 24 any other copyrightable work.

25 I think that, probably, summarizes the points that

1 are made in the paper that was submitted.

2 MR. STEINHILBER: I would like to make just two
3 minor comments: one of which being that I think one
4 of our other concerns is the fact that, in any discussion
5 on the use of computers -- especially in education -- we,
6 too, are concerned about the future, and whether or not
7 copyright law will lock us in, or restrict the educational
8 endeavors of how the computer can be used in educational
9 instruction.

10 I think, just as the copyright industry was --
11 no question -- badly damaged by the ¹⁹⁰⁹ law, and what
12 happened since then, and how technology/hurt, I would say, in
13 the publishing industry -- we would have no question about
14 that -- we have somewhat similar kinds of concerns that
15 the pendulum might swing the other way so that, if there
16 were any change in philosophy to basically restrict the
17 education of children to the traditional three-hour method,
18 ~~it~~ and would restrict us from moving to anything different.

19 One final comment, just to show the solidarity
20 here: I would just point out for the record that only on
21 rare occasions does the NEA and the School Association
22 agree. When Management and Labor does agree on certain
23 things, I would like to point it out for you on the record.

24 JUDGE FULD: Thank you for being here.

25 VICE-CHAIRMAN NIMMER: As to your distinction

1 between input and output, I can understand that with
2 respect to copyright data -- material data -- that is fed
3 into a computer, and then you want to feed that out; but,
4 if I understand a computer program -- and I am not certain
5 that I do -- a computer program constitutes instructions
6 to the computer. You don't have an output of the program
7 per se -- at least generally you don't, I don't think.

8 DR. HYER: If you buy the computer program, the
9 only way you can read it is to put it in the computer.

10 VICE CHAIRMAN NIMMER: The question should be as
11 to the words "read" or "perform". If you call it "perform"
12 it is an infringement; if you call it "read" it is not an
13 infringement.

14 MR. LACY: I wonder about the analogy to a film
15 where there exists some distinct right to make a copy of
16 the film, and the right to perform with that film.

17 If a school buys a film, there is a license --
18 either expressed, or tacit and implied -- in the purchase
19 of it, that the school can show the film in the school.
20 There is no point in buying it if there was not.

21 Similarly, when you buy a program from I.B.M. to
22 use in a computer, there is no point in buying it if you do
23 not have a computer.

24 It does not mean that you have a total right,
25 once you buy the film. One cannot lend it to a friend who

1 runs a commercial local TV station and have it performed
2 on the TV station for profit.

3 MR. STEINHILBER: That would not even give us the
4 right, if I were the attorney for School District A, to
5 turn that same program over to School District B, to use
6 carte blanche.

7 MR. LACY: I am saying there is a right about
8 inputting the computer to that program itself. It is not
9 an unlimited use gained by the buyer.

10 DR. HYER: That is why the user of the "output"
11 is a different matter. I was trying to make a distinction
12 between the original input, and the use after that original
13 input.

14 MR. LACY: I really do think we are sliding over --
15 we are really thinking about data bases, not program.

16 Normally, one can, of course, duplicate a program
17 on a computer.

18 JUDGE FULD: If there are no more questions,
19 thank you.

20 MR. LACY: We have not heard Dr. Hilton's
21 position.

22 MR. STEINHILBER: Basically, his contention is
23 that he makes a distinction between the program and
24 the data, and he contends that, as to the program itself,
25 the program should be subject to/^acompulsory licensing

1 provision. But not the data.

2 MR. LACY: Are you sufficiently familiar with his
3 position, let us say, to assume that it means compulsory
4 to a university?

5 If a university has the job of working out a
6 curriculum assignment situation, or maybe just wants a
7 payroll or an inventory accounting system, and it can
8 shop around and discover a program that some commercial
9 firm has, it can compulsorily take possession of that
10 and use it on the basis of some government stipulated
11 program?

12 Is that it?

13 MR. STEINHILBER: That is correct. The program,
14 itself, could not be kept completely secret. There would
15 be some sort of absolute access.

16 JUDGE FULD: Thank you.

17 We will adjourn the public hearing and go into
18 Executive Session.

19 (Whereupon, at 4:45 o'clock, p.m., the public
20 hearing was adjourned until 9:30 o'clock, a.m., June 10,
21 1976.)

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Part II

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WAMiller

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES
OF COPYRIGHTED WORKS

(CONTU)

Seventh Meeting

June 10, 1976

- - - - -

Room 910
CONTU Conference Room
1921 Jefferson Davis Highway
Arlington, Virginia

- - - - -

BEFORE:

STANLEY H. FULD - CHAIRMAN
Retired Chief Judge,
New York Court of Appeals
Special Counsel, Kaye, Scholer,
Fierman, Hays and Mandler

MELVILLE B. NIMMER -- VICE CHAIRMAN
Professor of Law
UCLA Law School

APPEARANCES:

(As hereinbefore listed)

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1 JUDGE FULD: May I call this meeting to order?

2 I welcome Quincy Rogers, the Executive Director
3 of the Domestic Council on the Right to Privacy.

4 You are going to discuss the National Informa-
5 tion Policies.

6 STATEMENT OF QUINCY ROGERS, EXECUTIVE DIRECTOR
7 DOMESTIC COUNCIL ON THE RIGHT TO PRIVACY

8 MR. ROGERS: Thank you very much.

9 JUDGE FULD: Thank you for being here.

10 MR. ROGERS: I thought, before I got into anything, I would
11 tell everyone a little bit about what the Domestic
12 Council on the Right to Privacy is about, and what its
13 history is, briefly.

14 The Committee was established in February of 1974
15 and from, time to time, there are special committees of
16 the Domestic Council established.

17 The Domestic Council, of course, is the
18 Presidential staff arm which is responsible for domestic
19 policy and which, in a sense, parallels the National
20 Security Council and the Economic Council.

21 As I said, from time to time, in special areas
22 there are established committees of the Domestic Council
23 which I tend to think of as subcommittees; but they are
24 not so named.

25 The Committee on the Right to Privacy is one
such committee. It is chaired by the Vice President and

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1 is made up of those Members of the Cabinet and other
2 Agency heads who have a particular interest in the Privacy
3 Policy.

4 The first Executive Director Phillip Buchan^{en, sp.}
5 and Douglas Metzler is also now on the Economic White House
6 Staff. He was the Interim Acting Director for quite a
7 period of time.

8 The Committee has been active in a whole variety
9 of Privacy questions over the last couple of years, including
10 the passage and later implementation of the Privacy Act of
11 1974. We are at work now on, for instance, bank records
12 legislation, which was before the Congress; work on
13 Security Clearance matters; and quite a number of other
14 initiatives that the Committee has been involved in.

15 Of course, that is not why I am here today. I am
16 here today to tell you all a little bit about something
17 else that we have been working on, and that is what we
18 are calling an "Information Policy Study". Let me give
19 you a little bit of the background on that.

20 Vice President Rockefeller was concerned that,
21 in addition to the Privacy questions, that this part of the
22 policy-making apparatus was to try and take a look at
23 some of the broader questions, and information policy. So
24 we began to get into questions of related areas quite
25 a bit; and if I might just make reference to a few notes

1 here -- which I think will explain a little bit better
 2 some of that background, and will also give you some idea
 3 of the kinds of things in which we have become interested.

4 We have said, on various occasions, that
 5 privacy is a cutting edge of a host of information policy
 6 issues, and that the privacy issue has brought a realization
 7 of underlying structural changes in society. This kind of
 8 structural change has been commented on by Daniel Bell; by
 9 Peter Drucker and other people who have indicated that
 10 we are in the midst of it; and that the underlying meaning
 11 of this structural change is that ours is a post-industrial
 12 society in which the service sector has outgrown the goods-
 13 producing sector.

14 Bell and others have noted that the portion of
 15 the service sector which predominates is the one which deals
 16 with information. He has called this the "Information Age."

17 In a memorandum to the Vice President, we noted
 18 that it was both a sign of growing interest in, and policy
 19 fragmentation of, issues of this nature; that there are current
 20 at least ten temporary study commissions in various states
 21 of existence, dealing with various types of information
 22 issues.

23 Among the better known of these commissions, of
 24 course, is yours. There is also a Privacy
 25 Protection Study Commission.

1 There is a Federal Paperwork Commission; there
2 is an Electronic Funds Transfer Commission; and there are
3 a number of others.

4 In October of last year, the Domestic Council
5 Committee held what we call a Roundtable on Privacy
6 and Information Policy, and there were a number of knowledge-
7 able people who were invited to discuss a broad range of
8 issues.

9 The two days which were available were not nearly
10 adequate to deal with all of the issues pertinent to such
11 a topic, but did get a process of such discussion which
12 culminated in the President requesting the Committee to
13 review major information policy issues and report back
14 to him -- the deadline being September 1 -- with recom-
15 mendations from the government organizations to deal with
16 them. In so doing, he noted the need for better coordina-
17 tion of government policy in these areas.

18 JUDGE FULD: Is there a conflict between your
19 organization, and other governmental organizations, on areas
20 that invade privacy?

21 MR. ROGERS: No. I would not say so. Perhaps,
22 though, it will become clear as to what I am talking about
23 as I move on.

24 There are other major issues about which we are
25 speaking. I should say there are as many lists as there

1 are people and organizations, who have an interest in, or
2 a perspective, on what they call an "Information Policy".

3 It seems to me that the government's list must--
4 necessarily give priority to those issues which have major
5 impact on society and the quality of life. And, as
6 I tell everyone, if I don't know the issues which they
7 think are crucial, I would hope that they would give me the
8 benefit of their views.

9 We on the Committee Staff, have begun by
10 dividing the relevant issues into several categories. The
11 first of these are economic issues.

12 Questions such as: What is the significance
13 of the fact that some conservative estimates indicate
14 that 30% of our Gross National Product is in the Information
15 Sector, and that over 50% of our labor force is now involved
16 in these activities?

17 How adequate are our tools for measuring these
18 phenomena?

19 What are the labor-related issues that arise
20 from these trends?

21 What inflationary or deflationary significance
22 do they have?

23 What are the implications of this activity for gro
24 policies and conservation-of-resource policies?

25 What are the pertinent microeconomic questions,

1 such as increasing consumer-group demands for information?

2 The second set of questions:

3 What is the proper locus of regulation of the
4 information sector, for security, confidentiality,
5 accuracy, etc.?

6 What are the implications for Federal-State
7 relations of calls for preemption by Federal law?

8 Are other methods available to harmonize potential
9 conflicting laws of different jurisdictions?

10 What may happen internationally, where harmoniza-
11 tion of regulation is even more difficult?

12 Can we prevent the erection of data walls and
13 other restrictions on free-flow of information?

14 Third: What are the means of harmonizing the
15 conflicting impulses represented by the Freedom of
16 Information Act and Sunshine Laws on the one hand, and
17 Privacy and secrecy laws on the other?

18 How are these lines to be drawn?

19 What are the considerations which apply only
20 to the public sector? To the private sector?

21 Fourth: How should we, as a nation, cope with
22 communications networking of all types?

23 How should we cope with the fact that the
24 different systems for the transmission of information are
25 being driven, by technology, into similar modes?

1 What should the infrastructure of our information
2 systems look like?

3 How can we preserve competition?

4 How can we preserve private initiatives?

5 Fifth: How can we best provide incentives for
6 the creation of knowledge?

7 What is the role of copyright, patent, trade
8 secret in this process?

9 How should our national knowledge base be
10 managed?

11 What is the role of government, vis-a-vis
12 the private sector, with respect to the enormous amount of
13 knowledge and information created by government?

14 Tony Oettinger, of the Harvard program on
15 Information and Information Technologies, has said that,
16 "Everything is related to everything else."

17 This truism is evident in any categorization of
18 information policy issues such as I have just outlined.
19 Networking issues impact on economic policy questions;
20 freedom of information, and compensation for information
21 questions interrelate; etc. But the divisions that I have
22 just outlined are a place to start fulfilling our mandate.

23 Having outlined some of the areas which--
24 it seemed to us that any such categorization of important
25 issues facing government should have, I will come back to

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what I listed as "Category 5," which is, I presume, the thing that is of most interest to this Commission; and that is the question of technology, copyright, and so on.

I have, incidentally, read the questions which you have sent out, and I am not going to presume to answer them--for a variety of different reasons.

The first, of course, is the fact that I do not consider myself an expert in copyright. I think that more or less explains the crux of what it is we think we are about--as opposed to what we think you are about.

The question that I am addressing, primarily, is less one of what the substantive rules ought to be at this juncture, than one which concerns how government policy making apparatus ought to be organized.

At the current time, in the Executive Branch, questions relating to all of these areas -- many of which we believe interrelate, and many of which many people are beginning to see interrelate to a much greater sense -- are scattered throughout and, indeed, with respect to some of the issues that I talked about, the Executive Branch has no capability.

So the problem, as we see it, is a policy machinery. I could put it in a more practical way, in a sense, by saying that there has been a great criticism lately that Commission reports have a tendency to be



1 sent back to the government very frequently, and are
2 sitting on shelves and gathering dust some place.

3 This is not the way things should work.

4 One of the things that I am concerned with is
5 whether or not there will be continuing apparatus to
6 continue to deal with, not only the questions which are
7 being faced now and dealt with, but those questions which
8 have not been anticipated and will, eventually, arise.

9 So, again, the question, in a sense, is:

10 What is the policy - making machinery of the government going
11 to look like? Who is going to be left, over the years?

12 The other major underlying theme, I think, of
13 the effort that I am involved in, is sort of a question
14 of viewing policy questions in relationship to each other.

15 In the case of Privacy and Freedom of Information,
16 I think it is probably fair to say that those were handled
17 more or less on an ad hoc and separate basis as they
18 went through the Congress within the Executive Branch --
19 this being one example of the fact that ^{when} things start getting
20 overly compartmentalized, it gets very difficult to have any
21 adequate coordination.

22 I brought a couple of things -- particularly for
23 Professor Miller, who is not here today -- which I thought
24 were a good example -- at least, I judged they were an
25 example of over-compartmentalization in an organization

1 which is not government but which, I suppose, has its own
2 bureaucratic problems. I also brought it because I thought
3 Professor Miller has indicated it was an example of one
4 of the privacy issues we are going to have.

5 The Washington Post on June 7 -- that is last
6 Monday -- carried an editorial which said: "Absent fathers
7 and child support", which is an editorial all about the
8 parents-locator service, which is a system designed to
9 go around the country and find the fathers of children who
10 are on Welfare and get them to pay up and fulfill their
11 obligations.

12 It struck a bell with me, so I went back to
13 the files, and I found that a little less than one year
14 ago, the same Washington Post put out another editorial
15 attacking that same program!

16 So I sort of viewed that as an over-compartmentalization
17 question but, also, I think --

18 JUDGE FULD (Interposing) It might be maturity.

19 MR. ROGERS: Well, it could be a change in
20 position. That is right.

21 But I was interested that there was no reference
22 back -- no reference back. Indeed, if you read them, you
23 can see it looks like they came out of two different areas.

24 Other than that, again, except to stress that
25 we do not view our role as answering the kinds of questions

1 raised, but as one that helps hone them.

2 Again, the only other thing I would add is that,
3 in terms of the copyright -- the whole sort of copyright
4 question -- in both terms of the Hill, and in terms of the
5 work you are doing; in terms of its relationship to changes
6 in users as well as owners, I think that one of the things
7 which I would hope we could all do in some sense is to
8 advance the sense of understanding of the interests that
9 are involved.

10 I say that because, from my limited experience
11 in these areas, I have a sense that, too often, the
12 important public interests that are involved in these
13 questions are not as clear as they seem, because of
14 the focus that one begins to have in terms of all of the
15 various private interests that are involved.

16 I say that from sort of a personal point of view,
17 having been on the Hill at a time when the legislation
18 was going through. I worked on the Senate Judiciary
19 Committee.

20 In my view, Copyright is an example of the very
21 important kinds of rules which govern the whole set of
22 issues relating to the knowledge base and the dissemination
23 of knowledge, and that really is about all I have to say--
24 except that I would be glad to answer any questions that
25 anybody has.

1 MR. PERLE: You have suffered through Copyright
2 for a long time. I am very familiar with it.

3 Is there anything that we, as a Commission,
4 should be considering in the Privacy area in relation
5 to our Statutory charge?

6 MR. ROGERS: I am sorry. I really don't have
7 anything specific at the moment.

8 MR. PERLE: Let me sharpen the question a little.
9 We are really asked to deal with provisions of
10 copyright legislation.

11 MR. ROGERS: Yes.

12 MR. PERLE: Does the Privacy consideration
13 belong there, or in some other type of legislation?

14 MR. ROGERS: Well, the Privacy consideration,
15 I think, probably belongs in other types of legislation.

16 There has been a standing debate as to whether
17 or not privacy legislation should be dealt with in an
18 omnibus fashion, or on a piecemeal fashion; but in neither
19 case does it seem to me that we are talking about legisla-
20 tive packages.

21 MR. LEVINE: Along those lines, I have met once--
22 and it is our pleasure to continue discussing the inter-
23 relationship, if there is such, with the Executive
24 Director on the other Privacy Commission -- the Privacy
25 Protection ~~Detection~~ Commission. So that they understand the role of

1 Copyright, and we understand what they are doing, to see
2 if there is any interconnection.

3 VICE-CHAIRMAN NIMMER: May I just point out when
4 Warren and Brandeis wrote their article, The Right of
5 Privacy, ~~it started in a solarium~~ They relied, in a
6 large degree, upon earlier common law copyright cases,
7 particularly one involving Prince Albert, and the privacy
8 of certain documents of his. In origin, there is some
9 relationship.

10 MR. ROGERS: Yes.

11 MR. DIX: Mr. Chairman, I am referring to the
12 last thing you said about the public interest -- the
13 latent public interest -- in all of these areas. I
14 wondered -- we have been wrestling with how one attempts
15 to measure two conflicting, as it were, forces, in one
16 sense, with Copyright -- the rights of the creator and the
17 producer, as against the rights of the consumer, or the
18 interests of both.

19 I wondered, in the Domestic Council, how you go
20 about weighing these things.

21 I guess what I am saying is: Have you found
22 techniques or methods of weighing two rather disparate
23 kinds of interest like this, and coming out with where
24 the public interest lies. When I say "weighing", let me
25 one more thing:

1 Are there individuals who have a special
2 technique of doing this whose judgment one can say has
3 a certain validity, perhaps: Policy analysts --
4 this sort of person?

5 MR. ROGERS: Well, I feel like I would be getting
6 a little far afield to be responsive, but it seems to me
7 that one answer is that the Constitutional system presumes
8 that by continuing to debate and hammer out things in
9 different forums, you somehow arrive at that.

10 I would almost be tempted to go so far as to say
11 that, as a reflection of the fact that there is no simple
12 formula. But maybe, if I can try and be a little more
13 specific about what I had in mind there: looking at the
14 information policy questions has taught me -- and this
15 may be an obvious thing to many people but it caused it to
16 occur to me -- that one has to be very careful when they
17 look at information flow, about what the effect of the
18 regulation in one place will mean in another place.

19 I have in mind, for instance, as a rough
20 analogy, the Buckley Amendments that deal with information
21 in schools. And on the sort of tail-end, shall we say,
22 of information flow, the public policy now is that that
23 shall be open to the subject so he can look at his own
24 records. And critics of this system charge that the result
25 of that is to simply dry up the flow at the beginning

1 -- to take the right away and make it meaningless.

2 It seems to me -- and I grant that it is rough --
 3 it seems to me there is sort of a rough analogy in the
 4 question of information -- whether we want to call it
 5 "knowledge" or "technical skills" or whatnot, that is
 6 sort of where a copyright /patent /trademark stands at
 7 the gate of its regulation without getting into a deep
 8 discussion about the Constitutional background of
 9 copyrights, etc. It seems to me that one policy basis
 10 that one might have for these systems is whether or not
 11 they maximize this process of dissemination of knowledge
 12 and information and, in doing that, it seems to me that
 13 you have to realize that you maximize -- there is an
 14 assumption that you maximize dissemination by providing
 15 adequate incentives. But you know, how much deeper can
 16 you go into that kind of a formula analysis? I don't know.
 17 It is one that I am particularly interested in, because it
 18 seems to me it goes to an underlying policy question that
 19 I would favor.

20 MR. DIX: Thank you. That is quite responsive to
 21 a very vague question, I must say.

22 MR. ROGERS: Thank you.

23 MR. CARY: Mr. Chairman?

24 JUDGE FULD: Yes.

25 MR. CARY: If I may ask a question somewhat along

1 the same line.

2 We have been wrestling over the past meeting or
3 two with the problem of whether there should be -- or is
4 there -- any adequate protection for computer software, for
5 example, and I just would like to get your comments on
6 where you think public interest lies in a situation like
7 that.

8 Here, we are confronted with such ideas as, well:
9 Here is an industry which is burgeoning -- as some people
10 have said -- at producing software, and they say some of
11 them rely on -- what is the word -- "trade secrets
12 philosophy". They really don't think it is an acceptable
13 means of protection.

14 They seem to come out, in general, for copyright
15 protection. So we are charged with the problem of
16 deciding some sort of a recommendation in this area.

17 Do you have any thoughts along this line -- of
18 whether or not protecting software, in a sense, is in the
19 public interest; or does this tend to create a monopoly
20 --bearing in mind, of course, that patents are monopolies
21 and that copyright is a type of monopoly, but they have a
22 Constitutional purpose to increase the incentive of the author
23 and inventors, and to thereby make it possible to disseminate
24 this information more readily.

25 Do you have any comments on that?

1 MR. ROGERS: Well, I read--as a matter of fact,
2 yesterday--what I think is all of the testimony that you had
3 in your last session -- if not a good portion of it -- and
4 it was then that I decided for sure that I was not going
5 to get any specific answers about that sort of thing--except
6 that it occurred to me: I recall that someone had pointed
7 out to me that Earl Kitner in his book, Monograph on
8 the Law of Intellectual Property, made reference to the
9 fact that the patent copyright systems were products of the
10 industrial age and were a response to the need for the
11 dissemination of knowledge. It occurred to those of us
12 who had been talking in terms of the post-industrial age--
13 that maybe we are talking -- at least with respect to
14 some of these things -- about entirely new systems.

15 Now, whether or not that is Constitutionally
16 possible -- how one finds the authority for it -- is a
17 different question. But it does seem to me that one
18 ought not -- at least at the outset -- shirk from the
19 possibility of an entirely new approach -- something
20 that is sort of sui generis, I suppose.

21 MR. CARY: Thank you.

22 MR. ROGERS: I really don't think I ought
23 to make any comment about the balancing because, again,
24 I want to repeat that it seems to me that my current
25 responsibility is to try and focus on what the policy

1 making apparatus of the Executive Branch ought to be, over
 2 the next few years. While I feel very strongly that there
 3 ought to be somebody at a high level who is concerned
 4 about these kinds of issues, I would not--it seems to
 5 me premature -- try to substitute judgement for how
 6 one would answer those questions. Indeed, in the first
 7 instance at least, it is the responsibility of the
 8 Commission, I suppose.

9 MR. CARY: I did not have any intention of
 10 putting you on a hook or anything. I was speaking
 11 philosophically.

12 MR. ROGERS: No. I understand.

13 MR. CARY: I see your point of view, and I
 14 accept that.

15 MR. ROGERS: Thank you.

16 MR. LEVINE: Did I understand that by
 17 September first you would be issuing a report on the
 18 coordination --

19 MR. ROGERS : (Interposing) That is the deadline
 20 I must say that I am not, sure that:

- 21 (a) We are going to make it at this juncture, or
 22 (b) It would be public at that juncture.

23 MR. LEVINE: What about the Privacy issue?

24 MR. ROGERS: Under the Freedom of Information
 25 Act--at least the recommendation portion--until the

1 President has had a chance to focus on them; although I
2 probably will feel reasonably free to talk about it at
3 that juncture.

4 JUDGE FULD: Are there any other questions?

5 MS. WILCOX: I wonder, in your position, if you
6 have any advice for us in dealing with some of the issues
7 of Privacy in the data basis -- the computer data basis --
8 not the software programs -- that would be a consideration
9 for the general problem?

10 MR. ROGERS: Well, I guess the thing I would
11 focus on, in those terms, would be the definitional problem.
12 There is, of course, a sort of full question of property
13 rights. I don't know if one wants to call those "Privacy",
14 or not.

15 Then there is the whole set of confidentiality
16 questions. I guess that would really be security/confi-
17 dentiality, and that whole set of definitional questions.

18 One source for defining those is Ruth Davis's
19 group out at the Bureau of Standards. It has done quite a
20 bit of work in terms of discussion of the definitional
21 differences, and a discussion which I think helps hone down
22 really what it is that we are talking about. I would be
23 glad to try and pull together some of that stuff and
24 send it over.

25 JUDGE FULD: We would appreciate that.

1 MR. LEVINE: I found, when we discussed the
2 computers, that making analogies is unwise. But I will make
3 an analogy on this. In the area of obscenity, which may
4 be prohibited by some laws, at least the law as we under-
5 stand it now is that you can, nevertheless, secure
6 copyright for obscene material, notwithstanding the fact
7 that there may be a law that says it is obscene. There
8 may be privacy material and data bases that may not
9 necessarily mean that we are not entitled to copyright
10 protection.

11 JUDGE FULD: Any other questions?

12 (None)

13 JUDGE FULD: Thank you very much.

14 (Whereupon, at 10:45 o'clock, a.m., the
15 public hearing was concluded.)

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